FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 3) [2023] FCA 723

File number(s):	NSD 1447 of 2019
Judgment of:	**ABRAHAM J**
Date of judgment:	4 July 2023
Catchwords:	**CORPORATIONS** – conflicted remuneration – consumer law – banking and financial institutions – directors' duties – contraventions by corporate defendants and individual defendant – numerous breaches of Corporations Act 2001 (Cth) and Australian Securities and Investments Commission Act 2001 (Cth) – assessment of pecuniary penalties and other relief – where individual defendant did not give evidence during liability hearing – where defendants did not deliberately contravene laws – where defendants sought to downplay seriousness of conduct – where insufficient evidence to determine financial position of defendants – where defendants have no prior contraventions of similar conduct – where failures in compliance system to be seen in context of competitive sales environment – where deterrence must be dominant consideration – advertising orders not made – declarations, restraining orders, probation order and disqualification order made – pecuniary penalties imposed **COSTS** – where defendants sought apportionment of costs – usual order as to costs made
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB(1), 12DA, 12DB(1)(a), 12DB(1)(d), 12DB(1)(e), 12DB(1)(g), 12DB(1)(i), 12DJ(1), 12GBA, 12GD, 12GLA(2)(b), 19 *Competition and Consumer Act 2010* (Cth) Sch 2 s 13 *Corporations Act 2001* (Cth) ss 79, 180, 206C, 206E, 912A(1)(a), 912A(1)(c), 963E, 963F, 963J, 963K, 1317E, 1317G(1), 1317G(1E), 1317G(1F), 1324 *Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017* (Cth) *Evidence Act 1995* (Cth) s 55 *Federal Court of Australia Act 1976* (Cth) s 21, 43
Cases cited:	*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory*

Revenue (Northern Territory) [2009] HCA 41; (2009) 239 CLR 27

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

Australian Building and Construction Commissioner v Pattinson [2022] HCA 13; (2022) 399 ALR 599

Australian Communications and Media Authority v Limni Enterprises Pty Ltd [2022] FCA 795

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd [1997] FCA 450; (1997) 145 ALR 36

Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2017] FCAFC 159; (2017) 258 FCR 312

Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd [2011] FCA 372

Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd [1999] FCA 1175

Australian Competition and Consumer Commission v High Adventure Pty Ltd [2005] FCAFC 247; (2006) ATPR 42-091

Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd t/a Bet365 (No 2) [2016] FCA 698

Australian Competition and Consumer Commission v Leahy Petroleum (No 2) [2005] FCA 254; (2005) 215 ALR 281

Australian Competition and Consumer Commission v Origin Energy Limited [2015] FCA 55

Australian Competition and Consumer Commission v Reckitt Benckiser Pty Ltd [2016] FCAFC 181; (2016) 349 ALR 25

Australian Competition and Consumer Commission v Uber B.V. [2022] FCA 1466

Australian Competition and Consumer Commission v Ultra Tune Australia Proprietary Limited [2019] FCA 12

Australian Competition and Consumer Commission v Unique International College Pty Ltd (Imposition of Penalty) [2019] FCA 1773

Australian Competition and Consumer Commission v Valve Corporation (No 7) [2016] FCA 1553

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

Australian Securities and Investments Commission v

Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) [2014] FCA 1308; (2014) 322 ALR 45

Australian Securities and Investments Commission v Axis International Management Pty Ltd (No 5) [2011] FCA 60; (2011) 81 ACSR 631

Australian Securities and Investments Commission v Forex Capital Trading Pty Ltd [2021] FCA 570

Australian Securities and Investments Commission v Forge [2007] NSWSC 1489

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

Australian Securities and Investments Commission v One Tech Media (No 6) [2020] FCA 842

Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 2) [2022] FCA 786

Australian Securities and Investments Commission v Vines [2006] NSWSC 760; (2006) 58 ACSR 298

Australian Securities and Investments Commission v Vocation Limited (In Liquidation) (No 2) [2019] FCA 1783; (2019) 140 ACSR 382

Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus) [2022] FCA 515; (2022) 407 ALR 1

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

Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (The Botany Cranes Case) [2023] FCAFC 40

Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39; (2010) 269 ALR 1

Cruickshank v Australian Securities and Investments Commission [2022] FCAFC 128; (2022) 403 ALR 67

Director of Consumer Affairs Victoria v Wens Bros Trading Pty Ltd [2019] FCA 39

Fair Work Ombudsman v Austrend International Pty Ltd (No 2) [2020] FCA 1193

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (Kiama Aged Care Centre Appeal) [2023] FCAFC 63

Fair Work Ombudsman v Lam [2021] FCA 205; (2021) 390 ALR 39

HIH Insurance (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq), Re; Australian Securities and

Investments Commission v Adler [2002] NSWSC 483; (2002) 42 ACSR 80

Idylic Solutions Pty Ltd, Re; Australian Securities and Investments Commission v Hobbs [2013] NSWSC 106; (2013) 93 ACSR 421

J McPhee & Son (Australia) Pty Ltd v Australian Competition & Consumer Commission [2000] FCA 365; (2000) 172 ALR 532

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

Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission [2022] FCAFC 170

Medical Benefits Funds of Australia Ltd v Cassidy [2003] FCAFC 289; (2003) 135 FCR 1

Mill v The Queen [1988] HCA 70; (1988) 166 CLR 59

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

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

Re Vault Market Pty Ltd [2014] NSWSC 1641

Registrar of Aboriginal and Torres Strait Islander Corporations v Murray [2015] FCA 346

Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129

Royal v El Ali (No 3) [2016] FCA 1573

Rushcutters Bay Smash Repairs Pty Ltd v H McKenna Netmakers Pty Ltd [2003] NSWSC 670

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

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362

Thiess Watkins White Construction Ltd (in liq) v Witan Nominees (1985) Pty Ltd [1992] 2 Qd R 452

Trade Practices Commission v Carlton United Breweries Ltd (1990) 24 FCR 532

Trade Practices Commission v CSR Ltd [1990] FCA 762; (1991) ATPR 41-076

Ultra Tune Australia Pty Ltd v Australian Competition and Consumer Commission [2019] FCAFC 164

Valve Corporation v Australian Competition and Consumer Commission [2017] FCAFC 224; (2017) 258 FCR 190

Division: General Division

Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	312
Date of hearing:	23 March 2023 and 19 April 2023
Counsel for the Plaintiff:	Ms N Sharp SC with Ms G Walker SC
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendants:	Mr A Cheshire SC with Mr S Jayasuriya
Solicitor for the Defendants:	Kardos Scanlan

ORDERS

NSD 1447 of 2019

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**SELECT AFSL PTY LTD (ACN 151 931 618)** First Defendant
	BLUEINC SERVICES PTY LTD (ACN 109 789 077) Second Defendant
	INSURANCE MARKETING SERVICES PTY LTD (ACN 160 307 979) (and another named in the Schedule) Third Defendant

ORDER MADE BY: **ABRAHAM J**

DATE OF ORDER: **4 JULY 2023**

DEFINITIONS:

In these orders, the following terms mean:

ASIC means the Australian Securities and Investments Commission.

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

BlueInc Services means the Second Defendant.

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

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

IMS means the Third Defendant.

Sales Agent means an agent who primarily made outbound telephone calls to, and answered inbound telephone calls from, potential consumers for the purpose of selling insurance products.

Select means the First Defendant.

Liability Judgment means the Court's reasons for judgment dated 8 July 2022 (*Australian Securities and Investment Commission v Select AFSL Pty Ltd (No 2)* [2022] FCA 786).

Retention Agent means an agent who primarily dealt with existing customers.

PURSUANT TO S 1317E OF THE CORPORATIONS ACT AND S 21 OF THE FCA ACT, THE COURT DECLARES THAT:

1. Select separately contravened s 963E of the Corporations Act on each occasion that a representative for whom it was the responsible licensee accepted the following conflicted remuneration:

   (a) the 15 representatives identified in [158] of the Liability Judgment accepted conflicted remuneration in the form of a four-night cruise package to the Gold Coast in July 2015 (**Cruise**);

   (b) the one representative identified in [166] of the Liability Judgment accepted conflicted remuneration in the form of a brand new Vespa scooter on 1 July 2015 (**Vespa**);

   (c) the eight representatives identified in [179] of the Liability Judgment accepted conflicted remuneration in the form of a seven-day holiday package to Las Vegas in the United States of America in April 2016 (**Las Vegas Trip**);

   (d) the nine representatives identified in [191] of the Liability Judgment accepted conflicted remuneration in the form of a seven-night holiday package to Hawaii in the United States of America in December 2017 (**Hawaii Trip**).

2. Select separately contravened s 963F of the Corporations Act by failing to take reasonable steps to ensure that each individual representative of its financial services licence for whom it was the responsible licensee did not accept the following conflicted remuneration:

   (a) the 15 representatives identified in [158] of the Liability Judgment who accepted conflicted remuneration in the form of the Cruise;

   (b) the one representative identified in [166] of the Liability Judgment who accepted conflicted remuneration in the form of the Vespa;

   (c) the eight representatives identified in [179] of the Liability Judgment who accepted conflicted remuneration in the form of the Las Vegas Trip;

   (d) the nine representatives identified in [191] of the Liability Judgment who accepted conflicted remuneration in the form of the Hawaii Trip,

   with a separate contravention occurring each time a representative accepted the Cruise, the Vespa, the Las Vegas Trip or the Hawaii Trip.

3. BlueInc Services separately contravened s 963J of the Corporations Act on each occasion that it gave its employees who were representatives under Select's financial services licence the following conflicted remuneration:

   (a) the Cruise, to the 14 employees identified in [158] of the Liability Judgment;

   (b) the Vespa, to the one employee identified in [166] of the Liability Judgment;

   (c) the Las Vegas Trip, to the seven employees identified in [179] of the Liability Judgment;

   (d) the Hawaii Trip, to the nine employees identified in [191] of the Liability Judgment.

4. Russell Howden was involved within the meaning of s 79 of the Corporations Act in:

   (a) each of the contraventions of ss 963E and 963F of the Corporations Act by Select referred to in declarations 1 and 2 above; and

   (b) each of the contraventions of s 963J of the Corporations Act by BlueInc Services referred to in declaration 3 above.

PURSUANT TO S 1317E OF THE CORPORATIONS ACT, THE COURT DECLARES THAT:

5. Russell Howden contravened s 180(1) of the Corporations Act by failing to exercise his powers and discharge his duties owed to Select with the degree of care and diligence that a reasonable person would exercise by:

   (a) knowing of, conceiving of, planning, promoting and/or approving incentive programs for each of the Cruise, Vespa, Las Vegas Trip and Hawaii Trip and failing to take reasonable or any steps to ensure that Select's representatives did not accept those benefits;

   (b) failing to take reasonable or any steps to prevent Select from engaging in contraventions of ss 963E and 963F of the Corporations Act; and

   (c) exposing Select to a foreseeable risk of harm, being contravention of the conflicted remuneration provisions and exposure to the risk of reputational harm, litigation and/or regulatory action.

6. Russell Howden contravened s 180(1) of the Corporations Act by failing to exercise his powers and discharge his duties owed to BlueInc Services with the degree of care and diligence that a reasonable person would exercise by:

(a) knowing of, and participating in, BlueInc Services' provision of each of the Cruise, Vespa, Las Vegas Trip and Hawaii Trip to its employees and failing to take reasonable or any steps to ensure that BlueInc Services did not give its employees those benefits;

(b) failing to take reasonable or any steps to prevent BlueInc Services from engaging in contraventions of s 963J of the Corporations Act; and

(c) exposing BlueInc Services to a foreseeable risk of harm, being contravention of the conflicted remuneration provisions and exposure to the risk of reputational harm, litigation and/or regulatory action.

PURSUANT TO S 21 OF THE FCA ACT, THE COURT DECLARES THAT:

Contraventions relating to Kathy Marika

7. During a telephone call made to Kathy Marika on 9 September 2015 by a Sales Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Kathy Marika that there were no exclusions to the Let's Insure Funeral Cover, optional accidental death cover (**ADC**) or optional accidental serious injury cover (**AIC**) save for a criminal activity-based exclusion to the AIC, when in fact there were significant exclusions to each of the ADC and AIC;

(b) contravened s 12DB(1)(a) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Kathy Marika that Let's Insure would pay the total amount of benefits to each beneficiary of ADC and AIC, when in fact only payments totalling the amount of benefits would be paid per insured person under the policy;

(c) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Kathy Marika that ADC, AIC and Household Expenses Cover (**HEC**) were not optional extras and/or were a standard component of the insurance policy, when in fact they were all optional extras that a consumer could elect not to add to Let's Insure Funeral Cover (**Standard Cover Representation**);

(d) contravened s 12DB(1)(g) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Kathy Marika that the HEC was offered as a gift and/or "just to help out", when in fact the HEC was an optional extra for which she would be charged an additional premium amount;

(e) contravened s 12DB(1)(g) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Kathy Marika that the insurance premium remained the same throughout the duration of the policy, when in fact the premium for Let's Insure Funeral Cover was stepped and would therefore increase over the life of the policy;

(f) contravened s 12DJ(1) of the ASIC Act by the Sales Agent coercing Kathy Marika into purchasing two Let's Insure Funeral Cover policies, each with ADC and AIC, and providing her direct debit payment details over the telephone;

(g) engaged in unconscionable conduct towards Kathy Marika in contravention of s 12CB(1) of the ASIC Act.

8. During the period 16 September 2015 to 11 August 2016, by Retention Agents who were employed by BlueInc Services, and who were also agents of Select, each of BlueInc Services and Select:

(a) contravened s 12DJ(1) of the ASIC Act by unduly harassing Kathy Marika by continuing to contact Kathy Marika to seek payment of her insurance premiums;

(b) engaged in unconscionable conduct towards Kathy Marika in contravention of s 12CB(1) of the ASIC Act by failing to permit Kathy Marika to cancel her two Let's Insure Funeral Cover policies, each with ADC and AIC, and continuing to seek payment for the policies from Kathy Marika.

Contraventions relating to David Mirrawana

9. During a telephone call made to David Mirrawana on 23 March 2015 by a Sales Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making a false and/or misleading representation to David Mirrawana that there were no exclusions to the Let's Insure Funeral Cover, ADC and AIC save for limited sporting-based exclusions to the AIC, when in fact there were significant exclusions to each of the ADC and AIC (**Limited Exclusions Representation**);

(b) contravened s 12DB(1)(a) of the ASIC Act by the Sales Agent making a false and/or misleading representation to David Mirrawana that Let's Insure would pay $16,000 to each beneficiary of a Let's Insure Funeral Cover policy, when in fact only payments totalling of $16,000 per insured who passed away would be paid;

(c) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making the false and/or misleading Standard Cover Representation to David Mirrawana;

(d) contravened s 12DB(1)(g) of the ASIC Act by the sales agent making a false and/or misleading representation to David Mirrawana that the insurance premium remained the same throughout the duration of the policy, when in fact the premium for Let's Insure Funeral Cover was stepped and would therefore increase over the life of the policy;

(e) contravened s 12DJ(1) of the ASIC Act by the Sales Agent coercing David Mirrawana into purchasing Let's Insure Funeral Cover, ADC, AIC and HEC, and providing his direct debit details over the telephone;

(f) engaged in unconscionable conduct towards David Mirrawana in contravention of s 12CB(1) of the ASIC Act.

Contraventions relating to Jennifer Yalamul

10. During a telephone call made to Jennifer Yalumul on 29 May 2015 by a Sales Agent who was contracted to IMS, and who was also an agent of Select, each of IMS and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Jennifer Yalumul that there were no exclusions to the FlexiSure Life Cover and optional accidental death and accidental serious injury cover (**FlexiSure AC**) save for intentional or self-inflicted injury and participating in professional sports, when in fact there were significant exclusions to the FlexiSure AC;

(b) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Jennifer Yalumul that FlexiSure AC was not an optional extra and/or was a standard component of the insurance policy, when in fact it was an optional extra that a consumer could elect not to add to FlexiSure Life Cover;

(c) engaged in unconscionable conduct towards Jennifer Yalumul in contravention of s 12CB(1) of the ASIC Act.

11. During the period 1 February 2016 to 28 August 2017, by Retention Agents who were contracted to IMS or employed by BlueInc Services, and who were also agents of Select, each of IMS, BlueInc Services and Select engaged in unconscionable conduct towards Jennifer Yalumul in contravention of s 12CB(1) of the ASIC Act by failing to permit Jennifer Yalumul to cancel her FlexiSure Life Cover with FlexiSure AC.

Contraventions relating to Zondani Mtawale

12. During a telephone call made to Zondani Mtawale on 14 April 2015 by two Sales Agents, one who was contracted to IMS and the other who was employed by BlueInc Services, and who were also agents of Select, each of IMS, BlueInc Services and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agents making the false and/or misleading Limited Exclusions Representation to Zondani Mtawale;

(b) contravened s 12DB(1)(a) of the ASIC Act by the Sales Agents making a false and/or misleading representation to Zondani Mtawale that Let's Insure would pay the total amount of benefits to each beneficiary of a Let's Insure Funeral Cover policy, when in fact only payments totalling the amount of benefits would be paid per insured person under the policy;

(c) engaged in unconscionable conduct towards Zondani Mtawale in contravention of s 12CB(1) of the ASIC Act.

Contraventions relating to Teubiti Tapera

13. During a telephone call made to Teubiti Tapera on 7 May 2015 by a Sales Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select contravened s 12DB(1)(i) of the ASIC Act by representing to Teubiti Tapera that Select could only send him the policy information once the insurance policy had commenced and/or once he had provided his payment details, when in fact neither of those events were necessary in order to provide written policy information to a consumer.

14. During telephone calls made to Teubiti Tapera on 6 and 7 May 2015 by Sales Agents who were contracted to IMS or employed by BlueInc Services, and who were also agents of Select, each of IMS, BlueInc Services and Select:

(a) contravened s 12DJ(1) of the ASIC Act by coercing Teubiti Tapera into purchasing FlexiSure Life Cover insurance and providing his credit card details over the telephone;

(b) engaged in unconscionable conduct towards Teubiti Tapera in contravention of s 12CB(1) of the ASIC Act.

Contraventions relating to Dawnetta Yeatman

15. During a telephone call made to Dawnetta Yeatman on 17 June 2015 by a Sales Agent who was contracted to IMS, and who was also an agent of Select, each of IMS and Select:

(a) contravened s 12DB(1)(e) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Dawnetta Yeatman that the minimum level of cover of the FlexiSure Life Cover was $35,000, when in fact the minimum level of cover for FlexiSure Life Cover was $15,000;

(b) contravened s 12DB(1)(e) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Dawnetta Yeatman that she would save $50 per month and have an additional coverage of $20,000, and doing so 11 times, when there were no reasonable grounds for making the representations;

(c) engaged in unconscionable conduct towards Dawnetta Yeatman in contravention of s 12CB(1) of the ASIC Act.

16. During the period 7 September 2015 to 7 October 2015, by Retention Agents who were employed by BlueInc Services, and who were also agents of Select, each of BlueInc Services and Select contravened s 12DJ(1) of the ASIC Act by unduly harassing Dawnetta Yeatman by continuing to contact Dawnetta Yeatman on multiple occasions to seek payment of her insurance premiums.

Contraventions relating to Josephine Shadforth

17. During a telephone call made to Josephine Shadforth on 26 June 2015 by a Sales Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making the false and/or misleading Limited Exclusions Representation to Josephine Shadforth;

(b) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Josephine Shadforth that ADC and AIC were not optional extras and/or were a standard component of the insurance policy, when in fact they were both optional extras that a consumer could elect not to add to Let's Insure Funeral Cover;

(c) engaged in unconscionable conduct towards Josephine Shadforth in contravention of s 12CB(1) of the ASIC Act.

18. By Retention Agents who were contracted to IMS or employed by BlueInc Services, and who were also agents of Select, each of IMS, BlueInc Services and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Retention Agents making false and/or misleading representations to Josephine Shadforth on 18 September 2015 and 15 October 2015 that the Let's Insure Funeral Cover with optional ADC and AIC could only be cancelled in writing because the insurance policies were a financial product, when in fact there was no such requirement by virtue of the insurance policies being a financial product;

(b) contravened s 12DJ(1) of the ASIC Act by unduly harassing Josephine Shadforth during the period 17 September 2015 to 15 October 2015 by pursuing payment of insurance premiums in circumstances where Josephine Shadforth wanted to cancel the policy and could not cancel in writing;

(c) engaged in unconscionable conduct towards Josephine Shadforth in contravention of s 12CB(1) of the ASIC Act during the period 26 June 2015 to 15 October 2015 by refusing to reasonably assist Josephine Shadforth to cancel her Let's Insure Funeral Cover with optional ADC and AIC with the result that premium payments were charged to her despite her requests to cancel the policy, and then pursuing payment in the manner that occurred.

Contraventions relating to Georgina Gaykamangu

19. During a telephone call made to Georgina Gaykamangu on 7 July 2015 by a Sales Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making the false and/or misleading Limited Exclusions Representation to Georgina Gaykamangu;

(b) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making the false and/or misleading Standard Cover Representation to Georgina Gaykamangu;

(c) contravened s 12DJ(1) of the ASIC Act by coercing Georgina Gaykamangu into purchasing Let's Insure Funeral Cover, ADC, AIC and HEC, and providing her direct debit payment details over the telephone;

(d) engaged in unconscionable conduct towards Georgina Gaykamangu in contravention of s 12CB(1) of the ASIC Act.

Contravention relating to Geraldine Campbell

20. During a telephone call made to Geraldine Campbell on 2 September 2015 by a Sales Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select engaged in unconscionable conduct towards Geraldine Campbell by signing up Geraldine Campbell to FlexiSure Life Cover with optional CC and taking direct debit payment details from her in contravention of s 12CB(1) of the ASIC Act.

Contraventions relating to Edmund Nundhirribala

21. During a telephone call made to Edmund Nundhirribala on 4 September 2015 by a Sales Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making the false and/or misleading Limited Exclusions Representation to Edmund Nundhirribala;

(b) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making the false and/or misleading Standard Cover Representation to Edmund Nundhirribala;

(c) engaged in unconscionable conduct towards Edmund Nundhirribala in contravention of s 12CB(1) of the ASIC Act.

Contraventions relating to Irshad Hussain

22. During a telephone call made to Irshad Hussain on 4 November 2015 by a Sales Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agents making the false and/or misleading representation to Irshad Hussain that there were no

exclusions to the Let's Insure Accident Cover (**Let's Insure AC**) save for professional or motor sport-based exclusions, when in fact there were significant exclusions to the Let's Insure AC;

(b) contravened s 12DB(1)(g) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Irshad Hussain that the insurance premium remained the same throughout the duration of the policy, when in fact the premium for Let's Insure Funeral Cover was stepped and would therefore increase over the life of the policy;

(c) engaged in unconscionable conduct towards Irshad Hussain in contravention of s 12CB(1) of the ASIC Act.

23. During a telephone call made to Irshad Hussain on 11 November 2016 by a Retention Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select contravened s 12DB(1)(i) of the ASIC Act by the Retention Agent making a false and/or misleading representation to Irshad Hussain that the Let's Insure AC could only be cancelled in writing because it was a financial product, when in fact there was no such requirement by virtue of it being a financial product.

24. During the period 24 October 2016 to 4 April 2017, by Retention Agents who were employed by BlueInc Services, and who were also agents of Select, each of BlueInc Services and Select engaged in unconscionable conduct towards Irshad Hussain in contravention of s 12CB(1) of the ASIC Act by failing to permit Irshad Hussain to cancel his Let's Insure AC and requiring Irshad Hussain to provide a written document bearing his signature before permitting him to cancel his policy.

Contraventions relating to Freddie Lewis

25. During a telephone call made to Freddie Lewis on 25 November 2015 by a Sales Agent who was contracted to IMS, and who was also an agent of Select, each of IMS and Select:

(a) contravened s 12DA of the ASIC Act by the Sales Agent making a misleading or deceptive representation to Freddie Lewis that it would be difficult for him to contact FlexiSure, when in fact Freddie Lewis could have contacted FlexiSure by calling an inbound sales number;

(b) contravened s 12DA of the ASIC Act by the Sales Agent making a misleading or deceptive representation to Freddie Lewis that Select required his bank account details for the purpose of paying benefits to him, when in fact it was so that it could debit money from that account for payment of FlexiSure Life Cover premiums;

(c) engaged in unconscionable conduct towards Freddie Lewis in contravention of s 12CB(1) of the ASIC Act.

26. During the period 9 December 2015 to 9 February 2016, by Retention Agents who were employed by BlueInc Services, and who were also agents of Select, each of BlueInc Services and Select:

(a) contravened s 12DJ(1) by unduly harassing Freddie Lewis by not permitting Freddie Lewis to cancel the policy over the telephone, pressing him to keep the policy and continuing to seek payment from him;

(b) engaged in unconscionable conduct towards Freddie Lewis in contravention of s 12CB(1) of the ASIC Act by failing to permit Freddie Lewis to cancel his FlexiSure Life Cover and continuing to seek payment from him.

Contraventions relating to Cynthia Mirniyowan

27. During telephone calls made to Cynthia Mirniyowan on 28 April 2016 by a Sales Agent who was employed by BlueInc Services, and who was also an agent of Select, each of BlueInc Services and Select:

(a) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Cynthia Mirniyowan that there were no exclusions to the Let's Insure Funeral Cover, ADC or AIC save for limited professional sporting-based and criminal activity exclusions to the AIC, when in fact there were significant exclusions to each of the ADC and AIC;

(b) contravened s 12DB(1)(d) of the ASIC Act by the Sales Agent making a false and/or misleading representation to each of Cynthia Mirniyowan and her partner Derek Wurrawilya that each of them were "really happy" with the quote provided for the purchase of the Let's Insure Funeral Cover with AIC and ADC;

(c) contravened s 12DB(1)(i) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Cynthia Mirniyowan that ADC and AIC (including the ADC booster) were not optional extras and/or were a standard

component of the insurance policy, when in fact they were both optional extras that a consumer could elect not to add to Let's Insure Funeral Cover;

(d) engaged in unconscionable conduct towards Cynthia Mirniyowan in contravention of s 12CB(1) of the ASIC Act.

28. During the period 19 May 2016 to 6 February 2017, by Retention Agents who were employed by BlueInc Services, and who were also agents of Select, each of BlueInc Services and Select:

(a) contravened s 12DJ(1) of the ASIC Act by unduly harassing Cynthia Mirniyowan by continuing to contact Cynthia Mirniyowan to seek payment of her insurance premiums;

(b) engaged in unconscionable conduct towards Cynthia Mirniyowan in contravention of s 12CB(1) of the ASIC Act by failing to permit Cynthia Mirniyowan to cancel her Let's Insure Funeral Cover policy, with ADC, AIC and ADC booster, and continuing to seek payment from her.

Contraventions relating to Deepak Shrestha

29. During a telephone call made to Deepak Shrestha on 22 August 2017 by a Sales Agent who was contracted to IMS, and who was also an agent of Select, each of IMS and Select:

(a) contravened s 12DB(1)(g) of the ASIC Act by the Sales Agent making a false and/or misleading representation to Deepak Shrestha that the insurance premium remained the same throughout the duration of the Let's Insure Easy Life Insurance policy, when in fact the premium was stepped and would therefore increase over the life of the policy;

(b) engaged in unconscionable conduct towards Deepak Shrestha by signing up Deepak Shrestha to Let's Insure Easy Life Insurance with optional Easy Life AC and taking credit card details from him in contravention of s 12CB(1) of the ASIC Act.

PURSUANT TO S 21 OF THE FCA ACT, THE COURT DECLARES THAT:

30. In the period January 2015 to May 2017, Select contravened s 912A(1)(a) of the Corporations Act by failing to do all things necessary to ensure that the financial

services covered by its financial services licence were provided efficiently, honestly and fairly as:

(a) the Refer a Friend program (**Refer a Friend Program** or **Program**) was devised and executed unfairly, as at a time that Select's Sales Agents were also participating in additional incentive programs for sales volume-based benefits, in particular the Cruise, Vespa, and Las Vegas Trip, it enabled those Sales Agents to:

(i) solicit from newly-acquired customers contact details for their friends or family, in circumstances where those customers did not have the opportunity to decline to participate in the Refer a Friend Program and could not reflect on the implications of providing contact details of friends or family members, were incentivised to provide such details, and the Program did not require consent to be sought from the referred persons or afford the newly-acquired customers the opportunity to obtain the referred persons' consent;

(ii) impliedly suggest to the referred persons by "name-dropping" that the customer who had provided their contact details had encouraged Select's contact of the referred person and/or endorsed or approved of Select's insurance policies;

(b) Select did not take adequate steps to ensure that the Refer a Friend Program was not abused by failing to:

(i) adequately monitor the telephone calls of Sales Agents soliciting contact details from newly-acquired customers for the purpose of the Refer a Friend Program, or the telephone calls of Sales Agents made to persons whose contact details were obtained through the Program; and

(ii) identify that the use of the Refer a Friend Program would, or was causing or contributing to, a spike in sales in postcodes with a high proportion of Aboriginal and/or Torres Strait Islander populations in the period from January 2015 to October 2015.

31. Russell Howden was involved, within the meaning of s 79 of the Corporations Act, in the contravention of s 912A(1)(a) of the Corporations Act by Select referred to in declaration 30 above.

32. Select separately contravened s 912A(1)(c) of the Corporations Act when it failed to comply with the financial services laws in Chapter 7 of the Corporations Act on each occasion that:

(a) a representative for whom it was the responsible licensee accepted conflicted remuneration in contravention of s 963E, as referred to in declaration 1 above; and

(b) it failed to take reasonable steps to ensure that a representative of its financial services licence did not accept conflicted remuneration in contravention of s 963F, as referred to in declaration 2 above.

33. Russell Howden was involved within the meaning of s 79 of the Corporations Act in each of the contraventions of s 912A(1)(c) of the Corporations Act by Select referred to in declaration 32 above.

34. Select contravened s 912A(1)(c) of the Corporations Act when it failed to comply with the financial services laws in Division 2 of Part 2 of the ASIC Act on each occasion when:

(a) it engaged in unconscionable conduct in contravention of s 12CB(1) of the ASIC Act, as referred to in declarations 7(a), 8(b), 9(f), 10(c), 11, 12(c), 14(b), 15(c), 17(c), 18(c), 19(d), 20, 21(c), 22(c), 24, 25(c), 26(b), 27(d), 28(b) and 29(b) above;

(b) it made representations that were misleading or likely to mislead in contravention of s 12DA of the ASIC Act, as referred to in declarations 25(a) and 25(b) above;

(c) it made false or misleading representations in contravention of s 12DB(1)(a) of the ASIC Act, as referred to in declarations 7(b), 9(b) and 12(b) above;

(d) it made false or misleading representations in contravention of s 12DB(1)(d) of the ASIC Act, as referred to in declaration 27(b) above;

(e) it made false or misleading representations in contravention of s 12DB(1)(g) of the ASIC Act, as referred to in declarations 7(d), 7(e), 9(d), 22(b) and 29(a) above;

(f) it made false or misleading representations in contravention of s 12DB(1)(i) of the ASIC Act, as referred to in declarations 7(a), 7(c), 9(a), 9(c), 10, 10(b),

12(a), 13, 17(a), 17(b), 18(a), 19(a), 19(b), 21(a), 21(b), 22(a), 23, 27(a) and 27(c) above;

(g) it coerced consumers in contravention of s 12DJ of the ASIC Act, as referred to in declarations 7(f), 9(e), 14(a) and 19(c) above;

(h) it unduly harassed consumers in contravention of s 12DJ of the ASIC Act, as referred to in declarations 8(a), 16, 18(b), 26(a) and 28(a) above.

THE COURT ORDERS THAT:

Disqualification and restraining orders in relation to Mr Howden

35. Pursuant to s 206E of the Corporations Act, Russell Howden is disqualified from managing corporations for 5 years.

36. Pursuant to s 1324 of the Corporations Act, Mr Howden is restrained, in respect of companies of which he is a director and which hold a financial services licence (and/or which employ representatives of a financial services licensee), from causing or permitting those companies to give conflicted remuneration to their representatives.

Pecuniary penalties in relation to contraventions of the Corporations Act

37. Select pay to the Commonwealth a pecuniary penalty pursuant to s 1317G(1E) of the Corporations Act in the sum of $1,200,000.

38. BlueInc Services pay to the Commonwealth a pecuniary penalty pursuant to s 1317G(1E) of the Corporations Act in the sum of $900,000.

39. Mr Howden pay to the Commonwealth a pecuniary penalty pursuant to s 1317G(1) of the Corporations Act in the sum of $100,000.

Pecuniary penalties in relation to contraventions of the ASIC Act

40. Select pay to the Commonwealth a pecuniary penalty pursuant to s 12GBA of the ASIC Act in the sum of $6,500,000.

41. BlueInc Services pay to the Commonwealth a pecuniary penalty pursuant to s 12GBA of the ASIC Act in the sum of $3,500,000.

42. IMS pay to the Commonwealth a pecuniary penalty pursuant to s 12GBA of the ASIC Act in the sum of $1,400,000.

Restraining orders in relation to Select, BlueInc Services and IMS

43. Pursuant to s 1324 of the Corporations Act:

(a) BlueInc Services is restrained from giving conflicted remuneration to its employees in contravention of Part 7.7A of Chapter 7 of the Corporations Act;

(b) Select is restrained from accepting, and failing to take reasonable steps to ensure that representatives of its financial services licence do not accept, conflicted remuneration in contravention of Part 7.7A of Chapter 7 of the Corporations Act.

44. Pursuant to s 12GD of the ASIC Act, each of BlueInc Services, Select and IMS, and their employees and agents, are restrained from:

(a) pressing a consumer to purchase an insurance policy over the telephone during the same call, in circumstances where the consumer has asked for time to consider the transaction;

(b) selling an insurance policy to a consumer over the telephone during the first substantive outbound telephone call to the consumer about the insurance policy;

(c) selling an insurance policy to a consumer without taking genuine and reasonable steps to confirm that the consumer has received and considered a written product disclosure statement and a written financial services guide in relation to the policy;

(d) selling an insurance policy to a consumer without taking genuine and reasonable steps to ensure that the consumer understands the coverage offered by the policy, the exclusions to the policy and the cost of the policy over the duration of that policy;

(e) making false or misleading representations in relation to the coverage offered by the insurance policy, the exclusions to the policy and the cost of the policy over the duration of that policy;

(f) requiring an insurance policy to be cancelled in writing where that policy has been sold during a telephone call.

Probation order

45. Pursuant to s 12GLA(2)(b) of the ASIC Act, Select, BlueInc Services and IMS are to, at their own expense, establish a compliance, education and training, and internal operations review program (**Compliance Program**) set out in the Annexure to these orders.

Costs

46. Pursuant to s 43 of the FCA Act, the defendants are to pay ASIC's costs, to be agreed or assessed.

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

ANNEXURE – COMPLIANCE PROGRAM

Select AFSL Pty Ltd (ACN 151 931 618) (**Select**), BlueInc Services Pty Ltd (ACN 109 789 077) and Insurance Marketing Services Pty Ltd (ACN 160 307 979) (together, the **Entities**; each, an **Entity**) shall establish a compliance, education and training, and internal operations review program (**Compliance Program**) that complies with each of the below requirements.

For the purpose of this Annexure, the reference to "staff" is a reference to employees, contractors and/or other representatives or agents of the relevant Entity.

A. GENERAL

(1) The Entities will pay all costs associated with implementing the Compliance Program, including but not limited to the appointment of the Consultant (defined at [4] below).

B. APPOINTMENTS

(2) Within the later of either seven (7) days after the date of the order of the Court pursuant to s 12GLA(2)(b) of the ASIC Act (**Court Order**) or 14 days prior to the date of commencement of any agreements entered into by the Entities for the marketing, distribution or administration of insurance policies (with the relevant date being referred to as the **Commencement Date**), the Entities will appoint a responsible senior manager, with suitable qualifications or experience in corporate compliance, of their business as a Compliance Officer with responsibility for ensuring that the Compliance Program is effectively established, implemented and maintained in accordance with the Court Order (**Compliance Officer**).

(3) On the second and third annual anniversary of the Commencement Date, the Compliance Officer will report to ASIC as to whether:

(a) the Compliance Officer has taken reasonable steps to ensure that the Entities' policies, procedures and systems for managing the risks identified in the course of the Initial Review and Compliance Review referred to at [8(a)] below and – including those policies, procedures and systems adopted as a result of the recommendations made in the course of the Compliance Review referred to at [21] below – are appropriate and adequate; and

(b) nothing has come to the Compliance Officer's attention during the previous 12 months to suggest that the Compliance Program is not appropriate, to the extent reasonably possible, to address the risks set out in [8(a)] below; or

(c) any matters that have come to their attention during the previous 12 months that would indicate that the Compliance Program is not appropriate to ensure that the risks set out in [8(a)] below have been or will be adequately addressed, and what steps the Entities have taken or will take to address those matters (including any relevant timeframes).

(4) Within fourteen (14) days of the date of the Commencement Date, the Entities will engage, jointly and severally, one expert (**Consultant**) who:

(a) has the necessary expertise, experience and operational capacity to perform the role contemplated by the Court Order; and

(b) has had no prior or existing contractual, employment or other commercial relationship with the Entities, their related bodies corporate and their officers at the time of the appointment; and

(c) will at all material times be capable of exercising objective and impartial judgement,

whose:

(d) terms of appointment are to be based on the matters set out in [7] and [23] below; and

(e) whose appointment and terms of appointment are to be approved by ASIC in writing, such approval not to be unreasonably withheld.

(5) If one Consultant cannot address all of the risks set out in [8(a)] below, two or more Consultants may be engaged.

(6) If the Consultant becomes unable to proceed with the engagement as a result of physical impediment, conflict of interest or becoming aware of information that adversely affects their ability to exercise objective and impartial judgment, the Consultant must notify each of the Entities and ASIC of the same, and a different Consultant may be engaged in accordance with the process set out in [4] above within 14 days of the first Consultant's notice.

C. INITIAL STEPS AND REVIEW

a. Initial Review

(7) The Entities will instruct the Consultant to conduct an initial review and risk assessment in accordance with [8]-[9] below (Initial Review), including to prepare the Initial

Review Report (defined in [9] below), to be completed within three (3) months of the date of the Commencement Date (or such further time as the Consultant requires, with any extension of time to be approved by ASIC, such approval not to be unreasonably withheld).

(8) The Initial Review must, at a minimum:

(a) identify areas where each Entity is at risk of breaching:

(i) Pt 2, Div 2, Subdivisions C and D of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and

(ii) Ch 7, Pt 7.6, Division 3 and Pt 7.7A, Division 4 of the *Corporations Act* 2001 (Cth) (**Corporations Act**).

(b) assess the likelihood of these risks occurring;

(c) identify where there may be gaps in each Entity's existing policies, procedures and systems for managing these risks, including, but not limited to the Entities' policies, procedures and systems around induction and training;

(d) provide recommendations for action.

(9) The Consultant will prepare a written report (**Initial Review Report**) setting out:

(a) a description of the methodology, parameters, limitations, qualifications and assumptions applicable to the Initial Review, including evidence gathered and examined;

(b) the findings of the Initial Review, including the reasons for each of the Consultant's opinions; and

(c) recommendations made as a consequence of the Initial Review.

(10) Select, on behalf of the Entities, will provide a copy of the Initial Review Report to ASIC within five (5) days of receiving it from the Consultant.

(11) Each Entity will implement promptly and with due diligence any recommendations made by the Consultant as a result of the Initial Review, within 30 days of receiving the Initial Review Report (or such further time as the Entity requires, with any extension of time to be approved by ASIC, such approval not to be unreasonably withheld).

b. Compliance Policy

(12) Within 30 days of the issuance of the Initial Review Report, each Entity will issue a compliance policy (**Compliance Policy**) that:

(a) is written in plain language;

(b) contains a statement of commitment to compliance with the Corporations Act and the ASIC Act, including in particular to ensuring appropriate sales and retention conduct and not providing conflicted remuneration to staff;

(c) contains a strategic outline of how the commitment at [12(b)] above will be realised within the Entity;

(d) addresses each of the recommendations made by the Consultant in the Initial Review and what steps it has taken or is taking to implement the recommendations;

(e) contains a requirement for all staff to report any Compliance Program related issues, including any concerns regarding sales and retention conduct and conflicted remuneration to the Compliance Officer; and

(f) refers staff to its Complaints Handling System (as referred to in [14] below).

(13) Each Entity will provide a copy of their Compliance Policy to ASIC and the Entity's staff within five (5) days of issuing it.

c. Complaints Handling System

(14) Within four (4) months of the date of the Commencement Date, each Entity will ensure that it has a complaints handling system:

(a) that addresses each of the recommendations made by the Consultant in the Initial Review to the extent those recommendations relate to complaints handling;

(b) that at a minimum, is capable of identifying, storing and responding to consumer complaints; and

(c) of which staff and consumers are made aware.

(15) Each Entity will provide a copy of any policies and procedures regarding the complaints handling system to ASIC and the Entity's staff within five (5) days of issuing them.

d. Education and training

(16) Each Entity will introduce regular (at least once a year) practical training for all staff of each Entity whose duties could result in them being concerned with conduct that may contravene Ch 7, Pt 7.6, Division 3 and Pt 7.7A, Division 4 of the Corporations Act and Pt 2, Div 2, Subdivisions C and D of the ASIC Act.

(17) Each Entity must ensure that its training is:

(a) designed and conducted by a suitably qualified compliance professional (**Compliance Trainer**) with expertise in compliance with the Corporations Act and ASIC Act; and

(b) addresses any matters, and/or adopts recommendations made in the Initial Review Report by the Consultant.

(18) In relation to training scheduled in the three (3) year period following the date of the Commencement Date, each Entity must provide to its Compliance Trainer, for the purposes of conducting training for the Entity's staff, a copy of:

(a) the Court Order;

(b) the Compliance Policy of each Entity;

(c) any policies and procedures regarding the complaints handling system; and

(d) all reports prepared by the Consultant as at the date the training is scheduled.

(19) Each Entity will ensure that awareness of the Compliance Policy and complaints handling system form part of the induction of all new staff, including directors, officers, employees, consultants, contractors and other representatives of the Entity.

D. COMPLIANCE REVIEW AND RECOMMENDATIONS

a. Compliance Review

(20) Within the period of four (4) to five (5) months of receiving the Initial Review Report from the Consultant, each Entity will instruct the Consultant to conduct a further review of the Compliance Program (**Compliance Review**) to be carried out in accordance with [21]-[22] below, including to prepare the Compliance Review Report (defined in [22] below), to be completed within 12 months of the Commencement Date (or such further time as the Consultant requires, with any extension of time to be approved by ASIC, such approval not to be unreasonably withheld).

(21) The Compliance Review must, at a minimum:

(a) review the extent to which each Entity's Compliance Program adequately addresses the matters identified and recommendations made in the Initial Review or any subsequent review; including:

(i) the adequacy of each Entity's sales and retention conduct, including with respect to identifying and dealing with potentially vulnerable consumers;

(ii) the adequacy of each Entity's remuneration practices as relevant to the prohibition on conflicted remuneration;

(iii) the adequacy and effectiveness of each Entity's complaints handling system; and

(iv) the adequacy and effectiveness of each Entity's policies, procedures, scripts and staff training;

(b) make recommendations for rectifying any deficiencies in [21(a)(i)]-[21(a)(iv)] above that the Consultant considers are reasonably necessary to ensure that each Entity has the required policies, procedures and training in place to ensure effective on-going compliance with Ch 7, Pt 7.6, Division 3 and Pt 7.7A, Division 4 of the Corporations Act and Pt 2, Div 2, Subdivisions C and D of the ASIC Act.

(22) The Consultant will prepare a written report (**Compliance Review Report**) setting out:

(a) a description of the methodology, parameters, limitations, qualifications and assumptions applicable to the Compliance Review, including evidence gathered and examined;

(b) the findings of the Compliance Review, including the reasons for each of the Consultant's opinions; and

(c) recommendations made as a consequence of the Compliance Review.

(23) Select, on behalf of the Entities, will provide a copy of the Compliance Review Report to ASIC within five (5) days of receiving it from the Consultant.

b. Recommendations

(24) Each Entity shall implement promptly and with due diligence any recommendations made by the Consultant as a result of the Compliance Review within 30 days of receiving the Compliance Review Report (or such further time as the Entity requires, with any extension of time to be approved by ASIC, such approval not to be unreasonably withheld).

(25) Each Entity shall, in the event that the Compliance Review Report identifies any recommendations or actions that have not been implemented by that Entity, provide ASIC with a written plan (**Remedial Action Plan**) setting out the actions the Entity proposes to take to ensure that those recommendations and actions are implemented.

(26) Each Entity will provide its Remedial Action Plan to ASIC within 14 days of the Compliance Review Report being provided to ASIC.

(27) Each Entity will implement promptly and with due diligence any Remedial Action Plan within the 30 days referred to in [24] above, except that if ASIC requires any reasonable modifications to any Remedial Action Plan, then the Entity will implement the Remedial Action Plan as so modified.

E. REASONABLE ASSISTANCE TO THE CONSULTANT

(28) Each Entity shall:

(a) permit the Consultant access to its books and to interview current employees, contractors, representatives and/or agents to the extent that it is reasonable having regard to the requirements of this Court Order;

(b) give the Consultant any information or explanation reasonably requested of any matter connected with the Compliance Program;

(c) provide the Consultant access to all customer data required to enable it to fulfil its obligations under this Court Order and the Compliance Program; and

(d) otherwise give all reasonable assistance to the Consultant to enable the Consultant to carry out the terms of their engagement and to produce the Initial Review Report and the Compliance Review Report.

F. OTHER

(29) If requested by ASIC, each Entity will, at their own expense and within a reasonable period, provide ASIC with copies of documents and information in respect of matters that are the subject of the Compliance Program.

(30) Each Entity acknowledges that ASIC may from time to time publicly refer to the content of any of the Initial Review Report, the Entity's Compliance Policy, the Compliance Review Report, the Entity's Remedial Action Plan and/or the Compliance Program and may make public a summary of that material or a statement that refers to the content of that material.

(31) Each Entity will notify ASIC as soon as reasonably practicable, and in any event within ten (10) days of becoming aware, of any failure by any of the Entities to comply with the terms of the Court Order.

REASONS FOR JUDGMENT

ABRAHAM J:

1 These reasons relate to the determination of the relief to be imposed for the contraventions found by this Court in *Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 2)* [2022] FCA 786 (Liability Judgment or LJ) and should be read in conjunction with the Liability Judgment. Unless otherwise stated, terms defined in the Liability Judgment have the same meaning in these reasons.

2 The Corporate Defendants are to be dealt with for the following:

(a) Select AFSL Pty Ltd (Select), for contraventions of the conflicted remuneration provisions of the *Corporations Act 2001* (Cth) (Corporations Act) and of the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act);

(b) BlueInc Services Pty Ltd (BlueInc Services), for contraventions of the conflicted remuneration provisions of the Corporations Act and the consumer protection provisions of the ASIC Act; and

(c) Insurance Marketing Services Pty Ltd (IMS), for contraventions of the consumer protection provisions of the ASIC Act.

3 Mr Howden is to be dealt with for his involvement in contraventions of the conflicted remuneration provisions the Corporations Act, breaches of the general obligations provisions imposed on a holder of an AFSL under ss 912A(1)(a) and (c) of the Corporations Act, and his directors' duties contraventions of s 180 of the Corporations Act.

4 There is no dispute between the parties that declarations ought to be made. That said, there is dispute between the parties as to: the quantum of any pecuniary penalties imposed; the form of the declarations; whether Mr Howden should have a disqualification order made against him; and whether advertising orders ought to be made. The dispute, in large part, is underpinned by a dispute as to the assessment of the seriousness of the contravening conduct.

5 The plaintiff, the Australian Securities and Investments Commission (ASIC) sought the following total penalties (having also identified what it submitted is the appropriate penalty for each contravention or course of conduct):

(a) for contraventions of the conflicted remuneration provisions of the Corporations Act:

(i) that Select pay a pecuniary penalty in the sum of $1,800,000;

(ii) that BlueInc Services pay a pecuniary penalty in the sum of $1,700,000;

(b) for contraventions of the consumer protection provisions of the ASIC Act:

(i) that Select pay a pecuniary penalty in the sum of $11,450,000;

(ii) that BlueInc Services pay a pecuniary penalty in the sum of $6,850,000;

(iii) that IMS pay a pecuniary penalty in the sum of $3,150,000.

6 In respect to Mr Howden, ASIC sought, inter alia: a pecuniary penalty of $100,000; and disqualification from managing corporations for various alternate periods, the longest being 10 years.

7 The Corporate Defendants submitted that the appropriate penalties were:

(a) for their contraventions of the conflicted remuneration provisions of the Corporations Act:

(i) the sum of $300,000 being payable by Select;

(ii) the sum of $200,000 being payable by BlueInc Services;

(b) for their contraventions of the consumer protection provisions of the ASIC Act:

(i) the sum of $1,000,000 being payable by Select;

(ii) the sum of $500,000 being payable by BlueInc Services;

(iii) the sum of $200,000 being payable by IMS.

8 In respect to Mr Howden, he submitted that he should not be disqualified at all and conceded that, if no disqualification order is made, he should pay a pecuniary penalty of $20,000.

9 For the reasons below, I impose the following penalties:

(a) for contraventions of the conflicted remuneration provisions of the Corporations Act:

(i) Select is to pay a pecuniary penalty in the sum of $1,200,000;

(ii) BlueInc Services is to pay a pecuniary penalty in the sum of $900,000;

(b) for contraventions of the consumer protection provisions of the ASIC Act:

(i) Select is to pay a pecuniary penalty in the sum of $6,500,000;

(ii) BlueInc Services is to pay a pecuniary penalty in the sum of $3,500,000;

(iii) IMS is to pay a pecuniary penalty in the sum of $1,400,000.

10 In respect to Mr Howden, he is disqualified from managing corporations for a period of five years and is to pay a pecuniary penalty of $100,000.

Legal principles

11 The principles to be applied are largely not in issue. They are well-established. Rather, the issue is with their application.

12 At the outset, it is appropriate to address the maximum penalties for each of the contraventions:

(a) for each Conflicted Remuneration Contravention it is $1 million: s 1317G(1F) of the Corporations Act (as it was prior to March 2019);

(b) with respect to:

(i) all of the contraventions in relation to David Mirrawana, Zondani Mtawale and Teubiti Tapera;

(ii) the sales contraventions in respect of Jennifer Yalumul, Dawnetta Yeatman, Josephine Shadforth, and Georgina Gaykamangu; and

(iii) part of the retention contraventions in respect of Josephine Shadforth,

being those contraventions which occurred prior to 31 July 2015, for each contravention it is $1.7 million: s 12GBA(3) of the ASIC Act (which, it may be noted, is significantly higher than the comparable penalties under the ACL at the time);

(c) save for the contraventions referred to in [12(d)] below, the balance of the Consumer Contraventions occurred between 31 July 2015 to 30 June 2017, and it is $1.8 million: s 12GBA(3) of the ASIC Act; and

(d) with respect to the retention contraventions relating to Jennifer Yalumul and all contraventions in respect of Deepak Shrestha, each of which occurred after 1 July 2017, for each contravention it is $2.1 million: s 12GBA(3) of the ASIC Act.

13 In regard to the relevance of a maximum penalty, in *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357, the majority observed at [31]:

> [31] … careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and

balanced with all of the other relevant factors, a yardstick …

14 In a civil penalty context, the relevance of a prescribed maximum penalty as a yardstick was explained by the Full Court of the Federal Court in *Australian Competition and Consumer Commission v Reckitt Benckiser Pty Ltd* [2016] FCAFC 181; (2016) 349 ALR 25 (*Reckitt Benckiser*) at [155]-[156] as follows:

> [155] The reasoning in *Markarian* about the need to have regard to the maximum penalty when considering the quantum of a penalty has been accepted to apply to civil penalties in numerous decisions of this Court both at first instance and on appeal (*Director of Consumer Affairs, Victoria v Alpha Flight Services Pty Ltd* [2015] FCAFC 118 at [43]; *Australian, Competition and Consumer Commission v BAJV Pty Ltd* [2014] FCAFC 52; (2014) ATPR 42-470 at [50]-[52]; *Setka v Gregor (No 2)* [2011] FCAFC 90; (2011) 195 FCR 203 at [46]; *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29; (2011) 202 IR 467 at [28]-[29]). As *Markarian* makes clear, the maximum penalty, while important, is but one yardstick that ordinarily must be applied.
>
> [156] Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed.

15 This passage was more recently cited with approval in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599 (*Pattinson*) at [53].

16 The primary purpose of any civil penalty regime is to ensure compliance with the statutory regime by deterring future contraventions: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (*Agreed Penalties Case*) at [24]. The principal object of an order that a person pay a pecuniary penalty is deterrence. That is, specific deterrence of the contravenor and, by his or her example, general deterrence of other would-be contravenors: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 at [116]. Civil pecuniary penalties are "primarily if not wholly protective in promoting the public interest in compliance [with the statute]": *Agreed Penalties Case* at [55] and [59], [68], [110]. This point was emphasised more recently in *Pattinson* at [15]-[16], [43], and [45] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ.

17 The deterrent effect "must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business": *Pattinson* at [17], citing *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 (*Singtel Optus*) at [62].

18 The assessment of a penalty of appropriate deterrent value will have regard to a number of factors including: (1) the nature and extent of the contravening conduct; (2) the amount of loss or damage caused; (3) the circumstances in which the conduct took place; (4) the size of the contravening company; (5) the degree of power the contravening company has, as evidenced by its market share and ease of entry into the market; (6) the deliberateness of the contravention and the period over which it extended; (7) whether the contravention arose out of the conduct of senior management or at a lower level; (8) whether the contravening company has a corporate culture conducive to compliance, as evidenced by educational programs or other corrective measures in response to an acknowledged contravention; and (9) whether the contravening company has shown a disposition to co-operate with the authorities responsible for the enforcement of the relevant Act in relation to contravention: *Pattinson* at [18], referring to the *Trade Practices Commission v CSR Ltd* [1990] FCA 762; (1991) ATPR 41-076 (*TPC v CSR*) at 52,152-52,153. These are not to be considered to be a rigid list of factors to be ticked off (*Pattinson* at [19]), but rather are to inform a multifactorial consideration that leads to a result arrived at by a process of "instinctive synthesis" addressing the relevant considerations (*Reckitt Benckiser* at [44]).

19 In *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 (*NW Frozen Foods*) at 292, Burchett and Kiefel JJ (Carr J agreeing) explained that these factors may be regarded as elaborations of the statutory requirement to consider the circumstances in which the act or omission took place. At 297, their Honours then expanded the relevant considerations to include: whether the contravenor has engaged in similar conduct in the past; and the contravenor's financial position. In *J McPhee & Son (Australia) Pty Ltd v Australian Competition & Consumer Commission* [2000] FCA 365; (2000) 172 ALR 532 at [163], the relevant considerations were also expanded to include whether the conduct was systematic, deliberate or covert.

20 In *Pattinson* at [46], the majority explained that an appropriate penalty is one that "strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case".

21 Ordinarily, separate contraventions arising from separate acts should attract separate penalties. However, where separate acts give rise to separate contraventions that are inextricably interrelated, they may be regarded as a "course of conduct" for penalty purposes: *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243 at [234]. This avoids double punishment for those parts of the legally distinct contraventions that involve overlap in wrongdoing: see, for example, *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 at [39] and [41]. Whether the contraventions should be treated as a single course of conduct is fact specific, having regard to all of the circumstances of the case.

22 Characterising a number of contraventions as one course of conduct does not mean that the course of conduct is capped at the maximum penalty for one contravention. The maximum penalty for the course of conduct is not restricted to the prescribed statutory maximum penalty for any single contravening act: *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd t/a Bet365 (No 2)* [2016] FCA 698 at [24]. It does not proceed as if it is only one contravention: *Australian Competition and Consumer Commission v Unique International College Pty Ltd (Imposition of Penalty)* [2019] FCA 1773 at [52]. The penalties ultimately imposed are of an appropriate deterrent value, having regard to the actual, substantive wrongdoing.

23 The principle of totality requires the Court to make a "final check" of the penalties to be imposed on a wrongdoer, considered as a whole, to ensure that the total penalty does not exceed what is proper or appropriate for the entire contravening conduct: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* [1997] FCA 450; (1997) 145 ALR 36 at 53, citing *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59.

24 I will return to address the legal principles relevant to some of the other orders sought against the Corporate Defendants and Mr Howden (together, the Defendants), when considering the relevant submissions.

Evidence

25 The evidence at the liability hearing stands as evidence admitted for the purpose of the relief hearing.

26 In addition, ASIC, read the affidavit of Cameron Luke Villarosa affirmed on 4 October 2022, and tendered the annexures to it. ASIC also tendered an amended statement of further agreed background facts and extracts of the transcripts of the examinations conducted pursuant to s 19 of the ASIC Act.

27 For the Defendants, Mr Howden read an affidavit, in his own name, sworn 22 November 2022. The Defendants also read two character references for Mr Howden: an affidavit of Thomas Noel Grogan sworn 18 November 2022 (with its annexure); and an affidavit of Mark Wallis Willock sworn 22 November 2022 (with its annexure). Further, the Defendants tendered: extracts of the transcripts of the examinations conducted pursuant to s 19 of the ASIC Act (to which ASIC objected on the ground of relevance); a bundle of documents comprising the deed of settlement establishing the Howden family's trust and share certificates; an email from ASIC to the Defendants regarding costs; the documents annexed to Mr Howden's affidavit; and a compilation of training documents and BlueInc Group Pty Ltd's (BlueInc Group) training register from its access database.

28 It is necessary to consider Mr Howden's evidence in more detail.

Evidence of Mr Howden

29 Although Mr Howden did not give evidence in the liability hearing, he sought to read a lengthy affidavit on this hearing. ASIC objected to passages of the affidavit, generally on the basis they canvassed matters already addressed at the liability hearing and of which findings have been made, and in relation to some passages, more specifically, on the basis that they cavil with findings in the Liability Judgment. The parties agreed that those objections could be ruled on in this judgment. I note that some, albeit limited paragraphs were not pressed by the Defendants after objection was taken, being part of [59] and [185]-[186], which plainly cavilled with my findings.

30 As to the remaining objections on the basis the affidavit cavils with my findings in the Liability Judgment, some of the passages do cavil with those findings. For example, the remaining words of [59] and [95(c)], [95(d)].

31 In respect to [95(c)] and [95(d)] regarding certain practices, it was submitted by the Defendants that it would be unfair to Mr Howden to exclude the evidence given that he was cross-examined on his role in setting the culture of the Corporate Defendants and his knowledge of the culture. However, those paragraphs are inconsistent with the LJ at [22], [24], [94]. Moreover, given my

findings, including the frequency with which Mr Howden walked the floor, that his office was on the sales floor, and that he was a micromanager, I do not accept that he was not aware of that conduct. In that context, the statement at [59] that he was not concerned with Sales Agents' sales or calls also cavils with my conclusion in the LJ at [1390].

32 In respect to [36(h)], [71], [97], [106], [167], whilst perhaps not strictly cavilling with my findings, they involve a selective recitation of the events and the roles of persons in the companies. Although I admit the paragraphs on the basis described below at [37], it is difficult to understand how they advance the Defendants' case, when the aspects omitted relate to findings in the Liability Judgment.

33 Similarly, I admit [168] on the same basis. That said, although I accept the imposition of a penalty mechanism in the Incentives schemes was intended to be aimed at compliance, I do not accept that it had the level of significance referred to. If that was so, for example, Mr Howden and others of senior management would have considered the appropriateness of: a compliance system which only assessed one in 10 calls at that time in 2015; implementing the Las Vegas and Hawaii Incentives after Mr Howden was aware of an issue as to the use of the Refer a Friend program in relation to certain Indigenous communities in 2015 (regarding which Mr Hoey was given an informal warning); and implementing the Hawaii Incentive, after Mr Howden had acknowledged the spike in sales to the postcodes identified as having a high concentration of Indigenous residents (the spike) was contributed to by an overall increase in sales at the time that the Cruise Incentive and the Vespa Incentive were being conducted. Each of these details are considered further below.

34 In respect to [99] and [101], they are said to reflect Mr Howden's understanding that the functions of Retention Agents were being performed in accordance with the instructions of St Andrew's. However, as at the time of swearing the affidavit, that could not be his understanding, for if it was, it ignores the findings in the Liability Judgment.

35 The remainder of the objections to Mr Howden's evidence by ASIC were put on the basis that, in substance, if a matter was dealt with in the liability phase, as a matter of principle and a matter of fairness, a defendant that has made a deliberate choice not to give evidence for strategic reasons should not then be provided with the opportunity to give their version of events at the penalty phase. In effect, the submission is that the ship has sailed.

36 In *Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission* [2022] FCAFC 170 at [194]-[195], the Court observed:

> [194] In *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2005] FCA 1847; (2005) 224 ALR 467 at [6] Merkel J took a stricter view based on the interest in the finality of litigation and related discretionary considerations, saying:
>
> > … During the course of the penalty hearing the respondents sought to raise a number of matters relating to liability that had not been raised at the hearing on liability. In so far as those matters could have been tested or met by FSU adducing, or challenging, evidence in relation to those matters, it is not appropriate to allow them to be raised at the penalty hearing: see *Park v Brothers* [2005] HCA 73 at [33]–[34]. As a consequence, at the penalty hearing I ruled that the evidence filed by the respondents for the purposes of that hearing, which was also capable of being relevant to liability, was to be received only in relation to the quantum of any penalty, and not in relation to the liability of CBA in respect of that penalty. The main reason for that ruling was that the issue of liability had been determined in the reasons for judgment on the basis of the pleadings and evidence before the Court at trial, as well as on the basis of the manner in which the respective parties chose to conduct their cases at trial. In those circumstances, it would be unfair to FSU if the respondents' evidence at the penalty hearing was able to be relied upon, directly or indirectly, in relation to liability, absent applications to amend the pleadings and to re-open the respondents' case. No such applications were made.
>
> [195] We prefer the approach in *Finance Sector Union* to that in *Forge*. It would have been unfair to ASIC and contrary to the interests of justice to permit the appellants to challenge facts found in the liability hearing in the penalty hearing when they made a deliberate forensic decision not to appear in the liability hearing.

37 I propose to adopt this approach, and admit the remaining evidence of Mr Howden objected to, on the penalty hearing only. It is appropriate to note here that Mr Howden has been cross-examined. The issue is one of the weight to be attached to the evidence. As noted above, some of the material in the affidavit is selective, which fails to grapple with the findings made.

38 As referred to above, ASIC also objected to the extracts of the transcripts of the examinations conducted pursuant to s 19 of the ASIC Act tendered by the Defendants. They were said not to be relevant on the same basis advanced in relation to the challenges to Mr Howden's affidavit. That submission was not expanded upon. I admit the evidence on the same basis as the affidavit.

39 I note also that at times during the cross-examination, counsel for the Defendants objected to questions which were asked of Mr Howden in his role as the sole director and controlling mind of the Corporate Defendants, which might be said to relate to the Consumer Contraventions (which were not alleged against him personally). The questions were allowed, as they were

relevant. That is particularly so given some of the topics Mr Howden addressed in his affidavit. He could be asked questions in both his individual capacity and as the sole director of the Corporate Defendants. The issue then becomes one of weight.

40 At times, Mr Howden's evidence was defensive and evasive. When questions were asked about his actions, or accepting responsibility, he often added qualifications to his answers. As a general observation, he sought to create a picture of his involvement as somewhat different to that found in the Liability Judgment. It was a position more removed or distanced from the contravening conduct. At times, although accepting responsibility for the contravening conduct, he showed no real appreciation for what had occurred.

41 In that context, I will address six topics at this stage.

42 *First*, in the Liability Judgment I found that the evidence established that Mr Howden was in control, and a micromanager (LJ at [1346], [1390]-[1391]):

> [1346] I have discussed elsewhere the various roles undertaken by Mr Howden. That discussion is applicable here. The evidence establishes that Mr Howden was in control, and if anything, was a micromanager.
>
> …
>
> [1390] It is Mr Howden's own account in his s 19 examination that he sat in an office on the same level as the Sales Agents. It was an open plan, glass office and Mr Howden's door was always open, to anyone working under him. Mr Howden regularly interacted with staff, including Sales Agents and managers. He knew everyone individually and would routinely speak with them about sales and whether agents were meeting their targets. The inference to be drawn from the evidence (from the s 19 examinations of the agents), is that Mr Howden was a micromanager. Mr Howden was located in the same office, where posters for the Incentives and "leader board" screens were also located. Mr Howden presided over what at the very least, would be described as a very competitive, sales driven culture designed to sell more products by, inter alia, rewarding the top performers. These practices were known and endorsed by senior management, including Mr Howden, and set the culture of the sales environment.
>
> [1391] As previously explained, in relation to the Incentives, Mr Howden approved the Incentives. As Mr Atwal, who was Sales Manager, described, Mr Howden had sole responsibility setting policies, targets and incentives. Under privilege, Mr Atwal also said that Mr Howden was privy to the "rev-up" sessions of the sales teams.

43 Also see the description in the LJ at [24], [94]-[95], [106].

44 In cross-examination, Mr Howden was asked whether he was a micromanager. His answers were unsatisfactory. He claimed not to be able to answer the question until he understood what was meant by that term. It is a frequently used and readily understood concept. It had been used

in the liability hearing this case. In the circumstances, including his access to the evidence presented at the liability hearing, his presence during that hearing (which addressed that evidence and included submissions that he was a micromanager), his access to the written submissions and the Liability Judgment, that purported lack of understanding is somewhat disingenuous. Mr Howden had very hands on involvement in the day to day activities of the business.

45 *Second*, the Incentives schemes were implemented at Mr Howden's initiative. He had a central and active role in their operation: see, for example, LJ at [248]-[249]. Mr Howden accepted in cross-examination that he did not seek any advice from or even inform Select's Head of Compliance and Quality Assurance, Mr Hitchcock, before the Incentives were offered. Rather, he gave evidence that he took the approach that promotional material was available (that is, after the Incentives were launched) and that Mr Hitchcock would therefore be aware of the Incentives and raise any concerns as to their unlawfulness if he had them. Bearing in mind, that up until July 2015 Mr Hitchcock worked at most one day per week, and ordinarily one day per fortnight, and was only present in the office on an ad hoc basis from July 2015: LJ at [194], [1393]. Bearing in mind also that from October 2015, the position of Compliance and Quality Assurance Team Leader was taken over by Mr Nguyen, who had no prior experience in a compliance role and no compliance qualifications when he commenced with Select. Mr Nguyen had only one year's experience in another financial services institution before commencing at BlueInc Group: LJ at [1393].

46 *Third*, Mr Howden was cross-examined as to when he was aware of the spike and the issue as to use of the Refer a Friend program. His answers in cross-examination on this topic were inconsistent.

47 In the Liability Judgment, I accepted the unchallenged evidence of Mr Hoey, as to the events of being issued a warning and the termination of his employment: LJ at [203]. I concluded that in around late 2015, Mr Hoey had a conversation with Mr Atwal and Mr Howden where they raised with him concerns about the number of sales in certain Indigenous communities and the use of the Refer a Friend program: LJ at [100], [201], [203], [204], [1329], [1354]. Although this was an informal warning by Mr Howden and Mr Atwal, Mr Hoey's evidence was that he was told by Mr Howden at that time that "nothing was going to happen. That will be it": LJ at [1329], [1354]. The warning that was given does not appear in any compliance report: LJ at [205]. Thereafter, Mr Hoey was promoted, further Incentives were offered and he was provided

a raise in salary for "consistent performance": LJ at [204]. There is no evidence of any compliance steps having been taken, or measures put in place to address the issue which Mr Howden was aware had arisen. Rather, once Mr Howden had knowledge of the spike, further Incentive programs were launched by him without informing his compliance officer, and the Refer a Friend program continued.

48 I accept ASIC's submission that Select and Mr Howden, at the very least, turned a "blind eye" to the risks to consumers arising from the use of the Refer a Friend program and sales made to consumers within certain Indigenous communities from late 2015 until it was raised by St Andrew's in October 2016. When St Andrew's first raised the issue in October 2016, Mr Howden immediately responded on 1 November 2016 by saying there was no reason to believe there had been any mis-selling: LJ at [1327]. His initial response was not to conduct any review. The Refer a Friend program was permitted to continue until May 2017, despite Select and Mr Howden acknowledging to St Andrew's on 1 November 2016 that the Refer a Friend program was a contributing factor to the spike: LJ at [1324].

49 Related to that is the evidence of the termination of Mr Hoey and Ms Dudbridge, again a topic of cross-examination.

50 In February 2017, Mr Hoey signed a Final Formal Warning letter, which was also signed by Mr Shah (who was Head of Sales), in respect to the excessive use of the Refer a Friend program although, the document was dated 5 October 2015. Around the same time, Ms Dudbridge also signed a Formal Warning letter, dated 5 October 2015 and signed by Mr Shah, for her excessive use of the Refer a Friend program: see LJ at [101]-[102] and [201]. In cross-examination, Mr Howden's evidence was that in February 2017 he asked Mr Shah to get the warning that had been given, in writing. However, the documents that Mr Hoey and Ms Dudbridge were required to sign, are plainly dated as if the warning had been given in 2015 and are referred to as a "final warning" although that is not what was given at the time. Mr Howden attributed the erroneous date to a misunderstanding by Mr Shah as to what he was to do. These documents were produced by Select to ASIC during the course of their investigation.

51 It was not until February 2017 that Select advised St Andrew's that two Incentives schemes (the Cruise Incentive and the Vespa Incentive), which coincided with the introduction of the Refer a Friend program, contributed to the spike: LJ at [1325]. Mr Howden knew that Mr Hoey and Ms Dudbridge were responsible for the largest proportion of the spike: LJ at [1327]. As referred to above, it was also at that time in February 2017 that backdated documents were

created to reflect that they had received formal warnings in 2015. The file note of a further meeting with St Andrew's on 2 June 2017, records that Select advised it had not assessed a need to inform ASIC. It also records that after discussion, Select agreed to send a letter to ASIC. The plain meaning of the words recorded are evident. Mr Howden's prevarication and excuses in evidence on this topic were unconvincing (as was the Defendants' submission linking the dismissal to the results of a review provided by St Andrew's on 1 June 2017). On 5 June 2017, Select terminated Mr Hoey and Ms Dudbridge's employment. On 19 June 2017, Select informed ASIC of the spike and that it had terminated the employment of the two sales persons involved. The compelling inference is that the termination of Mr Hoey and Ms Dudbridge's employment occurred because St Andrew's prevailed on Select to report the conduct to ASIC.

52 *Fourth*, when asked about the Refer a Friend program during cross-examination, Mr Howden initially only "now" accepted that the program involved the client having no opportunity to consult with their friends and family about whether they consented to their names being referred. He pointed to the part of the sales script where the Sales Agents were required to ask Referring Customers whether the Referred Customers, to the Referring Customer's best knowledge, would be happy being referred: LJ at [1302]. In written submissions to the Royal Commission, which Mr Howden approved as the sole director, Select admitted that, not only should consumers not have been asked for details of friends and family "unless and until they had given their express consent", but each instance in which that occurred "was a failure by the relevant representatives": LJ at [1315]. The sales script is far removed from obtaining consent from the Referred Customer. Rather, it reflects a deliberate choice by the Defendants not to do so. Although ultimately accepting during cross-examination that the script fell "very far short" of consent, Mr Howden said it did not occur to him that the program would be misused. However, as explained above at [47], he did have such knowledge in 2015. Mr Howden's submission at this hearing went further and contended that he "could not have known" it would affect the Indigenous community. For the same reason, that is not accepted. It is inconsistent with my findings: see, for example, LJ at [1312]. The inherent and unfair features of the program were "ripe for abuse … particularly so in relation to potentially vulnerable customers": LJ at [1312]. That was in circumstances where the Refer a Friend program was introduced at the time the Incentives schemes were instituted. Noting also, that in 2014 Mr Hitchcock had raised with Mr Howden problems associated with Select's marketing to Indigenous communities: LJ at [1330].

53 In this context, it is also appropriate to refer to Mr Howden's evidence in his affidavit about being aware that Real Insurance had a program similar to the Refer a Friend program. This was used to support his position that he was unaware it might lead to unacceptable behaviours, on the basis that another insurance company was doing it. There are a number of obvious differences which serve to highlight the problems with the program as implemented by Select. The campaign run by Real Insurance involved documentation which was required to be completed by the referring customer, which very clearly stated that there were four steps involved. The second step was to advise the person whose details were being provided before returning the documentation to Real Insurance. Indeed, the documentation by Let's Insure (a trading name of Select) before 2015, listed "[m]ake sure you get your friends' or relatives' permission to refer them" before the form was to be completed. It also stated that by returning the form "you confirm that you have obtained your friends'/relatives' permission to disclose their details and for us to contact them". This reflects knowledge that such a step was required.

54 It is to be recalled that ASIC's case is confined to the manner in which the Refer a Friend program was conducted between January 2015 and May 2017, which is the time from which the program was, according to Select, first included in its sales script. Since June 2013, it had been in the form of a flyer contained in welcome packs mailed to Select's customers, to which no complaint is made: LJ at [1286]. Select decided to change the approach. It chose to request the information in the sales call. It can be inferred that decision was made because it was seen to be beneficial to Select, in circumstances where referrals were a significant part of its business. It can also be inferred that if these details were obtained over the telephone, there may be more referrals, as customers might not fill out documentation. Further, there is an immediacy, with the information being obtained more quickly for use. When the decision was made to change the approach, the sales script was changed to require the customer to be asked for referrals. As noted above, the script: did not require Sales Agents to obtain consent from Referred Customers or afford Referring Customers the opportunity to obtain consent from them; and did not ask Referring Customers whether they wished to participate in the program at all. The script required that Sales Agents would seamlessly launch into the offer and request contact details, once the Referring Customer had purchased an insurance policy. The sales script which the Sales Agents were required to follow dictated that approach: LJ at [1302]-[1303].

55 In those circumstances, the initial answer during cross-examination that Mr Howden only "now" is aware that the program involved the client having no opportunity to consult with their

friends and family about whether they consented to their names being referred, is incorrect. It illustrates his preparedness to minimise his involvement in the conduct and his understanding of the issues, at the time the conduct was occurring.

56 *Fifth*, when asked in cross-examination what went wrong in relation to the Consumer Contraventions, Mr Howden's response was that it was the Agents' conduct. The implication is, in light of his submissions, that the Sales Agents went off script. However, the limited exclusion misrepresentation was built into the sales script, as was the Refer a Friend program. Moreover, Sales Agents were trained in sales techniques designed to increase their persuasiveness, including techniques for closing sales and for handling objections. Sales Agents were told that "simply reading out the features and benefits off the script … will not capture the customer's attention". They were told that if they aligned their product presentation to benefits and impulse factors "their power to persuade will greatly increase". The training was designed to encourage and persuade customers to purchase the policy during the sales call: LJ at [226]. Attempts to blame the Consumer Contraventions on Sales Agents is reminiscent of Select's evidence before the Royal Commission where the spike was blamed on two "rogue" Sales Agents. I note that the remaining 46 percent of the sales identified in that spike were made by 51 other Sales Agents: LJ at [195]. Accordingly, there was no real recognition by Mr Howden of the failure of Select's compliance systems, culture or the nature of the programs implemented.

57 *Sixth*, Mr Howden gave evidence that he has done his best "to be transparent, forthright and cooperative with ASIC and the Royal Commission". He accepted that he was the sole person giving instructions in relation to the Corporate Defendants, including as to what matters in this proceeding would be admitted. As explained in the Liability Judgment, little was admitted: LJ at [296]-[298]. For example, in relation to the Consumer Contraventions, although prior to closing submissions the Corporate Defendants had not sought to defend that the conduct in relation to Mr Mirrawana and Ms Marika was unconscionable, they submitted, nonetheless, that the conduct still had to be established. Their position in respect to Ms Gaykamangu and Ms Mirniyowan had been to deny the conduct. During closing submissions, and only after the approach was raised by the Court, were admissions made that in respect to those four consumers, the sales calls were unconscionable. Further, Mr Howden did not present any evidence in respect to the case against him. ASIC were put to proof. Even if it could be said that claims such as the conflicted remuneration claims involved a legal argument to be had,

that was not so for others, such as the unconscionability claims, which were dependent on characterisation of the conduct.

58 Given these examples, it is appropriate to address the Defendants' submission that because a matter was put in mitigation, it does not follow that the Corporate Defendants and Mr Howden do not accept responsibility for the contraventions or that there is no insight into the conduct. They submitted that was the effect of ASIC's approach to its submissions. Although I do not accept that was ASIC's approach, I do accept that simply because a matter was put in mitigation, it does not necessarily follow that there is a lack of acceptance of responsibility or insight as to the conduct which occurred. However, as the examples above illustrate, a lack of acceptance of responsibility or insight by the Defendants does apply to at least some aspects of this case.

Consideration

59 I will address the considerations in turn, noting there is overlap between them.

The nature, extent and duration of the conduct

Conflicted Remuneration Contraventions

60 In relation to the Conflicted Remuneration Contraventions, the claims involve four Incentives: the Gold Coast Cruise (which was offered from February to June 2015); the Vespa Scooter (which was offered from February to June 2015); the Las Vegas Trip (which was offered from January to March 2016); and the Hawaii Trip (which was offered from July to November 2017): LJ at [152]-[192].

61 As can be seen, there are four separate Incentives schemes spanning a period of almost three years. They were carefully conceived of, promoted within the Call Centre and given to Sales Agents. The Defendants, based on Mr Howden's evidence, submitted that these contraventions are less serious because he did not know that the Incentives schemes were conflicted remuneration, and instead saw them as the same as paying commission.

62 I accept that these Incentives were not implemented by the Defendants knowing it was in breach of the conflicted remuneration provisions of the Corporations Act, and therefore unlawful, to do so. If the Incentives schemes were conducted knowing they were unlawful, that would be a significant aggravating feature in assessing the seriousness of the Conflicted Remuneration Contraventions. That feature is not present in this case. That said, ignorance by

the Defendants of their legal obligations does not mitigate the seriousness of this conduct. The absence of the aggravating factor is not a mitigating factor.

63 The conflicted remuneration provisions are protective of the community. Volume based benefits are presumed to be conflicted remuneration, for self-evident reasons. Mr Howden (who was the holder of the AFSL) did not know his legal obligations and did not make any legal inquiries, or even inquiries with his compliance officers, before any of the Incentives schemes were implemented. The Defendants took no steps at all to determine the propriety of the conduct. As ASIC submitted, an AFSL holder acting apparently in ignorance of its obligations, when providing remuneration designed to motivate the persons providing financial product advice to sell more financial products, is itself serious. It exposes consumers to risk.

64 The four Incentives schemes were initiated separately over three different years, the last being in 2017. At no time over those years was advice sought. The conduct extended to the entirety of the sales business, across the four separate Incentives schemes, which incentivised Sales Agents during 13 months of a 34 month period. In the already highly competitive and pressured sales environment that rewarded top sales persons, and at times belittled or ridiculed the less successful, Mr Howden chose to introduce Incentives purportedly to further motivate the Sales Agents and Retention Agents, to be even more productive.

65 As referred to above, the Incentives schemes: were first implemented at the time of the implementation of the Refer a Friend program; and continued after Select and Mr Howden were aware from 2015, that there had been an issue as to use of the Refer a Friend program by experienced and senior Sales Agents. Further, the Hawaii Incentive was offered in July to November 2017, despite Select and Mr Howden acknowledging to St Andrew's on 1 November 2016 that the spike was contributed to by an overall increase in sales at the time that the Cruise Incentive and the Vespa Incentive were being conducted.

66 As Select, through Mr Howden, admitted before the Royal Commission, the Cruise and Vespa Incentives in 2015 inappropriately motivated staff and drove wrong behaviours in two particular Agents (Mr Hoey and Ms Dudbridge): LJ at [172] and [219]. Select also admitted to the Royal Commission that the Incentives were of a nature and magnitude that "led representatives into failing to follow the practices required of them": LJ at [173] and [219].

67 The Incentives, in the circumstances, could reasonably be expected to influence the financial product advice given: LJ at [241]. It is difficult to understand otherwise.

Consumer Contraventions

68 In relation to the Consumer Contraventions, it is important to recall that the contravening conduct occurred with respect to 14 Consumers. This case did not involve representative claims and the Corporate Defendants are only to have a penalty imposed in respect to those 14 Consumers. That said, there were a large number of Sales and Retention Agents involved in the conduct the basis of those contraventions. They occurred over a period of three years, and in most instances involved multiple calls and interactions with the Consumers. This, ASIC submitted, underscores the poor corporate culture of the Corporate Defendants.

69 ASIC submitted that this conduct is more appropriately characterised as reckless than deliberate, although also pointed to some individual examples of deliberateness, such as: Mr Banks' continuation of the sales call with Irshad Hussain despite knowing that he spoke no English (LJ at [1044]); and Mr Shah completing the sale with Ms Shadforth despite his assessment that she was a bit "slow" and could not write (LJ at [854]).

70 The Corporate Defendants emphasised how few calls these contraventions relate to when compared to the total calls made during the relevant period. They also submitted that the Consumer Contraventions: were not premeditated and deliberate; generally arose from the conduct of low-level staff; and were not the result of any policy to target a particular ethnic group (where the Corporate Defendants did not have any way to monitor the ethnic make-up of customers or potential customers, as they did not ever request or gather such information). In relation to the calls involving Retention Agents, the Corporate Defendants submitted that the requirement to cancel policies in writing was standard industry practice at the time. That was said to somewhat diminish the objective blameworthiness of the conduct.

71 The Corporate Defendants also submitted that, although I found that "Mr Howden had some awareness in 2015 that Patrick Hoey had made sales to Indigenous areas as a result of the Refer a Friend program and that no action was taken beyond giving him an informal warning", there was no finding about the extent of Mr Howden's knowledge of Mr Hoey's conduct. They submitted that there was no finding that Mr Howden knew of the call Mr Hoey had made to Mr Mirrawana or the number of sales Mr Hoey was making to members of the Indigenous community. In that circumstance, the Corporate Defendants submitted that it was "not open to ASIC to submit as it does that Select and Mr Howden "turned a blind eye to the risks to consumers arising from the use of the Refer a Friend program and sales made to consumers within certain Indigenous communities from late 2015".

72 The Corporate Defendants submitted that the offending is at the lower end of seriousness when compared to other cases where contraventions have been established.

73 As agreed between the parties, I accept that this conduct cannot generally be characterised as deliberate. I also accept that, as ASIC contended, the conduct is generally more appropriately characterised as reckless, although individual examples of deliberateness occurred (as identified by ASIC).

74 Contraventions of unconscionability, coercion, undue harassment and making false or misleading representations, by their nature are objectively serious. So much is reflected by the maximum penalty: see [12(b)]-[12(d)] above. It is unnecessary to repeat the conclusions, with the seriousness of the contraventions being self-evident from my findings in the Liability Judgment. The personal characteristics of each of the Consumers are also addressed in the Liability Judgment, and it is unnecessary to repeat the details of each here. That said, it is to be recalled that in relation to 11 Consumers, I found that the Agents in the circumstances knew, or ought to have known, that they were vulnerable, or at least in a weaker bargaining position: see, for example, LJ at [442] and [491], [539], [599] and [629], [799]-[804], [881]-[884] (and [892]) and [911]-[912], [951], [975], [1011], [1054]-[1055] and [1078], [1121] and [1146], and [1207] and [1232]. In relation to the three remaining Consumers, I found that the Agents knew, or ought to have known, that they were in a weaker bargaining position: see, for example, LJ at [711], [746] and [1268].

75 As to Mr Howden's knowledge, the evidence which was accepted was not just, as submitted by the Corporate Defendants, that he had some "some awareness in 2015 that Patrick Hoey had made sales to Indigenous areas as a result of the Refer a Friend program". Rather, the circumstances of the conversation between Mr Hoey, Mr Atwal and Mr Howden, and the lack of action flowing from that are as set out at [47] above. The Corporate Defendants are correct to say there was no finding that Mr Howden knew of the call Mr Hoey made to Mr Mirrawana or the number of sales Mr Hoey was making to members of the Indigenous community. However, the obvious inference regarding the purpose of the conversation referred to at [47] above, was that it was to express concerns about use of the program. If there were no concerns about the sales being made from the referrals, based on the vulnerability of the communities, it is difficult to understand the basis of the warning. Noting also, as referred to above at [52], that in 2014 Mr Hitchcock had raised with Mr Howden problems associated with Select's marketing to Indigenous communities: LJ at [1330]. In the circumstances, having done nothing

in response (except warning Mr Hoey informally) it can properly be said that Mr Howden, at the very least, "turned a blind eye to the risks to consumers arising from the use of the Refer a Friend program and sales made to consumers within certain Indigenous communities from late 2015" until it was raised by St Andrew's in October 2016.

76 Mr Howden's evidence, where he repeatedly said that no action was taken earlier because he did not know the extent of the conduct until after the investigation, provides no excuse. The reason why the extent was not known earlier is because Mr Howden chose not to do anything but informally warn Mr Hoey. He chose not to conduct any investigation, even though he knew of the issue regarding use of the Refer a Friend program by a senior Sales Agent in relation to certain Indigenous communities. There is no evidence that any other step was taken, not even a general warning to Sales Agents about the use of the program.

77 Moreover, as noted in the Liability Judgment at [1327], although Mr Howden did not know about the call with Mr Mirrawana, it was assessed by the compliance system as passing quality assurance (QA) standards, even though it has ultimately been accepted by the Corporate Defendants to be unconscionable. Passing a call such as that one, adversely reflects on the adequacy of compliance system. It can be inferred that such calls not being considered unacceptable would have infected the attitudes of Sales Agents.

78 The submission set out at [70] above, that the requirement to cancel policies in writing was standard industry practice at the time, does not address the conduct in this case. Although Select may have preferred to receive cancellation requests in writing, there was no requirement that such requests be in writing. There was a discretion to accept cancellation by other means which could be exercised. Moreover, a policy could be allowed to lapse for non-payment: LJ at [389]-[390]. In some of the calls the Consumers stated that they could not write, yet the Retention Agents insisted that the cancellation be in writing: see, for example, LJ at [563]-[564], [854]-[864], [1080]-[1081]. In some instances, the Consumer expressly stated they did not want the policy and could not pay the premiums (and had failed to pay premiums, sometimes repeatedly), yet the policy continued. The consequence on occasions of the continued insistence of the need for the policy to be cancelled in writing, is that despite Consumers wishing to cancel their policy because they were unable to pay the premiums, they continued to have those premiums charged, and on occasions the premiums even increased: LJ at [389] and [493].

The amount of loss or damage caused

Conflicted Remuneration Contraventions

79 The Defendants submitted there is no evidence that the Incentives caused any direct loss or damage, and any indirect financial loss is speculative.

80 ASIC submitted that it is not possible to quantify the direct financial loss and damage caused by the Conflicted Remuneration Contraventions. However, it was submitted that the contraventions gave rise to a risk of indirect financial loss because of the manner in which the schemes incentivised Sales Agents.

81 I accept that there is no evidence of direct loss or damage caused by these contraventions, and any indirect loss or damage cannot be expressed in terms greater than as a risk.

Consumer Contraventions

82 ASIC submitted that: as at 1 November 2018 and as agreed by the Defendants, premiums totalling $10,466.32 had been paid by 12 of the 14 Consumers; as at 31 August 2022, refunds totalling $4,348.50 had been paid to eight of the 12 Consumers; and interest had also been paid to six of those eight Consumers. Further, it was submitted that in the three months to March 2023, the Corporate Defendants refunded the balance of the relevant Consumers and made payments for interest. In so doing, they were said to have paid a further $12,068.47 to six of the Consumers. ASIC also submitted that no explanation has been provided as to why those payments were only made five months after the Liability Judgment, and in the period leading up to the hearing on relief. Further, ASIC submitted that despite the Corporate Defendants having admitted in June 2021 that their conduct in respect of Ms Marika and Ms Mirniyowan was unconscionable, full payments were not made to them until 2023. The Corporate Defendants were also said to have: known that Ms Marika had not received a complete refund, but not made further payment until 23 January 2023; and made no payments to Ms Mirniyowan until 27 February 2023. I accept those submissions.

83 ASIC also submitted that the loss and damage inflicted upon the Consumers was not solely financial: most of the Consumers lived on very low incomes; and it can be inferred that the lack of access to those funds had a detrimental impact upon them at all relevant times, even if they have been subsequently refunded premiums and paid interest. Further, significant pressure was said to have been placed on the Consumers, which in a number of cases was found to have amounted to coercion, and a number were subjected to undue harassment.

84 The Corporate Defendants submitted that ASIC should not overstate the loss to the Consumers in circumstances where the amounts in question were small and full remediation has been provided in all but one instance. It was also submitted that the Court should not accept ASIC's invitation to infer that the Consumers suffered loss beyond those matters addressed in their affidavits. The Corporate Defendants submitted that "[a]lthough the loss suffered was small and refunds have been provided in all instances, the Corporate Defendants acknowledge that these were unacceptable calls and should not have happened. Mr Howden publicly acknowledged this even before the hearing on liability".

85 That last submission overstates the evidence. The public acknowledgement referred to, is Mr Howden's evidence in the Royal Commission in relation to the call with Ms Marika: see LJ at [198], [300], [443]-[444]. There is no basis to assert that at that stage it was publicly acknowledged that the "calls" were unacceptable. The topic of co-operation is addressed below at [159]-[166]. Suffice to say at this stage, even in relation to the call to Ms Marika which was publicly acknowledged, the approach taken in these proceedings was as set out at [57] above.

86 It is important to recall the impact on the Consumers. Although the monetary figures may be small in comparison to some other cases, for the Consumers to whom these sales were made, it reflected a significant portion of their income. To give just one example to illustrate. As ASIC submitted, Ms Yalamul paid premiums of $1,268.22 in the period May 2015 to August 2017: LJ at [627]. In 2015, her income was $500 a fortnight, and she spent all of her money before the next payday: LJ at [576]. The premiums she paid are equivalent to more than 5 weeks of her income, or almost 10 percent of her annual income. Ms Yalamul was not paid a refund until 23 January 2023.

87 In so far as the Corporate Defendants submitted that loss or damage beyond financial is not relevant, I do not accept the submission. I note that in the context of s 13 of the ACL, loss and damage was held not to be given a narrow meaning, to include personal injury and mental stress: *Australian Competition and Consumer Commission v Uber B.V.* [2022] FCA 1466 at [15]. There is no reason as a matter of statutory construction why that would not be so in respect to these contraventions.

88 The impact of the conduct on the Consumers is described throughout the Liability Judgment when considering whether the contraventions had been established. The distressing nature of the conduct, particularly in relation to the retention calls, is evident simply by a consideration of the nature and circumstances of contraventions. Moreover, it can be inferred in the

circumstances that the conduct placed the Consumers under financial stress. Further, there is evidence from the Consumers. To take the following as examples: Ms Yalumul's evidence is that the repeated phone calls were upsetting and she wanted them to stop (LJ at [622]); the effect of these calls on Ms Yeatman is that they were "sickening", "getting on [her] nerves" and "invading [her] privacy", and she felt harassed by the contact (LJ at [823]); Ms Shadforth described the effects as that she "was getting sick of their calls and I was wild … They were getting on my nerves because I could not cancel over the phone" (LJ at [863]); and Ms Mirniyowan's evidence was that Retention Agents' calls were "stressing [her] out" (LJ at [1223]).

The circumstances in which the conduct took place

89 ASIC submitted that there are five sets of circumstances that are relevant to the question of pecuniary penalty. Those submissions are as follows.

90 *First,* the sales conduct was said to have occurred in a pressurised, competitive sales environment (as described in the LJ at [22], [24], [1391]), with the culture known to and endorsed by senior management (LJ at [24], [1390]), where: a high proportion of Sales Agents were backpackers or other temporary visitors to Australia, with a high turnover (LJ at [17]); the compliance system failed to adequately monitor and identify the consequences of this culture (LJ at [1354]); and many of the sales calls to the Consumers passed QA procedures when they plainly should not have. ASIC also referred to the LJ at [199]: "if the Sales Agents were not being pulled up for inappropriate calls, a particular type of conduct would be seen as acceptable to the Corporate Defendants". This environment was said to be a significant contributing factor in the conduct towards consumers.

91 *Second,* the conduct in respect of four Consumers was said to have occurred because the Sales Agents obtained their contact details from the Refer a Friend program, which was "devised and executed unfairly" and the inherent and unfair features of which were "ripe for abuse … particularly so in relation to potentially vulnerable customers": LJ at [1312].

92 *Third*, the circumstances of the interactions between the Agents and the Consumers. ASIC submitted that while each Consumer was badly treated, some of the more egregious examples included maintaining sales calls when: Mr Mirrawana was concerned about an approaching cyclone (LJ at [516]-[518]); Mr Lewis was at a funeral (LJ at [1124]); the Sales Agent was of the view that Ms Shadforth was "slow" and could not write, yet she was actively denied the opportunity to cancel by way of a means alternative to writing (LJ at [855]-[864]); and Mr

Hussain had no material involvement in the call, could not speak English and then, on retention calls, was actively denied the opportunity to cancel by way of a means alternative to writing (LJ at [1035]-[1043], [1080]-[1084]).

93 *Fourth*, each Incentive was said to have constituted a high value motivating tool inserted into an already pressurised, competitive sales environment, and provided a further factor which could be expected to influence the manner in which sales were made.

94 *Fifth*, ASIC submitted that the Court may have regard to the fact that the conduct occurred in the context of a relatively common industry, namely the sale of life insurance and related financial products. It occurred in the relatively common context of the sale of financial products through the provision of general advice, and as such without regard to the personal circumstances of the Consumers.

95 The Defendants did not address ASIC's submissions set out above at [91]-[94] directly (in a manner necessary to repeat beyond their consideration elsewhere). Those submissions involve propositions which arise from my findings, and I accept they are part of the circumstances of the contraventions. The Defendants did make submissions about the sales environment and compliance, which I will address separately at [135]-[155] below. Suffice to say at this stage, the environment as submitted by ASIC, is supported by the findings in the LJ, and I accept that it plainly contributed to the contraventions.

The size of the company and its financial position

96 ASIC submitted that as a group, the operations of the Corporate Defendants were reasonably substantial. The Corporate Defendants were said to have had a reasonably large management structure and a large number of employees and agents. There was also said to be a significant and rapid revenue growth in the period of the contravening conduct, with the 2017 commission revenue of $19.058 million being approximately 150 percent of the 2015 figure of $12.729 million. It was submitted that, as funds were distributed between the three Corporate Defendants as reimbursement for services provided, effectively stripping Select (the primary income earner from St Andrew's, the policy underwriter) of income and profits, it is difficult to establish the true levels of cost of sales and profit. Relevantly, it was submitted that: Select derived significant revenue in the relevant period from St Andrew's; the bulk of Select's revenue from St Andrew's was passed on to IMS as "cost of sales" as a "marketing service fee" (in FY2014 and FY2015) or as "direct costs" as "commissions paid" (in FY2016 and FY2017); and BlueInc Services, which was the employing entity and thus largely responsible

for wages and office costs (save for payments to labour hire providers made by IMS), received funds from IMS, and its financial records record the salary costs.

97 ASIC also submitted, referring to *Australian Securities and Investments Commission v Forex Capital Trading Pty Ltd* [2021] FCA 570 (*Forex*) at [153] that because of the cost shifting between the three Corporate Defendants, the surest guide to assessing the financial strength of the companies is to have regard to revenue. ASIC analysed those figures in relation to each Corporate Defendant. It submitted that Select ceased distribution activities in Australia on 19 March 2018. Select's revenue of $7 million for the financial year ending 30 June 2019 was said to be largely from retention activities and ongoing trailing commission entitlements. It was submitted that thereafter, the revenue position for Select has remained largely stable, with Select receiving $5.994 million for the financial year ending 30 June 2020, $6.154 million for the financial year ending 30 June 2021 and $5.918 million for the financial year ending 30 June 2022. Accordingly, it was submitted that, on any view, Select has continued to earn significant revenue since ceasing its Australian distribution business. BlueInc Services was said to have received revenue of $6.896 million and $6.096 million, and IMS $7.554 million and $8.035 million, for the years ending 30 June 2020 and 30 June 2021 respectively. However, the precise distribution within the group was said not to be clear from the financial statements, nor it was it said to be possible to identify whether there were any other sources of revenue during those years. Both IMS and BlueInc Services were said to have ceased trading, as at 30 June 2021 and 31 December 2021, respectively.

98 ASIC submitted that the income generated by Select during the relevant period was essentially commission and fees in respect of sales and retention services, and as such was at the heart of the contravening conduct in this matter. It was also submitted that: since Select ceased distributing in Australia, it has nonetheless continued to earn commission income; and, as such, the revenue remains linked to the subject matter of the contravening conduct, being insurance products sold prior to and during the relevant period.

99 ASIC accepted that the overall size and scale of the Corporate Defendants' business is, and was to a lesser degree during the relevant period, at the smaller end of the scale and does not form part of a much larger financial undertaking.

100 However, ASIC took issue with the consolidated results of the Corporate Defendants set out in their submissions, as their source and therefore reliability is not known. ASIC submitted that the basis on which intercompany transactions have been identified and eliminated was not

made clear and the calculations are not transparent, in circumstances where Mr Howden chose not to explain these matters in his affidavit. Accordingly, it was submitted that the Court should place little, if any, weight on the consolidated results.

101 ASIC submitted that despite its cessation of business in Australia, the BlueInc Group continues to have a significant trailing commission asset, which, until 1 July 2021, was effectively owned by IMS (pursuant to an internal agreement that Select would pay future marketing fees to IMS). That trailing commission asset was said to have been sold to BlueInc Group on 1 July 2021 for $8,021,628, the cash component of which was $6,016,221. It was submitted that IMS effectively transferred the $6 million cash payment for that asset to BlueInc Group as dividends. ASIC submitted that by doing so, Mr Howden caused the BlueInc Group to effectively place its largest asset out of the hands of the Corporate Defendants, and closer to the hands of his wife, who is the sole shareholder of Howden Family Holdings, the ultimate owner of BlueInc Group. In addition, BlueInc Services was said to have paid BlueInc Group dividends of $375,000, $675,000 and $300,000 on 19 January 2021, 16 June 2021 and 10 August 2021, respectively.

102 ASIC submitted that as a result, the capacity of each Corporate Defendant to pay pecuniary penalties is purportedly limited after the movement of the trailing commission asset to the parent company. It was submitted that, as at 30 June 2022, Select was recorded as having net assets in the order of $1 million, BlueInc Services in the order of $600,000 and IMS in the order of $3.3 million (of which $3.1 million was said to be an unspecified intercompany loan, with opaque recoverability). However, it was submitted that the Corporate Defendants' current financial position must necessarily be viewed against the backdrop of the deliberate decision to transfer assets out of the hands of the Corporate Defendants since reservation of the Liability Judgment in this matter.

103 Further, ASIC submitted that the capacity of the Corporate Defendants to meet penalties ought to be given relatively minimal weight, particularly in light of that recent movement of assets and the payment of dividends. It was also submitted that significant weight should be given to the levels of revenue received during the period of the contravening conduct, and the fact that sales achieved during that period continue to bring revenue into the group by reason of the trailing commission asset.

104 The Corporate Defendants submitted that their size and financial position must be considered by reference to them as a collective as: they were managed as a single entity with the same

interests; they shared the same owners and management structure; and the work done by each was an aspect of the same basic function of marketing, distributing and administering insurance policies. Further, it was submitted that the Corporate Defendants are essentially a family business. The Corporate Defendants provided figures (collectively) for revenue and profit for each of the financial years from that ending June 2015 until June 2022, eliminating intercompany transactions to avoid double counting of the same revenue and expense items. Those figures were as follows: for the financial year ending 30 June 2015, total revenue of $14,232,063 with a profit after tax of $734,867; for the financial year ending 30 June 2016, total revenue of $21,261,762 with a profit after tax of $496,253; for the financial year ending 30 June 2017, total revenue of $23,654,510 with a profit after tax of $3,885,223; for the financial year ending 30 June 2018, total revenue of $20,007,244 with a loss after tax of $332,166; for the financial year ending 30 June 2019, total revenue of $11,859,492 with a profit after tax of $1,058,560; for the financial year ending 30 June 2020, total revenue of $11,374,349 with a loss after tax of $3,821,256; for the financial year ending 30 June 2021, total revenue of $12,077,446 with a profit after tax of $3,003,160; and for the financial year ending 30 June 2022, total revenue of $8,198,777 with a profit after tax of $23,676. I note that these are the figures criticised by ASIC, as described at [100] above.

105 The Corporate Defendants also submitted that as a result of this proceeding, they have suffered a significant diminution in the value of their businesses. They submitted that: Select has ceased trading and no staff work on its behalf; BlueInc Services has ceased active trading and does not have any staff or clients; and IMS has ceased trading and does not have any staff or clients. As at 30 June 2022, Select was said to have had net assets of $1,012,378, BlueInc Services was said to have had net assets of $601,318 and IMS was said to have had net assets of $3,328,145.

106 The Corporate Defendants took issue with ASIC's criticism of Mr Howden for causing IMS to sell a trailing commission asset to BlueInc Group and transferring the sale price to BlueInc Group as a dividend. They submitted that: by 25 August 2021, when the dividend was declared, IMS had ceased trading; and the dividend was declared so that the operating parts of the business would have working capital. It was said to be no more than sound commercial sense that money should be put to use. It was submitted that Mr Howden has not embarked on a course of stripping the Corporate Defendants of assets. The stated intention of Mr Howden is for the Corporate Defendants to trade again after the resolution of this proceeding, which was said to obviously necessitate the Corporate Defendants being able to pay the pecuniary penalty imposed on them. It was also submitted that: the only remuneration Mr Howden and his wife

received from the Corporate Defendants was a salary (said not to be extravagant or out of keeping with the services performed); and the BlueInc Group has not paid Howden Family Holdings any dividends.

107 The Corporate Defendants also took issue with ASIC's submission that the "surest guide" to assessing the financial strength of the Corporate Defendants is to have regard to revenue. They submitted that it fails to take account of the fact that the Corporate Defendants had substantial liabilities. Their profit over this period was said to be far less than the amount ASIC seeks in pecuniary penalties. Logic and financial orthodoxy were said to dictate that financial strength is demonstrated by profit rather than by revenue. Accordingly, the Corporate Defendants submitted that reliance on *Forex* is misplaced on the basis that, inter alia, in that case there was a vast and inexplicable gap between revenue and profit, and a lack of detail available about the relevant profit-sharing arrangement, which do not apply here.

108 It can be accepted: that the size and scale of the Corporate Defendants was, although reasonably substantial, at the smaller end of the scale; and that they do not form part of a much larger financial undertaking.

109 The approach adopted in *Forex* at [153], which is relied on by ASIC in support of its submission directing attention to revenue, must be read in its context. That can be readily seen by the following at [152]-[153]:

> [152] As a result of the contravening conduct, clients incurred significant financial losses of money deposited to their trading accounts, and Forex CT earned significant revenue. There was no evidence before me of the specific loss or damage suffered by the eight identified clients. However, the parties agreed that Forex CT and Mr Yoshai gained a significant benefit and vast losses were incurred to clients when looking at Forex CT's operations across the Relevant Period. The realised losses incurred by all of Forex CT's clients during the Relevant Period amounts to approximately $141,886,180. Even when the realised profits of clients during the Relevant Period are taken into account (as I have already observed above) there were net losses amounting to approximately $77,619,914 which translated to a corresponding net gain to Forex CT. I am satisfied that the revenue earned by Forex CT throughout the Relevant Period was the result of the unconscionable system of conduct.
>
> [153] As I have also observed above, after operating expenses, Forex CT's profit during the Relevant Period was $461,564. These operating expenses included costs under a risk mitigation agreement between Forex CT and a related body corporate incorporated in a foreign country. It is clear that the benefit obtained by Forex CT is broader than the financial profit. The total revenue was substantial, and Forex CT employed hundreds of employees. I am satisfied that the benefit gained by Forex CT and Mr Yoshai and the vast losses incurred by clients support the imposition of a significant pecuniary penalty.

110 As apparent from that passage, there was over $77 million in revenue, a risk mitigation agreement in place, and an ultimate profit of less than half a million dollars. It is hardly surprising that in that context, regard was had to the revenue in assessing the benefit. That case is removed from this.

111 That said, the evidence relied on by the Corporate Defendants has unsatisfactory elements. The consolidated results for the Corporate Defendants in Mr Howden's affidavit, and relied on by the Corporate Defendants, is unsourced. There is no real explanation as to how it was compiled, even though the Corporate Defendants were on notice that its lack of sourcing was a criticism made by ASIC in its written submissions, and said to impact on its reliability. Its admissibility is challenged by ASIC on that basis. Although I am prepared to accept its relevance given the relatively low bar in s 55 of the *Evidence Act 1995* (Cth), the absence of explanation and source material significantly impacts on the weight that can be placed on it. There is also an absence of evidence as to the internal arrangements between the companies, including as to "management fees" and "cost recovery fees". Although referred to briefly in Mr Howden's affidavit, this was not further explained. It is apparent, as ASIC submitted, that almost all of Select's revenue was paid to IMS, and a lesser amount paid to BlueInc Services by both Select and IMS. As a result, ASIC accepts that the primary source of income for the three Corporate Defendants came in via Select, but that by reason of their choice of financial arrangements, each Corporate Defendant received significant revenue during the relevant period.

112 The Corporate Defendants were correct to accept that I might consider I do not have enough evidence to determine their real value. I accept it cannot be determined by their revenue alone. There was cost shifting between the Corporate Defendants, which makes it difficult to determine the financial strength of the companies. Further, that is not overcome simply by submitting it is necessary to look at the group together. The figures provided by the Corporate Defendant, on an all group basis, are not transparent.

113 Consequently, I only have some general sense of the size of the profits and assets.

114 This is impacted by IMS selling its trailing commission asset from the sale of the insurance policies, to BlueInc Group for about $8 million, the cash component of which was about $6 million (that is, the amount from the $8 million after tax). BlueInc Group paid the cash component to IMS, and IMS transferred the value of the trailing commissions to BlueInc Group. After that had occurred, IMS paid a $6 million dividend to the BlueInc Group. Therefore, IMS no longer has the benefit of the trailing commissions. Rather, their financial

benefit is now with the BlueInc Group. In addition, the cash component that IMS obtained from the transaction is no longer with IMS because it then paid a $6 million dividend to BlueInc Group. BlueInc Group is not one of the Defendants. This all occurred in July 2021, after the liability hearing had finished and judgment was reserved. By that time the Corporate Defendants had admitted four contraventions of unconscionability and accepted four representations as false or misleading.

115 Mr Howden was the sole director of both IMS and BlueInc Group: LJ at [1]. The shareholder of the BlueInc Group, Mrs Howden, holds the shares as trustee for the Howden family's trust (which includes Mr Howden and their children).

116 The trailing commissions and the $6 million are no longer available to be used in payment of any penalty or costs that may be ordered.

117 Mr Howden denied that the sale transaction and the dividend were intended to remove money from the Corporate Defendants and put it out of the reach of the Court. He gave evidence that it was instead to make funds available for another company in the group in New Zealand, which required capital.

118 However, the timing of the sale is, to say the least, very curious. There is no evidence as to the financial status of that company in New Zealand or any other company requiring any capital at that time. The financial position of BlueInc Group is unknown. Again, the information provided by Mr Howden is scant. Regardless of Mr Howden's intent, he must at the very least have been aware that the consequence of the transaction was that the value of the asset had been removed from the hands of the Corporate Defendants at a time when they would be faced with a pecuniary penalty. It would also have been obvious to him, that this would reduce the ability of Corporate Defendants to pay any penalty and costs orders. The financial benefit is still with BlueInc Group, with the shares being held by Mrs Howden for the Howden family's trust.

119 That is relevant in assessing the Corporates Defendants' submission as to its ability to pay any pecuniary penalty. Further, in light of the Corporate Defendants' submission that the penalties sought by ASIC would lead to liquidation (based on their size and current operations), I also note that capacity to pay is not determinative. In *Australian Securities and Investments Commission v One Tech Media (No 6)* [2020] FCA 842, Davies J observed at [12] that:

> [12] … the fact that the company may not be able to pay a pecuniary penalty does

> not mean that an order for a pecuniary penalty should not be made: *Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liquidation) (No 2)* [2015] FCA 93 at [12]. It is still appropriate to impose a pecuniary penalty as a measure of the Court's disapproval of the company's conduct and as a measure of the seriousness with which the Court regards the contraventions.

120 In *Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCAFC 247; (2006) ATPR 42-091, the Court considered a circumstance where the trial judge had expressed that he had "no intention 'of impos[ing] penalties that would ruin the respondents'": see [9]. In allowing the appeal, the Court observed at [11] that:

> [11] … by focusing on the detriment to the respondents the judge ignored both the seriousness of the contravention as well as the need to fix upon an appropriate penalty by reference to the need to deter future contraventions. As the cases to which the judge was referred show, the principal, if not the sole, purpose for the imposition of penalties for a contravention of the antitrust provisions in Part IV is deterrence, both specific and general. This rule is so well entrenched that citation of authority is unnecessary. Moreover, as deterrence (especially general deterrence) is the primary purpose lying behind the penalty regime, there inevitably will be cases where the penalty that must be imposed will be higher, perhaps even considerably higher, than the penalty that would otherwise be imposed on a particular offender if one were to have regard only to the circumstances of that offender. In some cases the penalty may be so high that the offender will become insolvent. That possibility must not prevent the Court from doing its duty for otherwise the important object of general deterrence will be undermined.

121 Applying this proposition, Gordon J observed in *Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd* [2011] FCA 372 at [54], that:

> [54] However, as deterrence is the primary objective of penalties, the financial capacity of a respondent to pay must not prevent the Court from doing its duty even if in some cases, the penalty is so high that the offender will become insolvent: … Put another way, I accept that capacity to pay is a relevant factor, but one of "less importance when balanced against the necessity of imposing a penalty that satisfies the objective of general deterrence": *Australian Communications and Media Authority v Mobilegate Ltd A Company Incorporated in Hong Kong (No 6)* [2009] FCA 1533 at [28] and *Leahy Petroleum (No 2)* [2005] FCA 254 at [9] and [11].

122 Her Honour referred to the observation of Merkel J in *Australian Competition and Consumer Commission v Leahy Petroleum (No 2)* [2005] FCA 254; (2005) 215 ALR 281 at [9] and [11]:

> [9] … However, a contravening company's capacity to pay a penalty is of less relevance to the objective of general deterrence because that objective is not concerned with whether the penalties imposed have been paid. Rather, it involves a penalty being fixed that will deter others from engaging in similar contravening conduct in the future. Thus, general deterrence will depend more on the expected quantum of the penalty for the offending conduct, rather than on a past offender's capacity to pay a previous penalty …

…

> [11] … Giving significant weight to capacity to pay in such circumstances would not only produce anomalous outcomes, such as the most culpable offender receiving the lightest penalty, but it would also reward companies for carrying on business in a manner that resulted in those companies having few, if any, assets available to pay a penalty when it is imposed …

123 There are two further submissions that it is appropriate to address at this stage.

124 As explained above at [105], the Corporate Defendants submitted that as a result of this proceeding, they have suffered a significant diminution in the value of their businesses. ASIC took issue with that submission. It must be put in context. As ASIC submitted, on Mr Howden's evidence, Select ceased trading well before this proceeding was commenced. Mr Howden's evidence was that that it did so because it was no longer commercially viable to distribute insurance policies after the *Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017* (Cth) commenced, rendering its previous distribution model unviable. BlueInc Services ceased trading, on Mr Howden's evidence, as a result of the expiry of its Administrative Services Agreement with St Andrew's, which was not renewed because, under amendments to the Corporations Act on 1 January 2022, BlueInc Services would have required an AFSL to continue providing its services to St Andrew's. Accordingly, its cessation of trading was not as a result of this proceeding. On Mr Howden's evidence, IMS' business was to service the two insurance distribution businesses within the BlueInc Group, Select and Momentum Life Services (which operates in New Zealand). Its Distribution Agreement with Momentum Life Services, which is unaffected by this proceeding, ended in March 2021, and Select is not trading due to a change in legislation.

125 The submission that BlueInc Group is a "family business", must also be considered in context. Although at one level that may be correct, it is not the complete picture. BlueInc Group is a corporate group, which is controlled and run by Mr Howden, and made up of at least 10 companies, including a registered life insurer. As ASIC submitted, as at 23 August 2017, the Australian operations employed 119 persons, as well as contracted personnel through labour hire providers. As referred to above, the financial position of BlueInc Group is unknown, as the Defendants have not provided evidence of that, or of the overall size of the Group.

Involvement of senior management

126 ASIC submitted that a clear aggravating factor in this case is that Mr Howden, the head and controller of all three Corporate Defendants, was: involved in setting and approving the

corporate culture of the business, which facilitated the Consumer Contraventions; and intimately involved in the Conflicted Remuneration Contraventions. Other senior management, including the compliance managers Mr Hitchcock and Mr Nguyen, were said to have worked within the culture set by Mr Howden with there being no evidence that they took any steps to challenge or alter that culture or his practices, which permitted the Consumer Contraventions, the Conflicted Remuneration Contraventions and the AFSL General Obligations Contraventions.

127 The Defendants accepted that this Court concluded that Mr Howden knew of and approved of the conduct of the Incentives and had a central and active role in their operation: LJ at [248]. They accepted that this conduct was deliberate, in that the act of offering the Incentives was intentional. However, they highlighted that Mr Howden did not intend to offer unlawful incentives or set out to contravene the conflicted remuneration provisions. It was also submitted that there was nothing covert about the contravening conduct. That was said to be a fact that should be taken into account when calculating the pecuniary penalty necessary for deterrence: citing *Singtel Optus* at [63]. In that case, it was said that those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from the contravention. It was submitted here that no such calculation was made, which is relevant to the imposition of a lesser penalty. It was also submitted that senior management was not involved in the Consumer Contraventions.

128 I have already addressed the Conflicted Remuneration Contraventions not being intentional breaches of the law at [62]-[67] above. I also reiterate that Mr Howden was the sole director and Responsible Manager under Select's AFSL when all of the Incentives schemes were conducted.

129 As to senior management not being involved in the Consumer Contraventions, it may be accepted that generally the conduct was of low-level staff. However, they arose out of a culture created by senior management including Sales Managers and Mr Howden. It is also important to recognise that in some instances, the conduct was engaged in by more senior sales staff. Mr Hoey and Ms Dudbridge, who were two of Select's most senior Sales Agents, were responsible for the contraventions in respect of three of the Consumers. Mr Shah, who was a Team Leader at the time, was responsible for some of the contraventions in respect of Ms Shadforth. Moreover, as explained above at [47], some of those staff were later promoted within the organisation.

Degree of market power

130 ASIC submitted that, using Mr Howden's evidence, Select accounted for 6.7 percent of the total direct funeral insurance premiums written in the market for the year ended 31 December 2016. Based on that data, it was calculated that it was the fourth largest amount of premiums for funeral insurance written for that year in the group of eight for which data is available. ASIC did not suggest that Select wielded a significant degree of market power, but that it was not an insignificant player in the funeral insurance market during the relevant period. The Corporate Defendants accepted that was a fair characterisation of its size in the market during the relevant period.

131 ASIC also submitted that, by its practice of focusing on "keeping its premiums as low as possible", it was likely to be more attractive to a lower socio-economic cohort than more expensive products.

132 The Corporate Defendants submitted that Select's fundamental business activity was the same as that of its competitors and the products it distributed were fundamentally similar to those of its competitors. There was said to be nothing special or unique about its role in the market that would have allowed it to wield particular power. ASIC submitted that this illustrates the importance of general deterrence in this matter as it is necessary to ensure that competitors understand the consequences of contravening the Corporations Act and the ASIC Act.

133 The market in which Select was operating was described by Mr Howden as "a direct market, which is the middle income to low income market", where Select sought to provide cheaper products than its competitors. He also accepted that persons in the low income component of the market may have certain vulnerabilities (and that Defendants were aware of that).

134 I accept the characterisation of Select as a "not an insignificant player in the funeral insurance market", and that its business was fundamentally similar to that of its competitors. I also accept ASIC's submission and Mr Howden's evidence as to Select's position in the market.

Culture of compliance

135 There is substantial dispute between the parties as to the findings that should be made in respect to compliance, and the Defendants' attitude towards it.

136 On the one hand, ASIC submitted that there was a culture of sales at all costs, with a competitive culture that did not place sufficient weight on matters concerned with compliance. On the other hand, the Defendants submitted that Select had a culture of compliance.

137 As addressed below, the Defendants have no prior findings of similar conduct, and must have the penalty imposed on that basis.

138 The Defendants also submitted that there were detailed compliance systems in place which reflected that they attempted to achieve compliance. They made detailed submissions about those systems, including as to the Compliance and Quality Assurance Team, the Compliance Committee, systematic training of Agents, compliance materials, the monitoring undertaken by St Andrew's and the process for the resolution of complaints. Albeit those systems were accepted to have been found to be inadequate in relation to 18 sales calls. This was said to be in contrast to contraventions in other cases where there were no compliance systems in place. It was said that as only 18 calls were found to be inadequate, there were no contraventions in respect to 99.97323 percent of calls during the relevant period.

139 A number of observations need to be made about the compliance systems and culture that existed.

140 *First,* if there had been no compliance system in place, it would have been a significantly aggravating factor. As previously noted, the absence of an aggravating factor is not a mitigating factor.

141 *Second,* in the circumstances of the Corporate Defendants' business and the holding of the AFSL necessary for its conduct, the existence of a compliance system is non-negotiable. Obligations are imposed on those holding an AFSL and the business must be conducted accordingly. The relevant issue is the effectiveness of the compliance system in place to achieve its purpose.

142 *Third,* although the Corporate Defendants base their submissions on there being only 18 sales calls contravening provisions of the ASIC Act, it is unclear why the many retention calls found to contravene the ASIC Act, given their content, are not included in that figure. Those calls also reflect that many different Agents were involved. It follows that it cannot be suggested, as it was to the Royal Commission, that two "rogue" Agents were to blame: LJ at [195]. Noting also in that context that in the liability hearing, the Corporate Defendants' submission, which was not accepted, also attempted to cast blame on particular Sales Agents: LJ at [1316]. For example, I accepted in the LJ at [195] that the review of the spike, which was conducted after St Andrew's raised the issue, reflected that 46 percent of the sales were conducted by 51 other Sales Agents.

143 *Fourth*, in any event, on the Corporate Defendants' own admissions, other calls occurred during the relevant period which were not acceptable, or at the very least, problematic. The Corporate Defendants are not to be penalised for those calls, but they are relevant in assessing their submission that these 18 calls were, in effect, isolated conduct. For example, Select informed ASIC that 280 out of the 641 sales identified in the spike did not meet their revised compliance standards. As ASIC submitted, that equates to 43.68 percent of the reviewed sales, in respect of which Select itself informed some consumers that they had been "subject to unfair sales practices". I note that the calls were not confined to the spike, as Mr Howden gave evidence at the Royal Commission that the call to Ms Marika was not one of the calls within the spike. I also note that, in this context, ASIC also submitted, based on the contents of a letter it sent to Mr Howden on 2 February 2018 (in its engagement with Select after the spike was drawn to its attention by Bank of Queensland) that: ASIC listened to 66 calls in which it identified a range of poor sales practices being used to close a sale, including excessively pushy or aggressive sales techniques; and ASIC identified inappropriate sales tactics in 30 percent of the 55 calls from July 2017 that it reviewed, and noted that for the next worst performing firm it was reviewing, fewer than 10 percent of calls indicated such sales practices.

144 ASIC also observed that these poor sales practices continued despite the changes made after St Andrew's first raised its concerns. The correspondence reflects that Select did not challenge those findings. In response it "note[d] ASIC's concerns about inappropriate 'pushy' sales tactics", altered its QA process to "address any sales tactics of this type", proposed a remediation plan, and in conclusion stated that it "regret[ted] that our sales practices were unacceptable to ASIC".

145 It follows that in assessing the compliance system, and the Defendants' submissions about its effectiveness, the acknowledged failures are relevant.

146 It is to be recalled that, as referred to above, this is not a representative proceeding. As agreed between the parties, these were not systemic contraventions. However, as submitted by ASIC, when considering the proportion of a maximum penalty, the Court is entitled to have regard to the contravenor's history and circumstances, not just to assess the deterrence required, but also to appreciate the gravity of the contraventions in their proper and complete context: citing *Australian Competition and Consumer Commission v Ultra Tune Australia Proprietary Limited* [2019] FCA 12 at [329].

147 *Fifth*, when considering the compliance system, it was accepted in the Royal Commission that in 2015 only one in 10 calls were monitored and calls from more junior Sales Agents were listened to more frequently than those from more senior Sales Agents (LJ at [194]), which was known by Select and Mr Howden (LJ at [1354]). Therefore in the context of a highly competitive sales environment, in 2015, nine out of 10 calls was not assessed. In respect to the Consumer Contraventions, a number of the calls that were assessed as passing QA, plainly, even on a brief reflection, should not have: see, for example LJ at [1321], [1327]. These calls include some which the Corporate Defendants admitted during closing submissions at the liability hearing, were unconscionable: LJ at [193]. The call to Mr Mirrawana, which is described in the LJ at [515]-[540], provides just one example. Some calls which did fail the assessment, did not identify key inappropriate conduct: see, for example, LJ at [1321]. The QA assessment appeared at times to reflect an assessment of whether a Sales Agent had complied with the sales script, as opposed to an assessment of the quality of the call: LJ at [199]. A number of the offending calls which formed the basis of the Consumer Contraventions were not assessed at the time.

148 As referred to above, the compliance system did not detect the spike. Although Select and Mr Howden were aware in 2015 of an issue of concern about the use of the Refer a Friend program, the response was as set out at [47] above. The program continued, and only after notification by St Andrew's did Select investigate: LJ at [199]. Further, as I concluded in the Liability Judgment at [199], "[i]f plainly inappropriate calls passed QA, the quality assurance standards would be no deterrent. Or, to put it another way, if the Sales Agents were not being pulled up for inappropriate calls, a particular type of conduct would be seen as acceptable to the Corporate Defendants".

149 *Sixth,* as part of their submissions, the Defendants relied on the role of Team Leaders to tap into calls and provide ongoing coaching and supervision. The example of Mr Banks was relied on. It is to be recalled that Mr Banks was the Sales Agent who made the call to Mr Hussain, which was held to be unconscionable: LJ at [1034]-[1067]. He subsequently became a Team Leader and Sales Manager during the relevant period: LJ at [156]. As ASIC submitted, other Team Leaders were involved in the Consumer Contraventions. Mr Shah, who also became a Sales Manager during the relevant period, made the unconscionable sale to Ms Shadforth: LJ at [191], [881]-[895]. Mr Thompson was one of the two Sales Agents who made the unconscionable sale to Mr Mtawale: LJ at [651]-[677]. Mr Hoey became a sales coach, after he was cautioned in 2015 about his use of the Refer a Friend program: LJ at [90]. A

consideration of the calls by those Agents, and the basis of the findings of unconscionability, impacts on the submission that Team Leaders being in place to monitor calls, reflects, with other matters, a culture of compliance.

150 As referred to above at [45], Mr Hitchcock was ordinarily only in the office one day per fortnight: LJ at [194] and [1393]. I note also that the person who succeeded him as Compliance Manager, Mr Nguyen, was involved in the sale to Ms Mirniyowan, in a follow up call after the sale was made. In doing so, rather than contacting Ms Mirniyowan herself, Mr Nguyen chose to speak to her partner Mr Wurrawilya as to whether she had received the documents and understood the policy: LJ at [1227]. ASIC described this behaviour as "problematic". In the circumstances, if the purpose of the call was to see if the documentation had arrived, and Ms Mirniyowan understood the policy which had been sold to her, there seems to be no proper basis to be communicating with her partner, and not with her directly. In circumstances where this is the conduct of the Compliance Manager, it reflects on the submission advanced by the Defendants that there was a culture of compliance.

151 If Team Leaders or Mr Nguyen, who are training others, can behave in this manner, it reflects on what is perceived to be appropriate conduct, and therefore the culture of compliance.

152 In so far as the Defendants rely on aspects of the s 19 examination of Mr Banks, Mr Shah, Mr Nguyen and Mr Atwal to support the submission that "the evidence of former employees is there was a culture at Select that took compliance seriously", those passages must be considered in, inter alia, the context described above. ASIC also referred to the s 19 examination of Mr Hudson, which was said to be to the effect that "while the status of sales made by Sales Agents was accessible at all times through the intranet to all staff members, information about the compliance status of Sales Agents was only added to the accessible data about midway through 2017. Once that information was available, it was apparent that there were Sales Agents with an adverse compliance standing who were still working in the business and, at the very least, the perception (if not the reality) was that compliance was not enforced". That submission accurately reflects the evidence given in that examination. If compliance is not enforced (or at least that is the perception), that is not conducive to a culture of compliance. ASIC submitted that the observation of Mr Hudson is consistent with the delay between the identification of the spike and the termination of Mr Hoey and Ms Dudbridge (which was also shortly after Select agreed to the request made by St Andrew's that it write to ASIC in respect of the spike). That can be accepted.

153 *Seventh*, these factors are to be assessed in the context where there was a "competitive, sales driven culture designed to sell more products": LJ at [24], [1390]. Its practices were "known to, and endorsed by, senior management, including Mr Howden, and set the culture of the sales environment": LJ at [24].

154 The Defendants took issue with this characterisation being of any assistance, as a sales-driven culture was said to be inevitable in such a business. However, as referred to above, in the already highly competitive and pressured sales environment that rewarded top sales persons (and at times belittled or ridiculed the less successful), Mr Howden chose to introduce Incentives, purportedly to further motivate the Sales Agents and Retention Agents to be even more productive. The Refer a Friend program was introduced at the same time. It is difficult to see how in that context, it could not be seen as providing an obvious risk of, to use Mr Howden's words "driving wrong behaviours". In that context, compliance was not considered in any real way, with only one in 10 calls being monitored. It was plainly inadequate. Significantly, this was all in the context where Mr Howden had had the issue of marketing to Indigenous communities raised with him in 2014, and in relation to concern regarding use of the Refer a Friend program in 2015.

155 Mr Howden said multiple times in evidence that the compliance system was evolving over time. That may be so, but evolving compliance must be seen in the context of the failures set out above (noting especially the lack of action set out at [47] above). Moreover, that there was an investigation after St Andrew's had raised the issue of the spike, and after the Defendants had said it was not an issue, does not explain the inadequacy of the compliance system and lack of action during the relevant period. Attention was not given the compliance obligations as required.

156 The Defendants' submission that Select had a culture of compliance cannot be accepted. That said, attempting to place labels on the Defendants' attitude towards compliance, as ASIC did in submitting there was a culture of "sales at all costs", does not advance their case.

Past conduct

157 This topic is addressed above, when considering the submissions in respect to the compliance regime. As stated, the Defendants have no prior contraventions of similar conduct.

158 I note that Mr Howden also highlighted that he had been involved in the financial services industry for nearly 40 years and prior to these proceedings, and had an unblemished record.

Level of co-operation

159 Co-operation can reduce an otherwise appropriate penalty: *Trade Practices Commission v Carlton United Breweries Ltd* (1990) 24 FCR 532 at 542. This is based on public policy considerations. It increases the likelihood of co-operation in future cases, in a way that: furthers the object of the legislation; frees up the regulator's resources (thereby increasing the likelihood that other contravenors will be detected and brought to justice); and facilitates the course of justice: *Agreed Penalties Case* at [46]; *NW Frozen Foods* at 293-294.

160 ASIC submitted, in essence, that the Defendants have not co-operated in any meaningful way. The Defendants take issue with that assertion.

161 I have made some observations above at [57]-[58] about Mr Howden's evidence as to co-operation.

162 In that context, I address the Defendants' submissions that even before ASIC commenced the proceeding, Mr Howden had publicly condemned conduct in relation to the Consumer Contraventions, in statements which were taken to constitute admissions. This related only to Ms Marika in relation to statements made to the Royal Commission. Despite those statements, the Corporate Defendants' position in this proceeding was as described at [57] above.

163 At one level, the Defendants are correct that very few factual matters were in issue, in so far as that submission relates to disputes as to the facts. The parties were clearly in dispute as to what the facts meant. As observed above at [57], some claims were dependent on characterisation of the conduct (for example, unconscionability on the recordings of the telephone calls). Little was admitted in relation to those matters.

164 That said, the Defendants did not require the Consumers for cross-examination, which not only saved time in the conduct of the proceedings, but also saved each of them having to go through the experience of giving evidence. I take that into account.

165 The Defendants submitted that when they first became aware of the spike, Mr Howden and the Corporate Defendants tried to actively communicate and co-operate with ASIC by, amongst other things, providing ASIC with updates on Select's investigation into the spike and proposed remediation, and providing ASIC with any requested information and documents. This submission is based on the evidence of Mr Howden, which I addressed above. I have also addressed the timing and circumstances of the Defendants' communication with ASIC at [51] above. It was on 19 June 2017 that Select first corresponded with ASIC regarding the spike.

However, as ASIC submitted, the Defendants did not report the spike to ASIC, rather it was reported by the Bank of Queensland (the parent company of St Andrew's) on 17 January 2017. The minutes of a meeting between the Bank of Queensland, St Andrew's and ASIC held on 3 February 2017 record that, in terms of considering remediation, further information had been required from Select by St Andrew's and it was noted that "Select [was] not much assistance".

166 In relation to remediation undertaken by the Corporate Defendants, only very recently have all 14 Consumers been refunded, some as late as shortly before the relief hearing, in the circumstances described above at [82]. The circumstances in which the Defendants conducted an investigation has been detailed elsewhere: see, for example, LJ at [199] and above at [148], [155]. There has been some remediation in relation to the cases identified in the spike. In or about June 2017, Select commenced a remediation program, with the only evidence being that the sum of $106,428 had been refunded as at 27 November 2017.

Course of conduct

167 Although the parties agree that the course of conduct principles should be applied, there is dispute as to their application to the facts.

Conflicted Remuneration Contraventions

168 ASIC submitted that the starting point lies in calculating the number of contraventions of ss 963E, 963F and 963J of the Corporations Act. As was submitted by ASIC, the number of contraventions of any particular provision is a question of statutory construction. It involves determining the gravamen of the obligation imposed by the provision: see, for example, *Ultra Tune Australia Pty Ltd v Australian Competition and Consumer Commission* [2019] FCAFC 164 at [52]-[54].

169 In relation to s 963E of the Corporations Act, ASIC submitted that a contravention occurs each time a representative of the licensee accepts conflicted remuneration. On that basis, there were said to be 33 contraventions of s 963E by Select. Fifteen Sales Agents accepted the Cruise Incentive; one Sales Agent accepted the Vespa Incentive; eight Sales Agents accepted the Las Vegas Incentive; and nine Sales Agents accepted the Hawaii Incentive: LJ at [158]-[160], [166]-[168], [179]-[180], [191]. Section 963E is in the following terms:

> **963E Licensee must not accept conflicted remuneration**
>
> (1) A financial services licensee must not accept conflicted remuneration.
>
> Note: This subsection is a civil penalty provision (see section 1317E).

(2) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee accepts conflicted remuneration; and

(b) the licensee is the, or a, responsible licensee in relation to the contravention.

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

170 ASIC also submitted there was a contravention of s 963F of the Corporations Act on each occasion a Sales Agent received conflicted remuneration, as on each occasion Select failed to take reasonable steps to ensure that its representatives did not accept conflicted remuneration. On that basis, there were said to be 33 contraventions of s 963F by Select: LJ at [242]. Section 963F is in the following terms:

963F Licensee must ensure compliance

A financial services licensee must take reasonable steps to ensure that representatives of the licensee do not accept conflicted remuneration.

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

171 ASIC submitted that even if the Court was against its construction of s 963F, it would make no practical difference to penalty in this case, as the s 963F contraventions should be grouped together with the s 963E contraventions in the one course of conduct relating to each Incentive.

172 ASIC also submitted that the obligation imposed by s 963J is an obligation on the part of the employer not to give any particular employee conflicted remuneration, and that provision operates in the same manner as s 963E. ASIC submitted that accordingly, there were 31 contraventions of s 963J by BlueInc Services: see LJ at [158] and [179]. Section 963J is as follows:

963J Employer must not give employees conflicted remuneration

An employer of a financial services licensee, or a representative of a financial services licensee, must not give the licensee or representative conflicted remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of the employer.

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

173 The Defendants submitted that the Conflicted Remuneration Contraventions arose out of a single course of conduct relating to Select's remuneration practices, namely its practice of running competitions offering prizes for selling the most policies in a particular period. It was submitted that the model of each of the Incentives was materially identical (being participants won the Incentives by selling insurance products), and the manner in which they incentivised

staff and the way Agents qualified for them was the same. It was also submitted that the same misunderstanding or ignorance on Mr Howden's part led to them being implemented. Similarly, the reason why the Incentives contravened the conflicted remuneration provisions was said to be common, as evidenced by the fact that determination of whether the Incentives were conflicted remuneration was considered collectively in the Liability Judgment.

174 Accordingly, the Corporate Defendants submitted there was a single contravention of ss 963E and 963F by Select and a single contravention of s 963J by BlueInc Services. The Corporate Defendants submitted that this was the approach followed in *Forex* and *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* [2022] FCA 515; (2022) 407 ALR 1 (*Westpac Omnibus*), the two reported cases where there were contraventions of the conflicted remuneration provisions. It was submitted that in *Forex*, the description of the conflicted remuneration at [22] shows it took a variety of forms and was given on multiple occasions, but the contravention of the conflicted remuneration provisions was considered in toto and wrapped up into a single pecuniary penalty: citing *Forex* at [16]. It was submitted that in *Westpac Omnibus*, during the period from 30 November 2015 to 25 August 2021, the defendant gave conflicted remuneration to financial advisers or their advice licensees by the payment of commissions in respect of insurance cover obtained by members, commission which was paid as a percentage of the insurance premium payable in respect of the relevant member. This was said to have been treated as a single course of conduct and single contravention of s 963K: citing *Westpac Omnibus*, declaration [4], and at [192].

175 The Corporate Defendants' submission did not address the statutory construction question raised by ASIC as to the number of contraventions, but rather focused on the characterisation of the conduct as a single course of conduct.

176 As explained in the Liability Judgment at [223], the starting point for ascertaining the meaning of a statutory provision, is the text of the statute having regard to its context and purpose: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14], citing *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]-[71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 at [47].

177 I accept ASIC's submission that each of ss 963E and 963F was contravened on each occasion a Sales Agent received conflicted remuneration, and correspondingly, on each occasion Select failed to take reasonable steps to ensure that its representatives did not accept conflicted

remuneration. Section 963J operates in the same way. This interpretation accords with the text of the provisions, read in context, and given their purpose.

178 I note in this context, that in *Forex,* the Court found that there had been 116 contraventions of s 963J by the first defendant: *Forex* at [83], and reflected in order [10]. The contraventions were characterised as a single course of conduct for the purpose of penalty. This was in circumstances where the contraventions arose out of the use of what appears to be a particular bonus scheme: *Forex* at [22], [83]. In *Westpac Omnibus*, there were multiple contraventions of s 963K which were accepted to be a single course of conduct: see [185]-[192].

179 Each case must turn on its own facts. I do not accept the Corporate Defendants' submission that there was a single contravention of ss 963E and 963F by Select and a single contravention of s 963J by BlueInc Services. That approach fails to recognise that although there was similarity between the schemes, they were separate and complete within themselves. They were separately conceived and implemented, as reflected above at [60]. That said, I will treat the Cruise Incentive and the Vespa Incentive as one course of conduct, given that they were implemented at the same time. The Las Vegas Incentive and Hawaii Incentives were implemented later, and separately. They are separate courses of conduct.

180 The conduct is properly characterised with the contraventions of ss 963E and 963F respectively being one course of conduct for each of the Incentives. That recognises that in relation to each Incentive, there are common underlying facts. Therefore, there are three courses of conduct for Select. There are, for the same reason, three courses of conduct for BlueInc Services in relation to the contraventions of s 963J.

Consumer Contraventions

181 ASIC submitted that the contraventions of s 12DB(1)(i) of the ASIC Act arising from the limited exclusions representations should form one course of conduct, as they were each a consequence of the mandatory language of the sales scripts the Sales Agents were required to follow. In respect of the other contraventions, it submitted that in relation to each Consumer there is one contravention for the sales conduct, and where applicable, one for the retention conduct.

182 The Corporate Defendants submitted that if Sales Agents had followed the sales scripts the limited exclusions representations would not have been made. The misrepresentations were said not to be a consequence of the mandatory language of the sales script. They submitted that

where contraventions have been established in relation to the conduct of Sales Agents and Retention Agents towards a particular Consumer, this should form one course of conduct. The contraventions said to be inextricably intertwined, both factually and legally. The way that the policy was sold was said to be an integral aspect of why the retention conduct was inappropriate.

183 I do not agree with the submission that if the Sales Agents had followed the sales scripts there would not have been a contravention. However, although this contravention occurred in relation to each of the Consumers, I also do not agree that it should be treated separately from the other contraventions.

184 The more appropriate grouping is that, in relation to each Consumer, there is one course of conduct. That avoids any risk of double punishment, and recognises that there is a relationship between the sales and retention conduct (albeit being separate conduct, undertaken for different purposes). In approaching it in this way, I accept that the sales conduct was about persuasion of the Consumer to sign up and provide their direct debit details for the purpose of an insurance policy so that payment of premiums could commence, while the retention conduct was about the persuasion of the Consumer to maintain the policy and pay premium arrears, so as to ensure that the insurance policy and payment of premiums did not cease. The conduct occurred at different points in time and in different ways: the sales conduct was in one or perhaps two calls, while the retention conduct often encompassed multiple contacts with the Consumer over a period of time. The sales conduct and the retention conduct also arose out of different transactions. However, but for the sales conduct, the retention conduct would not have occurred. The series of interactions between Agents and Consumers were interconnected. More specifically, what occurred in making the sales coloured the retention conduct.

Other matters

185 *First*, in relation to overlap. The Corporate Defendants submitted that the pecuniary penalty imposed on one Corporate Defendant should be taken into account and be commensurately reduced by reference to the penalties imposed on the others. It was said that to do otherwise would be to impose double punishment, referring to *Australian Competition and Consumer Commission v Origin Energy Limited* [2015] FCA 55 (*Origin Energy*) at [63] and *Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd* [1999] FCA 1175 at [39]. It was submitted that this is in circumstances where: there is an identity of interests between the Corporate Defendants; they are ultimately owned by same person, namely, the wife of Mr Howden; they share the same sole director and secretary, namely Mr Howden; they are part of

the same corporate group, the BlueInc Group; they share the same management; and, at all times, the BlueInc Group, of which the Corporate Defendants are members, has been managed as a single entity with the same interests.

186 The Corporate Defendants submitted that there is no issue with a separate penalty being imposed on each of them to reflect the fact that agents were representatives of more than one Corporate Defendant. However, it was submitted that in quantifying these penalties, ASIC did not recognise it is the same individual who will bear the burden of the pecuniary penalty imposed on the Corporate Defendants in relation to conduct which is identical (in the case of the Consumer Contraventions) or aspects of the same conduct (in the case of the Conflicted Remuneration Contraventions). It was submitted that multiple defendants are effectively liable for the same conduct, rather than there being a completely separate set of defendants. That was said to be a factor that can and should be taken into account when quantifying the pecuniary penalty so as to prevent double punishment.

187 ASIC submitted that having chosen to organise their affairs in the way that they have, the Corporate Defendants must accept the consequences and burden of creating three separate legal personalities. It was said that, since each legal personality contravened a penalty provision, each should be liable for that contravention. ASIC also submitted that the arrangements had benefit is confirmed by Mr Howden's evidence, namely to "insulate" Select from "marketing and distribution expense risk". ASIC also referred to Mr Howden's s 19 examination in which he explained:

> Select AFSL is a registered entity, among other things it's got to make sure it's run responsibly, doesn't have ups and downs with cash, we didn't want to expose Select AFSL to what's known in the market as expense risk. In other words, new business strain. So we entered into an arrangement with… [IMS] in exchange for the commission that Select AFSL would be entitled to – [IMS] would wear any expense losses, … conversely any gains in exchange for taking that risk.

188 ASIC referred to *Origin Energy* at [64], *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; (2017) 258 FCR 312 (*Cement Australia*) at [391], and *Director of Consumer Affairs Victoria v Wens Bros Trading Pty Ltd* [2019] FCA 39 (*Wens Bros Trading*) at [98] in support of its submission. ASIC submitted that the task for the Court is to set the appropriate penalty taking into account the circumstances of each contravenor. It was also submitted that the lower penalties it sought for BlueInc Services and IMS recognise that there is a degree of overlap resulting from BlueInc Services and IMS being the employer or principal of the Sales Agents and Retention Agents, who were acting as agents

of Select, the AFSL holder. This approach was said to similarly recognise that Select's conduct and its position as the holder of the AFSL should attract a higher penalty.

189 Ultimately, despite the Corporate Defendants suggesting otherwise, each Corporate Defendant has contravened the provisions, and accordingly each is to be dealt with in respect to their contraventions. It is not in dispute that there is some degree of overlap. Leaving aside the amounts sought by ASIC, generally the suggested penalties are lower for BlueInc Services and IMS which I assume is to reflect the overlap. Noting also Select's position as the holder of the AFSL.

190 Both parties refer to *Origin Energy*, although to different passages. It is appropriate to refer to [63] and [64]:

> [63] There are circumstances in which, by reason of the close familial or economic relationships between respondents, it may be appropriate to have regard to the overall effect of an aggregation of proposed penalties, especially if they would result in one entity or person being punished twice for the same, or substantially similar, conduct …
>
> [64] … The imposition of separate penalties on the present respondents does not involve an element of double punishment of any of them. It is in any event evident that the penalties agreed upon by the parties have been structured to reflect the different culpability of each respondent. Further, the respondents must have chosen to organise their affairs in the way that they did, with separate subsidiaries engaged in the retail supply of electricity and natural gas. Presumably they did so because of the advantages which thereby accrued. That being so, it does not seem appropriate to ignore their separate status, simply because it is advantageous, in the present context, to do so.

191 In *Cement Australia*, the Court observed at [391]:

> [391] … the one principle to be discerned [from the case law] is that each contravenor must be separately responsible for its own course of conduct. This is not just a discretionary factor. The legislature has indicated that the contravenor should be subject to the "appropriate" pecuniary penalty — the "appropriateness" is to be determined by reference to the contravenor's own conduct and the acts and omissions of that person.

192 The Corporate Defendants were structured in that way because there were business advantages of doing so. Mr Howden said in evidence that the reason was as he explained in his s 19 examination, referred to above at [187]. He chose to structure the companies in this manner.

193 As explained in *Cement Australia*, the contravenor should be subject to the "appropriate" pecuniary penalty which is to be determined by reference to the contravenor's own conduct and the acts and omissions of that person: also see *Wens Bros Trading* at [98].

194 *Second*, the Defendants referred to the effect of these proceedings. They submitted that: any detriment the Corporate Defendants suffer directly impacts on Mr Howden's family; the Corporate Defendants have suffered a significant diminution in the value of their businesses as a result of this proceeding; the ability of the Corporate Defendants to do business in Australia has been severely restricted; the Corporate Defendants have incurred significant legal fees defending the proceeding; Mr Howden has suffered the serious stigma attached to being the subject of an investigation by ASIC, a witness at a Royal Commission and the subject of adverse findings by this Court; Mr Howden has had to devote a significant amount of his time during the past four years to dealing with these matters; Mr Howden's ability to do business in Australia has been severely restricted; and Mr Howden has resigned from the board of another company in the BlueInc group in an effort to allay the concerns of the Reserve Bank of New Zealand. These factors were relied on to found the submission that Mr Howden has already been punished, to a certain extent, which can be taken into account.

195 Care must be taken with aspects of this submission, as some of the matters identified are of a kind that flows from the contraventions: see, for example, *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed)* [2014] FCA 1308; (2014) 322 ALR 45 at [357]; *Fair Work Ombudsman v Austrend International Pty Ltd (No 2)* [2020] FCA 1193 at [142]-[145]; *Fair Work Ombudsman v Lam* [2021] FCA 205; (2021) 390 ALR 39 at [24]; *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (Kiama Aged Care Centre Appeal)* [2023] FCAFC 63 at [49]. As ASIC submitted, the natural consequences of engaging in conduct in contravention of the Corporations Act and being the sole director of a corporate group that contravened the Corporations Act and the ASIC Act is not hardship that mitigates a penalty.

196 That said, ASIC submitted that it may be accepted that Select and BlueInc Services have suffered reputational harm as a result of the Conflicted Remuneration Contraventions. So much may be accepted. It may also be accepted that Mr Howden has suffered reputational harm.

197 Some of the matters relied on have been addressed above: see, for example, diminution of the business at [124] above.

198 ASIC took issue with the submission that the Corporate Defendants having incurred significant legal fees defending the proceeding is a relevant consideration. In doing so it relied on obiter

observations of Perry J in *Australian Communications and Media Authority v Limni Enterprises Pty Ltd* [2022] FCA 795 at [95]. That observation in context was that:

> [93] It does not necessarily follow, however, that, because liability to pay the prosecution's costs may be taken into account in assessing criminal penalties, liability to pay the legal costs of the regulator enforcing a civil penalty provision is relevant to the assessment of the civil penalties. Thus, in *Pattinson* at [14], [Kiefel] CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ held that "*basic differences' between criminal prosecutions and civil penalty proceedings mean there are limits to the transplantation of principles from the former context to the latter*".
>
> [94] It has already been seen that it is no part of the purpose of civil penalties to punish. As such costs cannot be regarded as part of any "punishment" for contravening a civil penalty provision, in contrast to the approach adopted in *Barnes (CCA)* in the criminal context. Furthermore, as ACMA submitted, costs and civil penalties serve different purposes (ACS at [11]). While the purpose of imposing a civil penalty is focused upon deterrence, the purpose of an award of costs is compensatory in the sense of indemnifying the successful party for the expense incurred by the successful party by reason of the legal proceedings: see *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 543 (Mason CJ) and 567 (McHugh J); *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; (2001) 115 FCR 229 (*Ruddock (No 2)*) at [11]–[12] (Black CJ and French J). It is also true that, if (as he has foreshadowed) in due course Mr Kontaxis may take issue with the reasonableness of ACMA's costs, the proper remedy is for an assessment of the reasonableness of ACMA's costs to be made on a taxation.
>
> [95] The highest it might be put, in my view, in the civil penalty context is that a liability to pay the costs of the regulator might be able to be taken into account in ensuring that the penalties to be imposed are not oppressive and thereby exceed the level required to achieve the objects of specific and general deterrence. On the other hand, there may be strong policy reasons as to why that approach might not be taken or which call for a high degree of caution before adopting such an approach. In particular, it might become a disincentive for a respondent to co-operate with the regulator if the respondent's liability for the regulator's costs could, in effect, be offset to some degree against the civil penalty which might otherwise be imposed. In any event, it is unnecessary to determine this question in this case because of Mr Kontaxis' failure to give evidence as to his complete financial position.

199 There is merit in the observation that there are strong policy reasons against the submission advanced. It would appear to be a rather unusual circumstance where a defendant could choose to defend proceedings (regardless of the strength of the plaintiff's case against them), incur legal fees in so doing, yet seek to have any penalty imposed reduced because of the amount of fees or costs incurred. That, as ASIC submitted might "encourage defendants to 'roll the dice' instead of taking a realistic position in respect of claims against them, on the expectation that even if their defence is unsuccessful, any costs liability will be neutralised by a reduction in penalty".

200 At its highest, it may be that legal fees incurred inform a defendant's current financial status, which is a consideration to take into account. However, as referred to above at [119]-[122], a defendant's capacity to pay is not determinative and, as noted above at [112] and below at [202], the evidence as to the Defendants' financial position is limited.

201 I note that in *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003; (2011) 196 FCR 430 (*Healey*) at [227]-[228], Middleton J observed that normally any liability to pay costs as a result of an order for costs would be a matter that could be relevantly taken into account in determining any penalty, either as a matter relevant to the financial circumstances of the defendant and their ability to pay a penalty, or as an element of the other consequences suffered by the defendant as a result of the contraventions: citing *Australian Securities and Investments Commission v Vines* [2006] NSWSC 760; (2006) 58 ACSR 298 (*Vines*) at [134]. The observations are obiter as the issue did not appear to be a live issue in either of those cases. Moreover, *Vines* does not appear to stand for the proposition as unequivocally as may have been suggested in *Healey*.

202 In any event, in this case there is a factual issue, as there is no evidence of BlueInc Group's financial positon, even though $6 million was, on Mr Howden's evidence, transferred to another company in the group requiring working capital, such as to put it to use. Similarly, Mr Howden has not presented any evidence as to his (or his family's) financial position beyond the evidence pertaining to his remuneration received from the Corporate Defendants (see above at [106]).

203 *Third*, as referred to above at [27], the Defendants read two character references for Mr Howden. ASIC submitted that little weight should be placed on them given that, taking the example of Mr Grogan's affidavit: the letter of instruction annexed only directed him to read certain portions of the Liability Judgment; in the annexed letter, he does not acknowledge having read any part of the Liability Judgment; the high point of his evidence is that Mr Howden is a "man of integrity"; and he states that Mr Howden has "great attention to detail", which is consistent with my finding that he is a micromanager. Both references were submitted to be a "very short but somewhat light-on reference", and it was noted that neither referee worked with Mr Howden within the BlueInc Group, nor were they exposed in a regular and reliable way to his day to day business practices. I accept that, as submitted by the Defendants: Mr Grogan stated that he holds Mr Howden "in the highest regard as an intelligent, competent and honest person"; and Mr Willock stated that Mr Howden "takes a very diligent and complete

approach to matters which is of a standard that exceeds a majority of Directors in businesses of his size". Although these references are to be taken into account, the weight to be attached to them is impacted by the fact that: the witnesses were directed to read only part of the Liability Judgment (not including the contraventions by the Corporate Defendants of which Mr Howden is the sole director); neither witness appears to have been exposed to Mr Howden's day to day business practices; and my findings in the Liability Judgment.

204 *Fourth*, the Defendants advanced a number of submissions referring to and relying on the role of proportionality in imposing civil penalties. In reply, ASIC submitted that there is "no place" for a notion of proportionality when it comes to the calculation of civil penalty: citing *Pattinson* at [10].

205 Properly understood, although the Defendants referred to proportionality, the ultimate submission more accurately was directed to taking into account the circumstances of the contravention and contravenor.

206 It should first be noted that an appropriate penalty "is one that strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case": *Pattinson* at [46].

207 Relevantly, in *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (The Botany Cranes Case)* [2023] FCAFC 40 at [207], the Full Court observed in respect to *Pattinson*, inter alia, that: the purpose of a civil penalty is primarily, if not solely, the deterrence (both specific and general) of future contraventions (citing *Pattinson* at [9]); the maximum available penalty is not to be reserved for only the most serious examples of offending but is available to be imposed where it is reasonably necessary to achieve the deterrence of future contraventions (citing *Pattinson* at [10]), but it does not follow that the power to impose a penalty "must be taken to require the imposition of a penalty approaching the maximum in relation to any and every contravention by a recidivist offender" (citing *Pattinson* at [46]); both the circumstances of the contravener and the circumstances of the contravention (i.e. the seriousness of the contravention) may be relevant to the assessment of the appropriate penalty (citing *Pattinson* at [19] and [57]); and the penalty appropriate to protect the public interest by deterring future contraventions may be "moderated" by a range of factors of the kind adverted to by French J in *TPC v CSR* (citing *Pattinson* at [47]).

208 *Fifth*, the parties agreed that there is limited utility in looking at the circumstances of other cases and the penalties there imposed to provide guidance in this case. Having considered the limited cases referred to by the parties, there is some force to that submission. There are only very limited cases where a penalty has been imposed for contraventions of the conflicted remuneration provisions, and they were in factually different circumstances. As ASIC submitted, the Consumer Contraventions have their own nuances. This case is, in part, about the particular circumstances of individual consumer interactions. Accordingly, it is unnecessary to repeat the detail of the submissions made in respect to the cases which were referred to by the parties.

Other orders sought against the Corporate Defendants

Injunctions

209 ASIC submitted that the Court is warranted in granting an injunction against each of the Corporate Defendants restraining them from engaging in conduct in the future which contravenes the relevant parts of the Corporations Act and the ASIC Act that have been the subject of these proceedings. ASIC seeks injunctions, in terms not opposed by the Corporate Defendants.

210 In the circumstances of this case, in my view it is appropriate to make injunctions in those terms.

Advertising orders

211 There is no issue that the Court is empowered to make such orders, but rather, the issue is whether the orders ought to be made in this case.

212 ASIC relied on the observations of Gilmour J in respect of the ASIC Act in *Australian Securities and Investments Commission v Axis International Management Pty Ltd (No 5)* [2011] FCA 60; (2011) 81 ACSR 631 (*Axis International Management*) at [289] (drawing on the approach of Stone J in *Medical Benefits Funds of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1 at [45]-[63]). That passage is as follows:

> [289] Relevantly to this case, her Honour considered that:
>
> (a) any order was discretionary and that the principles governing the exercise of the discretion had been developed in the context of orders under ss 80 and 80A of the Trade Practices Act;
>
> (b) the power should be exercised protectively and not punitively: *Australian Competition and Consumer Commission v On Clinic Australia* (1996) 35 IPR

635;

(c) any order should be closely related to the contravening conduct and can be directed at aiding the enforcement of the primary orders and the prevention of the repetition of such conduct: *Australian Competition and Consumer Commission v Real Estate Institute of WA Inc* (1999) 95 FCR 114;

(d) advertising can be justified on the basis that it may have some public educational effect in relation to the operation of the relevant legislative provisions: *Australian Competition and Consumer Commission v Target Australia* [2001] ATPR 41-840;

(e) the effluxion of time may have a bearing on the utility of any such orders;

(f) there may be utility in informing persons who have been misled as to the true position: *Medical Benefits Fund of Australia Ltd v Cassidy* at [59].

213 Such publicity orders should do more than notify members of the public of the outcome of the case by advising of the contraventions: *Axis International Management* at [290].

214 ASIC submitted that an advertising regime and an accompanying complaints handling process and reporting regime is appropriate in this matter for six reasons. *First*, the extensive nature of the contravening conduct in this case, which when considered across the 14 Consumers was said to reveal broadly consistent patterns of high pressure sales techniques liable to result in unconscionable conduct and the making of misrepresentations, and give rise to the inference that such conduct is likely to have also occurred outside of this consumer group. *Second*, the failure of the compliance and QA systems utilised by the Corporate Defendants to identify matters of concern, and its "plainly inadequate" nature, citing LJ at [1354]. *Third*, the problematic nature of the corporate culture. *Fourth*, the use of the Refer a Friend program and the Incentives, which were said not to be limited to the Consumers or even to the sales identified by St Andrew's as part of the spike. *Fifth*, the review conducted after the identification of the spike resulted in broader refunds than simply to the Consumers, with 43.68 percent of the reviewed sales found to be inappropriate, in respect of which Select itself informed some consumers they had been "subject to unfair sales practices". *Sixth*, the Corporate Defendants were said not to have reviewed their conduct and voluntarily conducted a remediation program (despite proposing one to ASIC) to identify any other impacted consumers.

215 ASIC provided the terms of the order sought. In summary, those orders required that within 45 days: a notice would be posted on identified websites of the Corporate Defendants; and an SMS would be sent to all consumers in relation to which a mobile telephone is known, who purchased certain insurance products over the telephone from 1 February 2015 to 21 December 2017 (apart from those who have already been refunded all premiums), informing them of the

findings in this proceeding and that they may be able to get their money back. The website notice also referred to the findings in this proceeding, and stated that customers might be able to get their money back or other compensation if they bought insurance over the telephone from Let's Insure or FlexiSure between 1 January 2015 and 21 December 2017, or had difficulty cancelling their Let's Insure or FlexiSure insurance during that time, and thought that the person who spoke to them: put pressure on them to buy insurance or talked them into buying insurance; sold them insurance they didn't understand or want; made it difficult for them to cancel their insurance; harassed them to pay their insurance; or said things to them that were wrong. Both the website notice and the SMS included space for a contact telephone number to be provided. ASIC submitted that the information contained in those orders is appropriately directed to bringing to the attention of the relevant consumers and other persons who may have been directly affected by the lack of disclosure, that they may have an entitlement to make a legal claim for damages or a refund, and directing them to a complaints handling mechanism to be put in place. It was also submitted that the orders will have the effect of bringing to the attention of the general public the relevant provisions of the ASIC Act and the Corporations Act, the consequences of contravening those provisions, and the fact that ASIC will pursue such matters. These factors were said to have all relevantly been considered appropriate matters in the making of publicity orders in *Axis International Management*.

216 The Corporate Defendants opposed the orders sought for the following reasons. *First*, the proposed orders were said to go further than the allegations made or established by ASIC in the proceeding. It was submitted that the circumstances referred to in the website notice referred to features present in the calls with the 14 Consumers in a context where ASIC did not allege that the behaviour of these agents was representative of the conduct of agents more broadly, which is what the advertising orders are premised on. It was also submitted that ASIC could have, but did not, bring representative proceedings alleging systemic misconduct by the Corporate Defendants, meaning it cannot now proceed as if it had done so. *Second*, the Corporate Defendants currently do not have any staff, which was said to mean that they could not: physically carry out the process of obtaining the contact details of and contacting customers and former customers for a period lasting almost three years (let alone do so within 21 days initially sought by ASIC); or set up a complaints handling process. *Third*, BlueInc Services' Administrative Services Agreement with St Andrew's terminated on 31 December 2021, which was said to mean there is no basis on which the Corporate Defendants can contact

former clients without the consent of St Andrew's. It was said to be unclear how the Corporate Defendants would even be able to obtain the current contact details of these customers.

217 In support of its case, and to address the Corporate Defendants' submission that the order is not necessary as this case involved contraventions in respect to 14 Consumers, ASIC referred to *Australian Competition and Consumer Commission v Valve Corporation (No 7)* [2016] FCA 1553 (*Valve*), where an advertising order was made in respect to three contraventions. That order was upheld on appeal: *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224; (2017) 258 FCR 190. As the Corporate Defendants submitted, the orders there made must be read in their proper context. *Valve* does not assist ASIC. It is correct that the advertising orders were made where there were only three contraventions, but it is the nature of those contraventions which is relevant. In each instance the contraventions involved conduct which was misleading or deceptive or likely to be or false and misleading. They were representations to "consumers in Australia". That is to be contrasted to this case where the 14 Consumer Contraventions were directed to the conduct relating to those 14 Consumers individually. ASIC did not present a representative case.

218 In circumstances where the Consumer Contraventions appear to be the main basis of the order sought, given its proposed content, I am not satisfied in this case that they should be made. The orders sought are based on identified features common to the contraventions in relation to the 14 Consumers, but are directed to all consumers who purchased certain policies over an almost three year period. Even accepting the broader implications of the Refer a Friend program and the Incentives, ASIC chose to bring the action in relation to 14 Consumers and not a broader systemic case. Further, the Corporate Defendants are currently not operating, albeit that Mr Howden expressed a desire that would change after the relief is finalised (if he is able to do so). This impacts on the resources involved in the orders sought. That is so even though it may be accepted, as ASIC submitted, that shortly before this hearing the Corporate Defendants were able to process and correspond in relation to remaining refunds. I also note that ASIC did not suggest any lesser form of the order, for example not including directly contacting all customers who were sold a policy between 1 February 2015 and 21 December 2017. It is important that the public and the business community is made aware of the relevant provisions of the ASIC Act and the Corporations Act and the consequences of contravening them, as reflected by these proceedings, but in the circumstances of this case, I am not satisfied this establishes that orders in the terms sought should be made. I also note that there are other means that can achieve that purpose.

Probation orders

219 ASIC sought prohibition orders under s 12GLA(2)(b) of the ASIC Act, being a compliance regime. ASIC has nominated the terms of the order sought, which are not opposed by the Corporate Defendants. In the circumstance where the Corporate Defendants are not currently operating, but on the evidence they intend to recommence operations, ASIC ultimately submitted that the commencement date be the later of within 7 days of the Court's orders or 14 days prior to the date of commencement of any agreements entered into by the Corporate Defendants for the marketing, distribution or administration of insurance policies. That was on the basis that the commencement date should be before the Corporate Defendants start selling insurance policies again, in circumstances where the Corporate Defendants proposed that the Commencement Date be the later of either within 7 days of the Court's orders or the date of recommencement of the marketing, distribution and administration of insurance policies by any of the Corporate Defendants.

220 I agree that the order sought is appropriate, in the terms sought by ASIC.

Orders sought against Mr Howden

Legal principles

221 The principles relevant to the imposition of a pecuniary penalty have already been discussed above. The following are additional matters relevant to the relief sought by ASIC in relation to Mr Howden. There is no issue between the parties as to these principles.

222 As a starting point, the maximum penalty for each of the two contraventions of s 180 found against Mr Howden is $200,000: s 1317G(1) of the Corporations Act (as it then was). In addition, s 1317G(1)(b) has limited the circumstances in which a penalty can be ordered, namely to where a contravention: materially prejudices the interests of the corporation or scheme, or its members; or materially prejudices the corporation's ability to pay its creditors; or is serious.

223 ASIC sought both disqualification and pecuniary penalty orders against Mr Howden. In such a case, the Court should consider the issue of disqualification before that of a pecuniary penalty: *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 (*Rich*) at [45] and *Idylic Solutions Pty Ltd, Re; Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106; (2013) 93 ACSR 421 (*Hobbs*) at [52]. Although the seriousness of a contravention may warrant the imposition of a pecuniary penalty, in the

ordinary course, the Court would only consider imposing a pecuniary penalty where a disqualification order would not provide adequate or appropriate remedy: *Hobbs* at [53]. This approach was confirmed in *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; (2022) 403 ALR 67 at [143]-[145], in the context of the High Court's recent decision in *Pattinson*.

224 ASIC seeks disqualification orders against Mr Howden under:

(a) s 206E of the Corporations Act: based on the Conflicted Remuneration Contraventions by Select and BlueInc Services, and the AFSL General Obligations Contraventions by Select (in so far as they do not relate to the Consumer Contraventions); and by reason of Mr Howden's contraventions of s 180(1) of the Corporations Act and his involvement in the Conflicted Remuneration Contraventions and Select's s 912A(1)(a) (pertaining to the Refer a Friend program) and s 912A(1)(c) (pertaining to conflicted remuneration) contraventions;

(b) s 206C of the Corporations Act, based on Mr Howden's contraventions of s 180(1) of the Corporations Act.

225 Mr Howden acknowledges that ss 206C and 206E fall to be considered. They are in the following terms:

> **206C Court power of disqualification—contravention of civil penalty provision**
>
> (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
>
> (a) a declaration is made under:
>
> (i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or
>
> (ii) section 386-1 (civil penalty provision) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* that the person has contravened a civil penalty provision (within the meaning of that Act); and
>
> (b) the Court is satisfied that the disqualification is justified.
>
> (2) In determining whether the disqualification is justified, the Court may have regard to:
>
> (a) the person's conduct in relation to the management, business or property of any corporation; and
>
> (b) any other matters that the Court considers appropriate.
>
> (3) To avoid doubt, the reference in paragraph (2)(a) to a corporation includes a

reference to an Aboriginal and Torres Strait Islander corporation.

….

206E Court power of disqualification—repeated contraventions of Act

(1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:

(a) the person:

(i) has at least twice been an officer of a body corporate that has contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or

(ii) has at least twice contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of a body corporate; or

(iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and

(b) the Court is satisfied that the disqualification is justified.

(1A) For the purposes of subsection (1), a person is an ***officer*** of an Aboriginal and Torres Strait Islander corporation if the person is an officer of that corporation within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

(2) In determining whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate.

(3) To avoid doubt, the reference in paragraph (2)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

226 Mr Howden accepted that ASIC correctly set out the legal principles to be applied in determining whether a disqualification order should be made and the length of that order. The issue between the parties is whether the order should be made.

227 In that context, it is appropriate to refer to *HIH Insurance (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq), Re; Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 (*HIH Insurance*), where Santow J at [56] summarised the applicable principles. In *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 (*Murray*) at [220], Gordon J summarised those principles as follows:

[220] What then are the Santow principles? They were distilled in *ASIC v Adler* at [56] to include:

(1) Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards.

(2) Disqualification orders are designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office.

(3) Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors.

(4) A disqualification order is protective against present and future misuse of the corporate structure.

(5) The order has a motive of personal deterrence, though it is not punitive.

(6) The objects of general deterrence are also sought to be achieved.

(7) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company.

(8) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature, such as those involving dishonesty.

(9) In assessing the appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public.

(10) It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct.

(11) A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming.

(12) The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519 are influential. The criteria were character of the offenders, nature of the breaches, structure of the companies and the nature of their business, interests of shareholders, creditors and employees, risks to others from the continuation of offenders as company directors, honesty and competence of the offenders, hardship to the offenders and their personal and commercial interests, and offenders' appreciation that future breaches could result in future proceedings.

(13) Factors which lead to the imposition of the longest periods of disqualification (of 25 years or more), were large financial losses, high propensity that defendants may engage in similar activities or conduct, activities undertaken in fields in which there was potential to do great financial damage, lack of contrition or remorse, disregard for law and compliance with corporate regulations, dishonesty and intent to defraud, and previous convictions and contraventions for similar activities.

(14) In cases in which the period of disqualification ranged from seven to 12 years,

> the factors included serious incompetence and irresponsibility, substantial loss, where the defendants had engaged in deliberate courses of conduct to enrich themselves at others' expense but with lesser degrees of dishonesty, continued, knowing and wilful contraventions of the law and disregard for legal obligations, and lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform.
>
> (15) The factors leading to the shortest disqualifications, that is disqualification for up to three years, were, although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated, the defendants had no immediate or discernible future intention to hold a position as manager of a company and the defendant had expressed remorse and contrition, acted on the advice of professionals and had not contested the proceedings.

228 In *Rich*, McHugh J at [48]-[58] cited these propositions with approval, disagreeing only with the proposition that there is no element of punishment or retribution in a disqualification order. The propositions have been repeatedly applied. They are not "a rigid catalogue of matters that must be considered in every case", but rather they inform the exercise of the discretion as appropriate in each case: *Murray* at [219].

229 Also see *Rich* at [43] and *Healey* at [110].

Disqualification

230 Mr Howden remains a director of the Corporate Defendants and other entities. His evidence is that, unrestrained, he intends to recommence trading through the Corporate Defendants or other entities in the financial services sector in Australia. As such, ASIC submitted public protection should be given very significant weight. It submitted that Mr Howden's evidence reflects his lack of insight into his own involvement in and contribution to the corporate culture and practices that resulted in the contraventions of ss 912A(1)(a) and 912A(1)(c). Accordingly, it was submitted that specific deterrence must be given significant weight in assessing the length of the disqualification orders.

231 ASIC also submitted that general deterrence must play a significant role in the determination of the period of disqualification, highlighting that Mr Howden: was the sole director and senior manager of the Corporate Defendants and in particular for Select, the AFSL holder; was involved in and presided over significant contraventions of the conflicted remuneration provisions of the Corporations Act, by which Sales Agents (predominantly backpackers) were incentivised by holidays and prizes to sell more insurance products to consumers, some of whom were vulnerable; was involved in the Refer a Friend program, which was designed and executed unfairly and contravened s 912A(1)(a); presided over a corporate culture and

practices, and an inadequate compliance system, that permitted and did not identify the numerous Consumer Contraventions, which in turn resulted in contraventions by Select of s 912A(1)(c); gave evidence that, despite his role as Key Person and a Responsible Manager under Select's AFSL, he was simply oblivious to the application of the conflicted remuneration provisions of the Corporations Act to his business; and, as sole director, enabled the transfer of the trailing commission, as explained above.

232 Further, ASIC submitted that s 206E(2) permits the Court to have regard to Mr Howden's conduct in the management of any corporation and any other matter it considers appropriate. In this case that was said to include: what is proved in this proceeding concerning the management of Select, BlueInc Services and IMS; and the contraventions, including the numerous contraventions of the consumer protection provisions. Although it was accepted that caution was required in adopting this approach given Mr Howden was not involved in the Consumer Contraventions, it was submitted that he oversaw the companies and set the culture that caused them to occur.

233 ASIC submitted that in the circumstances, the appropriate disqualification period for Mr Howden is: in respect of s 206E, 10 years; or in respect of s 206C, by reason of the focus on the personal contraventions of the Corporations Act being more limited, seven years.

234 Mr Howden submitted that at all times he had regard to the law and the importance of compliance with corporate regulations. He submitted that the Corporate Defendants had a detailed compliance system. This was said to be supported by Mr Howden's conduct "once the events the subject of the contravention came to his attention". He was said to have taken the contraventions seriously and commenced an internal investigation into the root causes of the spike. Further, it was submitted that Mr Howden strove to create a positive, customer-centric culture that was productive and maintained a level of sales. His conduct was said not to have involved any dishonesty or incompetence. It was also submitted that Mr Howden's unawareness in relation to the Conflicted Remuneration Contraventions was not unreasonable or incompetent (for the reasons referred to above at [61]). Further, although Mr Howden knew that a customer could not have given their consent to having their contact details provided to and being contacted by Select, it was submitted that he could not have known that the Refer a Friend program would affect Indigenous communities in the way it did, particularly when Select did not keep records of a customer's ethnicity. Mr Howden's position that "it did not occur to me that [the Refer a Friend program] might result in unacceptable behaviours, let alone

towards vulnerable or Indigenous people" was said not to display incompetence, even more so in circumstances where a similar program had been run by one of Select's competitors: see [53] above.

235 Mr Howden also addressed the effect of a disqualification order, noting that: he was the only person "running these corporate structures", and accordingly could not continue as an employee while a management team continued to do so; given his age and being a manager in the financial services industry, he would not be employed elsewhere in the market; and if such an order were not limited to any industry, he could not be involved in his self-managed superannuation fund.

236 Ultimately, he submitted that he should not be subject to a disqualification period, but if it were to be ordered, it should be short and only in relation to the financial services industry.

237 Most of these submissions have been addressed above. For example, the compliance system, and the adequacy thereof is referred to above at [135]-[156]. Mr Howden's submission as to his approach on finding out about these contraventions is not accepted in the manner asserted, for the reasons given above: see, for example, [47]-[48]. In evidence, Mr Howden repeatedly use the phrase "with the benefit of hindsight". However, in the context of those findings above, there is no evidence that Mr Howden turned his mind to whether the compliance system was sufficient: see also, for example, [147]-[148] and [153]-[155]above. The submission that he could not have known about the effect of the Refer a Friend program has been addressed above at [52]-[55].

238 One matter on which Mr Howden's evidence is silent, is why he approved sales scripts which meant that the Referred Customer did not consent before their details were provided and where Referring Customers were not asked they wished to participate in the program: see above at [54]. That was in circumstances where Select dictated that the script be followed, and a failure to do so, at least theoretically, resulted in a fail if that was one of the calls assessed: see above at [147]. Because of the manner in which their details were elicited, it meant that Referred Customers were cold called, and Sales Agents could put pressure on them by the use of the name dropping.

239 As noted above, Mr Howden submitted that to disqualify him would deprive him of the ability to earn a living. There is no evidence to support that submission, nor is there any reason to suppose that would be so. It might be that he wishes to work in the manner he previously has,

but given his background, there is no basis to suggest that he will be unable to do so as an employee or contractor. I also note that Mr Howden has provided no information about his personal financial circumstances and therefore no information as to his ability to support himself from his existing assets.

240 I refer also to the discussion at [249] below.

241 In those circumstances, and given his lack of real appreciation for what occurred (see, for example, above at [40]), pursuant to s 206E, I disqualify Mr Howden from managing corporations for a period of five years. Each of the criteria in s 206E is satisfied and, given the purpose of a disqualification order, I am satisfied that such an order is justified. I note that in reaching that conclusion, I have accepted the approach set out at [232] above.

Pecuniary penalty

242 ASIC submitted that, for his contraventions of s 180 of the Corporations Act, Mr Howden should also pay a pecuniary penalty of $100,000. Mr Howden submitted that, if no disqualification order is made, it would be appropriate for him to pay a pecuniary penalty of $20,000. He submitted that if a disqualification order were to be made, that would be sufficient punishment and no pecuniary penalty should be ordered.

243 It is not in issue that the same principles as apply to the Corporate Defendants on the question of pecuniary penalty apply to a pecuniary penalty ordered pursuant to s 1317G.

244 Mr Howden submitted that his contravention of s 180 is at the lower end of the scale, and does not share the aggravating features of the two other cases where contraventions of the conflicted remuneration provisions have been dealt with by this Court. The incentivisation provided was said to effectively be the same as that provided by the payment of commission, which was legal. He also submitted that any penalty should fall into the "lower range" category identified by Santow J in *HIH Insurance* as this conduct was said to have features within that category, namely: remorse and contrition; repayment of the funds in question; seeking to save costs in the proceeding by his conduct in not requiring the Consumers to be available for cross-examination; the offences did not involve dishonesty but negligence or carelessness; the previous unblemished character of Mr Howden; and the fact that further contraventions are unlikely.

245 Mr Howden chose not to provide evidence of his personal financial position: see above at [202].

246 ASIC submitted that Mr Howden's contraventions have resulted in Select and BlueInc Services engaging in the Conflicted Remuneration Contraventions, for which ASIC seeks penalties totalling $3.5 million and costs. It also submitted that the contraventions have led the companies to incur very significant legal costs in the course of the proceedings and accepted that reputational damage has occurred. ASIC also took issue with the submission as to incentivisation, and submitted that the incentivisation provided was prohibited because of the inherent conflict between the interests of the Sales Agent in maximising the number of sales, and the interests of consumers. ASIC further submitted that Mr Howden even now holding this attitude reinforces the need for specific deterrence.

247 ASIC also submitted that the Incentives were directed to maximising revenue, which resulted in benefit to the Corporate Defendants and, through the ownership structure, to Mr Howden and his family.

248 I accept that the power to order a pecuniary penalty in s 1317G(1)(b) is enlivened on the bases that the contraventions materially prejudiced the interests of the corporation and were serious.

249 I do not accept that this conduct is in the lower range identified in *HIH Insurance*. I note in that regard, the typical features of such conduct include that the defendant has no immediate or discernible intention to hold a position as a manager of a company, acted on the advice of professionals and had not contested the proceedings, none of which apply in this case. Mr Howden's submissions on this topic fail to appreciate the seriousness of the conduct and, as explained above, involve an attempt to distance himself from that conduct and to minimise its seriousness. So much is evident from his submission as to the incentivisation. That submission fails to recognise his obligations under the AFSL, and the irresponsibility of his actions and ignorance in that context. As previously explained: Mr Howden did not consult Select's Head of Compliance and Quality Assurance before implementing the Incentives (see [45] above); he approved the scripts for the Refer a Friend program which was to run at the same time as the Incentives (see LJ at [344] and above at [54], [154], [238]); and he was aware of an issue of concern in 2015 about the use of the Refer a Friend program in relation to certain Indigenous communities, but continued to use it, while offering further Incentives (see [47] above). Mr Howden showed limited insight as to his role in the contraventions.

Injunction

250 ASIC sought an injunction against Mr Howden in a similar form to that sought against the Corporate Defendants, restraining the provision against conflicted remuneration. It is not opposed. I agree that the order sought is appropriate, in the terms sought by ASIC.

Totality

251 The principle of totality is described above at [23].

252 ASIC submitted that the penalties it suggested in respect of the contraventions (or courses of conduct) give due regard to the principle of totality. ASIC also submitted: that totality principles do not arise on the question of disqualification, as a single determination is required under ss 206C(1)(b) and 206E(1)(b) as to whether a disqualification is justified; and that, in relation to ss 206E(1)(a)(i) and (ii), there must be multiple contraventions, but there is a single determination of disqualification, meaning no occasion arises to apply the principle of totality (citing *Re Vault Market Pty Ltd* [2014] NSWSC 1641 at [81]; cf *Hobbs* at [159] and [317] and *Australian Securities and Investments Commission v Forge* [2007] NSWSC 1489 at [77]-[78]).

253 The Defendants emphasised that the principle of totality operates to ensure that the penalties to be imposed, considered as a whole, are just and appropriate. An aspect of the principle was said to be that the ultimate penalty must not be crushing. The Corporate Defendants submitted that the contraventions were not such that as a result they should cease to exist. The application of the totality principle was said to mean, amongst other things, that the pecuniary penalty imposed on each of the Corporate Defendants should be set at a level that they can pay and survive. Mr Howden submitted that in formulating the appropriate pecuniary penalty to be imposed on him, the Court should have regard to the fact that both contraventions of s 180 arose out of the same conduct, and have regard to the principle of totality.

254 In relation to the Corporate Defendants' submission as to the effect of a penalty, I note the principles referred to above at [119]-[122]. I also note: the consideration of the Corporate Defendants' financial position at [108]-[118] and [123]-[125] above; and that Mr Howden did not provide evidence of his financial position (see [202] above).

255 I have taken the principles of totality into account in assessing the penalties imposed.

Conclusion

256 I have considered the submissions of the parties, the evidence relied on and the relevant principles.

257 Based on what it submitted were the circumstances of the various contraventions, the Defendants have sought to downplay the seriousness of the contravening conduct. That is in circumstances where Mr Howden has demonstrated a lack of insight into and acceptance of responsibility for aspects of that conduct.

258 As previously explained, it may be accepted that: the Defendants did not deliberately contravene the relevant laws (although the underlying acts constituting the contravening conduct were deliberate); and it is not contended that those contraventions arose in circumstances of dishonesty. If the conduct had those characteristics it would aggravate its seriousness. Regardless, deterrence has an important role to play in this case. The provisions which have been contravened are protective of consumers.

259 The importance of deterrence is also in a context where the Defendants' approach to their obligations was distinctly irresponsible. One illustration of that being Mr Howden, the holder of the AFSL, considering that he did not need to consult his compliance manager as to the Incentives schemes before they were implemented. Rather, he considered it was sufficient that the schemes be implemented and if the compliance manager had any concerns as to their unlawfulness (upon seeing the relevant promotional materials), he would raise them.

260 That approach reflected an attitude to their obligations which, for example: did not address an issue as to use of the Refer a Friend program in relation to certain Indigenous communities that Mr Howden was aware of in 2015 (instead choosing to continue the program without any investigation or consequences for the senior Sales Agent whose conduct raised the concern); required the involvement of St Andrew's in 2016 to have Select conduct an investigation, and in 2017 to have the conduct reported to ASIC; attempted to limit responsibility by attributing the conduct in relation to the Refer a Friend program to "rogue" Sales Agents (in particular, two Sales Agents); attempted to attribute responsibility for the Consumer Contraventions to the conduct of Agents; and deliberately included an approach in the sales script as to the Refer a Friend program that meant that the Referred Customer was not asked if they wanted to be referred and the Referring Customer was not asked whether they wished to participate in the program. This was all in a competitive environment which rewarded top Sales Agents, and at times belittled or ridiculed the less successful. It was also in relation to a work force which

comprised a high proportion of backpackers and other temporary visitors to Australia, with a high turnover. The failures of the compliance systems in place must be seen in this context.

261 Having systems in place to properly and appropriately monitoring compliance is essential. Further, holding an AFSL brings with it legal obligations which must be taken seriously and carried out responsibly. The contravening conduct must be seen in the context of those obligations.

262 That the Defendants were not aware of the applicable laws (as was said to be the case in relation to the Conflicted Remuneration Contraventions), or the extent of the issues regarding use of the Refer a Friend program (in circumstances where they failed to investigate upon becoming aware of an issue in 2015 and the sales scripts described above were approved), or that its compliance program was not adequate for purpose, only serve to highlight the importance of deterrence. Any penalty imposed must be sufficient to ensure that it is not regarded by the Defendants or others as an acceptable cost of doing business.

263 Mr Howden's and the Corporate Defendants' lack of insight as to the seriousness of the contraventions reflects that specific deterrence also has a role to play in any penalty imposed.

264 I also note the nature and circumstances of the Consumer Contraventions found against the Corporate Defendants. Contraventions of unconscionability, coercion, undue harassment and making false or misleading representations, are, by their very nature objectively serious. The Consumer Contraventions found are particularly egregious examples of such conduct (the seriousness being self-evident from my findings in the Liability Judgment). Although each Consumer must be considered separately, as explained in the Liability Judgment, there are common features to the conduct. The Agents knew, or ought to have known, of the vulnerability of 11 of the Consumers, or at least that they were in a weaker bargaining position, and that the other three Consumers were in a weaker bargaining position: see [74] above. The conduct towards all of the Consumers, (particularly those 11 Consumers), took advantage of and exploited their vulnerabilities or weaknesses. Their interests were disregarded. I described some of the common features of the calls in the LJ at [337]:

> … The Agents ask leading questions in the calls designed to elicit affirmative responses. Policy amounts were put to the Consumers without any questions as to their need or appropriateness. The Agents gave no opportunity to the Consumers to ask questions or reflect on what was occurring. In a number of cases, the Consumer barely speaks, except to provide the details elicited (for example banking details for direct debit). In some cases where questions were asked they were not answered. The Sales Agents just continued or pushed forward through the call, to sign the Consumer up to

> a policy. There were no reasonable attempts made to ensure the Consumers understood what was occurring. Often, the Sales Agents used the approach of endorsing or reinforcing the appropriateness of what was occurring (that is the sale of the insurance to them) by referring to the Consumers' relatives, who they said had referred them for this policy. These features also were common in the retention calls, with the Retention Agents pushing ahead to achieve their agenda, regardless of what was being said by the Consumers.

265 Misrepresentations were made. High pressure tactics were applied. Sales tactics were used to overbear the free will of Consumers. Having made the sales, Retention Agents ignored the express wishes of the Consumers to cancel policies and acted so as to wear them down.

266 The assessment of loss or damage is in the context of Select's focus on the low to middle income market and the Defendants' awareness that some consumers may accordingly have certain vulnerabilities: see [133] above. In that context, the nature of the product may have the result that a lower monetary figure is involved (when compared with some other cases involving contraventions of the same provisions), but the relative impact on the consumer is necessarily higher (noting also that the impact of the conduct is not confined to financial loss). Again this highlights the importance of general and specific deterrence.

267 Further, general deterrence of similar conduct in similar businesses (namely, businesses marketing and distributing through call centres and businesses selling life insurance and related financial products) is important.

268 I also note that, accepting that each of the Corporate Defendants have committed contraventions, I am nonetheless mindful in imposing penalties of the relationship between the companies, as discussed above and in the Liability Judgment. Recalling also that it is Select who holds the AFSL.

269 I have taken into account the matters advanced in mitigation as referred to above, but given the factual bases of each of the contraventions, considered in the context of this statutory scheme, deterrence (and the protective element that brings) must be the dominant consideration.

270 Weighing all the relevant factors as explained above, bearing in mind the protective and deterrent purpose of a pecuniary penalty, as applied to the facts of this case, I am satisfied that the pecuniary penalties set out below are appropriate for each of the contraventions.

271 The declarations have significant utility as the circumstances of the contraventions call for marking of the Court's disapproval of the contravening conduct. I am satisfied that it is in the

interests of justice to make the declarations. I have taken this into account when considering the appropriate pecuniary penalties.

272 As explained above, I am not satisfied in the circumstances that an advertising order is appropriate. However, I make the probation, disqualification and restraining orders as explained above. I have also taken that relief into account when considering the appropriate pecuniary penalties.

Pecuniary penalty orders

Conflicted Remuneration Contraventions

273 As explained above, there are three courses of conduct. I impose the following penalties.

274 In relation to Select:

(a) Cruise Incentive and Vespa Incentive, $400,000.

(b) Las Vegas Incentive, $400,000.

(c) Hawaii Incentive, $400,000.

275 In relation to BlueInc Services:

(a) Cruise Incentive and Vespa Incentive, $300,000.

(b) Las Vegas Incentive, $300,000.

(c) Hawaii Incentive, $300,000.

276 That is a total of $1,200,000 for Select and $900,000 for BlueInc Services. Taking into account the principle of totality, in my view they are appropriate.

Consumer Contraventions

277 As explained above, the contraventions for each Consumer are treated as one course of conduct. As apparent from the penalties below, I consider that those sought by ASIC were generally too high, particularly given the common factual substratum resulting in multiple contraventions. Care must be taken to avoid double punishment. On the other hand, those said to be appropriate by the Corporate Defendants do not recognise the seriousness of the contraventions and the circumstances in which they were committed.

278 I also note that both parties approached the assessment on the basis of the individual Consumers, such that different penalties were suggested in relation to different Consumers.

The maximum penalties also vary, depending on the date of the contraventions, and the number of contraventions in the course of conduct.

279 The conduct is detailed in the Liability Judgment, and it is unnecessary to repeat.

280 In relation to Ms Marika, the contraventions relate to sales and retention conduct. The conduct generally is described in the LJ at [422]-[442] and [479]-[483], the five contraventions for false and/or misleading representations in the LJ at [454]-[470], the two contraventions for unconscionability in the LJ at [471] and [489]-[497], the contravention for coercion in the LJ at [472]-[478] and the contravention for undue harassment in the LJ at [484]-[488]. In relation to that conduct, for Select, I impose a penalty of $700,000, and for BlueInc Services $400,000.

281 In relation to Mr Mirrawana, the contraventions relate to sales conduct. The conduct generally is described in the LJ at [515]-[540], the four contraventions for false and/or misleading representations in the LJ at [543]-[553], the contravention for unconscionability in the LJ at [541], and the contravention for coercion in the LJ at [554]-[558]. In relation to that conduct, for Select, I impose a penalty of $500,000, and for BlueInc Services, $300,000.

282 In relation to Ms Yalumul, the contraventions relate to sales and retention conduct. The conduct is generally described in the LJ at [578]-[591] and [610]-[627], the two contraventions for false and/or misleading representations in the LJ at [592]-[596] and the two contraventions for unconscionability in the LJ at [597]-[604] and [628]-[635]. In relation to that conduct, for Select, I impose a penalty of $500,000, for BlueInc Services $175,000 and for IMS $300,000.

283 In relation to Mr Mtawale, the contraventions relate to sales conduct. The conduct generally is described in the LJ at [651]-[677], the two contraventions for false and/or misleading representations in the LJ at [678]-[697] and the contravention for unconscionability in the LJ at [698]-[706]. In relation to that conduct, for Select, I impose a penalty of $300,000, for BlueInc Services $150,000 and for IMS $150,000.

284 In relation to Mr Tapera, the contraventions relate to sales conduct. The conduct generally is described in the LJ at [725]-[739], the contravention for a false and/or misleading representation in the LJ at [744]-[745], the contravention for unconscionability in the LJ at [746]-[759] and the contravention for coercion in the LJ at [760]-[767]. In relation to that conduct, for Select, I impose a penalty of $350,000, for BlueInc Services, $175,000 and for IMS, $175,000.

285 In relation to Ms Yeatman, the contraventions relate to sales and retention conduct. The sales conduct generally is described in the LJ at [778]-[789], the two contraventions for false and/or misleading representations in the LJ at [793]-[798], the contravention for unconscionability at [799]-[809] and the contravention for undue harassment at [816]-[827]. In relation to that conduct, for Select, I impose a penalty of $450,000, for BlueInc services $175,000 and for IMS $275,000.

286 In relation to Ms Shadforth, the contraventions relate to sales and retention conduct. The conduct generally is described in the LJ at [844]-[865], the three contraventions for false and/or misleading representations in the LJ at [866]-[870], the two contraventions for unconscionability in the LJ at [881]-[895] and [911]-[916], and the contravention for undue harassment in the LJ at [903]-[910]. In relation to that conduct, for Select, I impose a penalty of $550,000, for BlueInc services $300,000 and for IMS $250,000.

287 In relation to Ms Gaykamangu, the contraventions relate to sales conduct. The conduct generally is described in the LJ at [929]-[938], the two contraventions for false and/or misleading representations in the LJ at [943]-[947], the contravention for unconscionability in the LJ at [948] and the contravention for coercion in the LJ at [949]-[955]. In relation to that conduct, for Select, I impose a penalty of $400,000, and for BlueInc Services, $250,000.

288 In relation to Ms Campbell, the contravention relates to sales conduct. The conduct generally is described in the LJ at [968]-[971] and the contravention for unconscionability in the LJ at [972]-[979]. In relation to that conduct, for Select, I impose a penalty of $300,000, and for BlueInc Services, $175,000.

289 In relation to Mr Nundhirribala, the contraventions relate to sales conduct. The conduct generally is described in the LJ at [995]-[998], the two contraventions for false and/or misleading representations in the LJ at [1005]-[1008] and the contravention for unconscionability in the LJ at [1009]-[1014]. In relation to that conduct, for Select, I impose a penalty of $350,000, and for BlueInc Services $200,000.

290 In relation to Mr Hussain, the contraventions relate to sales and retention conduct. The conduct generally is described in the LJ at [1034]-[1043] and [1068]-[1071], the three contraventions for false and/or misleading representations in the LJ at [1048]-[1053] and [1072]-[1076] and the two contraventions for unconscionability in the LJ at [1054]-[1067] and [1078]-[1087]. In

relation to that conduct, for Select, I impose a penalty of $600,000, and for BlueInc Services, $350,000.

291 In relation to Mr Lewis, the contraventions relate to both sales and retention conduct. The conduct generally is described in the LJ at [1100]-[1106] and [1137]-[1142], the two contraventions for unconscionability in the LJ at [1121]-[1130] and [1146]-[1156] and the contravention for undue harassment in the LJ at [1143]-[1145]. In relation to that conduct, for Select, I impose a penalty of $500,000, for BlueInc services $250,000 and for IMS, $250,000.

292 In relation to Ms Mirniyowan, the contraventions relate to both sales and retention conduct. The conduct generally is described in the LJ at [1176]-[1185] and [1212]-[1223], the three contraventions for false and/or misleading representations in the LJ at [1189]-[1200], the two contraventions for unconscionability in the LJ at [1201] and [1231]-[1235] and the contravention for undue harassment in the LJ at [1224]-[1230]. In relation to that conduct, for Select, I impose a penalty of $650,000, and for BlueInc Services, $400,000.

293 In relation to Mr Shrestha, the contraventions relate to sales conduct. The conduct generally is described in the LJ at [1246]-[1263], the contravention for a false and/or misleading representation in the LJ at [1264]-[1267] and the contravention for unconscionability in the LJ at [1268]-[1272]. In relation to that conduct, for Select, I impose a penalty of $350,000, and for IMS $200,000.

294 In relation to the Consumer Contraventions, this amounts to a total of $6,500,000 for Select, $3,500,000 for BlueInc Group and $1,400,000 for IMS. Taking into account the principle of totality, in my view they are appropriate.

Directors' Duty Contraventions

295 In relation to Mr Howden, as explained above, I disqualify him managing corporations for a period of five years. Taking that into account, for the contraventions of s 180(1) (LJ at [1370]-[1398]), I impose a pecuniary penalty of $100,000.

Costs

Submissions

296 ASIC seeks its costs of the proceeding. It submitted that there is no reason to depart from the usual order as to costs, with the Defendants being jointly and severally liable.

297 The Defendants submitted that the Court's power to award costs under s 43 of the *Federal Court of Australia Act 1976* (Cth) is broad and unfettered, recognising that it is to be exercised judicially and in accordance with well-established principles. They submitted that ASIC's costs should be apportioned between the Defendants in this case, citing as an example, *Australian Securities and Investments Commission v Vocation Limited (In Liquidation) (No 2)* [2019] FCA 1783; (2019) 140 ACSR 382 (*Vocation*) at [89]-[90]. They also submitted that apportioning costs between unsuccessful parties is not a precise science, but rather Courts do the best they can as a matter of impression.

298 In particular, Mr Howden submitted that the contraventions against him were more limited. In relation to the Conflicted Remuneration Contraventions and the contravention of 912A(1)(a) (pertaining to the Refer a Friend program) Mr Howden's liability was said to be dependent on ASIC establishing the primary contravention against Select and/or BlueInc Services. It was submitted that once that contravention was established, there was little further evidence or submissions relied on to establish Mr Howden's liability. As such, it was submitted that he should not be liable for the costs of ASIC establishing the primary contravention. In relation to his contraventions of s 180, it was submitted that Mr Howden's liability was dependent on ASIC establishing that the Incentives constituted conflicted remuneration and that little further evidence or submissions were relied on to establish Mr Howden's liability. Mr Howden submitted that there was no allegation against him in relation to the Consumer Contraventions, which was the most time consuming part of the proceedings. It was therefore submitted that it would be seriously unjust for Mr Howden to be liable for these costs.

299 Mr Howden also submitted that the limited nature of his contraventions is reflected in the differences in penalties sought by ASIC. It was submitted that five percent of the overall proceeding can be attributed to him, and that he should be liable for five percent of ASIC's costs of the proceeding as assessed or agreed.

300 As between the Corporate Defendants, it was submitted that it is appropriate that Select, the AFSL holder, bears the largest costs liability. Having regard to the contraventions established against it, the way the case against it was conducted, and the penalties sought, it was submitted that 50 percent of the overall proceeding can be attributed to Select, and that it should be liable for 50 percent of ASIC's costs of the proceeding as agreed or assessed. Having regard to the same factors, it was submitted that: 25 percent of the overall proceeding can be attributed to BlueInc Services and it should be liable for 25 percent of ASIC's costs of the proceeding as

agreed or assessed; and 20 percent of the overall proceeding can be attributed to IMS and it should be liable for 20 percent of ASIC's costs of the proceeding as agreed or assessed.

301 The Defendants also submitted that ASIC has estimated its recoverable litigation costs to the end of the relief hearing as being in the approximate range of $2.3 million to $3.1 million.

302 ASIC took issue with the Defendants' approach. It submitted that the Defendants face a high bar in seeking to persuade the Court to depart from the usual order as to costs with joint and several liability, as "special circumstances" must be established to do so: citing *Royal v El Ali (No 3)* [2016] FCA 1573 (*Royal*) at [53]-[55]. ASIC submitted that the Defendants have not discharged that onus.

303 *First*, ASIC submitted that, save for a handful of Consumer Contraventions, ASIC made out its case on all claims against all of the Defendants. The Defendants' reliance on *Vocation* was accordingly said to be misplaced.

304 *Second*, ASIC submitted that there is sufficient commonality between each of the Defendants, including a significant commonality of evidence, issues and in the substratum of facts in relation to the impugned conduct, to exclude departure from the general rule: citing *Rushcutters Bay Smash Repairs Pty Ltd v H McKenna Netmakers Pty Ltd* [2003] NSWSC 670 at [17]; *Royal* at [53]-[55]. It was submitted that: each Corporate Defendant was involved in the Consumer Contraventions; the use of the Refer a Friend program and the Incentives fed into those contraventions; and Mr Howden was involved in the Refer a Friend program and the Incentives. Further, the Incentives and the Refer a Friend program were said to be integers in some of the unconscionable conduct claims and Mr Howden was found to be liable by the Court in relation to those matters. Accordingly, it was submitted that it would be artificial to attempt to split out such aspects.

305 *Third*, ASIC submitted that there were no circumstances of the Defendants conducting separate and distinct defences where the costs incurred could not be attributed to the joint conduct of the Defendants in the defence of the action: citing *Thiess Watkins White Construction Ltd (in liq) v Witan Nominees (1985) Pty Ltd* [1992] 2 Qd R 452 at 454. The Corporate Defendants and Mr Howden were said to have elected to defend the proceeding, with each Defendant putting ASIC to proof in respect of the claims against them.

306 *Fourth*, ASIC submitted that the Defendants' contention that Mr Howden should not bear the costs of the process of ASIC establishing the primary allegations against the Corporate

Defendants fails to acknowledge: the general principle that where there is a common factual and legal underpinning of a case against multiple defendants, they should be jointly and severally liable for those costs; the reality that ASIC could have chosen to run the case against Mr Howden alone, and would have had the same task of proving Select and BlueInc Services' liability even in their absence as defendants to the proceeding; ASIC was required to establish the matters against Mr Howden personally in any event because it could not use the Corporate Defendants' admissions against him personally (because he elected to maintain his privilege against self-exposure to penalty, and because the case against him for a breach of s 180 was not reliant on findings that the Corporate Defendants had engaged in conflicted remuneration and did not depend on findings of corporate liability); Mr Howden elected not to make any admissions, with the consequence of exposure to an adverse costs order; and Mr Howden's control over the Corporate Defendants and the conduct of the case against them was unequivocal.

307 ASIC also submitted that it was relevant that Mr Howden was the sole controlling mind of the three Corporate Defendants, and determined how the Defendants would respond to the proceeding. Further, ASIC submitted that in so far as the interests of justice are to be weighed in determining whether to apportion costs, the Court should take into account that Mr Howden has recently taken steps to disable at least one of the Corporate Defendants from honouring a costs order (referring to the $6 million trailing commission discussed above at [114]-[118]).

Consideration

308 As a starting point, costs are compensatory to a successful party, and the ordinary rule is that there is joint and several liability of all defendants for a costs liability. That purpose is in contrast to the deterrent purpose of a penalty.

309 There is an artificiality in the Defendants' submissions on the topic of costs. As ASIC correctly submitted, it needed to establish the primary conduct to establish Mr Howden's accessorial liability. To approach the assessment on any other basis does not reflect the reality of the conduct of the proceedings. I note also in this context that ASIC could not use the Corporate Defendants' admissions against Mr Howden, and as he chose to maintain his privilege against self-exposure to penalty. Moreover, although it was not alleged that Mr Howden was involved in the Consumer Contraventions, matters such as the Refer a Friend program, which was the basis of his contravention of s 912A(1)(a), were also an integer of some of them. There is a common substratum of facts. Further, as ASIC correctly submitted, the difference in the

penalties sought must be seen in the context where different maximum penalties were faced by the Corporate Defendants and Mr Howden, and a disqualification order was also sought against Mr Howden. The suggestion that Mr Howden was only involved in 5 percent of the proceedings is entirely unrealistic.

310 There is also a commonality in the proceedings as Mr Howden was the sole controlling mind of the Corporate Defendants. He accepted in cross-examination that he gave instructions as to how the Corporate Defendants would conduct the proceedings. That, in itself, might be considered sufficient commonality to exclude departure from the general rule. The Corporate Defendants took a common approach to the conduct of this proceeding, which generally involved putting ASIC to proof.

311 The Defendants' reliance on *Vocation*, does not assist. It does no more than provide an example of a case where an order was made apportioning costs between the defendants. There, three individuals faced contraventions, and the case against one was more extensive and more successful than in relation to the other two, such that the Court concluded that one should be required to pay a greater proportion of ASIC's costs. That is very different to the case here. Every case is fact specific.

312 The Defendants have not established that in this case, there is good reason to depart from the usual order as to costs.

I certify that the preceding three hundred and twelve (312) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham.

Associate: 

Dated: 4 July 2023

SCHEDULE OF PARTIES

NSD 1447 of 2019

Defendants

Fourth Defendant: RUSSELL HUGH HOWDEN