FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Macrolend Pty Ltd (No 3) [2025] FCA 1158

File number:	QUD 75 of 2024
Judgment of:	**SARAH C DERRINGTON J**
Date of judgment:	19 September 2025
Catchwords:	**CORPORATIONS** – debenture – whether certain loan and promissory note arrangements were "financial products" by reason of being debentures within the meaning of s 9 of the ***Corporations Act*** *2001* (Cth) **CORPORATIONS** – alleged contraventions of ss 911A(1) and 911A(5B) of the *Corporations Act* – whether first defendant company and third defendant company carried on a financial services business in this jurisdiction without an Australian Financial Services Licence (**AFSL**) – whether sole director of companies carried on a financial services business in this jurisdiction without an AFSL and/or was involved in the companies' contraventions – where contraventions admitted – whether declaratory relief should be granted **CORPORATIONS** – alleged contravention of s 601CD of the *Corporations Act* – whether third defendant company carried on business in this jurisdiction without being registered to do so under Part 5B.2 of the *Corporations Act* – where contravention admitted – whether declaratory relief should be granted **CONSUMER LAW** – misleading or deceptive conduct – whether first defendant company and sole director engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the *Corporations Act* and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) – where company and sole director prepared and caused to be issued to prospective investors: information memoranda which conveyed a representation that subsidiary company's intangible assets, as recorded on its balance sheet as at 30 June 2018, were valued at $1,027,140,000; information memoranda which conveyed representations that substantially all of the funds invested would be used to grow subsidiary company; information memoranda or other

documents which conveyed representations that company expected to achieve a public listing in respect of the software product on the London and/or NASDAQ Stock Exchanges in 2021 or 2022 and intended there would be a public listing in respect of the software product in 2022 – where company and sole director did not have reasonable grounds for making the representations – where admission of misleading or deceptive conduct – whether declaratory relief should be granted and in what terms

CORPORATIONS – banning order under ss 1101B and 1324 of the *Corporations Act* – whether defendants should be restrained from carrying on a financial services business in this jurisdiction without holding an AFSL, except as permitted by the *Corporations Act* – where defendants accepted that banning orders should be made

DIRECTORS – disqualification order under s 206E of the *Corporations Act* – whether, in addition to being restrained from carrying on a financial services business in Australia without an AFSL, sole director of companies should be disqualified from managing corporations – where disqualification order appropriate – consideration of appropriate period of disqualification

Legislation:

Australian Securities and Investments Commission Act 2001 (Cth) ss 12BAA, 12BAB, 12BB, 12DA, 19, 79

Corporations Act 2001 (Cth) ss 9, 21, 206E, 206G, 286(1), 601CD, 761A, 761C, 761E, 762C, 763A, 763B, 764A, 765A, 766A, 766C, 769C, 911A(1), 911A(5B), 911D, 1041H, 1101B, 1305, 1317E, 1324

Corporations Amendment (Litigation Funding) Regulations 2022 (Cth)

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth)

Cases cited:

ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65; 224 FCR 1

ANZ Executors and Trustees Ltd v Humes Ltd [1990] VR 615

Australian Competition and Consumer Commission v Danoz Direct Pty Ltd [2003] FCA 881; 60 IPR 296

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited [2023] FCA 256

Australian Securities and Investments Commission v Blue Star Helium Ltd (No 4) [2021] FCA 1578; 158 ACSR 196

Australian Securities and Investments Commission v CFS Private Wealth Pty Ltd (No 2) [2019] FCA 24

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd [2019] FCA 1932; 140 ACSR 561

Australian Securities and Investments Commission v Getswift Ltd (Penalty Hearing) [2023] FCA 100; 167 ACSR 178

Australian Securities and Investments Commission v Godfrey [2017] FCA 1569; 123 ACSR 478

Australian Securities and Investments Commission v Macrolend Pty Ltd [2024] FCA 1028

Australian Securities and Investments Commission v One Tech Media Ltd [2020] FCA 46; 275 FCR 1

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

Australian Securities and Investments Commission v Ostrava Equities Pty Ltd [2016] FCA 1064

Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2) [2020] FCA 1463; 148 ACSR 154

Australian Securities and Investments Commission v Stone Assets Management Pty Ltd [2012] FCA 630; 205 FCR 120

Baumer v The Queen [1988] HCA 67; 166 CLR 51

Chan v Cresdon Pty Ltd [1989] HCA 63; 168 CLR 242

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

Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 3) [2018] FCA 1395

Cruickshank v Australian Securities and Investments Commission [2022] FCAFC 128; 292 FCR 627

Forge v Australian Securities and Investments Commission [2004] NSWCA 448; 52 ACSR 1

GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd [2003] FCA 50; 128 FCR 1

Jones v Dunkel [1959] HCA 8; 101 CLR 298

Mawhinney v Australian Securities and Investments Commission [2022] FCAFC 159; 294 FCR 375

Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd (2004) ATPR 41-993

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

Productivity Partners Pty Ltd (trading as Captain Cook College) v Australian Competition and Consumer Commission [2023] FCAFC 54; 297 FCR 180

	Re Chemeq Ltd; Australian Securities and Investments Commission v Chemeq Ltd [2006] FCA 936; 234 ALR 511 *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 *Re Scott* [2012] NSWSC 1643 *Rich v Australian Securities and Investments Commission* [2004] HCA 42; 220 CLR 129 *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Number of paragraphs:	176
Date of hearing:	14-16 July 2025
Counsel for the Plaintiff:	Mr M Brady KC and Mr L Clark
Solicitor for the Plaintiff:	Clayton Utz
Counsel for the Defendants:	Mr S Webster KC, Mr P Donovan and Mr T Ellis
Solicitor for the Defendants:	JF Legal

ORDERS

QUD 75 of 2024

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**MACROLEND PTY LTD (ACN 122 386 109)** First Defendant
	DAVID HODGSON Second Defendant
	GREAT SOUTHLAND LTD Third Defendant

ORDER MADE BY: **SARAH C DERRINGTON J**

DATE OF ORDER: **19 SEPTEMBER 2025**

THE COURT DECLARES THAT:

1. In respect of the First Defendant's (**Macrolend**) conduct in raising funds from investors for the purpose of an investment in a software product called "Kradle" (**Kradle Investment Arrangement**) during the period July 2018 to 31 May 2023:

   (a) investments made for the purpose of the Kradle Investment Arrangement were made pursuant to a "facility" within the meaning of s 763A(1)(a) of the ***Corporations Act** 2001* (Cth) such that the facility was a financial product;

   (b) the Kradle Investment Arrangement provided for investors to obtain a legal or equitable right or interest in a share, and therefore in a "security" within the meaning of s 761A of the *Corporations Act* (then in force), and accordingly a financial product for the purpose of s 764A(1)(a) of the *Corporations Act*;

   (c) Macrolend dealt in the financial products identified in subparagraphs (a) and (b) above by issuing those financial products and thereby carried on a financial services business in this jurisdiction without an Australian Financial Services Licence (**AFSL**) in contravention of s 911A(1) of the *Corporations Act* during the period July 2018 to 31 May 2023 and in contravention of s 911A(5B) of the *Corporations Act* during the period 13 March 2019 to 31 May 2023.

2. In respect of Macrolend's conduct in raising funds from investors pursuant to instruments described as "loan agreements" and "promissory notes" (**Macrolend Loan and Promissory Note Arrangement**) during the period 5 January 2015 to 25 January 2022:

   (a) each of the instruments entered into by investors for the purpose of the Macrolend Loan and Promissory Note Arrangement was a "debenture" within the meaning of s 9 of the *Corporations Act* and accordingly a "security" within the meaning of s 761A of the *Corporations Act* (then in force) and a financial product within the meaning of s 764A(1)(a) of the *Corporations Act*;

   (b) Macrolend carried on a financial services business in this jurisdiction without an AFSL in contravention of s 911A(1) of the *Corporations Act* during the period 5 January 2015 to 25 January 2022 and in contravention of s 911A(5B) of the *Corporations Act* during the period 13 March 2019 to 25 January 2022.

3. The Second Defendant (**Mr Hodgson**):

   (a) during the period 5 January 2015 to 9 August 2023 contravened s 911A(1) of the *Corporations Act* and during the period 13 March 2019 to 9 August 2023 contravened s 911A(5B) of the *Corporations Act* by carrying on a financial services business in this jurisdiction without an AFSL;

   (b) on and from 13 March 2019 to 9 August 2023, contravened s 911A(1) and s 911A(5B) of the *Corporations Act* because he was involved in Macrolend's contraventions of s 911A(1) and s 911A(5B) of the *Corporations Act*, within the meaning of s 1317E(4)(b) of the *Corporations Act*;

   (c) on and from 13 March 2019 to 9 August 2023, contravened s 911A(1) and s 911A(5B) of the *Corporations Act* because he was involved in the Third Defendant, Great Southland Ltd's (**GSL**) contraventions of s 911A(1) and s 911A(5B) of the *Corporations Act* as set out in paragraph 4(d) below, within the meaning of s 1317E(4)(b) of the *Corporations Act*.

4. In respect of GSL's conduct in raising funds from investors pursuant to instruments described as promissory notes (**GSL Promissory Note Arrangement**) during the period 15 January 2015 to 9 August 2023:

(a) GSL contravened s 601CD of the *Corporations Act* by carrying on business in this jurisdiction without being registered to do so under Part 5B.2 of the *Corporations Act*;

(b) each of the instruments entered into by investors for the purpose of the GSL Promissory Note Arrangement was a "debenture" within the meaning of s 9 of the *Corporations Act* and accordingly a "security" within the meaning of s 761A of the *Corporations Act* (then in force) and a financial product within the meaning of s 764A(1)(a) of the *Corporations Act*;

(c) GSL carried on a financial services business in this jurisdiction without an AFSL in contravention of s 911A(1) of the *Corporations Act* during the period 15 January 2015 to 9 August 2023 and in contravention of s 911A(5B) of the *Corporations Act* during the period 13 March 2019 to 9 August 2023.

5. Between 13 February 2019 and 11 December 2020, Macrolend and Mr Hodgson engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the *Corporations Act* and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) in that:

(a) they prepared and caused to be issued to prospective investors in the Kradle Investment Arrangement, information memoranda (**IMs**) which conveyed a representation that **Kradle** Software Pty Ltd's intangible assets, as recorded on its balance sheet as at 30 June 2018, were valued at $1,027,140,000,

when in fact:

(b) Kradle did not hold intangible assets in that amount; and

(c) Kradle's balance sheet as at 30 June 2018, prepared by Kradle's chartered accountants, recorded intangible assets of $11,810.

6. Between 5 July 2018 and 15 November 2021, Macrolend and Mr Hodgson engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* in that:

(a) they prepared and caused to be issued to prospective investors in the Kradle Investment Arrangement, IMs which conveyed representations that:

(i) Macrolend would use substantially all of the funds obtained from investors to "grow Kradle";

(ii) from the proceeds raised from investors, up to AU$50 million would be loaned to Kradle at an interest rate of 4% per annum;

in circumstances where:

(b) at the time the representations were made, the true position was that the funds obtained from investors would be used by Macrolend for various purposes such that:

(i) not all, or substantially all, of the funds would be used to grow Kradle;

(ii) not all, or substantially all, of the funds would be loaned to Kradle on the terms identified in the IMs; and

(c) Macrolend and Mr Hodgson did not have reasonable grounds for making the representations.

7. Between about 13 February 2019 and 15 November 2021, Macrolend and Mr Hodgson engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* in that:

(a) they prepared and caused to be issued to prospective investors in the Kradle Investment Arrangement IMs which contained statements that:

(i) "*In order to fund the next stage of the growth of Kradle Software Pty Ltd, Macrolend Pty Ltd as trustee for the Macrolend Trust (Vendor) is selling some of its shares in the Company. From the proceeds of the sale of these shares the Vendor has agreed to make a secured loan of up to $50 million to Kradle Software Pty Ltd for a term of [3 or 4] years at an interest rate of 4% pa*";

(ii) "*In order to fund the next stage of the growth of Kradle Software Pty Ltd, Macrolend Pty Ltd as trustee for the Macrolend Trust (Vendor) is selling some of its shares in the Company via convertible notes. From the proceeds of the sale of these shares the Vendor has agreed to make a secured loan of up to $50 million to Kradle Software Pty Ltd for a term of 4 years at an interest rate of 7% pa*";

(iii) "*In order to fund the next stage of the growth of Kradle Software Pty Ltd, Macrolend Pty Ltd as trustee for the Macrolend Trust (Vendor) is selling some of its shares in the Company via convertible notes. It is the prerogative of the Vendor what it does with the proceeds of the sale of*

shares which it owns. From the proceeds of the sale of these shares, the Vendor will retire debt and will make a secured loan of up to $50 million to Kradle Software Pty Ltd for a term of 5 years at an interest rate of 7% pa for Kradle Software to use as working capital",

in circumstances where:

(b) at the time the representations were made, the true position was that the funds obtained from investors would be used by Macrolend for various purposes, such that not all, or substantially all, of the funds would be loaned to Kradle on the terms identified in the IMs;

(c) at the time the representations in subparagraphs 7(a)(i) and 7(a)(ii) above were made, there was no loan agreement between Macrolend and Kradle for a secured loan on the terms identified in those subparagraphs; and

(d) Macrolend and Mr Hodgson did not have reasonable grounds for making the representations.

8. Between about 13 February 2019 and 15 November 2021, Macrolend and Mr Hodgson engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* in that:

(a) they prepared and caused to be issued to prospective investors in the Kradle Investment Arrangement, IMs or other documents which conveyed representations that:

(i) Corearth Holdings Pty Ltd expected to achieve a public listing in respect of the Kradle software product on the London and/or NASDAQ Stock Exchanges in 2021 or 2022;

(ii) Kradle intended that there would be a public listing in respect of the Kradle software product in 2022,

in circumstances where:

(b) Macrolend and Mr Hodgson did not have reasonable grounds for making the representations.

THE COURT ORDERS THAT:

9. Pursuant to ss 1101B and 1324 of the *Corporations Act*, Macrolend:

(a) be restrained from carrying on a financial services business in this jurisdiction without holding an AFSL, except as permitted by the *Corporations Act*;

(b) post a notice, in a form to be approved by the Court, of these orders on the website www.paladincorp.com.au for a period of 90 days from the date of these orders.

10. Pursuant to ss 1101B and 1324 of the *Corporations Act*, Mr Hodgson be restrained from carrying on a financial services business in this jurisdiction without holding an AFSL, except as permitted by the *Corporations Act*.

11. Pursuant to s 206E of the *Corporations Act*, Mr Hodgson be disqualified from managing corporations for a period of 5 years from the date of these orders.

12. Pursuant to ss 1101B and 1324 of the *Corporations Act*, GSL:

(a) be restrained from carrying on business in this jurisdiction unless registered pursuant to Division 2 of Part 5B.2 of the *Corporations Act*;

(b) be restrained from carrying on a financial services business in this jurisdiction without holding an AFSL, except as permitted by the *Corporations Act*.

13. Macrolend, Mr Hodgson and GSL pay the Plaintiff's costs of this proceeding on a party-and-party basis, to be taxed in default of agreement.

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

REASONS FOR JUDGMENT

SARAH C DERRINGTON J:

INTRODUCTION

1 On 14 February 2024, after four years of investigations, the Australian Securities and Investments Commission (**ASIC**) commenced this proceeding against **Macrolend** Pty Ltd, Mr David **Hodgson** and Great Southland Ltd (**GSL**) (the first, second and third defendants, respectively). Mr Hodgson is the sole director and shareholder of Macrolend and the sole director of GSL. He and his wife, Mrs Merlene Hodgson, are each 50% shareholders of GSL.

2 In reliance on the matters pleaded in its Statement of Claim filed on 28 March 2024, ASIC seeks declarations of contravention, injunctive relief, a disqualification order and publication orders in respect of three arrangements pursuant to which funds totalling about $109 million were raised from investors – the **Macrolend Loan and Promissory Note Arrangement**, the **Kradle Investment Arrangement**, and the **GSL Promissory Note Arrangement**. The relief sought by ASIC is directed at two broad categories of conduct – that described as the ***financial services contraventions***, and that described as ***misleading or deceptive conduct***.

3 As to the *financial services contraventions*, the defendants did not obtain an Australian Financial Services Licence (**AFSL**) for the purpose of the three arrangements, as required by the ***Corporations Act*** *2001* (Cth), nor did GSL, a company registered in Belize but carrying on business in Australia, register as a corporation pursuant to the *Corporations Act*. The *misleading or deceptive conduct* comprised three representations made in the context of the Kradle Investment Arrangement. These were: a representation that as at 30 June 2018 **Kradle** Software Pty Ltd held intangible assets of $1,027,140,000 (the **balance sheet representation**); representations that the funds invested in Macrolend would be used by Macrolend to grow Kradle by selling some of its shares in Kradle, the proceeds of which would be used to make a secured loan of up to $50 million to Kradle (the **use of funds representations**); and representations that **Corearth Holdings** Pty Ltd (the sole shareholder in Kradle) expected to achieve a public listing in respect of the Kradle software product on either the London Stock Exchange or the NASDAQ Stock Exchange in 2021 or 2022, and that Kradle intended there would be a public listing in respect of the Kradle software product in 2022 (the **IPO representations**).

4 By the time of trial, the defendants had admitted to all of the *financial services contraventions* and to two of the incidents of *misleading or deceptive conduct* – the use of funds representations and the IPO representations. The defendants had also conceded that Macrolend and Mr Hodgson should be restrained from carrying on a financial services business in Australia without holding an AFSL, except as permitted by the *Corporations Act*, and that certain notices should be published. GSL also accepted that it should be restrained from carrying on business in Australia unless registered pursuant to Div 2 of Part 5B.2 of the *Corporations Act* and be restrained from carrying on a financial services business in Australia without holding an AFSL, except as permitted by the *Corporations Act*.

5 What remained in contention at trial was twofold:

1. whether, in respect of the balance sheet representation, the Court should make an additional finding and so declare as a matter of fact that as at 30 June 2018, Kradle did not hold intangible assets of $1,027,140,000; and

2. whether, in addition to restraining Mr Hodgson from carrying on a financial services business in Australia without an AFSL, to which he has already agreed (a **banning order**), the Court should also disqualify Mr Hodgson from managing corporations pursuant to s 206E of the *Corporations Act*, either permanently (as ASIC contends) or for some lesser period.

6 Unsurprisingly, Mr Hodgson vehemently resists disqualification in addition to a banning order.

7 Even though the defendants have admitted to all of the financial services contraventions and all but one incident of misleading or deceptive conduct, it is nevertheless necessary to interrogate the conduct the subject of those admissions. That is for three reasons.

8 *First*, as has been observed on several occasions, the fact the parties have agreed that a declaration of contravention should be made does not relieve the Court of the obligation to satisfy itself that the making of the declaration is appropriate: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (***Agreed Penalties Case***) at [48] and [59]; ***NW Frozen Foods*** *Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285 at 290-291; *Minister for Industry, Tourism & Resources v* ***Mobil Oil*** *Australia Pty Ltd* (2004) ATPR 41-993 at 48,632 [78]. It is not the role of the Court to simply "rubber stamp" orders agreed between a regulator and a person who has admitted a statutory contravention: *Agreed Penalties Case* at [31], [48] and [58]; *Mobil Oil* at

48,630 [70]; *Re* ***Chemeq*** *Ltd; Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; 234 ALR 511 at [100]; *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 3)* [2018] FCA 1395 at [74]; *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2023] FCA 256 (***ASIC v ANZ***) at [50].

9 As O'Bryan J went on to explain in *ASIC v ANZ* at [51]:

> The making of declarations should have some utility: see *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (*Rural Press*) at [95] (Gummow, Hayne and Heydon JJ). However, this does not necessarily require a litigant to seek consequential relief in connection with the subject matter of the declaration: see, e.g. *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* (2012) 213 FCR 380 at [271] (Perram J); *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55 (*AMP Financial Planning*) at [143] (Lee J). In the context of proceedings brought by a regulatory body, declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate a regulator's claim that the respondent contravened the provisions, assist a regulator to carry out its duties, and deter other persons from contravening the provisions: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; ATPR 42-140 at [6] (Nicholson J), and the cases there cited.

10 *Secondly*, in this case, the parties are not *ad idem* as to the appropriate wording of a declaration directed at the conduct constituted by the balance sheet representation. The scope of any such declaration will depend on whether I make a positive finding that as at 30 June 2018, Kradle did not have intangible assets in the amount of $1,027,140,000, as ASIC submits I should.

11 *Thirdly*, in determining whether Mr Hodgson should be disqualified for any period, it is necessary to understand the nature and scope of the conduct he has admitted to, in addition to the matter that remains in dispute.

BACKGROUND

12 Mr Hodgson has had an extensive business career. Since moving to Australia from Zimbabwe (via Japan and Southeast Asia) in 1985, he has built a number of businesses across different industries. He gave evidence that, in about 2002, he moved to the Sunshine Coast and joined the business Aussie Home Loans as a mortgage broker. About a year later, he left that business to commence his own mortgage broking business. He deposed that around this time he developed economic principles whereby "people, profit and planet are treated equally", with the goal of creating wealth without creating poverty or damaging the environment, principles he described as "wholistic capitalism". Mr Hodgson deposed that he has lectured on this topic

around the world over the past 20 years through a platform called "Kingdom Initiatives" and has been recognised for his work in this regard by the award of an Honorary Doctorate of Humane Letters from Vision International University in California.

13 In 2004, Mr Hodgson began to build the **Paladin Group**. He said his intention was to build a corporate group that operates according to the principles of wholistic capitalism. Mr Hodgson deposed that **Paladin Corporation** Pty Ltd was incorporated in 2007 to act "as a central body to manage and provide corporate administration and governance services to certain entities within the Paladin Group".

14 Mr Hodgson deposed to, in the early stages of building the Paladin Group, forming unit trusts to begin commercial property development. He said that after about eight months of doing so, he was given advice by a colleague who had a relationship with Diversified Funds Management Ltd (**DFML**) that they were getting close to the "20/12/2 rule" limit and would therefore need an AFSL. On the advice of DFML, Paladin Property Fund (**PPF**) was formed and Mr Hodgson became the Corporate Authorised Representative for PPF under DFML's AFSL. Subsequently, Paladin Acquisition Fund (**PAF**) was formed to focus on business acquisitions, rather than property development, and it too operated under DFML's AFSL.

15 Mr Hodgson deposed to advice he received from DFML in 2007 that he did not need an AFSL for the business he proposed to undertake, a matter to which I will return. Consequent upon that advice, Mr Hodgson said he ceased issuing shares in PPF and PAF and formed Macrolend for two purposes: to run the mortgage broking business; and to be a commercial lender.

16 Mr Hodgson deposed that Macrolend's business model was to borrow money from lenders and use that money to grow its own business. He explained that Macrolend made loans to third parties, who would be unable to borrow from commercial banks, and to entities within the Paladin Group. Loans were advanced at a rate in excess of Macrolend's cost of capital, which historically was between 12% and 19%. The lender was a creditor of Macrolend and not an investor. Like any lender, Macrolend made its profit on the difference between the rate at which it would lend and its cost of capital.

17 GSL was incorporated in 2014 and is registered as an international company in Belize. In the same way as Macrolend, it operated as a commercial lender and borrowed money to lend to other entities within the Paladin Group. Mr Hodgson said that, unlike Macrolend, GSL could service the needs of offshore lenders who preferred not to lend directly in the Australian market.

18 Mr Hodgson deposed to a subgroup of companies within the Paladin Group known as "**The Corearth Group**", which comprises Corearth Holdings, Corearth Australia Pty Ltd, Interactive Communications Solutions Pty Ltd (trading as Corearth Technologies), Corearth Construction Pty Ltd, Kradle, Kradle Software Inc (registered in the United States of America), and Kradle Software Limited (registered in the United Kingdom). Mr Hodgson said that The Corearth Group originally provided software to the telecommunications sector to monitor electromagnetic emissions from mobile phone towers but, by 2015, diversified into other software, specifically the **Kradle software product**, a software product designed to allow users to manage business data and conduct video conferencing. Mr Michael **Haddon** was a co-director of Kradle, together with Mr Hodgson.

THE MACROLEND LOAN AND PROMISSORY NOTE ARRANGEMENT

19 From about 5 January 2015 to 25 January 2022, a period of seven years, Macrolend raised $17,218,894.14 from 85 investors, of whom 17 redeemed their investments. The funds were raised following the issuance of **Disclosure Documents** to potential investors described as "Low Doc Finance Applications". In exchange for monies paid, Macrolend either entered into instruments with the investors described as "loan agreements" or issued investors with instruments described as "promissory notes", pursuant to which Macrolend undertook to repay the monies invested with interest thereon.

The Disclosure Documents

20 The Disclosure Documents were styled as follows: "Low Doc Finance Application ... by Macrolend Pty Ltd IBC 142996 To provide information to support Macrolend Pty Ltd's applications for finance from Institutional Lenders and Private Wholesale Lenders." On the foot of the first cover page, each of these documents provided: "Macrolend Pty Ltd Commercial Low Doc Loan and Promissory Note Finance Application – Page 1." Both documents were in materially the same terms except for the rates of interest.

21 As to the loan arrangement, page 3 of the Disclosure Documents provided relevantly:

> **IMPORTANT INFORMATION**
>
> This document is the Finance Application dated 5th January 2019 produced for Institutional Financiers and Private Wholesale Lenders (**Lender, Creditor, Financier**) to lend funds to MacroLend Pty Ltd (**MacroLend, the Company, the Borrower**) under Commercial Low Doc Loan Agreements (**LA**) or Promissory Notes (**PN**).
>
> MacroLend Pty Ltd is a subsidiary of the Paladin Group of Companies and it was incorporated to generate income via the provision of specialist finance to commercial

and business enterprises. This is achieved through lending funds to related entities which satisfy the credit policy and lending conditions of the Company.

DISCLAIMER

Lending money to MacroLend Pty Ltd on a Low Doc basis involves risk (see the section "Risk"). The Company recommends Lenders take specialist advice before entering into the Low Doc Loan Agreement or PN. Only information contained in this FA should be relied upon. No person is authorised to give any information, or to make any representations, in connection with this finance application which is not contained in this application for finance.

Any information or a representation which is not in this application for finance may not be relied on as having been authorised by the Borrower in connection with this application for finance.

22 Page 4 of the Disclosure Documents provided a "Loan Application Summary", which included, relevantly, that "Funds are used for specialist commercial and business lending to approved related borrowers," and "Lenders and Financiers are normal creditors of the Company. Lenders are not investors, they are not shareholders, and they are not unitholders, and as such they do not participate in profit distributions or capital growth of company shares, and they do not have any voting powers".

23 Page 5 of the Disclosure Documents identified the "Organisational Structure", the effect of which was to identify that the monies loaned by investors would be paid to Macrolend and then used to fund related entities, and the interest paid by those related entities back to Macrolend would, in turn, be used to pay interest to the lender.

24 As to Macrolend's ability to pay, page 6 of the Disclosure Documents provided:

MACROLEND'S ABILITY TO PAY INTEREST TO FINANCIERS AND LENDERS

MacroLend has in place an experienced Credit Committee which meets on a regular basis to assess, process, and manage loan applications. Prior to joining MacroLend Pty Ltd the members of the Credit Committee have worked in the debt markets collectively for over 54 years. They have owned and managed finance companies, mortgage trail books, and commercial and residential loan portfolios. They have worked as credit coaches, loan assessors, and debt recovery officers in major institutions. They have designed lending strategies which have produced fixed interest for the last 19 years. (Please note, past performance does not guarantee future returns).

MacroLend Pty Ltd assesses applications from commercial borrowers who can demonstrate an ability [sic] pay interest rates which are high enough to meet the expenses of the Company and provide interest of [sic] least 17%pa to its Lenders.

Income from loan fees, loan interest, and contracted fixed income, all contribute to the ability of MacroLend to pay interest to its creditors. The Company pays interest to its creditors on or before the 14th business day after the relevant quarter, based on the following formula: (Balance of Capital including any re-invested funds X 17.00% / 365 days X number of days in the three-month period the capital is loaned).

25 Pages 6-9 of the Disclosure Documents provided detail in relation to the lending process to be followed by Macrolend and its Credit Committee and in relation to the manner in which interest would be calculated and charged.

26 Pages 9 and 10 of the Disclosure Documents identified the various specific risks attached to this type of lending, including counterparty risk and key person risk, and also included a general statement of investment risk in the following terms:

> **Investment risk generally**
>
> It is important that Lenders understand the risks that can affect their capital. All loans are subject to risk, and loans or notes may not perform as expected resulting in a loss of capital or income to MacroLend Pty [sic] and therefore to its Financiers and Lenders.
>
> In particular, you should understand that:
>
> • MacroLend Pty Ltd lends to various types of borrowers against various types of assets, which carry different levels of risk depending on the assets that make up the security for the loans;
>
> • the value of the underlying security for a loan may go up and down;
>
> • returns are not guaranteed;
>
> • MacroLend Pty Ltd. does not guarantee the capital.
>
> • you may lose your money;
>
> • previous returns are not indicative of future performance.
>
> You should give consideration to the risk factors in this section, as well as the other information contained in this application for finance before making a decision to lend funds to MacroLend Pty Ltd.

The loan agreements

27 Two pro forma loan agreements were in evidence, each in materially the same terms. Each identified the parties as the Lender (the investor) and the Borrower (Macrolend). The Recital recorded:

> The Lender has agreed to make available certain loan advances or financial accommodation to the Borrower subject to and upon the terms and conditions specified in this Loan Agreement.

28 "Loan" was defined in cl 1(r) as follows:

> "**Loan**" means and includes all loans, advances, or financial accommodation of any nature whatsoever from the Lender to the Borrower and shall include without limitation the Initial Amount of the Loan, all moneys, debts and liabilities of any nature whatsoever due or owing or which may become owing whether previously, presently, or at some future date by the Borrower to the Lender.

29 The Borrower's covenants were specified in cl 4:

The Borrower covenants with the Lender that it shall:

a) Repay the Loan to the Lender upon the Repayment Date subject to the Special Conditions in the Schedule.

b) Pay to the Lender any other moneys hereby owing or secured in accordance with the provisions of this Loan Agreement.

c) Pay interest to the Lender upon the Loan and any other monies which may be owing or secured hereunder from the Date of Advance to the Repayment Date.

30 Clause 5 provided that the Loan would be immediately repayable in the event of certain defaults as follows:

> Notwithstanding anything herein contained, the Loan shall at the option of the Lender become immediately due and payable upon the happening of any one of the following events of default without the necessity for any notice or demand by the Lender and notwithstanding any delay or previous waiver by the Lender of the right to exercise such option. An Event of Default shall be deemed to have occurred if:
>
> a) Default is made by the Borrower in the due and punctual payment of all or any part of the Loan at any time due and payable by the Borrower to the Lender and the Borrower does not remedy the Default within 60 days of being requested in writing to do so.
>
> b) Default is made by the Borrower in the due and punctual payment of interest or any other moneys at any time due and payable by the Borrower to the Lender and the Borrower does not remedy the Default within 60 days of being requested in writing to do so.
>
> c) The Borrower becomes insolvent or commits an act of bankruptcy or enters or proposes to enter into any scheme or arrangement or compromise with its creditors generally or any class thereof.
>
> e)[sic] A mortgagee, chargee, liquidator, provisional liquidator, receiver, manager or agent for any such person is appointed to or enters into possession of all or any of the assets of the Borrower.
>
> f) In the opinion of the Lender the Borrower is insolvent within the meaning of the Corporations Act or stops or suspends payment of its debts generally, or ceases or threatens to cease to carry on its business or enters or proposes to enter into any scheme or arrangement or compromise with its creditors generally or any class thereof or is unable to pay its debts within the meaning of Section 460 and/or Section 461 of the Corporations Act.
>
> g) A petition or application is presented or an order made or a resolution is proposed or passed for the winding-up or liquidation of the Borrower or if notice of intention to propose such resolution is given.

31 Clause 6.9 imposed the obligation on Macrolend to pay interest, as to which Item 9 of the Schedule prescribed 17% per annum as the "Lower Rate" of interest and a "Higher Rate" of "20% per annum. See special conditions in Item 14". Item 14 of the Schedule provided:

> **Special Conditions**
>
> a) The Repayment Date shall be ninety (90) days after the Lender gives the

Borrower notice in writing ("the Repayment Notice") requesting the repayment of the Loan Amount PROVIDED such date of repayment cannot be earlier than the Repayment Date stipulated in Item 8 of the Schedule;

b) Should the Borrower fail to re-pay within 31 days the Principal due on the stipulated date then the higher rate of 20% pa will be charged until the Principal amount is re-paid.

c) Should the Lender fail to give the Borrower notice in writing ("the Repayment Notice") requesting the repayment of the Loan Amount, the loan will automatically roll over for a further two-year term and the Term Date will be extended by two years, and all other terms and conditions will be extended for two years.

d) Borrower retains the right to repay this loan partially or in full to Lender at any time during the Term with 30 day's [sic] written notice to Lender.

The promissory notes

32 Three pro forma promissory notes were in evidence, all in materially the same terms except as to the rate of interest, as follows:

PROMISSORY NOTE NUMBER: **ML-XXXX-01-XXXXXX**

ISSUED BY MACROLEND PTY LTD

Principal Loan Amount: **AUDXXX,XXX** Date: **XX/XX/2020**

FOR VALUE RECEIVED, **MacroLend Pty Ltd**, a registered private company in Australia, existing under and by virtue of a recorded Certificate of Incorporation (the **"Borrower"**), promises to pay **LENDER NAME**, a Wholesale Lender (**"Lender"**), the principal sum of AUD **XXXXXXX (Principal Amount)** on or about the second anniversary of the Effective Date of this Note. Borrower shall pay Interest at a rate of 12.00% pa (3.0% per three months) of balance of loan amount to Lender on or before 14th business day after each calendar quarter.

MACROLEND PTY LTD LOAN PROVISIONS

AT 2 YEAR MATURITY: One hundred and twenty days prior to the Term Date the Lender shall provide the Borrower with written notice of its intention to either redeem the loan or roll over the loan for a further two-year term. If the written notice requires Borrower to redeem the loan, Borrower shall pay to Lender all Principal and Interest outstanding on or about the Term Date. On the rare occasions when several redemptions fall on the same date there may not be sufficient cashflow for the redemptions to take place on the exact date. In this event the redemptions will be done on a first come first served basis and Lenders acknowledge they will wait in line until cashflow allows the completion of their redemption.

If the Lender does not provide any written notice to the Borrower the loan will automatically roll over for a further two-year term and the Term Date will be extended by two years, and all other terms and conditions will be extended for two years.

AT CALENDAR QUARTERS: Interest shall be paid to Lender on or before the 14th business day after each calendar quarter based on the following formula: (Balance of Capital-including any re-invested funds X 12.00% / 365 days) X number of days in the quarter capital is loaned.

EFFECTIVE DATE.

The Effective Date of this Promissory Note shall be the date on which the **latest deposit** of the Lender's funds is cleared into the bank account of the Borrower. For the avoidance of any doubt

if there are multiple deposits by the Lender over a period of weeks, months, or years, the Effective Date shall be the date the [sic] on which the most recent deposit was made and all earlier deposits will then fall become [sic] subject to the new date.

ACCOUNT INFORMATION.

Bank Name: XXXX
Address XXXX
Branch Name: XXXX
Account name MacroLend Pty Ltd atf MacroLend Trust
SWIFT XXXX
Account number XXXX

TERM

The Term of this Note shall be two years (2) from the Effective Date of this agreement. The Lender agrees to leave the funds with the Borrower for this two-year period and if Lender requests a full or partial withdrawal of Principal prior to the Term Date, Borrower shall respond to such a request entirely at Borrower's own discretion. Borrower retains the right to repay this loan partially or in full to Lender at any time during the Term with 30 day's [sic] written notice to Lender.

EXTENSION OF TERM

If the Lender does **not** provide a written notice to the Borrower of its intention to withdraw the loan at least one hundred and twenty days prior to the Term Date, the loan will automatically roll over for a further two-year term and the Term Date will be extended by two years.

INTEREST

Interest shall be paid to Lender on or before the 14th business day after each calendar quarter based on the following formula: (Balance of Capital-including any re-invested funds X 12.00% / 365 days) X number of days in the quarter capital is loaned.

REPAYMENTS.

This Note shall mature, and all amounts hereunder shall be due and payable in full on or about the Term Date.

SECURITY

Lender is a creditor of the Borrower and is afforded all the rights of a normal creditor of a private company, including its senior ranking to shareholders in the capital structure of the Borrower in the event of wind up.

CURRENCY

All payments under this Note shall be in Australian Dollars. MacroLend Pty Ltd converts all incoming USD to AUD because it primarily lends funds to Australian borrowers. MacroLend does not offer to carry the currency risk therefore Lenders who deposit USD into MacroLend Pty Ltd carry their own currency risk.

JURISDICTION AND GOVERNING LAW

Lender hereby submits to jurisdiction and governing law in Queensland, Australia or any other country in which the Borrower is located for the enforcement of Borrower's obligations and liabilities under this Note. Lender waives any and all rights to object to such jurisdiction and governing law. Lender stipulates that the statutes and laws of the state in which Borrower is located, without regard to conflicts of laws principles, will govern and apply to all matters relating to this Promissory Note. Lender waives and agrees not to plead or claim that any such action or proceeding has been brought in an inconvenient forum.

COMMERCIALITY

Borrower hereby represents and warrants that the loan evidenced by this Note is made and transacted solely for the purpose of carrying on commercial business activities.

RISK ORIENTED LOAN

Lender acknowledges that there is risk associated with this Loan. Borrower and its directors, shareholders, and assigns accept no liability or responsibility for loss of Principal or Interest during the Term of this Note. Recourse under this Note, in all respects, is to the assets of Borrower (MacroLend Pty Ltd) and not to the directors, shareholders, and assigns of the Borrower. No personal liability may be claimed against any officer or agent of Borrower provided that such loss of Principle [sic] or Interest is not due to, associated with or arising from the [sic] bad faith, intentional or willful misconduct, gross negligence, misrepresentation or fraud on the part of Borrower, its directors, shareholders, officers, agents and assigns.

IN WITNESS WHEREOF, Borrower has caused this Note to be duly executed and delivered to Lender as of the day and year first above written.

Characterisation of the loan agreements and the promissory notes

33 Macrolend and Mr Hodgson have admitted that Macrolend's conduct, evidenced by the loan agreements and the issuance of the promissory notes, constituted the carrying on of a financial services business. As Macrolend did not hold an AFSL, it accepted that it contravened s 911A(1) of the *Corporations Act* and, from 13 March 2019, s 911A(5B). The Court must be satisfied that this is so. That requires the construction and application of various provisions of Ch 7 of the *Corporations Act* (as then enacted), as to which the Australian Law Reform Commission said in its Final Report, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (ALRC Report 141, November 2023) at [2.2]:

> The existing legislative framework is unnecessarily complex, and the tools used to build and maintain the framework – such as notional amendments, conditional exemptions, and proliferating legislative instruments – often create more problems than they aim to solve. Much legislation is unclear and incoherent, and the objective of an adaptive, efficient, and navigable legislative framework remains unrealised. These problems also combine significantly to undermine the substantive content and quality of the law. The ALRC's findings underscore those of the Financial Services Royal Commission: fundamental norms of behaviour are unclear …

34 Section 911A(1) provided:

> [Licence required] Subject to this section, a person who **carries on a financial services business** in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.
>
> (Emphasis added.)

35 With effect from 13 March 2019, pursuant to amendments made by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth), s 911A(5B) of the *Corporations Act* provided that a person who contravenes s 911A(1) is taken

to contravene s 911A(5B) (which is a civil penalty provision, within the meaning of s 1317E of the *Corporations Act*).

Carrying on a financial services business

36 A "financial services business" was defined by s 761A of the *Corporations Act* to mean "a business of providing financial services". Section 761C provided:

> In working out whether someone carries on a financial services business, Division 3 of Part 1.2 needs to be taken into account. However, paragraph 21(3)(e) does not apply for the purposes of this Chapter.

37 Division 3 of Part 1.2 contained four sections that both give substance to and qualify the expression of "carrying on a business". Relevantly, s 21 outlined when a business will be carried on in Australia and provided for exceptions in s 21(3). Section 21(3)(e) provided, in summary, that a person does not carry on business in Australia merely because they solicit or procure "an order that becomes a binding contract only if the order is accepted outside Australia". Nevertheless, as will be observed, s 761C overrode s 21(3)(e) for the purposes of Ch 7. Combined with the definition of "in this jurisdiction" in s 911D, a service provider who provided financial services to Australians from overseas was to be taken to carry on a financial services business in this jurisdiction and was therefore required to hold an AFSL.

38 The common law understanding of "carrying on a business" remains relevant to an assessment of whether a particular activity is within the scope of s 911A. Relevant factors will include "elements of system, repetition and continuity" and "some element of commerce or trade". Engaging in an activity on a single occasion or "only as an ad hoc response to an infrequent occurrence or circumstance" will not usually indicate that a business is being carried on: ***GEC Marconi*** *Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50; 128 FCR 1 at [1372]-[1373].

39 In the present case, Macrolend was in the business of raising funds from investors and using those funds for the purposes of its own working capital and for commercial lending. In the Disclosure Documents, it held itself out to potential investors as being "incorporated to generate income via the provision of specialist finance to commercial and business enterprises".

What is a financial service?

40 The provision of a "financial service" was defined in s 766A(1) to include eight distinct activities, as well as any other conduct of a kind specified in regulations. Those eight activities

capture a broad range of conduct: providing financial product advice; dealing in a financial product; making a market for a financial product; operating a registered scheme; providing a custodial or depository service; providing a crowd-funding service; providing a claims handling and settling service; or providing a superannuation trustee service. For present purposes, Macrolend and Mr Hodgson have admitted to "*dealing in a financial product*" within the meaning of s 766A(1)(b).

What is dealing?

41 The definition of "dealing" was provided, relevantly, by s 766C in the following terms:

> (1) For the purposes of this Chapter, the following conduct (whether engaged in as principal or agent) constitutes ***dealing*** in a financial product:
>
> ...
>
> (b) **issuing a financial product**; (Emphasis added.)
>
> ...
>
> (2) Arranging for a person to engage in conduct referred to in subsection (1) is also ***dealing*** in a financial product, unless the actions concerned amount to providing financial product advice.
>
> ...
>
> (3) A person is taken not to ***deal*** in a financial product if the person deals in the product on their own behalf (whether directly or through an agent or other representative), unless:
>
> (a) the person is an issuer of financial products; and
>
> (b) the dealing is in relation to one or more of those products.
>
> (3A) For the purposes of subsection (3), a person (the ***agent***) who deals in a product as an agent or representative of another person (the ***principal***) is not taken to deal in the product on the agent's own behalf, even if that dealing, when considered as a dealing by the principal, is a dealing by the principal on the principal's own behalf.
>
> (4) Also, a transaction entered into by a person who is, or who encompasses or constitutes in whole or in part, any of the following entities:
>
> (a) a government or local government authority;
>
> (b) a public authority or instrumentality or agency of the Crown;
>
> (c) a body corporate (other than a CCIV) or an unincorporated body;
>
> (ca) a CCIV;
>
> is taken not to be ***dealing*** in a financial product by that person if the transaction relates only to:
>
> (d) securities of that entity; or

(e) if the entity is a government—debentures, stocks or bonds issued or proposed to be issued by that government.

(5) Paragraph (4)(c) does not apply if the entity:

(a) carries on a business of investment in securities, interests in land or other investments; and

(b) in the course of carrying on that business, invests funds subscribed, whether directly or indirectly, after an offer or invitation to the public (within the meaning of section 82) made on terms that the funds subscribed would be invested.

...

42 Relevantly, the meaning of "issuing" a financial product was provided for in s 761E in the following terms:

General

(1) This section defines when a financial product is ***issued*** to a person. It also defines who the ***issuer*** of a financial product is. If a financial product is issued to a person:

(a) the person ***acquires*** the product from the issuer; and

(b) the issuer ***provides*** the product to the person.

Note: Some financial products can also be acquired from, or provided by, someone other than the issuer (e.g. on secondary trading in financial products).

Issuing a financial product

(2) Subject to this section, a financial product is ***issued*** to a person when it is first issued, granted or otherwise made available to a person.

...

Issuer of a financial product

(4) Subject to this section, the ***issuer***, in relation to a financial product issued to a person (the ***client***), is the person responsible for the obligations owed, under the terms of the facility that is the product:

(a) to, or to a person nominated by, the client; or

(b) if the product has been transferred from the client to another person and is now held by that person or another person to whom it has subsequently been transferred—to, or to a person nominated by, that person or that other person.

What is a financial product?

43 The definition of a "financial product" is not without difficulty. The *Corporations Act* used both a general functional definition (s 763A) and specific inclusions (s 764A), specific exclusions (s 765A), and notional amendments made by the Corporations Regulations and ASIC legislative instruments.

44 The functional definition in s 763A provided:

> (1) [**Financial product defined**] A ***financial product*** is a facility through which, or through the acquisition of which, a person does one or more of the following:
>
> (a) makes a financial investment;
> (b) manages financial risk;
> (c) makes non-cash payments.
>
> This has effect subject to section 763E.
>
> (2) [**Financial investment facility**] A particular facility that is of a kind through which people commonly make financial investments, manage financial risks or make non-cash payments is a ***financial product*** even if that facility is acquired by a particular person for some other purpose.
>
> ...

45 In the present case, Macrolend and Mr Hodgson admit that the financial product in which they were dealing was a "security" as specifically included by s 764A(1)(a) because it was a "debenture". Section 761A defined a "security", relevantly, to mean:

> (a) a share in a body; or
> (b) a debenture of a body; or
> (c) a legal or equitable right or interest in a security covered by paragraph (a) or (b); or
> ...

46 Section 9 defined "body" to mean "a body corporate or an unincorporated body and includes, for example, a society or association".

47 Section 9 also defined "debenture" in these terms:

> ***debenture*** of a body means a chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body. The chose in action may (but need not) include a security interest over property of the body to secure repayment of the money. However, a debenture does not include:
>
> (a) an undertaking to repay money deposited with or lent to the body by a person if:
>
> (i) the person deposits or lends the money in the ordinary course of a business carried on by the person; and
>
> (ii) the body receives the money in the ordinary course of carrying on a business that neither comprises nor forms part of a business of borrowing money and providing finance; or
>
> (b) an undertaking by an Australian ADI to repay money deposited with it, or lent to it, in the ordinary course of its banking business; or
>
> Note: This paragraph has an extended meaning in relation to Chapter 8 (see subsection 1200A(2)).
>
> (c) an undertaking to pay money under:

(i) a cheque; or

(ii) an order for the payment of money; or

(iii) a bill of exchange; or

(e)[sic] an undertaking by a body corporate to pay money to a related body corporate; or

(f) an undertaking to repay money that is prescribed by the regulations.

For the purposes of this definition, if a chose in action that includes an undertaking by a body to pay money as a debt is offered as consideration for the acquisition of securities under an off-market takeover bid, or is issued under a compromise or arrangement under Part 5.1, the undertaking is taken to be an undertaking to repay as a debt money deposited with or lent to the body.

Are the loan agreements and the promissory notes "debentures"?

48 The parties were agreed that the Macrolend loan agreements and promissory notes each comprised a "debenture" within the meaning of s 9 of the *Corporations Act*, and are therefore a "security" within the meaning of s 761A, because they are properly characterised as a chose in action that includes an undertaking by Macrolend to repay as a debt money lent to Macrolend. The definition of "debenture" in s 9 of the *Corporations Act* was considered by the Full Court of the Federal Court in ***ABN AMRO Bank*** *NV v Bathurst Regional Council* [2014] FCAFC 65; 224 FCR 1. In the context of considering whether the instruments in that case were debentures or derivatives, the Full Court said at [642]-[650]:

642 The definition of a debenture in s 9 of the *Corporations Act* departs in a number of respects from the common law meaning and from earlier statutory definitions. The new definition was introduced by amendments which became effective on 13 March 2000: see Ford HAJ, Austin RP and Ramsay IM, *Ford's Principles of Corporations Law* (LexisNexis, subscription service) at [19.070] (service 86).

643 Under the former definition a debenture was a document issued by a corporation that created or acknowledged a debt: *Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998* (Cth) at 72. This followed the common law which grappled with difficulties in defining the precise nature of the term but accepted that the two essential characteristics of a debenture were:

> "... first that it is issued by a company and, secondly, that it acknowledges or creates a debt": *Handevel Pty Ltd v Comptroller of Stamps (Vic)* (1988) 157 CLR 177 at 195.

644 The amendments to the definition were intended to facilitate electronic commerce in debentures by focussing on the legal right to repayment of the debt rather than the piece of paper which evidenced it: *Explanatory Memorandum* at 72.

645 Thus, the amended definition departs from the earlier law in two respects. First, **a debenture is defined as a chose in action rather [than] a document**.

This departure may be more of form than substance because a debenture has always been understood as constituting a chose in action: see for example, Gower LCB, *Modern Company Law* (2nd ed, Stevens and Sons Limited, 1957) p 385.

646 The second departure from the earlier definition is that **the chose in action must include an undertaking by the body which issues the debenture to "repay as a debt"** money that has been deposited with or lent to it.

647 The definition goes on to say that the chose in action may (but need not) include a security interest over property of the body to secure repayment of the money. This corresponds with the common law nature of a debenture under which the document generally, but not necessarily, contained a charge on the undertaking of the company to support its indebtedness: *Lemon v Austin Friars Investment Trust* [1926] 1 Ch 1 at 15 (Pollock MR).

648 The description of these essential characteristics of a debenture is contained in the chapeau to the definition in s 9. The chapeau is followed by a number of exclusions to which we will refer later.

649 Whilst the chapeau purports to contain an exclusive definition of a debenture, it must be borne in mind that the function of a statutory definition is to act as an aid to construction of the statute. It is to be read as part of the fabric of the statute and is not to be given a narrow, literal meaning and then used to negate the purpose or policy of the substantive enactment: *Kelly v R* (2004) 218 CLR 216 at [84] and [103] (McHugh J).

650 It follows that the proper approach to the construction of the definition of a debenture in s 9 is to consider its meaning in light of the regulatory focus of the *Corporations Act*, in particular in Chs 2L and 6D. Those chapters of the *Corporations Act* recognise that the nature of a debenture is, as it always has been, inextricably bound up with its function as an important aspect of corporate fundraising.

(Emphasis added.)

49 In reaching its conclusion that an instrument which provided for a return of the amount of money deposited, at a time and in an amount, not linked to the conduct of the business of the company which issued it but instead measured by the performance of a separate index, was *not* a debenture, the Full Court reasoned:

675 First, when the words of the chapeau to the definition in s 9, "to repay as a debt money deposited with or lent to" the company, are read in light of the regulatory provisions of Ch 2L and Ch 6D, **it is evident that those words import the notion of an undertaking to repay a debt comprising a loan made to the company as part of its working capital.**

676 **Here, the nature of the loan and the obligation to repay it are quite different from that which is contemplated by the usual fundraising activities traditionally associated with the issue of debentures.** The loan made by LGFS was a particular form of investment in a financial product under which the obligation to redeem the investment by paying the Redemption Amount, both as to time and amount, was linked to the performance of the indices against which the value of the loan moneys was to be measured.

> 677 In our view the obligation to redeem that form of investment cannot be characterised as an undertaking to repay the loan as a debt. The obligation is different in nature from that which is ordinarily involved in the repayment of a loan, even one which is limited in recourse: cf *Commissioner of Taxation v Firth* (2002) 120 FCR 450 at [73]-[74].
>
> (Emphasis added.)

50 In the present case, the loan agreements and promissory notes were used for their classic purpose of fundraising. So much was made express in the Disclosure Documents. Macrolend has admitted that it used the funds raised for the purposes of its working capital and for commercial lending to related and third-party entities. That is precisely the function contemplated by the definition of "debenture" in s 9, read in the context of the regulatory provisions of Ch 2L and Ch 6D of the *Corporations Act*: *ABN AMRO Bank* at [675].

51 There is no doubt that Macrolend was responsible for the obligations under the terms of the Macrolend Loan and Promissory Note Arrangement and was the issuer of those financial products – being debentures. Accordingly, Macrolend dealt in financial products for the purposes of s 766C(1)(b) of the *Corporations Act*.

52 For these reasons, I am satisfied that, by its conduct pursuant to the Macrolend Loan and Promissory Note Arrangement, Macrolend carried on a financial services business and that it is appropriate to make the declarations sought in respect of that arrangement.

THE KRADLE INVESTMENT ARRANGEMENT

53 The second arrangement the subject of this proceeding involved Macrolend obtaining funds from investors for the purpose of investing in the development of the Kradle software product. From about July 2018 to 31 May 2023, Macrolend and Mr Hodgson provided information memoranda (**Kradle IMs**) to potential investors, which provided, inter alia:

1. in exchange for their investment, investors would either obtain shares held by Macrolend in Corearth Holdings, or an instrument described as a "convertible note" that conferred on investors an interest in Macrolend's shares in Corearth Holdings;
2. the funds invested would be used to support the development of Kradle; and
3. the use of the funds was intended to confer on investors the following benefits:
    a. the potential for the shares to increase in value; and
    b. the opportunity to take a profit from any potential increase in share value.

54 In evidence was an example of the Kradle IMs in respect of the sale of shares in Corearth Holdings dated 5 July 2018 (**5 July 2018 IM**). Relevantly, it stated:

(a) on the front cover, "The securities for sale offered by this IM should be considered a SPECULATIVE investment and potential purchasers should refer to section 4.2 of this IM for further details of risk factors";

(b) that it was issued by MacroLend Pty Ltd atf MacroLend Trust, defined as the "Vendors";

(c) in the key features section on pages 3 to 4, that (emphasis in original):

(i) **Business model**

"... The objective of the Company is to grow Kradle Software's client base and its revenue via the offer of a "freemium" model to the point that the Company can achieve a public listing at a value acceptable to the management of the Company. The Company expects to achieve the public listing in London and or New York by 2021.

Corearth Group itself has limited potential for growth and is not a candidate for a public listing. Therefore, Kradle Software Pty Ltd will be separated from Corearth Holdings Pty Ltd immediately after this capital raise has been completed. The shareholding in Corearth will be exactly the same as the shareholding in Kradle meaning no shareholder will be disadvantaged.

MacroLend Pty Ltd atf MacroLend Trust is a significant shareholder in the Company. MacroLend is selling a number of its shares to raise capital for the Company to grow Kradle Software Pty Ltd."

(ii) **Benefits**

"Access to shares in the Company which are priced at the current entry level of US$50.00 per share.

Access to the potential for the shares to increase in value as a result of the Company's potential to disrupt the ERP and Data Storage sectors.

Access to the public listing of the Company estimated in 2021, whereby shareholders may have the opportunity to exit all or some of their shareholdings and to take profit from the potential increase in share values."

(d) information about the Kradle product and risks to the investors of "acquiring Shares in the Company";

(e) at section 10.1 that "Purchasers may apply for Shares in the Company by completing and returning the Share Purchase Agreement enclosed with this Information Memorandum".

55 A similar IM dated 30 January 2020 was produced in respect of the acquisition of convertible notes (**30 January 2020 IM**). It provided, relevantly:

(a) on the front cover, "The securities for sale offered by this IM should be considered a SPECULATIVE investment and potential purchasers should

refer to section 4.2 of this IM for further details of risk factors";

(b) that it was issued by MacroLend Pty Ltd atf MacroLend Trust, defined as the "Vendors";

(c) in the key features section on pages 1 to 2, that (emphasis in original):

(i) **Business model**

"... The objective of the Company is to grow Kradle Software's client base and its revenue via the offer of a "freemium" model to the point that the Company can achieve a public listing at a value acceptable to the management of the Company. The Company expects to achieve the public listing in London and or Nasdaq stock exchanges during 2022 subject to reaching its funding targets and commercial milestones.

The Company, Corearth Holdings itself has limited potential for growth and is not a candidate for a public listing. Therefore, Kradle Software Pty Ltd will be separated from Corearth Holdings Pty Ltd immediately after the Company reaches its funding target. The new shareholders' shares will be converted via the execution of the Convertible Note from Corearth into Kradle Software Pty Ltd in exactly the same proportions as they are in Corearth. **For the avoidance of doubt this means the buyers of shares via this Information Memorandum will own shares in Kradle Pty Ltd but will <u>not</u> own shares in Corearth Holdings Pty Ltd once the two companies are separated.**

MacroLend Pty Ltd atf MacroLend Trust is a significant shareholder in the Company. Via this document MacroLend is selling a number of its shares to raise capital for the Company to fund the next stage of growth of Kradle Software Pty Ltd."

(ii) **Benefits**

"Access to shares in the Company which are priced at AU$68.00 per share. Access is via a Convertible Note which consists of 10 shares. Each convertible note is valued at AU$680

Access to the potential for the shares to increase in value as a result of the Company's potential to disrupt the ERP and Data Storage sectors. There is no guarantee of any capital increase.

Access to the public listing of the Company estimated in 2022, whereby shareholders may have the opportunity to exit all or some of their shareholdings and may be able to take profit if any from the potential increase in share values. There is no guarantee of any capital increase or opportunity to exit."

(d) information about the Kradle product and risks to the investors of "acquiring Shares in the Company";

(e) at section 10.1 that "Purchasers may apply for Shares in the Company by completing and returning the Share (convertible note) Application Form enclosed with this Information Memorandum".

56 A pro forma of the convertible notes entered into between Macrolend and the investors was in evidence. Clause 4 of that document provided:

> **4 CONVERSION OF NOTES**
>
> 4.1 The Conversion of notes will take place on the conversion date which shall be prior to any IPO of Corearth Holdings Pty Ltd or Kradle Software Pty Ltd or within 14 days of Corearth Holdings Pty Ltd or Kradle Software Pty Ltd becoming a limited company. The Date of any public offering will be determined by the Board of Directors of Corearth Holdings Pty Ltd or Kradle Software Pty Ltd. On the Conversion Date the Company will apply the Principal Amount in payment for the Ordinary Share(s) into which the Note(s) have been converted and the Company will transfer the Ordinary Shares to which the Noteholder is entitled to the Noteholder by providing the Noteholder with a signed Standard Transfer Form within 10 Business Days of the Conversion Date or the receipt of the relevant Note Certificate (whichever shall be the later).
>
> 4.2 On the same day that it transfers the Shares to the Noteholder the Company will provide Corearth Holdings Pty Ltd or Kradle Software Pty Ltd with a copy of the Standard Transfer Form and will ensure that Corearth Holdings Pty Ltd or Kradle Software Pty Ltd sends the Noteholder the appropriate share certificates.
>
> 4.3 Ordinary Shares allotted upon conversion of Notes will rank in all respects paripassu with the Ordinary Shares then on issue by the Issuer.
>
> 4.4 If before conversion of the Notes the Issuer completes a proposed Initial Public Offering on the Australian Stock Exchange (ASX) or such other International Stock Exchange then the note is automatically converted into ordinary shares in the Issuer on the same terms and conditions and the Noteholder will be entitled to the same % of the Issuer.
>
> 4.5 The Noteholder agrees to be bound by the Constitution of Issuer on conversion of the Notes into shares.

57 Only one investor appears to have received shares in Corearth Holdings. All others received convertible notes in exchange for their investment.

Characterisation of the Kradle Investment Arrangement

58 Macrolend and Mr Hodgson have admitted that Macrolend's conduct, evidenced by the Kradle Investment Arrangement, constituted the carrying on of a financial services business in this jurisdiction without an AFSL in contravention of s 911A(1) of the *Corporations Act* and, from 13 March 2019, s 911A(5B). Once again, the Court must be satisfied that this is so.

59 I have already considered the various provisions of the *Corporations Act* relevant to this proceeding by which one may determine whether or not certain conduct constitutes the carrying on of a financial services business in this jurisdiction. With respect to the Kradle Investment

Arrangement, the question necessary to interrogate is whether the investment, either in the Corearth Holdings shares or the convertible notes, is an acquisition of a financial product.

A financial product?

60 The investment contemplated by the Kradle Investment Arrangement is not amongst the specifically included financial products listed in s 764A of the *Corporations Act*. It is therefore necessary to have recourse to the functional definition in s 763A and to ask whether the arrangement is a facility through which a person makes a financial investment. If the answer to that question is yes, it will be a financial product.

What is a financial investment?

61 Section 763B provided as follows:

> For the purposes of this Chapter, a person (the ***investor***) ***makes a financial investment*** if:
>
> (a) the investor gives money or money's worth (the ***contribution***) to another person and any of the following apply:
>
> (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
>
> (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
>
> (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
>
> (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

62 Section 9 defined a "benefit" to mean "any benefit, whether by way of payment of cash or otherwise".

What is a facility through which one makes a financial investment?

63 Section 762C defined a "facility" to include:

> (a) intangible property; or
>
> (b) **an arrangement** or a term of an arrangement (including a term that is implied by law or that is required by law to be included); or
>
> (c) a combination of intangible property and an arrangement or term of an arrangement.
>
> (Emphasis added.)

64 An "arrangement" was in turn defined in s 761A to mean:

> ... subject to section 761B [not presently relevant], a **contract**, **agreement**, understanding, scheme or other arrangement (as existing from time to time):
>
> (a) whether formal or informal, or partly formal and partly informal; and
>
> (b) whether written or oral, or partly written and partly oral; and
>
> (c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights.
>
> (Emphasis added.)

65 In the present case, the Kradle IMs told prospective investors that in exchange for their investment, they would receive either shares in Corearth Holdings or a "convertible note" that conferred on them an "interest" in Macrolend's shares in Corearth Holdings. Certain investors entered into formal agreements with Macrolend consequent upon the information they received through the IMs. The funds advanced were to be used to support the development of Kradle and it was intended that benefits would be conferred upon the investors in the form of a potential increase in value of the shares and an opportunity to profit from any such increase. Macrolend engaged in this "fundraising" over a period of years. It was clearly "carrying on a business" in so doing: *GEC Marconi* at [1372]-[1373].

66 The investors gave money to Macrolend. The investors had no day-to-day control over the use of their contributions to generate the return or benefit which Macrolend intended be generated. Accordingly, the Kradle Investment Arrangement was a financial investment within the meaning of s 763B and s 763A(1)(a) and was therefore a financial product.

67 Moreover, the Kradle Investment Arrangement provided for investors to obtain a legal or equitable right or interest in a share: *Chan v Cresdon Pty Ltd* [1989] HCA 63; 168 CLR 242. In *ANZ Executors and Trustees Ltd v Humes Ltd* [1990] VR 615 at 629, Brooking J reiterated the long-standing equitable principle that:

> Generally speaking, someone who has a contract entitling him to purchase or subscribe for shares which are not to be had in the market will be able to have his contract specifically enforced; most of the cases are collected in Jones & Goodhart, Specific Performance, at 129-30.

68 As with the Macrolend Loan and Promissory Note Arrangement, Macrolend was the party responsible for performing the terms of the Kradle Investment Arrangement and so was the issuer of the financial product for the purposes of s 761E(4) of the *Corporations Act*. By issuing the products through entering into the Kradle Investment Arrangement with each investor,

Macrolend dealt in a financial product within the meaning of s 766C(1)(b) of the *Corporations Act*. It did so for the purposes of its own working capital and for commercial lending over a period of almost five years and received approximately $31 million from 66 investors.

69 For these reasons, through its conduct pursuant to the Kradle Investment Arrangement, Macrolend carried on a financial services business. It did not hold an AFSL. It is appropriate to make the declarations agreed to by the parties in respect of the Kradle Investment Arrangement.

GSL PROMISSORY NOTE ARRANGEMENT

70 From about 15 January 2015 to about 9 August 2023, GSL and Mr Hodgson issued disclosure documents to potential investors described as "Information Memorandum" or "Application for Finance" (**GSL Disclosure Documents**) for the purposes of raising funds for its own working capital and commercial lending to its related entities and third parties. Within that period, GSL obtained $60,973,307.84 from 64 investors, including 42 Australian investors, in return for "promissory notes".

71 The GSL Disclosure Documents were in materially the same terms as the Macrolend Loan and Promissory Note Arrangement Disclosure Documents. The promissory notes themselves were in materially the same terms as those entered into by investors for the purposes of the Macrolend Loan and Promissory Note Arrangement.

72 For the same reasons as those already given in respect of the Macrolend Loan and Promissory Note Arrangement, each instrument entered into by investors in the GSL Promissory Note Arrangement was a "debenture" within the meaning of s 9 of the *Corporations Act* and so a "security" within the meaning of s 761A and a "financial product" within the meaning of s 764A(1)(a). Similarly, GSL was the "issuer" of the financial products for the purposes of s 761E(4) and therefore "dealt" in financial products for the purposes of s 766C(1)(b) of the *Corporations Act*, whilst carrying on its business of raising funds from overseas and Australian investors from its principal place of business in Queensland.

73 However, contrary to s 601CD of the *Corporations Act*, GSL, being a "foreign company" within the meaning of s 9, was not registered under the Act, nor had it applied to be so registered.

74 GSL and Mr Hodgson admit that GSL was not authorised to carry on its financial services business in this jurisdiction without an AFSL in contravention of s 911A(1) (and from 13

March 2019, s 911A(5B)), and also contravened s 601CD of the *Corporations Act* by not being registered. It is appropriate to make the declarations agreed to by the parties in respect of the GSL Promissory Note Arrangement.

MR HODGSON'S LIABILITY – MACROLEND LOAN AND PROMISSORY NOTE ARRANGEMENT, KRADLE INVESTMENT ARRANGEMENT AND GSL PROMISSORY NOTE ARRANGEMENT

75 There was no dispute that from about 26 October 2006, Mr Hodgson has been a director of Macrolend and the person primarily responsible for its day-to-day operations. Mr Hodgson admitted that, in respect of the Macrolend Loan and Promissory Note Arrangement and the Kradle Investment Arrangement, he:

1. had primary responsibility for promoting the arrangements to potential investors, by informing them of the opportunity to invest and communicating with them about any investment or loan made;

2. created the Kradle IMs, the form of the convertible notes, and the form of the loan agreements and promissory notes, and knew the contents of those documents;

3. either provided the Kradle IMs and the Disclosure Documents to investors himself or directed his son, Jesse Hodgson, to do so;

4. signed each of the convertible notes issued to investors in respect of the Kradle Investment Arrangement and signed each of the loan agreements and promissory notes in respect of the Macrolend Loan and Promissory Note Arrangement.

76 Similarly, there was no dispute that Mr Hodgson has been the sole director of GSL and the person primarily responsible for its day-to-day operations since about 26 February 2014. Mr Hodgson admitted that, in respect of the GSL Promissory Note Arrangement, he:

1. had the primary responsibility for promoting the arrangement to potential investors, by informing them of the opportunity to invest and communicating with them about any investment or loan to be made;

2. created the form of the GSL Disclosure Documents and GSL promissory notes;

3. either provided the GSL Disclosure Documents and GSL promissory notes to investors himself or directed his son, Jesse Hodgson, to do so;

4. signed each of the promissory notes issued to investors.

77 Given those admissions, there can be no doubt that Mr Hodgson "arranged for" the "issue" by Macrolend of the Kradle IMs, the convertible notes, the loan agreements, and the promissory notes within the meaning of s 766C(2) of the *Corporations Act*: see *Australian Securities and Investments Commission v One Tech Media Ltd* [2020] FCA 46; 275 FCR 1 at [132]; *Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2)* [2020] FCA 1463; 148 ACSR 154 at [69]-[71]; *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630; 205 FCR 120 at [22]. Similarly, there can be no doubt that Mr Hodgson did likewise in respect of the issue by GSL of the GSL Disclosure Documents and the GSL promissory notes.

78 Subsequent to the enactment of s 1317E(3), which made s 911A(5B) a civil penalty provision with effect from 13 March 2019, a person who is "involved" in a contravention of a civil penalty provision is taken to have contravened the provision: s 1317E(4).

79 Section 79 explains what is meant by "involved" in the following terms:

> A person is involved in a contravention if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced, whether by threats or promises or otherwise, the contravention; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention.

80 Two requirements are necessary to establish that a person has been knowingly concerned in or party to a contravention. First, the person must have actual knowledge of all the essential facts constituting the contravention; it is *not* necessary that the person knew that those matters constituted a contravention. Secondly, the person must have engaged in conduct (by act or omission) which can properly be said to "implicate" them in the contravention or which shows a "practical connection" between them and the contravention: *Productivity Partners Pty Ltd (trading as Captain Cook College) v Australian Competition and Consumer Commission* [2023] FCAFC 54; 297 FCR 180 at [272].

81 On the admitted facts, there is no doubt that Mr Hodgson himself contravened s 911A(1) of the *Corporations Act* (and from 13 March 2019, s 911A(5B)) because he arranged for Macrolend and GSL to issue the financial products to investors, nor any doubt that he was involved in Macrolend's and GSL's contraventions of s 911A(1) (and from 13 March 2019, s 911A(5B)),

within the meaning of s 1317E(4)(b) of the *Corporations Act*. It is therefore appropriate to make the declarations in the terms agreed to by the parties in respect of Mr Hodgson's liability.

MISLEADING OR DECEPTIVE CONDUCT

82 ASIC alleges that Macrolend and Mr Hodgson engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, in contravention of s 1041H of the *Corporations Act* and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***).

83 Section 1041H(1) of the *Corporations Act* provides:

> A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

84 "Conduct" includes dealing in a financial product (s 1041H(2)(a)), issuing a financial product (s 1041H(2)(b)(i)), or doing any other act preparatory to, or in any way related to, the issuing of a financial product (s 1041H(2)(b)(x), read together with s 1041H(2)(b)(i)).

85 Section 12DA(1) of the *ASIC Act* provides:

> A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

86 Section 12BAB(1) provides, inter alia, that a person provides a financial service if, inter alia, they "deal in a financial product" within the meaning of s 12BAB(7) (s 12BAB(1)(b)). Relevantly, s 12BAB(7) includes the "making of a financial investment" within the meaning of s 12BAA(4) of the *ASIC Act* (s 12BAA(1)(a)), which is in the same terms as s 763B of the *Corporations Act*, and a dealing in a "security" (s 12BAA(7)(a)).

87 The principles applicable to these provisions are the same and are well settled: *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [4] (French CJ, Kiefel, Bell and Keane JJ). Nevertheless, Mr Hodgson's evidence was that he had not understood the normative prohibition on misleading or deceptive conduct until the mediation in this matter. I will return to that evidence. It is as well therefore to set out the useful summary of the principles by O'Bryan J in *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 at [98]-[101]:

> 98 The applicable principles concerning the statutory prohibition of misleading or deceptive conduct (and closely related prohibitions) in the Australian Consumer Law, the Corporations Act and the ASIC Act are well known. The **central question is whether the impugned conduct, viewed as a whole, has**

a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter): *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (*Puxu*) at 198 per Gibbs CJ; *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (*Taco Bell*) at 200; *Campomar* at [98]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 (*TPG Internet*) at [39] per French CJ, Crennan, Bell and Keane JJ; *Campbell* at [25] per French CJ. A number of subsidiary principles, directed to the central question, have been developed:

(a) First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: see *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 (*Global Sportsman*) at 87; *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569 at [60] per Nettle JA (Warren CJ and Cavanough AJA agreeing at [33]).

(b) Second, **it is not necessary to prove an intention to mislead or deceive**: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228 per Stephen J (with whom Barwick CJ and Jacobs J agreed) and at 234 per Murphy J; *Puxu* at 197 per Gibbs CJ.

(c) Third, it is **unnecessary to prove that the conduct in question actually deceived or misled anyone**: *Puxu* at 198 per Gibbs CJ. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself: see *Taco Bell* at 202 per Deane and Fitzgerald JJ.

(d) Fourth, it is not sufficient if the conduct merely causes confusion: *Puxu* at 198 per Gibbs CJ and 209-210 per Mason J; *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Campomar* at [106].

99 In assessing whether conduct is likely to mislead or deceive, the **courts have distinguished between two broad categories of conduct, being conduct that is directed to the public generally or a section of the public, and conduct that is directed to an identified individual.** As explained by the High Court in *Campomar*, the question whether conduct in the former category is likely to mislead or deceive has to be approached at a level of abstraction, where the Court must consider the likely characteristics of the persons who comprise the relevant class of persons to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful (at [101]-[105]). In *Google Inc v ACCC* (2013) 249 CLR 435, French CJ and Crennan and Kiefel JJ (as her Honour then was) confirmed that, in assessing the effect of conduct on a class of persons such as consumers who may range from the gullible to the astute, the **Court must consider whether the "ordinary" or "reasonable" members of that class would be misled or deceived** (at [7]). In the case of conduct directed to an identified individual, it is unnecessary to approach the question at an abstract level; the Court is able to assess whether the conduct is likely to mislead or deceive in light of the objective circumstances, including the known characteristics of the individual concerned. However, in both cases, the relevant question is objective: whether the conduct has a sufficient tendency to induce error. Even in the case of an

express representation to an identified individual, it is not necessary (for the purposes of establishing liability) to show that the individual was in fact misled. ...

100 The question **whether conduct is misleading or deceptive, and thereby contravenes the statutory prohibition, is logically anterior to the question whether any person has suffered loss** or damage by reason of the conduct: *Campbell* at [24] per French CJ; *TPG Internet* at [49]. As observed by French CJ in *Campbell* (at [28]):

> Determination of the causation of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. A misstatement of fact may be misleading or deceptive in the sense that it would have a tendency to lead anyone into error. However, it may be disbelieved by its addressee. In that event the misstatement would not ordinarily be causative of any loss or damage flowing from the subsequent conduct of the addressee.

101 Similarly, **where proceedings are brought by an enforcement agency, the Court has frequently imposed pecuniary penalties and other forms of relief** for contraventions of the prohibition of misleading or deceptive conduct **while expressly recognising that the conduct may not have caused loss**: see for example *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [57]; *ASIC v GE Capital Finance Australia* [2014] FCA 701 at [90]; *ASIC v Huntley Management Ltd* (2017) 122 ACSR 163; [2017] 35 ACLC 17-035; FCA 770 at [36]-[39].

(Emphasis added.)

88 Three categories of representations were impugned: the balance sheet representation, the use of funds representations, and the IPO representations. There was no dispute that in respect of each category, Mr Hodgson, as a director of Macrolend, had primary responsibility for promoting the Kradle Investment Arrangement, created the form of the Kradle IMs and knew their contents, and either provided the IMs to investors himself, or directed his son, Jesse Hodgson, to do so. His personal liability under s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* is coextensive with that of Macrolend.

The IPO representations

89 As to the IPO representations, between 13 February 2019 and 15 November 2021, four versions of the Kradle IMs stated that Corearth Holdings expected to achieve a public listing in respect of the Kradle software product on either the London Stock Exchange or the NASDAQ Stock Exchange in 2021 or 2022. In two documents titled "Executive Summary of Kradle Software" dated April 2020 and April 2021 respectively, it was stated that "Kradle is seeking to raise $150 million to take it to its intended IPO in 2022".

90 The IPO representations were representations as to future matters within the meaning of s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*. As such, it was incumbent on the representors to demonstrate they had reasonable grounds for making the representations.

91 Macrolend and Mr Hodgson admit that they did not have reasonable grounds for making the IPO representations, such that they are taken to be misleading. They therefore admit the misleading or deceptive nature of these representations.

The use of funds representations

92 As to the use of funds representations, between 5 July 2018 and 15 November 2021, Macrolend and Mr Hodgson sent to potential investors IMs which contained representations to the effect that funds advanced by an investor would be used to support the development of the Kradle software product via a secured loan to Kradle by Macrolend of up to $50 million, variously at an interest rate of 4% or 7% per annum for terms of, variously, three, four or five years. Some of the representations provided that "the Vendor [ie Macrolend] *has agreed* to make a secured loan … to Kradle" (emphasis added), despite the fact that, at the time those representations were made, no loan agreement between Macrolend and Kradle in those terms existed.

93 The use funds representations were also representations as to future matters within the meaning of s 769C of the *Corporations Act* and s 12BB of the *ASIC Act*. As such, it was incumbent on the representors to demonstrate they had reasonable grounds for making the representations. Macrolend and Mr Hodgson admit that they did not have reasonable grounds for making the use of funds representations. That was because at the time the representations were made, the true position was that the funds were to be used as working capital. Consequently, the representations are taken to be misleading. Macrolend and Mr Hodgson admit the misleading or deceptive nature of these representations.

The balance sheet representation

94 As to the balance sheet representation, ASIC seeks a declaration as to misleading or deceptive conduct in circumstances where, between 13 February 2019 and 11 December 2020, Macrolend and Mr Hodgson:

(a) Prepared and caused to be issued to prospective investors in the Kradle Investment Arrangement, Kradle IMs which conveyed a representation that Kradle's intangible assets as at 30 June 2018, as recorded on its balance sheet, were valued at $1,027,140,000,

when in fact

(b) Kradle did not hold intangible assets in that amount; and

(c) Kradle's balance sheet as at 30 June 2018, prepared by Kradle's chartered accountants, recorded intangible assets totalling $11,810.

95 Macrolend and Mr Hodgson admit that Kradle's balance sheet as at 30 June 2018, prepared by Kradle's chartered accountants, recorded intangible assets totalling $11,810. They submit however that there is insufficient evidence for the Court to find that Kradle did not hold intangible assets of over $1 billion as at 30 June 2018 and that there is no proper basis to consider that a declaration which incorporates such a finding will result in "complete accuracy" in the sense contemplated by Dowsett J in *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; 60 IPR 296 at [260], where his Honour emphasised the importance of framing any declaration "so as to convey a limited and accurate message to those who have an interest in its subject matter" and so as to "accurately reflect the impugned conduct in a concise way."

96 Macrolend and Mr Hodgson urged against the making of a declaration in the terms sought by ASIC because, they submitted, there was no direct evidence about the proper meaning to be given to the term "intangible assets", nor of the "true" value of whatever those intangible assets might be in the case of Kradle. They also cautioned against making a declaration which expressly deals with the actual value of a third party's assets when that third party is not before the Court and the value of its business is the subject matter of the declaration sought.

97 The declaration sought by ASIC does not, however, "deal expressly" with the actual value of Kradle's business. It states only as a matter of fact the correctness of what was recorded in a balance sheet. Nor does the declaration purport to identify what is included within Kradle's "intangible assets" or their "true" value. Rather, as I see it, the purpose of the declaration is to convey to those interested – undoubtedly the investors who were given an IM which stated Kradle's intangible assets as at 30 June 2018 to be worth over $1 billion – that, whatever their true value may have been, that was not it, in circumstances where Macrolend and Mr Hodgson have admitted that the balance sheet as at 30 June 2018 prepared by Kradle's chartered accountants recorded the value as $11,810.

The purported basis of the valuation

98 Mr Hodgson is a very experienced businessman. He has been a director and executive officer of multiple companies over a period of almost four decades. He is currently a director of 17 Australian companies and one international company (being GSL). Mr Hodgson has run a mortgage broking business and been engaged in commercial lending. Although Mr Hodgson has no formal qualifications in accounting or finance, I infer that he understands financial documents relevant to his businesses and those to whom his businesses lend. Mr Hodgson deposed that he has previously commissioned business valuations. In cross-examination, Mr Hodgson maintained that the figure of just over $1 billion was a proper representation of the value of the intangible assets of Kradle as at 30 June 2018, even though he had never sought advice from an accountant or a valuer. Indeed, he expressed the opinion in cross-examination that an accountant "wouldn't know". I formed the impression from his tone and manner at this point that Mr Hodgson believed he knew better than any accountant or valuer how to arrive at the valuation of Kradle's intangible assets.

99 Mr Hodgson deposed that when the Kradle Investment Arrangement was being developed, he needed to work out the price for each share or convertible note that was to be offered to investors. He said he knew that the total number of shares Macrolend owned in Corearth Holdings was 15,105,000 and that he "needed to work out the total value of all the shares combined and then divide that number by 15,105,000 to arrive at the price for each share or convertible note." Mr Hodgson deposed that he arrived at the price of USD50 (approximately AUD68 at the then applicable exchange rate) per share or convertible note by making enquiries which enabled him to apply what he described as the "true test of the market value of a business," which "is what price a willing buyer and a willing seller under no compulsion and having reasonable knowledge of the facts would agree". He arrived at the valuation of Kradle's intangible assets at $1,027,140,000 by multiplying AUD68 by 15,105,000 shares.

100 The enquiries made by Mr Hodgson were described in his affidavit.

101 The first enquiry was the **Silicon Valley trip**. The Silicon Valley trip was undertaken by Mr Hodgson's co-director, Mr Haddon, in 2017 prior to the launch of the Kradle software product. Mr Hodgson himself did not accompany Mr Haddon but was in San Francisco at the same time. I interpolate that Mr Haddon was the only other person who could have shed light on this trip. On 5 September 2022, Mr Haddon was examined pursuant to s 19 of the *ASIC Act*. ASIC tendered the transcript of his private examination pursuant to s 79 of the *ASIC Act*. Mr Haddon

was not required for cross-examination by Macrolend or Mr Hodgson. I infer that nothing he could have said would have assisted the defendants: *Jones v Dunkel* [1959] HCA 8; 101 CLR 298.

102 Mr Hodgson deposed that "at the time," Mr Haddon reported that "a venture capitalist had said to him that **he would pay $US180 million for a minority stake in Kradle**" (emphasis added). Mr Hodgson said, "If a minority stake was assumed to be less than 50%, then the lowest value for all of Kradle would be $US360 million". Mr Haddon's report was said to be confirmed by an email sent to Mr Hodgson on 1 September 2017. That email relevantly said:

> I spoke to a VC in Silicon Valley at the beginning of the year. **Based on what I told him**, he mentioned that they **would consider investing $180mil for a minority stake**. Social software investments had been done to death and they felt that based on the value placed on Atlassian (now worth $8Bil), he would be interested in investing in Kradle. **I did not take it further as we are not ready** and you said that you would prefer keeping it internal and finance it yourself as it would be expensive money at this stage. Sean confirmed that the VC's were struggling to find investments. The potential value of Kradle is billions (depending how well we market the product). I have never seen a product which businesses chase after seeing it once…and it is not yet finalised. Obviously we would have to invest heavily to get it global.
>
> (Emphasis added.)

103 That email was evidently not contemporaneous with Mr Haddon's visit to Silicon Valley, given the visit was "at the beginning of the year" and the email was sent in September. It was a response to an email earlier in the day concerning an upcoming audit in which Mr Hodgson said:

> Also for my credit committee I am explaining the reason for the pending relocation of the office, and the need for the funds for the bank guarantee, and **I am trying to give an impression of a rough valuation of what we think Kradle could be worth**. You mentioned to me in the past that Sean Robinson sent a demo over to Silicon Valley and VC's considered a "minor shareholding" to be worth about US$200m. Can you please describe this so that I get it right as it is already in our Paladin minutes.
>
> (Emphasis added.)

104 Mr Hodgson confirmed that no particular venture capitalist was identified by Mr Haddon, nor was the name of any fund or firm. Nothing about the possibility of funding was reduced to writing. Indeed, Mr Hodgson admitted that Mr Haddon told him that no firm offer had been made by anyone. That no such offer had been made should not have surprised Mr Hodgson; he admitted that he knew that no venture capitalist had done any due diligence on the product.

105 It is also tolerably clear that the unnamed venture capitalist in Silicon Valley was not shown anything more than a nascent prototype of the product, if anything. As is apparent from a

document entitled "***What is Kradle Software?***" dated 26 June 2018, the prototype was not released for testing until Q3 of 2017. Mr Hodgson admitted that he had sent this document by email to several investors. The covering email suggested to investors that "The company is projected to go from a present value of US$750 million to US$5 billion over the next 3 years". *What is Kradle Software?* forecasted a US$1 billion valuation by the end of Q4 2019 if one million users of the product had been achieved. Mr Hodgson admitted that by Q3 2018, Kradle had only about 5,000 users, and the highest number of users achieved so far is about 17,000.

106 The transcript of the examination of Mr Haddon on 5 September 2022 pursuant to s 19 of the *ASIC Act* provides further evidence that Mr Haddon did not demonstrate the product to the venture capitalist who was apparently prepared to offer the US$180 million. To the extent that Counsel for Mr Hodgson sought to impugn Mr Haddon's recollection in 2022 of his Silicon Valley trip in 2017, I consider it more probable than not that Mr Haddon would be able to recall whether or not he was able to demonstrate the Kradle software product at an event of that type and where such large sums of money were being discussed.

107 The minutes to which Mr Hodgson referred in the email to Mr Haddon in September 2017 appear to be those of a meeting of the Credit Committee of Macrolend dated 30 June 2017 (**June 2017 Minutes**). They record that Mr Haddon visited Silicon Valley in March 2017 and that he "**was offered US$180 million** by VCs for a minor shareholding in Corearth" (emphasis added). The June 2017 Minutes went on to record:

> **The fact is Kradle does not have a product in the market yet**, so this is a very conservative value as the VC do not know if the software will perform under load. Testing software inhouse is very different than testing in the market.
>
> **Based on the approaches by various VCs it is reasonable to value Corearth at $485 million AUD**. This is only taking into account the offer of USD 180m for 49% of Kradle, and no valuation attributed for the EME side of Corearth Group is included here. Prior to Kradle CE was valued at $15m by Aus Industry when they approved a grant in 2009. Therefore, the formula to create a valuation based on VC and Aus-Industry is (US$180,000,000/49x100x1.3212)+15,000,000 – AU$500,338,775. The multiple of 1.3212 is the exchange rate.
>
> (Emphasis added.)

108 In cross-examination, Mr Hodgson denied that he had arrived at the billion-dollar valuation himself. He said that he had sent Mr Haddon to the event in Silicon Valley "to actually find out what would the base valuation be worth". He opined, "That's the traditional normal way for an IT start-up company to go and establish what is it actually worth as an opportunity valuation. There is no other way." Mr Hodgson explained:

> So generally speaking if a VC offers a valuation or an interest based on the opportunity valuation before it has been load tested in the market, they will come in at around about half of its projected value, because the load testing in the market is what makes it robust and proves – proves whether it works.

109 As I have already observed, no product yet existed. Nevertheless, Mr Hodgson adopted what might best be described as hindsight reasoning to justify the $1 billion valuation. He said in cross-examination:

> So the next thing then, once you've established the base valuation, is to go to the market and find out what would you pay. Not selling anything, just what would you pay. Come and do your due diligence and have a look at this and tell us what would you pay. In that process we set the mark of what the VC have told us but now it's a product in the market. It's never crashed in eight years and it's a functional product. So please tell you what would you pay for this, for these shares, we estimate $50 a share, there's 15 million shares, would you pay that? Here's the product, would you go through it? And we did that extensively and those who came back and said yes, we would. … So they - that is what establishes a tech company traditionally and that's what we did when we sent him and that's where that figure comes from.

110 I interpolate that the Minutes of the Credit Committee meeting of 31 July 2018 record that the valuation attributed to Corearth by the unnamed venture capitalist "worked out to be AU$33 per share at a USD/AUD conversion rate of $1.3212" but because this "was prior to Kradle being launched … the price per share should be considerably higher".

111 Mr Hodgson said that he spoke with his accountant, Ms Kim **Jay** from Initiative Accounting (who was not Kradle's accountant), about inserting the $1 billion valuation into the balance sheet which appeared in the Kradle IMs. He said Ms Jay told him it was "not necessary" to put the valuation into the IMs but that he could do so as long the "actual reasoning behind it" was justified. He was challenged as to the veracity of this recollection given that it had not been referred to in his affidavit. The June 2017 Minutes record that:

> ML will discuss the methodology with Kim from Initiative Accounting and the propagation of this val through the various companies which own shares either directly in Corearth, or units in AF Icomms and AF Icomms 2, which ML has lent funds to.

112 The 29 September 2017 Minutes of the Credit Committee support Mr Hodgson's recollection of speaking with Ms Jay about the valuation. They record:

> We have spoken to Kim from Initiative Accounting, and she has advised a Directors Revaluation was the appropriate way to revalue the Corearth shares based on the offer made by the VC to Mike Haddon in Silicon Valley earlier this year, plus the pre-Kradle Corearth val of $15 million. The VC expressed interest for a 49% shareholding for US$180 million. This extrapolates out to $367million US and at [sic] with the USD at 1.3212 the AUD value is $500,338,775.
>
> We have revalued the Corearth shares owned by MacroLend to match this, and this

has now been added to the balance sheet.

113 The "revaluation" of the Corearth shares was as explained by Mr Hodgson in his evidence: the Corearth shares were valued at US$50 per share, multiplied by the 15,105,000 shares Macrolend held in Corearth, and applying the applicable exchange rate to arrive at AU$1,027,140,000.

114 Mr Hodgson's continuing assertion that the information provided to him by Mr Haddon emanating from the Silicon Valley trip was "of immense value" and justified his valuation of $1,027,140,000 for Kradle's intangible assets as at 30 June 2018 simply cannot be accepted. The information was no more than a figure plucked out of the air by an unidentified person at a tech-conference who had an unseen, and as yet unlaunched, product spruiked to him by Mr Haddon. It is wholly disingenuous of Mr Hodgson to suggest that he could base a valuation on that information. Indeed, he ultimately accepted that the information was nothing more than "a guide".

115 The second enquiry which Mr Hodgson said informed his valuation was of Mr Jayson **Lopez** from Ping An, which Mr Hodgson understood to be a large Chinese insurance company that also provides investment banking services. No evidence about Ping An was adduced. He said that in February 2018, after the launch of the product, he told Mr Lopez about Kradle and gave him access to the software. Mr Hodgson said that Mr Lopez told him that they – I presume Ping An – "would be interested in investing at $US50 per share but wanted to see the software operating commercially for at least six months under load". Again, in cross-examination, Mr Hodgson sought to justify his use of that conversation to arrive at a value of Kradle in mid-2018 by the fact that Ping An later invested $2 million in 2021. He said, "what we assessed actually happened."

116 The third enquiry which led to Mr Hodgson's valuation of Kradle at more than $1 billion was of an unnamed female fund manager at a conference in Thailand on "marketplace" at which Mr Hodgson was lecturing, organised by "a pastor from a big church in Ukraine", in March 2018. Mr Hodgson deposed that the unnamed person told him she was a fund manager in technology stocks who, after testing the software, agreed that a price of US$50 per share was appropriate, "subject to Kradle producing several months track record of live market pressures … [with] at least 5000 users and rising". In cross-examination, Mr Hodgson said that this conversation occurred after he asked the audience he was lecturing to if there were any fund managers in the audience.

117 No evidence was given about who this person was, what her qualifications for assessing the market value of this particular software product might have been, nor as to how she tested the software and over what time period in the context of the conference environment described by Mr Hodgson. The fact that the person is said to have "agreed with" Mr Hodgson that a particular price per share was "appropriate" says nothing about the relevant comparators in the mind of the person. It is inconceivable that such an interaction could give any reliable guide as to the value of Kradle in mid-2018.

118 The fourth enquiry was in June 2018 when, Mr Hodgson deposed, he sought the opinion of Mr David **Leslie** of Crestcorp. Mr Hodgson deposed that Mr Leslie had experience in the acquisition of technology stocks and tested the software after Mr Haddon gave him an "in-depth demonstration" of the Kradle product. He told Mr Hodgson that he "accepted a value of $AUD68 per share", which was the approximate conversion from $USD50 at the time. As emerged in cross-examination, Mr Leslie did ultimately invest in Corearth Holdings in late October 2019. That investment occurred pursuant to a share sale and purchase agreement dated 23 October 2019 between Macrolend and ASPInvestment Pty Ltd, of which Mr Leslie was a director. Pursuant to that agreement, 23,588 shares were purchased at a price of AU$1,604,000, equating to a value of AU$68 per share. However, Schedule 3 of the agreement provided that the value of the sale shares would be represented "as an equity holding of 10.62% of Corearth Holdings Pty Ltd, whereby each of the Sale Shares are priced at $1.00," but that the purchase price would "relate differently to shares in Kradle Software Pty Ltd whereby each share will remain priced at $68.00". During cross-examination, Mr Hodgson sought to explain, for the first time, that this arrangement was an "incentive offer" whereby Mr Leslie was incentivised to buy shares in Kradle by receiving equity in Corearth Holdings. Regardless of Mr Hodgson's omission of that detail from his affidavit, as with his other enquiries, the mere agreement to Mr Hodgson's suggested price by someone who was given no solid basis by which to make any objective assessment of value, could not sensibly be suggested as supporting the valuation at which Mr Hodgson arrived.

119 The fifth enquiry to which Mr Hodgson deposed in his affidavit was of Mr Scott Shoffner, managing director of River East Financial, in July 2018. The fact that River East Financial did invest by purchasing convertible notes at US$50 per share in September 2018 does not alter the position. It is no more than another example of Mr Hodgson's ex post facto justification for the valuation he inserted.

120 In contrast to Mr Hodgson's personal assessment of the value of Kradle's intangible assets as at 30 June 2018, the special purpose financial statement prepared at Mr Hodgson's request in 2021 (**2021 financial statement**) supports Macrolend's and Mr Hodgson's admission in this proceeding that Kradle's balance sheet as at 30 June 2018, prepared by Kradle's chartered accountant, Mr Dean **Vane** of UHY **Haines Norton**, recorded intangible assets totalling $11,810.

121 The 2021 financial statement was consistent with the consolidated financial statement prepared for Corearth Holdings and its subsidiaries for the financial year ended 30 June 2017, signed by Mr Haddon as director on 14 March 2018. That financial statement had also been prepared by Mr Vane as Corearth Holdings' accountant. It recorded that the intangible assets held by the group entities, including Kradle, were valued at $18,209.

122 The 2021 financial statement was also consistent with the consolidated financial statement prepared for Corearth Holdings and its subsidiaries for the financial year ended 30 June 2018, prepared by Haines Norton, which recorded the intangible assets of the group as $16,432 with a note describing "Intangibles" as including "in-house software" of $11,810. Mr Vane's unchallenged evidence, tendered pursuant to s 79 of the *ASIC Act*, was that he prepared the accounts from source documents provided by the companies within the Corearth Group and in accordance with relevant accounting policies referred to in the financial statement. That document was signed by Mr Vane on 14 December 2018 and was approved by the board of Corearth Holdings, including Mr Hodgson, as he admitted during cross-examination.

123 Mr Hodgson also admitted in cross-examination that he knew as at the middle of March 2018 that the intangible assets for the whole Corearth Group were valued at just over $18,000. He also admitted that the "in-house software" referred to in the note to the $16,432 value, with a figure of $11,810, "would include Kradle".

124 In my view, while I accept that there is no direct evidence as one might have expected from an independent expert providing a valuation of Kradle's intangible assets as at the relevant date, the evidence that was given by Mr Hodgson as to how the value of over $1 billion was arrived at is sufficient for me to find that such a value was entirely fanciful. Thus, although I am unable to reach any finding as to what the actual value of Kradle's intangible assets was as at 30 June 2018, I find that it *was not* $1,027,140,000. Prima facie, the value of those assets was $11,810 because of the presumption created by ss 286(1) and 1305 of the *Corporations Act*. Far from proving the contrary, Mr Hodgson's evidence demonstrated that he had a "Magic Pudding"

approach to creating the alleged value of Kradle in circumstances where he admitted: that he had neither valuation, nor financial expertise; that at least twenty potential investors received the Kradle IMs containing the balance sheet representation between 13 February 2019 and 11 December 2020; and that twenty people invested in Kradle.

125 It is appropriate to declare that as at 30 June 2018, Kradle did not hold intangible assets in the amount of $1,027,140,000, in addition to the declarations to which Macrolend and Mr Hodgson have already agreed.

SHOULD MR HODGSON BE DISQUALIFIED?

126 The remaining question then is whether, in addition to a banning order, Mr Hodgson should be disqualified from managing corporations pursuant to s 206E of the *Corporations Act* (and, if so, what is the appropriate period of such disqualification).

127 The principles relevant to the question of whether a company director ought to be disqualified from managing a corporation were summarised by Lee J in *Australian Securities and Investments Commission v Getswift Ltd (Penalty Hearing)* [2023] FCA 100; 167 ACSR 178 at [58]-[62] in the following terms:

> 58 … Section 206E(1) provides that 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 … 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 … 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.
>
> 59 In determining whether the disqualification is justified, s 206E(2) provides that 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. The criteria relevant to the exercise of the Court's discretion under this section are the same as those surveyed above in relation to s 206C. Hence, as may be evident on the face of the provisions, and in the light of the facts of this case, nothing turns on whether any disqualification order I make is made under s 206C or s 206E.

> 60 In *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 (at 152 [48]), McHugh J described the judgment of Santow J in *ASIC v Adler* as the leading authority on the Court's disqualification power. I do not propose to reconvey these oft-cited principles here, other than to highlight the following, which summary also draws upon the principles set out by Middleton J in *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003; (2011) 196 FCR 430 (at 445–449 [104]–[110]).
>
> 61 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: *ASIC v Adler* (at 97–99 [56] per Santow J). An order also seeks both general and personal deterrence, though it is not punitive: *ASIC v Adler* (at 97–99 [56] per Santow J); *ASC v Donovan* (at 603–607 per Cooper J). Protection of the public also envisages protection of individuals who deal with companies, including consumers, creditors, shareholders and investors: *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 (at [220] per Gordon J).
>
> 62 The Court is required to be satisfied not only that an order for disqualification should be made, but that the period of disqualification is justified: *Australian Securities and Investments Commission v Blue Star Helium Ltd (No 4)* [2021] FCA 1578; (2021) 158 ACSR 196 (at 214 [75] per Banks-Smith J). The length of the period of disqualification and the seriousness of the contraventions in question are correlative. …

128 There is no dispute in this case that s 206E(1)(a)(i) and (a)(ii) are engaged.

129 In considering whether any disqualification is appropriate, and if so for what period, I have taken into account the following factors.

The seniority of Mr Hodgson

130 Mr Hodgson has been a director of Macrolend from about October 2006 and its sole director since 1 October 2022. He has been the sole director of GSL from about 26 February 2014. Further, he has been a company director of some 33 companies for a period of 40 years since 1985 and, as I have observed earlier, is presently a director of 17 Australian companies and of GSL, a foreign company registered in Belize.

The admitted contraventions

131 Mr Hodgson was an officer of Macrolend and GSL at the time of the contraventions by those entities. He too contravened the *Corporations Act* and the *ASIC Act*. In total, there were 529 contraventions of ss 911A(1) and 911A(5B) of the *Corporations Act* arising out of the Macrolend Loan and Promissory Note Arrangement, the Kradle Investment Arrangement and the GSL Promissory Note Arrangement. As to the number of contraventions of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* in respect of the balance sheet representation,

the use of funds representations, and the IPO representations, there was a total of 124. There was only one contravention of s 601CD of the *Corporations Act* relating to GSL.

132 Those contraventions are very serious. The requirement to hold an AFSL to carry on a financial services business is an important part of the regulatory framework for the protection of investors and serves an important protective purpose: *Australian Securities and Investments Commission v One Tech Media Ltd (No 6)* [2020] FCA 842 at [22].

133 Mr Hodgson did not take any reasonable steps to prevent the contraventions of ss 911A(1) and 911A(5B) of the *Corporations Act*. To the contrary, Mr Hodgson adopted a laissez-faire approach to compliance with the financial services law. He admitted that, with some limited assistance from others, he created the form of the disclosure documents and instruments entered into with investors in respect of the arrangements. He is, however, not legally qualified. He did not obtain legal advice as to whether an AFSL was required for the purpose of these specific arrangements.

134 Mr Hodgson deposed to being told in 2007 by "Calvin (or Kelvin)" from DFML that if he complied with the "20/12/2 rule" he would not need an AFSL. In cross-examination, Mr Hodgson recollected that he had sought legal advice at around the same time from a lawyer called Cameron Rogers, who practised in Buderim, and who told him that whether he needed an AFSL was "a very grey area". He also suggested in cross-examination that he may have asked another lawyer, Mr Chris **Mee** of CNM Legal, for advice about whether he needed an AFSL, a suggestion that was at odds with his affidavit in which there was no suggestion that he had asked Mr Mee about an AFSL – merely that Mr Mee had never told him one was needed. Ultimately, Mr Hodgson conceded in cross-examination that he had no specific recollection of asking for such advice. In his written closing submissions, Mr Hodgson conceded that his efforts to obtain advice "were seriously inadequate".

135 This was surprising evidence. In June 2015, Mr Hodgson had been prohibited by ASIC from providing any financial services for a period of two years, having been found to have contravened various provisions of the financial services law. It is incomprehensible that a person of such vast corporate experience, and who was involved in raising very substantial sums of money, would not seek appropriate legal advice about obtaining an AFSL when it had clearly occurred to him that one might be necessary.

136 As to the misleading or deceptive conduct, that too was very serious. Mr Hodgson made a representation as to the value of the intangible assets held by Kradle in circumstances where, as I have found, he had no reasonable basis for making such an assertion. Similarly, he represented that substantially all of the funds invested would be used for the development of Kradle when he knew much of the money collected would be used for Corearth Holdings' working capital. Although Mr Hodgson ultimately admitted to this contravention, his continuing disavowal during his cross-examination that the clear wording of the IMs, "In order to fund the next stage of growth of Kradle …", meant that "all the funds" would be used to grow Kradle did him no credit. Nor was the blame cast on Mr Haddon for the represented date of the potential IPOs to Mr Hodgson's credit. Having agreed that he was responsible for creating the documents, his attempt to recast his admission of the contravention as the fault of another was unedifying.

The nature of the investors

137 Mr Hodgson was at pains throughout his evidence to portray his investors as sophisticated investors who had approached him for investment opportunities, not retail or "Mum & Dad" investors. He maintained that Macrolend never advertised or solicited to members of the public. Nonetheless, a substantial number of individuals and entities who invested in the arrangements were retail investors – approximately 73 out of a total of 85 investors in the Macrolend Loan and Promissory Note Arrangement, 51 out of a total of 66 investors in the Kradle Investment Arrangement, and 51 out of a total of 64 investors in the GSL Promissory Note Arrangement.

138 I do not accept Mr Hodgson's evidence that Macrolend never advertised to the public. There is evidence of email communications to people from whom Mr Hodgson was clearly soliciting funds (Mr Bob James, for example). Moreover, Mr Hodgson conceded that he spoke about his companies when lecturing around the world on his "wholistic capitalism" principles.

Losses to investors

139 One of the unusual features of the present case is that no investor has suffered any loss.

140 ASIC submits the Court should infer that Macrolend, GSL and Mr Hodgson are not in a financial position where they are able to pay interest to investors on loans made pursuant to the Macrolend Loan and Promissory Note Arrangement and the GSL Promissory Note Arrangement, nor are they able to repay the principal amounts loaned pursuant to those arrangements, nor the monies provided for the purpose of the Kradle Investment Arrangement.

141 The inferences which the Court is invited to make arise, ASIC submits, from four matters. The first is the terms of the disclaimers contained in two emails from Mr Hodgson to investors, dated 28 June 2025 (**28 June email**) and 12 July 2025 (**12 July email**) respectively, in which Mr Hodgson writes:

> Over the last 36 months since the Covid lockdowns destroyed over ½ of all Australian businesses, the estimates of timing of redemptions or interest payments have changed many times based on the above and this could continue to be the case.

Mr Hodgson said in cross-examination that he had been sending a disclaimer in those terms to investors for "about a year".

142 The second matter is Mr Hodgson's reference to the success of the Cseq technology as a vehicle to profitability and thus through which investors will be repaid.

143 The third matter is a text message from Mr Hodgson to an investor, Ms Susan **Vogel**, dated 4 July 2025 in which Mr Hodgson said "we do not physically have the funds to meet your deadline on 8 July" for repayment of funds pursuant to a statutory demand. Mr Hodgson said, "We are in the midst of a refinance of our home, and this is scheduled for settlement on 11 July. If you wait until then, I will advance your funds out of the proceeds of the settlement." Mr Hodgson gave uncontradicted evidence that Ms Vogel has since been repaid.

144 The fourth matter is the content of the 28 June email and the 12 July email, in which Mr Hodgson refers to challenges in funding Cseq.

145 The circumstance of "potential losses to investors" was not a matter pleaded against Mr Hodgson. He has not had an opportunity to meet such an allegation. In any event, in the face of the uncontradicted evidence that no investor has suffered any loss, I would not be prepared to infer from the four matters relied upon by ASIC that there is a material risk that investors may lose their investments in the arrangements. The financial position of the Paladin Group as a whole would need to be interrogated.

Contrition

146 Mr Hodgson submits that, more than merely stating regret, he has demonstrated contrition by proffering his consent to an order under s 1101B of the *Corporations Act* that, for life, he will not be involved in financial services. ASIC submits to the contrary.

147 In the course of evidence, Mr Hodgson made various statements that suggested he was contrite about his conduct. In relation to the misleading or deceptive conduct, he said:

> I have admitted to almost everything in this case and fully accepted that, once I understood it from my lawyers, with the meaning of deceptive and misleading conduct, as soon as I understood that I said, "Okay. I will admit that then." So I am deeply remorseful of that once I understood it. Prior to that, it was a case of contesting it because **I didn't want investors to think that I had deliberately done something that misled them. Once I understood that misleading and deceptive conduct is, by its nature, inadvertent, doesn't necessarily mean it's done on purpose, I immediately accepted it**, I immediately made the admissions and I immediately – I personally suggested to my lawyers – they didn't encourage me – I said if you – "Let's offer a banning order for life because I never want to go into this section of the Act ever again."
>
> (Emphasis added.)

148 In relation to the failure to hold an AFSL, Mr Hodgson said:

> But, at the end of the day, I've made every effort to try and comply, starting off with two trusts on our own, and then moving on into – once I knew we were getting close to the 2012 rule, I was told, "You're going to be in breach", **I went to Diversified Funds Management Limited. They trained me as a corporate authorised representative, put me through a course, and then they licensed us**. I don't know why they were shut down, but they were, I think, or they closed down. So we then went to get our own AFSL. **That went wrong, and I got banned for that**. And then we tried to do it on our own, and, right up to this very day, nothing that we've done has worked. So I said, "Never again. We want out of this, no matter how hard we've tried."
>
> (Emphasis added.)

149 As to the proffering of a lifetime ban from financial services, Mr Hodgson said:

> I've been involved in building a big company for many, many years, your Honour, and that required the raising of capital and we're driven by vision. Obviously we need to be profitable, but we're driven by vision as well. And we needed to have a big company to achieve our vision and so the raising of capital was important. **I tried the different ways of doing it, and - as I mentioned yesterday, and we ended up getting into trouble every time.** So actually stating that we're never going to do this again changes our whole world in terms of how do we now get going with what we've got to do. And it just - we're at the stage where revenue will flow especially in the Cseq model but also in Kradle, so we're actually - it's fortunate that we don't need to raise any more capital anyway, but **that has been the nature of our business all along, has been to try and raise this capital in order to grow the business ultimately bring in revenue and then pay back the creditors. So we think we can do it now with revenue**, but actually agreeing to never go there again is scary because **it's what we've done for 20 years**.
>
> (Emphasis added.)

150 Mr Hodgson's testimony demonstrates that he is no mangenue in the field of commerce such that he could have been taken by surprise at the allegations made against him. As he said himself, he has been operating his business model for some 20 years and it is a "big business". He has had experience with contraventions of the financial services law, having been previously banned for a period of two years for carrying on a financial services business

without an AFSL; this despite apparently being trained as an authorised corporate representative. Further, I reject Mr Hodgson's evidence that he did not understand, until the mediation of this matter in April of this year, that the concept of misleading or deceptive conduct within the meaning of the *Corporations Act* does not involve intention. It is inconceivable that his very experienced legal team did not explain the allegations against him when they were first made, even if I were to assume the very doubtful proposition that his prior training and experience had not equipped him with that knowledge.

151 Other matters make me doubt Mr Hodgson's true level of contrition. First, he was unable to explain adequately how his continued involvement in all his corporate entities, other than Macrolend and GSL (from which he has offered to resign as a director), would shield him from future transgressions of the financial services law. His evidence about the manner in which Cseq and Kradle would operate without transgression might best be described as optimistic.

152 Secondly, Mr Hodgson stuck firmly to his opinion that the methodology he had adopted to arrive at his valuation of Kradle's intangible assets was sound, despite his having no qualifications or experience with respect to such matters and in the face of the unchallenged evidence of Mr Haddon and Mr Vane.

153 Perhaps most troubling were the emails Mr Hodgson sent to "MacroLend Lenders" on 28 June 2025 and 12 July 2025.

154 The 28 June email followed my refusal on 25 June 2025 to adjourn the trial at the behest of Mr Hodgson, who had asserted that he was required to discharge his legal team for lack of funds and would therefore be unrepresented at trial.

155 In addition to setting out the disclaimer to which reference has already been made, and saying that he was "energetically trying to raise the funds to re-employ [his] legal team", Mr Hodgson said, inter alia:

> ASIC has made allegations that I have engaged in misleading or deceptive conduct when raising capital to fund our projects. We have never agreed with this because all information which is passed on to investors comes from my CEOs or department heads, and if they inadvertently make any errors, we correct them as soon as we become aware of them. …
>
> During the mediation process my lawyers advised that we should just admit to these because we don't intend to ever provide financial service and these allegations would be very costly to defend. **I accepted their advice and admitted to potentially misleading and deceptive conduct, even though I don't agree with the allegations.**
> …

> ASIC also alleged that MacroLend and Great Southland Ltd were raising capital without a financial services license. Once again **we do not agree with this, and as far as we are concerned we did not need a license, but I admitted to this in an effort to settle out of court.** ...
>
> The other allegation is that I have engaged in misleading or deceptive conduct over the valuation of Kradle Software. We went to great lengths to send our CEO to Silicon Valley to find out what Venture Capitalists would pay for this, and then using their opinion we went to institutional investors and asked them to do their due diligence and tell us what they would pay. From this we formed the valuation. ...
>
> Because I refused to admit to the misleading conduct over the valuation, and because I refused to accept disqualifications from directorships outside of the financial services part of the act, we went to court on Wednesday for a Directions Hearing. Because our funds have been plundered by the mounting legal costs, I very reluctantly had to discharge my legal team and had to face ASIC's team of lawyers on my own.
>
> (Emphasis added.)

156 On the Saturday evening prior to the commencement of the trial on 14 July 2025, Mr Hodgson sent the 12 July email. It recorded the news that "one of our investors offered to refinance our home ... it yielded sufficient funds to keep Cseq alive by paying outstanding Cseq creditors, and almost enough to cover the costs of reengaging our legal team". Mr Hodgson also stated, inter alia:

> Further to this we have received some incredibly generous donations from several unrelated investors which have truly blown us away. This has completed our ability to pay the legal team and at least fight big government (ASIC, ATO, and ABC) on a more even footing.
>
> ...
>
> Once again to those investors who have become so incensed by the massive overreach of the regulators and the persecution we have been facing from tax office, that you have spontaneously donated significant sums of funds to us, we are immensely grateful and are lost for words. Without you we would never have been able to defend ourselves against ASIC.

157 Despite Mr Hodgson's expressions of remorse before me, the content of these emails demonstrates that he considers ASIC's actions in investigating and prosecuting contraventions of the financial services law "overreach". Further, and despite his admissions to the contrary, Mr Hodgson to this day does not accept that he, or Macrolend, engaged in misleading or deceptive conduct, nor that Macrolend and GSL were required to hold an AFSL.

158 In the face of these statements by Mr Hodgson, I cannot accept that he feels any remorse, beyond the fact that he became subject to ASIC's attention, nor that he has demonstrated any true contrition. It is clear from the manner in which he seeks to cast blame on his "CEOs or department heads" and the regulator for the circumstances he is in that Mr Hodgson is unable to accept personal responsibility for any of his conduct.

Protection of the public

159 The purpose of a disqualification order is to protect the public, not to punish the director: *Rich v Australian Securities and Investments Commission* [2004] HCA 42; 220 CLR 129 at [52] per McHugh J; *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; 292 FCR 627 at [144]. ASIC sought to rely on the delegate's reasons for the decision which led to Mr Hodgson's banning order in 2015. Senior Counsel for Mr Hodgson objected to the admission of those reasons into evidence on the basis that they were introduced in reply, rather than in chief. I admitted the reasons because they are relevant to Mr Hodgson's state of mind, which he squarely put in issue in relation to the making of the misleading representations. Further, the reasons were not something that would have taken Mr Hodgson by surprise. Evidence relevant to the reasons could have been led orally, had his Counsel thought it necessary to do so.

160 In any event, the reasons do not take this issue very far. They reveal that, a decade ago, Mr Hodgson similarly gave an undertaking that he would restructure his businesses such that he would not be providing financial services. At their highest, the reasons suggest that in 2015, Mr Hodgson did not appear to know what the provision of financial services entailed.

161 His evidence in this matter is of a slightly different character. There is no doubt that Mr Hodgson knows what constitutes the provision of financial services. He repeatedly mentioned the 20/12/2 rule, which he understood to be the outer limit before an AFSL was required. This is an example of the "tick a box" approach to compliance referred to by Commissioner Hayne (Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019), 177) by which "meaningful" compliance with the financial services law is circumvented until the regulator, ASIC, is forced to intervene. Mr Hodgson was not concerned to comply with the intent of the financial services law, despite his previous "run-in" with the regulator in 2015.

Conclusion on disqualification

162 In the oft-cited passage from *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80, Santow J drew attention to the factors that have been considered by courts which have led to the longest periods of disqualification (25 years or more) (at [56(xiii)]), to periods ranging from 7-12 years (at [56(xiv)]), and to the shortest periods (up to 3 years) (at [56(xv)]). It is not possible to slavishly apply a checklist to the facts of a particular case. The use of comparator cases as to the lengths

of disqualification periods is also not necessarily helpful. As Banks-Smith J observed in *Australian Securities and Investments Commission v Blue Star Helium Ltd (No 4)* [2021] FCA 1578; 158 ACSR 196 at [99], their value is "so as to tend towards comity and consistency in the determination of penalties". Nevertheless, I have had particular regard to the cases where courts have imposed both a banning order pursuant to s 1101B and a disqualification order pursuant to s 206E of the *Corporations Act*, notably *Re Scott* [2012] NSWSC 1643, *Australian Securities and Investments Commission v CFS Private Wealth Pty Ltd (No 2)* [2019] FCA 24, and *Australian Securities and Investments Commission v Ostrava Equities Pty Ltd* [2016] FCA 1064.

163 Each case depends on its own peculiar combination of facts and circumstances which have led to the contraventions. The present case is no exception. I am particularly cognizant of the fact that, in this case, there has been no allegation against Mr Hodgson of dishonesty; nor of any deliberate attempt to mislead; nor that any person who invested was actually misled; nor that any investor has suffered any loss; nor that there has been any misappropriation of funds. The case against Mr Hodgson is that which was pleaded: *Mawhinney v Australian Securities and Investments Commission* [2022] FCAFC 159; 294 FCR 375 at [92]-[95].

164 Senior Counsel for Mr Hodgson urged me to impose any disqualification order "only on the basis of the crime" and not any subsequent conduct, referring me to the decision of the New South Wales Court of Appeal in *Forge v Australian Securities and Investments Commission* [2004] NSWCA 448; 52 ACSR 1 at [414]. The Court of Appeal cited *Baumer v The Queen* [1988] HCA 67; 166 CLR 51 at 58, where the High Court said it is a fundamental proposition of sentencing "... that the punishment [must] fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence". In the following paragraph, the Court of Appeal said:

> The circumstances of the offender are equally important to the question of the appropriate sentence. In *Ibbs v The Queen* [1987] HCA 46; (1987) 163 CLR 447 at 452, the High Court in a joint judgment approved Dwyer CJ's statement in *Reynolds v Wilkinson* (1948) 51 WALR 17 at 18 that:
>
> > "Crimes bearing the same general description have not equally evil content or characteristics, and offenders also differ in themselves."

165 In all the circumstances, having regard to both the contraventions and the person through whom those contraventions were committed, it is appropriate to impose a disqualification order in addition to an order pursuant to ss 1101B and 1324 of the *Corporations Act*. The restraint to which Mr Hodgson has consented is cast in the following terms:

Pursuant to s 1101B, the Second Defendant by himself, or by any agent or company of which he is an officer, be restrained from:

(a) carrying on a business in relation to financial products or financial services;

(b) dealing in any "financial product" (as defined in the *Corporations Act*).

166 Some infelicity of drafting has likely crept into that formulation; it is to be assumed that "financial services" are also those as defined in the *Corporations Act*. Nevertheless, for reasons I explained in *Australian Securities and Investments Commission v Macrolend Pty Ltd* [2024] FCA 1028 at [18], such a restraint will not prevent Mr Hodgson from lawfully carrying on a business in relation to financial services and products and/or dealing in financial products that do not fall within the scope of the definitions in the *Corporations Act*. For example, since the enactment of the *Corporations Amendment (Litigation Funding) Regulations 2022* (Cth), litigation funders have been absolved of the need to obtain an AFSL. Credit providers are not required to obtain an AFSL; nor service providers in relation to cryptocurrencies, unless their characteristics otherwise meet the definition of "financial product" or are used as the basis of other financial products such as cryptocurrency-linked derivatives (ALRC Report No 137, *Financial Services Legislation: Interim Report A*, November 2021 at [3.40]).

167 Despite Mr Hodgson's evidence that he intends to resign his directorship of Macrolend and GSL, Mr Hodgson will continue to be a director of 16 other Australian companies and to be associated with the companies and trusts that fall within the Paladin Group, as set out in the affidavit of Peter James Connor filed on 28 February 2025. That means he will continue to be subject to the provisions of the *Corporations Act*, and in particular to the financial services law, the metes and bounds of which he has shown an unwillingness to comply with, and has demonstrated an unwillingness to accept that he has indeed contravened that law, let alone accept personal responsibility for his non-compliance. For these reasons, a disqualification order is appropriate.

168 Mr Hodgson's conduct is far from the worst case. It was nevertheless serious (as has been admitted), repeated, occurred over periods of five (Kradle Investment Arrangement), seven (Macrolend Loan and Promissory Note Arrangement), and more than eight years (GSL Promissory Note Arrangement), reckless (particularly as to failing to seek proper advice), arrogant (in respect of the Kradle valuation), and involved very significant sums of money (as has been admitted). While there has been no loss to investors, no evidence that any investor was in fact misled, no suggestion that Mr Hodgson has been deliberately dishonest, and no misappropriation of funds, the public must be protected from such conduct. I do not accept that

Mr Hodgson is genuinely remorseful or contrite. I consider there is a real risk to the public if a disqualification order is not made.

169 In all the circumstances, I am satisfied that the appropriate disqualification period is 5 years.

SHOULD I STAY THE DISQUALIFICATION ORDER?

170 Mr Hodgson submits that any disqualification order should be stayed to permit him to bring an application under s 206G of the *Corporations Act* for leave to manage certain specified corporations. I am not persuaded that it is appropriate to stay the order.

171 Mr Hodgson referred to the decision in *Australian Securities and Investments Commission v Godfrey* [2017] FCA 1569; 123 ACSR 478 in which Moshinsky J stayed the disqualification order due to Mr Godfrey's indication that he would "immediately" apply under s 206G for leave to manage the corporate trustee of his and his wife's self-managed superannuation fund. Mr Godfrey had said he would resign as a director of all other corporations in which he was involved.

172 This Court does not have similar circumstances before it. Mr Hodgson's application for a stay is premature.

DISPOSITION

173 For the reasons I have given, I will make the declarations as to which the parties have reached agreement.

174 I find that it is appropriate to declare that, as at 30 June 2018, Kradle did not hold intangible assets totalling $1,027,140,000.

175 Pursuant to s 206E of the *Corporations Act*, I will order that Mr Hodgson be disqualified from managing corporations for a period of 5 years from the date of these orders.

176 The parties are agreed that Macrolend, Mr Hodgson, and GSL will pay ASIC's costs of the proceedings on a standard basis, to be taxed if not agreed.

I certify that the preceding one hundred and seventy-six (176) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Sarah C Derrington.

Associate: 

Dated: 19 September 2025