

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v BPS Financial Pty Ltd [2025] FCAFC 74

Appeal from: *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2024] FCA 457

File number(s): QUD 331 of 2024

Judgment of: **COLLIER, MARKOVIC AND SHARIFF JJ**

Date of judgment: 30 May 2025

Catchwords: **CORPORATIONS** – respondent carried on a financial services business within the meaning of Pt 7.6 of the *Corporations Act 2001* (Cth) (**Act**) by issuing a facility for non-cash payments involving the “Qoin” digital currency or crypto-asset – whether the respondent was exempt under s 911A(2) of the Act from the requirement to hold an Australian Financial Service Licence (**AFSL**) under s 911A(1) – where the respondent was appointed as an authorised representative of another entity that held an AFSL which covered the financial services provided by the respondent – whether the primary judge erred in finding that the respondent was exempt from holding an AFSL on the basis it had been appointed, and was providing financial services, as an authorised representative of an AFSL holder – practice of “AFSL provisioning”
STATUTORY INTERPRETATION – whether the exemption in s 911A(2) includes an “essential representative capacity requirement” – whether a person can be an authorised representative where it is the issuer of a financial product – HELD: appeal allowed – exemption in s 911A(2) applies when authorised representative provides financial services “as representative of” AFSL holder – outcome is fact dependent – in issuing the relevant financial product and providing financial services in relation to it, the respondent was not acting “as representative of” AFSL holder – unnecessary to decide whether an authorised representative can be an issuer of a financial product

Legislation: *Corporations Act 2001* (Cth) ss 9, 761A, 761E, 763A, 763D, 766A, 766B, 766C, 910A, 911A, 911B, 912A, 916A, 916C, 917A, 917B, 917D

Cases cited: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory*

Revenue [2009] HCA 41; 239 CLR 27
Australian Securities and Investments Commission v BPS Financial Pty Ltd [2024] FCA 457
Australian Securities and Investments Commission v Diversa Trustees Limited [2023] FCA 1267
Coulton v Holcombe [1986] HCA 33; 162 CLR 1
Federal Commissioner of Taxation v Glencore Investment Pty Ltd [2020] FCAFC 187; 281 FCR 219
Fox v Percy [2003] HCA 22; 214 CLR 118
Impiombato v BHP Group Limited [2025] FCAFC 9
Lee v Lee [2019] HCA 28; 266 CLR 129
Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2020] HCA 29; 271 CLR 495
NMFM Property Pty Ltd v Citibank Ltd (No 10) [2000] FCA 1558; 107 FCR 270
Re Bolton; Ex parte Beane [1987] HCA 12; 162 CLR 514
Saeed v Minister for Immigration and Citizenship [2010] HCA 23; 241 CLR 252
Suttor v Gundowda Pty Ltd [1950] HCA 35; 81 CLR 418
Warren v Coombes [1979] HCA 9; 142 CLR 531

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Registry:	Queensland
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Sub-area:	Commercial Contracts, Banking, Finance and Insurance
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Date of hearing:	14 March 2025
Counsel for the Appellant	Mr J T Gleeson SC with Mr R D Strong and Mr A P Hall
Solicitor for the Appellant	Australian Securities and Investments Commission
Counsel for the Respondent	The Respondent filed a submitting notice save as to costs
Counsel for the <i>Amicus Curiae</i>	Mr A P J Collins
Solicitor as <i>Amicus Curiae</i>	O'Shea Lawyers

ORDERS

QUD 331 of 2024

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

AND: **BPS FINANCIAL PTY LTD (ACN 604 899 381)**
Respondent

ORDER MADE BY: **COLLIER, MARKOVIC AND SHARIFF JJ**

DATE OF ORDER: **30 MAY 2025**

THE COURT ORDERS THAT:

1. Order 3 of the orders made by Downes J on 22 May 2024 be set aside (**22 May Orders**).
2. In substitution of Order 3 of the 22 May Orders, the Court declares pursuant to section 1317E(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) that between 5 November 2020 and 30 August 2021 the Defendant (**BPS**) carried on a financial services business in Australia in contravention of subsection 911A(1) of the Corporations Act, being a business of:
 - (a) dealing in a financial product being the Qoin Wallet; and
 - (b) providing financial product advice in relation to the Qoin Wallet by publishing on its website and in promotional material accessible to the public, statements of opinion which were intended to influence persons in making a decision in relation to the Qoin Wallet,when BPS did not have an Australian Financial Services Licence covering the provision of those financial services and thereby contravened section 911A(5B) of the Corporations Act.
3. There be no order as to the costs of the appeal, other than that the appellant pay the costs of the *amicus curiae*.

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

REASONS FOR JUDGMENT

THE COURT:

1. INTRODUCTION

- 1 In the proceedings below, the appellant (**ASIC**) made a number of claims against the respondent (**BPS**) including that it had contravened s 911A(1) of the *Corporations Act 2001* (Cth) (the **Act**) by carrying on a financial services business without holding an Australian financial services licence (**AFSL**).
- 2 The primary judge accepted a number of ASIC’s claims against BPS but rejected ASIC’s claim that BPS had contravened s 911A(1) of the Act during the period that it had been appointed as an authorised representative of PNI Financial Services Pty Ltd (**PNI**): *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2024] FCA 457 (**primary judgment** or **PJ**). In respect of this period, the primary judge found that BPS was exempt from the requirement to hold an AFSL because BPS was providing financial services as an authorised representative of PNI who held an AFSL that covered the financial services provided by BPS. ASIC appealed from this aspect of the primary judge’s findings.
- 3 The short background to the appeal is that BPS had developed and marketed a facility for making non-cash payments using a digital currency or crypto-asset named “**Qoin**”. Qoin is a notional unit of exchange in transactions undertaken through the “**Qoin Wallet**”. The Qoin Wallet App is an application specifically designed for Qoin that can be downloaded onto compatible Apple and Android devices and allows users to create a Qoin Wallet. The Qoin Wallet operates as a payment facility through which transactions are conducted using Qoin. It also enables users to view their balance of Qoin. The term “**Qoin NCP Product**” was used to describe the financial product issued and marketed by BPS.
- 4 It was not in dispute that by issuing the Qoin NCP Product, BPS carried on a “financial services business” and was required by s 911A(1) to hold an AFSL *unless* an exemption applied. It was common ground that BPS sought out an AFSL holder to seek its approval to appoint BPS as an authorised representative to enable it to issue the Qoin NCP Product. Initially, BPS was appointed as an authorised representative of Billzy Pty Ltd (**Billzy**). When that arrangement came to an end, BPS entered into an agreement with PNI under which it was appointed as an authorised representative of PNI (**PNI AR Agreement**). PNI held an AFSL which covered the

provision of financial services of the kind supplied by BPS: PJ [96]; see also PJ [23]–[27], [120]–[128]. Specifically, PNI’s AFSL permitted it to issue financial products and provide general financial product advice about them. By the PNI AR Agreement, PNI specifically authorised BPS to issue the Qoin NCP Product and to provide general financial product advice about that Product during the period from 5 November 2020 to 30 August 2021(**PNI Period**).

5 In the proceedings below, ASIC contended that BPS could not act as an authorised representative of PNI in relation to the Qoin NCP Product because BPS was the *issuer* of that financial product. ASIC submitted that where a person issues a financial product, the person cannot do so “on behalf of” another person such that the issuer needs to hold an AFSL and cannot be an authorised representative of another person in respect of that product. The primary judge rejected this contention and dismissed this part of ASIC’s case but upheld other aspects of ASIC’s case. Her Honour made orders to this effect on 22 May 2024.

6 By its amended notice of appeal, ASIC advanced two grounds of appeal, being in substance that the primary judge erred by finding that:

- (a) BPS was exempt under s 911A(2)(a) of the Act during the period of the operation of the PNI AR Agreement (**Ground 1**); and
- (b) during the PNI Period, BPS was acting as a representative of PNI (within the meaning of s 911A(2)(a) of the Act) without having made findings of fact as to whether or not, in providing those services, or any of them, BPS was acting on its own behalf or was acting as representative of PNI (**Ground 2**).

7 The primary judge granted ASIC leave to appeal on 24 May 2024. BPS filed a submitting appearance and, as a result, the Court made orders for the appointment of an *amicus curiae* to assist the Court.

8 ASIC’s core argument on appeal had a different focus to the argument it advanced before the primary judge. In the appeal, ASIC submitted that the authorised representative exemption in s 911A(2)(a) of the Act contains “an essential representative capacity requirement” which has the consequence that a person cannot be an authorised representative of an AFSL holder if the representative is itself the *issuer* of the financial product. ASIC acknowledged that its arguments on appeal were more refined and different to those which it had advanced before the primary judge. Whilst acknowledging these matters, ASIC submitted that its arguments on appeal were nevertheless within the scope of the submissions it had advanced before the

primary judge. As explained further below, the arguments that ASIC advanced on appeal were within the scope of the arguments it had made before the primary judge but were certainly not ASIC's central focus before her Honour.

9 For the reasons that follow, ASIC's appeal should be upheld. In upholding ASIC's appeal, it is not necessary to decide whether a person can be an authorised representative of an AFSL holder where that person is the issuer of the financial product. Rather, as explained below, the result of this appeal turns upon whether on the basis of the uncontroversial facts, BPS was acting in its capacity as an authorised representative of PNI during the PNI Period.

2. THE RELEVANT FACTS

10 As ASIC's second ground of appeal involved a challenge to the findings of fact made by the primary judge, it has been necessary to conduct a "real review" of the evidence before the primary judge: *Lee v Lee* [2019] HCA 28; 266 CLR 129 at 148 [55] (Bell, Gageler, Nettle and Edelman JJ) citing *Fox v Percy* [2003] HCA 22; 214 CLR 118 at 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ); see also *Federal Commissioner of Taxation v Glencore Investment Pty Ltd* [2020] FCAFC 187; 281 FCR 219 at 268 [151] (Middleton, Steward and Thawley JJ).

11 It is not controversial that the review of the primary judge's findings of fact and inferences drawn from those facts are subject to the principles stated in *Fox v Percy*; see also *Warren v Coombes* [1979] HCA 9; 142 CLR 531 at 551 (Gibbs ACJ, Jacobs and Murphy JJ); *Impiombato v BHP Group Limited* [2025] FCAFC 9 at [193] (Beach and O'Bryan JJ).

2.1 Background Facts

12 BPS is a member of the broader "Bartercard Group": PJ [19]. In late 2018, two former long-term employees of the Bartercard Group, Mr Antonie Wiese and Mr Rajesh Pathak, acquired the Bartercard Group through their own corporate interests: PJ [17].

13 By early to mid-2019, Mr Wiese, Mr Pathak and senior management of Bartercard discussed using blockchain technology to transition to a digital currency: PJ [17]. This initiative came to be known as the "Qoin Project" and BPS came to be the corporate vehicle through which the Qoin Project was established and implemented: PJ [17].

14 As set out above, the object of the Qoin NCP Product was to facilitate the use of Qoin using the Qoin Wallet and Qoin Wallet App. The Qoin Wallet component of the Qoin Wallet App had the function of enabling users to view their balance of Qoin and also operated as the

payment facility that enabled transactions to occur: PJ [47]. The facility enabled business operators to register as “Qoin Merchants”, enabling them to accept Qoin in payment for goods and services: PJ [48]. As the primary judge explained at PJ [63]:

When a person “transacts” using Qoin, they do not actually “send” a Qoin to another person or “acquire” a Qoin from another person, even though those terms are sometimes used colloquially to explain a transaction that gives rise to a decrease or increase in a Qoin balance. Instead, the Qoin Wallet communicates with the Qoin Blockchain Nodes through the mechanisms described above to carry out a command that records a deduction of a certain amount of Qoin against the “payer’s” Qoin Wallet, and an addition of the same amount of Qoin against the “payee’s” Qoin Wallet on the Qoin Blockchain, and prompts the Qoin Wallet to decrease/increase the Qoin balances associated with each Qoin Wallet address by the amount.

- 15 In order to facilitate such transactions, BPS also made available the “Q Shop”, which was an online directory in which Qoin Merchants and other users could list their services or products for sale: PJ [68].
- 16 It is relevant that, by in or about January 2020, and well before BPS approached PNI to enter into an authorised representative agreement, BPS had developed and made available to the public the Qoin Wallet and the Qoin Wallet App: PJ [30], [33]–[36].

2.2 Recognition of the need for an AFSL and the AR Agreements

- 17 BPS recognised that the Qoin NCP Product would involve the provision of a “financial product” within the meaning of s 763A as it would be a facility through which a person would make a non-cash payment as defined in s 763D: PJ [20].
- 18 BPS further recognised that, as it did not hold an AFSL, it would need to seek out an AFSL holder to enable it to issue the Qoin NCP Product: PJ [21]. BPS obtained a list of AFSL holders who held a licence permitting them to issue non-cash payment financial products: PJ [21]. This led to BPS approaching Billzy and entering into an agreement whereby BPS was appointed as an authorised representative of Billzy: PJ [22]–[23].
- 19 At some point, BPS was informed that Billzy would not be able to continue the arrangement after an initial 12-month period and it was suggested that BPS should approach PNI who also held an AFSL that permitted it to issue non-cash payment financial products: PJ [24]. This then led to BPS entering into the PNI AR Agreement and, at the conclusion of that Agreement, BPS re-established agreements with Billzy. Relevantly, the evidence established that (PJ [96]):

- (a) between 18 December 2019 and 4 November 2020, BPS was a party to “the First Billzy Arrangement” which included the “First Billzy Authorised Representative Agreement”;
- (b) between 5 November 2020 and 30 August 2021, BPS was a party to the PNI AR Agreement; and
- (c) from 1 September 2021 to the date of the hearing before the primary judge, BPS had been a party to “the Second Billzy Arrangement” which included “the Second Billzy Authorised Representative Agreement”.

2.3 PNI’s AFSL and the PNI AR Agreement

20 At all relevant times, **PNI’s AFSL** was of significant breadth. It provided as follows:

- 1. This licence authorises the licensee to carry on a financial services business to:
 - (a) provide general financial product advice for the following classes of financial products:
 - (i) deposit and payment products limited to:
 - (A) non-cash payment products; and
 - (b) deal in a financial product by:
 - (i) issuing, applying for, acquiring, varying or disposing of a financial product in respect of the following classes of financial products:
 - (A) deposit and payment products limited to:
 - (1) non-cash payment products; and
 - (ii) applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of the following classes of products:
 - (A) deposit and payment products limited to:
 - (1) non-cash payment products;
- to retail and wholesale clients.

21 The parties to the PNI AR Agreement were PNI as “Licensee” and BPS as the “Company”: PJ [125]. Recital B recorded that (PJ [125(2)]):

The Company has requested the Licensee appoint it as its Authorised Representative and to authorise it to provide the Specified Financial Services to enable it to promote and distribute the Product.

22 Clause 2.1(a) of the PNI AR Agreement provided that:

The Licensee appoints the Company as an Authorised Representative to:

- (i) provide Financial Services. This appointment is an authorisation for the purposes of section 916A(1) of the Corporations Act; and
- (ii) arrange the issue of the Product pursuant to section 911A(2)(b) of the Corporations Act.

23 Relevantly, the defined terms in the PNI AR Agreement included the following:

- (a) the term “Authorised Representative” was defined to have “the same meaning as it has in Section 916A(1) of the Corporations Act” (cl 1.1);
- (b) the term “Financial Services” was defined to have “the meaning given to that term in the Corporations Act” (cl 1.1);
- (c) the term “Product” was defined to mean “the Qoin Wallet, a non-cash payment product” (cl 1.1);
- (d) the term “Qoin” was defined to mean “the Company’s digital currency on a blockchain network” (cl 1.1);
- (e) the term “Qoin Wallet” was defined to mean “the Company’s online platform that stores private and public keys and interacts with various blockchain to enable Clients to send and receive digital currency (such as Qoin) and monitor their digital currency balance” (cl 1.1); and
- (f) the term “Specified Financial Services” was defined to mean “the Financial Services in Schedule 1” (cl 1.1), which in turn provided that the “Specific Financial Services” BPS could provide to “Retail and Wholesale clients” for the purposes of the PNI AR Agreement were as follows:
 - (a) Provide general financial product advice for the following classes of financial products:
 - (i) deposit and payment products, limited to:
 - A. non-cash payment products
 - (b) Deal in a financial product by issuing, varying or disposing of a financial product in respect of the following classes of products:
 - (i) deposit and payment products, limited to:
 - A. non-cash payment products
 - [(c)] Deal in a financial product by applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of the following classes of products:
 - (i) deposit and payment products, limited to:
 - A. non-cash payment products.

24 Clause 2.1(b) of the PNI AR Agreement provided that:

Notwithstanding any other provision of this Agreement, the Company is strictly prohibited from providing Financial Services that [are] not permitted under the Licensee's AFSL.

25 Clause 2.2 of the PNI AR Agreement contained the following "Acknowledgements":

- (a) The Company acknowledges that:
 - (i) it has received a copy of the Licensee's AFSL;
 - (ii) it has read and understood the terms and conditions of the Licensee's AFSL; and
 - (iii) the Licensee is not authorising the issue of any digital currency, including Qoin.
- (b) The Company has sought its own independent legal advice in relation to its appointment as an Authorised Representative of the Licensee and confirms the terms of the AFSL are sufficient to enable the Company to promote and operate the Product.

26 Clauses 4.1 to 4.5 of the PNI AR Agreement imposed various obligations upon BPS in relation to the manner in which it provided financial services under the PNI AR Agreement. Relevantly, cl 4.2(b) provided:

When providing Financial Services under this Agreement, the Company must do the following:

...

- (b) Only provide the Specified Financial Services in connection with the promotion, issue and operation of the Product.

27 Clause 6.1 of the PNI AR Agreement dealt with the requirements imposed on BPS in relation to the "PDS". It relevantly provided as follows:

- (a) The Company is responsible for the preparation of the PDS for the Product and must ensure the PDS complies with the requirements of the Corporations Act and any relevant ASIC policy, including (without limitation) the requirements of Sections 1013B, 1013C, 1013D, 1013DA and 1013G of the Corporations Act.
- (b) The Company must include any wording, statement or information (or amend any wording, statement or information) that the Licensee reasonably requires.
- (c) The Company is responsible for the costs associated with the preparation, issue and printing of the PDS, including the Licensee's legal costs associated with any review and amendment of the PDS.
- (d) If requested by the Licensee, the Company must provide the Licensee with a copy of the minutes of a meeting of the Company's board of directors, confirming each director of the Company consents to the issue of the PDS and

confirming the issue of the PDS (and/or any supplementary PDS).

- (e) The Company, in its capacity as an Authorised Representative of the Licensee, is authorised to make offers to people to arrange for the issue of the Product in accordance with the terms of the PDS and this Agreement.
- (f) The Company is responsible and liable for the issue of the PDS, including (without reservation) all of the content, disclosures, images, forecasts and representations made in the PDS. The Company agrees the Licensee bears no liability or responsibility for the content of the PDS.
- (g) If the PDS ceases to be up to date (for any reason) or contains a misleading or deceptive statement, then the Company must:
 - (i) cease to issue the Product; and
 - (ii) cease the distribution of the PDS and any promotional or marketing material relating to the Product,until the PDS (and any promotional or marketing material) has been updated (e.g., by way of a supplementary or replacement PDS) to the reasonable satisfaction of the Licensee.

2.4 Documents relevant to the issue of the Qoin NCP Product

28 There were several documents that were relevant to the issue of the Qoin NCP Product. As explained further below, these documents are relevant because versions of them existed well before BPS entered the PNI AR Agreement.

(a) *The White Paper*

29 From on or around 30 January 2020, a document entitled “Qoin – Official White Paper” (the **White Paper**) appeared on the “Qoin Website”: PJ [71]. The contents of the version of the White Paper made available on that website as at 28 March 2022 were in the same terms as the initial version of the White Paper: PJ [71]. As the primary judge noted at PJ [72], the White Paper stated:

This White Paper describes our plans and progress made towards opening the world’s largest private merchant trading ecosystem to the public on a distributed blockchain and smart contract platform. This new cryptocurrency, backed by participating merchant’s supply of goods and services, allows innovative ways for merchants to attract shoppers. Qoin is built on the latest Smartcoin, Tokenscript and Distributed Ledger Technology.

(Underline used to represent amendments from earlier versions.)

30 The White Paper also stated:

The Australian Qoin Wallet is a regulated non cash payments product approved as Authorised Representative number 1279598 of Australian Financial Services Licence (AFSL) number 494176. When the merchant ecosystem is expanded into the rest of

the world, the Council will engage with country regulators and law firms to get the appropriate guidance.

(b) Qoin Guide

31 In October 2020, BPS created a document titled “Qoin Merchant and Consumer Guide” (**Qoin Guide**). Amongst other things, the Qoin Guide provided guidance on the “Merchant Registration Process”. It identified the steps a prospective user had to take to download the “Qoin Wallet App” on mobile devices and, once done, how to register “to join Qoin” and create a “Wallet”: pp 4–7. It also identified that users were required to agree to the Qoin “terms of use” as part of the registration process. To do so, prospective users would be taken to an interface which invited them to read four documents by tapping on links respectively labelled “Financial Services Guide”, “Product Disclosure Statement”, “Terms of Use” and “Privacy Policy”. Beneath these links was a check box which provided “I agree to be bound by the Terms of Use”, which a prospective user could tick before tapping a further button labelled “Continue”.

32 It was expressly stated in the footer of the first page of the Qoin Guide that the “copyright of the information in this manual belongs to BPS Financial Limited” and that no part of the information could be “reproduced” or “given to an unauthorised person without the express written permission of BPS Financial Limited”. Each subsequent page of the Qoin Guide contained a recurring footer stating as follows: “©2020 BPS Financial Limited (Merchant Registration Process – How to Guide V2.02 (2020-10))”.

(c) Combined FSG/PDS

33 During the period December 2019 to November 2021, BPS issued six combined Financial Services Guides and Product Disclosure Statements (**Combined FSG/PDS**): PJ [78]. The Combined FSG/PDS which was available to the public on 31 August 2021 was representative of all six versions (which contained the same or similar statements as each other): PJ [78].

34 As its title suggests, the Combined FSG/PDS contained two parts: the first part set out the Financial Services Guide (**FSG**) and the second part set out the Product Disclosure Statement (**PDS**).

35 The Combined FSG/PDS stated:

This Combined FSG and PDS provides information about the payment system provided by BPS Financial Ltd (**Payment System**) to assist you in making an informed

decision about this product. The Payment System is an electronic Bill Paying Service.

...

The Financial Services Guide (FSG) is designed to help you decide whether to use any of the services we provide. The Product Disclosure Statement (PDS) contains information you require to make an informed decision about whether or not to register for and use our Payment System and services.

(Emphasis in original.)

36 As distinct from the Terms of Use (discussed below), BPS was identified as an Authorised Representative of “Billzy Pty Ltd” as the AFSL holder on the title page and in each of the first clauses of the FSG and the PDS: pp 1, 4 and 6. Clause 1 of the FSG and cl 1 of the PDS stated that they had each been respectively “prepared” or “provided” “by” BPS “*which is an Authorised Representative of Billzy*” (emphasis added). The clauses did not state that the FSG and PDS have been prepared or provided by BPS “*for*” Billzy, or “*on behalf of*” Billzy or “*as an authorised representative of*” Billzy.

37 Clause 1 of the FSG defined the words “we”, “us” and “our” to mean BPS, alone, rather than BPS and Billzy, together. This was so despite the express reference to Billzy in cl 1 and recognition of BPS’ status as an authorised representative. This language was then used extensively throughout the document in relation to the prospective user, which, consistent with the definition carried across from the Terms of Use (discussed below), was referred to as “you” in the FSG.

38 Clause 2 noted that the FSG contained information about “[t]he services *we* provide”. These services were then described in cl 4, which first noted that BPS was an authorised representative of Billzy and is authorised to (1) provide general financial product advice for non-cash payment products and (2) issue, apply for, acquire, vary or dispose of non-cash payments. Clause 4 then provided:

We are only authorised to provide general advice. Any advice **we provide** (including any statement of opinion or recommendation) will not take into account your individual objectives, financial situation or needs. Before using **our services**, you should consider the appropriateness of **our services** in regard to your objectives, financial situation and needs before you act on any **advice we provide**.

39 Whilst this clause made plain that BPS was “authorised” to provide general advice, it is equally plain that BPS was the entity providing the relevant services and advice. What is not plain, however, is whether BPS was acting as representative of Billzy or PNI, or on its own behalf.

- 40 The same position applies to cl 3 of the PDS, which provides that “Our services allow you to securely and conveniently make payments to Merchants”. The clause thereafter set out a table explaining that such services included making payments, requesting and receiving payments and withdrawing money.
- 41 Each of the clauses in the FSG and PDS that governed remuneration referred only to the employees and directors of BPS: FSG, cl 5; PDS, cl 2.
- 42 Further, it was BPS who charged fees and surcharges (PDS, cl 6), BPS who collected, used and exchanged personal information from users (PDS, cl 8), BPS who was entitled to vary the PDS at its reasonable discretion at any time (PDS, cl 9(1)), BPS who was entitled to exercise any right, remedy or power in any way it chooses (PDS, cl 9(4)) and BPS who was entitled to assign or otherwise deal with its rights under the PDS without a user’s consent (PDS, cl 9(5)).
- 43 It was not contemplated that Billzy would be bound by, or required to perform any services under, the terms of the PDS. Clause 5 of the PDS (headed “Terms of Use”) provided that by “accessing our Payment System, you agree to be contractually bound by the terms of this PDS and *our* Terms of Use” which “governs your use of *our* Payment System” (emphasis added).
- 44 It is apparent that the contractual relationship contemplated by the PDS was a bilateral one between BPS and the user of BPS’ services.

(d) Terms of Use

- 45 The evidence before the primary judge also included the “**Terms of Use**”, which appeared to be in a draft form and was dated 7 January 2020. It was said to be representative of the general form of the “Terms of Use” document that prospective users were invited to read as part of the registration process identified in the Qoin Guide (as addressed at [31]).
- 46 The Terms of Use were prefaced with a summary which preceded a series of numbered clauses together constituting the balance of the document. The summary was addressed to prospective users and relevantly provided, amongst other things, that:
- (a) “These Terms of Use govern your use of the App, sites located on the Q Wallet browser and web sites provided by BPS”;
 - (b) the Terms of Use, together with the “Privacy Policy”, “PDS” and “FSG”, “form an agreement between you and BPS (‘Agreement’)”; and

(c) “BPS reserves the right to amend the Agreement in relation to these Services”.

47 It is plain from this summary that the relevant contractual relationship was between BPS and Qoin users. There was no reference to the AFSL holder. The balance of the Terms of Use, in essence, took the form of a bilateral agreement between BPS and the relevant user of its services.

48 Clause 1 of the Terms of Use set out the definitions utilised throughout the document. Relevantly, “BPS”, “we” and “us” was defined to mean “BPS Financial Limited ABN 99 604 899 381” and “You” was defined to mean “the user who downloads and utilises the App and the Site and agrees to this Agreement”: pp 1–2. This language – “you”, “we”, “us” – was then used throughout the Terms of Use and appeared in all but one of the clauses.

49 The terms “Qoin Wallet” and “Q Wallet” were both defined to mean “a cryptocurrency wallet developed by *BPS* that connects to the Qoin Chain and allows a *User* to make cryptocurrency transactions”. The term “Services” was defined to mean “the services, including the App, the Q Wallet, sites located on the Q Wallet browser and web sites provided by *BPS* to *you*”. The term “Transaction Services” was defined to mean “services provided by *BPS* (through the App)” and the term “Directory” was defined to mean “a service available on the App and a website ... that *BPS* from time to time determines” (emphases added).

(e) PNI Documents

50 The versions of the Terms of Use and the Combined FSG and PDS before the Court predated the PNI AR Agreement. However, it was submitted, and not in dispute, that the documents were representative of the documents that applied during the PNI Period, with no substantive changes made to them: see also PJ [78].

51 Other than a select few documents, the Court was not provided with documents prepared during, or effective in, the PNI Period. To the extent that any such documents were included in the Appeal Books, one document was an email chain containing two emails exchanged between representatives of Bartercard and PNI on 27 October 2020 and 4 November 2020. These emails related to the authorised representative agreement between PNI and BPS.

52 In the earlier of the two emails, Mr Benjamin Banks (PNI, Managing Director) provided comments on a draft copy of what would become the PNI AR Agreement. One such comment

was that “[t]his is a BPS product and offering and therefore BPS is responsible for drafting and issuing of PDS/FSG in consultation with PNI”.

53 A further two documents included an email dated 19 November 2020 and its attachment. This email was sent by Mr Banks to Mr Steve Quinn (Bartercard, Group Risk Manager) and attached a document titled “Letter of Authority”, which was signed by Mr Banks on 19 November 2020 in his capacity as director of PNI. On its face, the Letter of Authority confirmed that BPS had become an authorised representative of PNI on 5 November 2020 and certified that BPS was authorised to provide certain financial services “as an authorised representative of PNI”. These services included (a) providing “general product advice for ... deposit and payment products, limited to non-cash payment products”, (b) dealing “in a financial product by issuing, varying or disposing of a financial product in respect of ... deposit and payment products, limited to non-cash payment products” and (c) dealing “in a financial product by applying for, acquiring, varying or disposing of a financial product in respect of ... deposit and payment products, limited to non-cash payment product on behalf of another person”.

(f) Evidence as to apparent compliance steps taken by Billzy and PNI

54 There was some evidence before the primary judge that Billzy and, later, PNI had taken steps to monitor the provision of services by BPS. The relevant measures are set out in affidavits respectively sworn on 20 July 2023 by Mr Antonie Wiese (the **Wiese Affidavit**) and Mr Stephen Quinn (the **Quinn Affidavit**). Mr Quinn was the Group Risk Manager of the Bartercard Group.

55 Relevantly, in relation to Billzy, Mr Wiese, Mr Pathak and Mr Quinn attended a first meeting with representatives of Billzy on 26 November 2019. Mr Quinn deposed that, later on that same day, he provided Billzy with the draft PDS for Qoin, this being almost one month prior to the execution of the first AR Agreement with Billzy: Quinn Affidavit at p 7 [35].

56 Mr Wiese deposed that discussions about compliance commenced at this initial meeting and were the subject of other telephone conversations and teleconferences in the following days: Wiese Affidavit at p 17 [93]–[95]. Mr Wiese’s evidence indicates that during these interactions, representatives of Billzy informed BPS about what documents were necessary for compliance purposes and instructed BPS that the “required documentation must include a Corporate Authorised Representative Agreement (CAR), Intermediary Agreement (IA),

Financial Services Guide (FSG) and Product Disclosure Statement (PDS)”: Wiese Affidavit at p 18 [99].

57 Mr Wiese further deposed that, following the execution of the “Authorised Representative Agreement”, representatives from BPS and Billzy began to work together to establish “appropriate procedures and reporting mechanisms to comply with the obligations under the Authorised Representative Agreement”: Wiese Affidavit at pp 20–21 [112]–[125]. In furtherance of this, Billzy provided BPS with a compliance plan relating to Billzy’s requirements as licensee, and both sides agreed to hold monthly “AFSL Compliance meetings”, commencing in February 2020: Wiese Affidavit at p 22 [128]–[129].

58 This was corroborated by Mr Quinn, who deposed that “monthly compliance meetings” with Billzy were conducted between February and November 2020 and that these meetings were always chaired by a representative of Billzy: Quinn Affidavit at pp 10–11 [56], [59]–[60], [68]. Mr Wiese deposed that minutes were produced following each meeting and that the “responsible managers” of Billzy followed up the “BPS compliance team” about “all actions items and outstanding items against the compliance plan”: Wiese Affidavit at pp 22–23 [129]–[131].

59 Outside of these meetings, Mr Quinn deposed that Billzy kept “document control over the [Combined FSG/PDS] for the Qoin Wallet”, such that “no changes could be made to [it] without approval of Billzy”: Quinn Affidavit at p 10 [56]–[58]. Additionally, Mr Quinn deposed that Billzy’s supervision over BPS extended to “reviewing and approving marketing material for the Qoin Wallet”.

60 The evidence of the compliance steps taken by PNI in the PNI Period was also set out in the Wiese and Quinn Affidavits. Mr Quinn’s evidence was that the supervision exercised by PNI reflected that which Billzy had previously exercised. That is, PNI continued holding monthly compliance meetings, reviewed and approved the marketing materials for the Qoin Wallet and kept document control over the Combined FSG/PDS: Quinn Affidavit at pp 13–14 [84]–[85].

61 However, Mr Quinn deposed that, unlike Billzy, PNI did not issue a compliance plan and that “the documentation of everything just became slightly less formal” than it had with Billzy: Quinn Affidavit at p 14 [86]. In his affidavit, Mr Wiese deposed that BPS continued to observe the Billzy compliance plan and that this plan was used to assess BPS at the monthly compliance meetings: Wiese Affidavit at p 26 [153]–[154]. As had occurred under Billzy’s supervision,

the evidence indicates that minutes were recorded in respect of each meeting and that “the PNI responsible manager followed up the BPS compliance team with all action items and outstanding matters against the compliance plan”: Wiese Affidavit at p 26 [155]. As for PNI’s control over the Combined FSG/PDS, PNI was said to have prepared an updated version of the document to be issued once the PNI AR Agreement came into effect: Quinn Affidavit at p 14 [88].

3. THE SALIENT STAUTORY PROVISIONS

62 Part 7.6 of the Act enacts a regime which requires a person who carries on a “financial services business” to hold an AFSL, unless an exemption applies. Relevantly, s 911A(1) provides as follows:

911A Need for an Australian financial services licence

- (1) 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.

Note 1: Also, a person must not provide a financial service contrary to a banning order or disqualification order under Division 8.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

63 Prior to 20 October 2023, the term “financial services business” was defined in s 761A of the Act as “a business of providing financial services”. A person provides a “financial service” if, amongst other things, they “provide financial product advice” within the meaning of s 766B, or “deal in a financial product” within the meaning of s 766C: ss 761A (definitions of “financial service” and “financial product advice”), 766A(1)(a) and (b). Relevantly, s 763A(1)(c) provides that a “financial product” includes a facility through which a person makes non-cash payments within the meaning of s 763D.

64 There was no dispute that the Qoin NCP Product was a financial product. There was also no dispute that BPS dealt with this financial product because it was the “issuer” of that product. Relevantly, s 766C(1)(b) outlines the meaning of “dealing” as follows:

766C Meaning of dealing

- (1) The following conduct (**whether engaged in as principal or agent**) constitutes dealing in a financial product:

...

- (b) issuing a financial product;

...

(Emphasis added.)

65 However, s 766C(1) was subject to the qualification in the sub-s (3), as follows:

(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.

(Emphasis added.)

66 Section 761E(2) provides that “a financial product is *issued*” to a person when it is first issued, granted or otherwise made available to a person (emphasis in original). Section 761E(4) identifies the “issuer” of a financial product as follows:

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.

Note: For example, the issuer of a direct debit facility is the financial institution with which the account to be debited is held, rather than the persons to whom payments can be made using the facility.

(Original emphasis retained; additional emphasis added.)

67 It was accepted that BPS was the issuer of the Qoin NCP Product.

68 As BPS was the issuer of the Qoin NCP Product, it followed that it was involved in dealing with that financial product and was engaged in providing a financial services business. It also followed that it was required to hold an AFSL unless it fell within an exemption. Relevantly, for this purpose, s 911A(2)(a) provides:

(2) However, a person is exempt from the requirement to hold an Australian financial services licence for a financial service they provide in any of the following circumstances:

- (a) the person provides the service **as representative of** a second person who carries on a financial services business and who:

- (i) holds an Australian financial services licence that covers the provision of the service; or
- (ii) is exempt under this subsection from the requirement to hold an Australian financial services licence that covers the provision of the service;

Note: However, representatives must still comply with section 911B even if they are exempted from this section by this paragraph.

(Emphasis added.)

69 At the relevant time, the term “representative” was defined in s 910A of the Act (and is now defined in s 9) as meaning:

- (a) if the person is a financial services licensee:
 - (i) **an authorised representative of the licensee;** or
 - (ii) an employee or director of the licensee; or
 - (iii) an employee or director of a related body corporate of the licensee; or
 - (iv) **any other person acting on behalf of the licensee;** or

...

(Emphasis added.)

70 The term “authorised representative” was at the time defined in s 761A of the Act (and is also now defined in s 9) as follows:

authorised representative of a financial services licensee means a person authorised in accordance with section 916A or 916B to provide a financial service or financial services **on behalf of** the licensee.

(Original emphasis retained; additional emphasis added.)

71 Relevantly, s 916A provides as follows:

916A How representatives are authorised

- (1) A financial services licensee may give a person (the ***authorised representative***) a written notice authorising the person, for the purposes of this Chapter, to provide a specified financial service or financial services **on behalf of** the licensee.

Note: There are limitations on a financial services licensee authorising an individual to provide certain personal advice if the individual does not meet certain requirements (see section 921C).

- (2) The financial services specified may be some or all of the financial services covered by the licensee’s licence.
- (3) An authorisation under subsection (1) is void to the extent that it purports to authorise a person to provide a financial service:
 - (a) that is not covered by the licensee’s licence; or

- (b) contrary to a banning order or disqualification order under Division 8; or
 - (c) in contravention of subsection 921C(2).
- (3A) A person must not give a purported authorisation if that purported authorisation is void to any extent under subsection (3).
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (4) An authorisation may be revoked at any time by the licensee giving written notice to the authorised representative.

(Original emphasis retained; additional emphasis added.)

4. THE PRIMARY JUDGE'S DECISION

72 For present purposes, the relevant question before the primary judge was whether BPS' conduct in carrying on a financial services business by issuing the Qoin NCP Product fell within the exemption under s 911A(2)(a) by reason of its appointment as an authorised representative of PNI during the PNI Period.

73 ASIC contended in the proceedings below that it was not possible for BPS, as the issuer of a financial product in its own right, to be an authorised representative of an AFSL holder. ASIC's primary argument before the primary judge focussed upon the use of the phrase "on behalf of" (as contained in the definitions of the terms "representative" and "authorised representative") to contend that an authorised representative must act on behalf of the AFSL holder. ASIC developed these arguments by reference to the principles of agency and the statutory conceptions of it by drawing an analogy from Lindgren J's reasons in *NMFM Property Pty Ltd v Citibank Ltd (No 10)* [2000] FCA 1558; 107 FCR 270 at 549–550 [1242]–[1244]. This is the argument the primary judge summarised and considered at PJ [132]–[142].

74 In rejecting ASIC's contentions, the primary judge carefully considered ASIC's submissions which sought to place emphasis on the meaning to be given to the words "on behalf of" (PJ [136]–[142]) but observed that these words did not appear in the relevant exemption contained in s 911A(2)(a): PJ [143]. Her Honour recognised that the words "on behalf of" do appear in s 916A of the Act but considered that this provision served the different purpose of enabling an AFSL holder such as PNI to determine whether and in what respect it will appoint an authorised representative such as BPS to act on its behalf: PJ [143].

75 The primary judge rejected ASIC's contention that an issuer of a financial product could not be the authorised representative of an AFSL holder. The primary judge reasoned that there

was nothing within the text of ss 911A(2) and 916A(1) of the Act, or the definitions of the terms of “representative” or “authorised representative”, which prevented a person from acting “as” an authorised representative if that person is an issuer of a financial product: PJ [144]–[146]. The primary judge observed that an “authorised representative” is defined as a person who is authorised under s 916A(1) to act on behalf of the AFSL holder: PJ [146]. Her Honour reasoned that, as s 916A(1) requires only that a written notice be given by the holder of the AFSL appointing a person as an authorised representative, there “...is nothing in s 916A which imposes a limitation on a person not being able to be an authorised representative of an AFSL holder if they are also the product issuer”: PJ [146].

76 In coming to this conclusion, the primary judge stated that (other than particular exceptions) the Act leaves it open to the AFSL holder to determine the circumstances in which it will be prepared to authorise a person to act on its behalf and to determine what it requires from the authorised representative such that it is left to the AFSL holder to decide what it will authorise the authorised representative to do “on its behalf” in any given case: PJ [148]. The primary judge observed that in “exchange for this freedom” the Act imposes significant responsibility on AFSL holders in relation to the conduct of authorised representatives including, for example, pursuant to s 912A(1)(ca): PJ [149]. Her Honour further observed that s 917B provides that the AFSL holder is responsible “...as between the licensee and the client, for the conduct of the representative, whether or not the representative’s conduct is within authority” and this responsibility makes the AFSL holder liable to the client in respect of any loss or damage suffered by the client as a result of the authorised representative’s conduct: PJ [150].

77 Turning to the facts, the primary judge found that the plain terms of the PNI AR Agreement authorised BPS to *issue* the Qoin NCP Product and to give general financial advice in relation to that Product: PJ [173]–[175]. The primary judge found that this authorisation fell within the scope of PNI’s AFSL and, therefore, BPS’ conduct in issuing and marketing the Qoin NCP Product fell within the exemption in s 911A(2)(a) of the Act.

78 As a result, the primary judge concluded that BPS was exempt from the requirement to hold an AFSL by reason of s 911A(2)(a) of the Act during the operation of the PNI AR Agreement: PJ [175].

5. ASIC'S ARGUMENTS ON APPEAL

79 As noted at the outset, ASIC's arguments on appeal had a different focus to those that were advanced before the primary judge.

80 Whereas ASIC's submissions in the proceedings below focussed upon the words "on behalf of", in the appeal ASIC focussed its arguments by reference to the scheme enacted under Pt 7.6 of the Act to contend that s 911A(2)(a) created an "essential representative capacity requirement" in that an authorised representative is required to act "as a representative of" an AFSL holder including by acting on behalf of that person.

81 ASIC submitted that the text of s 911A(2)(a) contained two key and mutually reinforcing concepts. The *first* being that the word "representative" serves the double function of (a) identifying (through the definition of "representative") the full ambit of persons who can claim the exemption and, (b) when used in the composite phrase ("... provides the services as representative of ..."), it also limits the exemption to the case where the person is providing the financial service in the capacity that qualifies them as a representative of the second person. The *second* key concept being that (on ASIC's submission) the person claiming the exemption must provide the service "as representative of" a second person who holds an AFSL which covers the provision of the service.

82 Although ASIC acknowledged that its arguments on appeal were more refined and had a different emphasis to those it advanced below, it was submitted that they were within the broad scope of the arguments that had been advanced before the primary judge. In this regard, ASIC pointed out that during oral argument before the primary judge, its Senior Counsel had made the following submission (T146–149 and specifically at T147.15–30):

...But I suppose the point is, really, that, if there was an authorised agreement, BPS' position is it must follow that any advice – if we're talking about advice for the moment – was – it falls within the authorised representative exception and we say, "No, you have to look at the facts." And our learned friends, in their submissions, talk much about the construction of the contracts and things of that nature. We say, when you look at the exemptions in 2(a) and 2(b), it's about the provision of the services in both instances. So that's where the focus of the court should be. So if we're just looking at (a), the focus of the court should be **is BPS providing the services as a representative of**, relevantly...

(Emphasis added.)

83 It was submitted that BPS had an opportunity to respond to this case.

84 On a review of the submissions advanced by ASIC in the proceedings below, it appears that it raised before the primary judge the arguments that it now advances on appeal. As a result, ASIC does not require leave to raise these arguments: cf *Suttor v Gundowda Pty Ltd* [1950] HCA 35; 81 CLR 418 at 438–9 (Latham CJ, Williams and Fullagar JJ *per curiam*) and *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 7–8 (Gibbs CJ, Wilson, Brennan and Dawson JJ). However, as we have already observed, these arguments were not the central focus of ASIC’s submissions below, little was said about them and they were not developed by ASIC before the primary judge in the same way that they have now been advanced in the appeal.

85 ASIC submitted that the primary judge’s conclusions erroneously relied on s 916A(1) which, it contended, did no more than deal with the form of an authorisation. ASIC submitted that s 916A(1) does not answer the question as to whether the conduct of the authorised representative meets the “essential representative capacity requirement”.

86 ASIC maintained its position that an issuer of a financial product could not issue the product as an authorised representative of an AFSL holder. In advancing these contentions, ASIC focussed upon the particular responsibilities that fall upon the issuer of a financial product including as set out in s 761E. It also relied upon a range of extrinsic materials relevant to the enactment of the statutory regime requiring the holding of AFSLs and the appointment of authorised representatives.

6. CONSIDERATION

87 For reasons that will become apparent, it is convenient to deal with Grounds 1 and 2 together. That is because in considering whether the primary judge erred in finding that BPS fell within the exemption in s 911A(2)(a) (Ground 1), it is also necessary to determine whether the primary judge erred in finding that BPS was acting in its capacity as an authorised representative of PNI (Ground 2).

88 As a result of the way ASIC focussed its arguments before the primary judge, the parties and the primary judge gave insufficient attention to the words “as representative of” which appear in s 911A(2)(a) of the Act and, as a result, to the factual issue as to whether in issuing the Qoin NCP Product, BPS was acting as a representative of PNI.

89 As set out above, the primary judge rejected ASIC’s arguments on the basis that the words “on behalf of” do not appear in the relevant exemption in s 911A(2)(a): PJ [143]. Given the way that ASIC advanced its case before the primary judge, it is understandable why the primary

judge focussed upon whether the words “on behalf of” appear in s 911A(2)(a). However, closer examination is required of the text, context and purpose of 911A(2)(a).

90 The starting position is that s 911A(2)(a)(i) operates as an exemption to the requirement to hold an AFSL as stipulated in s 911A(1). The requirement to hold an AFSL arises where a person “carries on a financial services business”. The exemption in s 911A(2)(a) operates where a person who carries on a financial services business “provides the service *as representative of* a second person who carries on a financial services business” and who holds an AFSL that covers that service (emphasis added). The text of s 911A(2)(a) emphasises that the exemption applies “...for a financial service” where the putative authorised representative provides “the service *as representative of*” the AFSL holder (emphasis added). These words focus attention on the service being provided by the putative authorised representative and whether that service is being provided “*as representative of*” the AFSL holder. In this sense, s 911A(2)(a) is concerned with the “...capacity in which the person provides the service”: see *Australian Securities and Investments Commission v Diversa Trustees Limited* [2023] FCA 1267 at [68] (Button J).

91 The focus on the representative capacity of the authorised representative is reinforced by s 911B(1). The statutory note to s 911A(2) provides that the “representatives must still comply with section 911B even if they are exempted from this section by this paragraph”. Section 911B(1) relevantly provides as follows:

911B Providing financial services on behalf of a person who carries on a financial services business

- (1) A person (the *provider*) **must only** provide a financial service in this jurisdiction **on behalf of** another person (the *principal*) who carries on a financial services business if one or more of the following paragraphs apply:

...

- (b) these conditions are satisfied:
- (i) the principal holds an Australian financial services licence covering the provision of the service; and
 - (ii) the provider is an authorised representative of the principal; and
 - (iii) the authorisation covers the provision of the service by the provider; and
 - (iv) in the case of a provider who is an employee or director of any other person (the second principal)

who carries on a financial services business, or of a related body corporate of such a second principal—if the provider provides any financial services in this jurisdiction on behalf of the second principal, the provider does so as an authorised representative of the second principal...

(Original emphasis retained; additional emphasis added.)

92 Section 911B(1) makes plain that a representative “must only provide a financial service” if they are providing the relevant service on behalf of a principal. The legislation makes it plain that there is an essential requirement that the “representative” act in their capacity as such.

93 The focus on the “representative capacity” of the relevant representative is consistent with the text of s 911A(2)(a). As ASIC submitted, s 911A(2)(a) contain the words “as representative of” and these words serve two overlapping purposes. The first is that, by use of the word “representative”, the legislature embedded within s 911A(2)(a) the defined meaning of the term “representative” and, in turn, the term “authorised representative”. The term “representative” as it applies to a financial services licensee refers to four types of persons: the first being authorised representatives of the licensee, the second being an employee or director of the licensee, the third being an employee or director of a related body corporate of the licensee and the fourth being any other person acting on behalf of the licensee. In turn, the term “authorised representative” is defined to mean a person “authorised in accordance with section 916A or 916B to provide a financial service or financial services on behalf of the licensee”.

94 The second purpose served by the words “as representative of” is to stipulate the scope of the exemption contained in s 911A(2)(a)—that is, these words confine the exemption to instances where an authorised representative provides relevant financial services in a representative capacity. This is consistent with the text of s 911B(1) which provides sharp focus on the representative being required “only” to act in that capacity. The word “as” has many different meanings, but in context, as a preposition, it reinforces that the exemption applies where the relevant person “provides the service *as* representative of” the AFSL holder (emphasis added). The exemption thereby operates where the relevant service is provided in that representative capacity. Essentially, this raises a factual question as to whether the relevant service is in fact being provided in that representative capacity.

95 The primary judge resolved the question as to whether BPS was acting in its representative capacity as an authorised representative of PNI by reasoning that s 916A(1) left it to the AFSL holder to determine the scope and extent of the authority it conferred upon the relevant

authorised representative. The primary judge reasoned that it was sufficient to enliven the exemption in s 911A(2)(a)(i) if the AFSL holder had appointed an authorised representative which covered the relevant service being provided by that representative.

- 96 Whilst the primary judge was correct to reason that s 916A(1) permits an AFSL holder to determine the content and scope of the authority granted to an authorised representative, it does not follow that every act of the authorised representative in providing the relevant financial service is provided in that capacity. Whether the authorised representative's conduct is in that capacity will depend on the facts. Thus, whilst the AFSL holder might lawfully and validly authorise a person under s 916A to provide specified financial services covered by the AFSL holder's licence, such an authorisation only operates to the extent that the authorised representative, in fact, provides the relevant financial service in that capacity. This, in turn, raises a factual question as to whether, in fact, the authorised representative acts in that capacity. That this is the case may be considered by reference to the example raised by Senior Counsel for ASIC:

Can I give one simple example to illustrate how it works, and let's take the case of the employee. Let's say Macquarie Bank has 10,000 employees. Each of those employees is a representative of Macquarie Bank which will hold an AFSL.

If one of those employees provides a financial product or provides financial advice in the capacity as employee of Macquarie Bank then the exemption is available, for obvious practical reasons. Macquarie does not have to get 10,000 separate licences for its employees, but if the employee provides the advice or the product on their own account, the fact that they happen to be an employee of Macquarie and therefore a statutory representative, is by the by they will have to get an AFSL.

- 97 The example advanced by Senior Counsel for ASIC is not merely theoretical. It is practical, and also accords with the possibility contemplated by the legislative scheme as provided for in s 916C where an authorised representative may be appointed as an authorised representative of "2 or more" AFSL holders with the respective consent of each such holder. Where that situation occurs, questions will arise as to whether the relevant service provided by the authorised representative has been provided in their capacity as an authorised representative of one or other of the AFSL holders. The position is no different in respect of the other categories of representatives contemplated by s 911A(2) where, for example, an employee, director or other person acting on behalf of the AFSL holder may be employed by, hold office with, or act for more than one AFSL holder. These possibilities are also addressed by s 911B.

98 None of the above analysis as to the focus on the representative capacity of the authorised representative cuts across the primary judge’s salient observation as to the existence of remedial provisions contained in the Act that impose liabilities and responsibilities on AFSL holders in respect of the conduct of their representatives. Relevantly, ss 917A, 917B and 917D of the Act provide as follows:

Division 6—Liability of financial services licensees for representatives

917A Application of Division

- (1) This Division applies to any conduct of a representative of a financial services licensee:
 - (a) that relates to the provision of a financial service; and
 - (b) on which a third person (the client) could reasonably be expected to rely; and
 - (c) on which the client in fact relied in good faith.
- (2) In this Division, a reference to a representative’s conduct being within authority in relation to a particular financial services licensee is, subject to subsection (3), a reference to:
 - (a) if the representative is an employee of the licensee or of a related body corporate of the licensee—conduct being within the scope of the employee’s employment; or
 - (b) if the representative is a director of the licensee or of a related body corporate of the licensee—conduct being within the scope of the director’s duties as director; or
 - (c) in any other case—**conduct being within the scope of the authority given by the licensee.**

...

917B Responsibility if representative of only one licensee

If the representative is the representative of only one financial services licensee, the licensee is responsible, as between the licensee and the client, for the conduct of the representative, **whether or not the representative’s conduct is within authority.**

...

917D Exception if lack of authority is disclosed to client

A financial services licensee is not responsible under section 917B or 917C for the conduct of their representative if:

- (a) the conduct is not within authority in relation to the licensee (or in relation to any of the licensees, if there were more than one); and
- (b) the representative disclosed that fact to the client before the client relied on the conduct; and

(Emphasis added.)

99 These provisions have the effect of imposing liabilities and responsibilities upon AFSL holders in respect of the conduct of their authorised representatives including whether or not that representative's conduct is within authority. However, as ASIC submitted, these remedial provisions operate as between the AFSL holder and the third-party client. They impose responsibility and liability on the AFSL holder in respect of the relevant client irrespective of whether the conduct of the authorised representative is within authority, unless that fact has been disclosed to the client as provided for under s 917D.

100 The remedial provisions do not answer the anterior, or separate, question as to whether the exemption contained in s 911A(2)(a) applies. More specifically, they do not answer the question whether the exemption in s 911A(2)(a) applies to a person purporting to act in the capacity of an authorised representative of the AFSL holder when, in fact, the relevant financial service has not been provided in that representative capacity.

101 Nor does s 916A(3) of the Act provide any assistance: cf PJ [147]. That provision provides as follows:

- (3) An authorisation under subsection (1) is void to the extent that it purports to authorise a person to provide a financial service:
 - (a) that is not covered by the licensee's licence; or
 - (b) contrary to a banning order or disqualification order under Division 8; or
 - (c) in contravention of subsection 921C(2).

102 The scenario contemplated by s 916A(3)(a) arises where the AFSL holder authorises a person to provide a financial service that is not covered by that holder's licence. It does not answer the question whether a person is exempt from holding an AFSL where the service provided by that person purports to be in that person's capacity as an authorised representative but where, in fact, the service is not provided in that capacity.

103 The focus on the representative capacity is also not inconsistent with the primary judge's pertinent observation that the AFSL holder bears significant responsibilities in respect of the conduct of authorised representatives including those under s 912A(1)(ca) to take reasonable steps to ensure that its authorised representatives comply with financial services laws: PJ [149]. Those obligations apply to an AFSL holder in respect of all of its authorised representatives, irrespective of whether those representatives ultimately act in that capacity or not. These are

obligations which the AFSL holder bears by reason of having appointed persons as its authorised representatives. The existence of those obligations does not provide an answer as to whether the financial services ultimately provided by an authorised representative were provided by that person in the capacity as an authorised representative of that AFSL holder.

104 ASIC placed considerable reliance upon extrinsic materials relating to the enactment of s 911A(2)(a), but these materials were of little assistance to the resolution of the constructional questions addressed above. As has been observed, such materials are potentially useful for discerning the mischief to which legislation is directed, but they cannot displace the meaning of the statutory text and cannot be substituted for the text: *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; 271 CLR 495 at [70] (Gageler J) citing *Re Bolton; Ex parte Beane* [1987] HCA 12; 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ); see also *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252 at 264–265 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ) and the authorities there cited.

105 Given the way that ASIC primarily advanced its case by focussing on the contention that a person who issues a financial product cannot do so as an authorised representative, the primary judge did not examine whether, in fact, in issuing the Qoin NCP Product, BPS was acting in its capacity as an authorised representative of PNI. Her Honour’s assessment of the evidence relating to BPS’ arrangements with PNI instead focussed on the fact that, by the PNI AR Agreement, PNI appointed BPS as its authorised representative to provide the “Specified Financial Services” which encompassed the provision of general financial product advice and the issuing of a financial product: PJ [173]. By reference to this frame of analysis, it is understandable that the primary judge reasoned that “BPS was authorised to issue the Qoin NCP Product and to give general financial product advice in relation to the Qoin NCP Product”: PJ [174].

106 However, in assessing the evidence in this way, the primary judge did not consider whether or not, in providing those financial services (ie, issuing the Qoin NCP Product and giving general financial product advice), BPS was acting on its own behalf or was acting as representative of PNI. The evidence, which we have reviewed, established that BPS was not issuing the Qoin

NCP Product in its capacity as a representative of PNI but was in substance doing so in its own right. There are several facts that support this conclusion.

107 *First*, BPS had developed the Qoin NCP Product well before it had any dealings with PNI. The Qoin NCP Product had been developed from sometime in late 2019. At that time, PNI had no involvement in the development of the Product and there is no evidence that it had any involvement in the development of the Product at any later time.

108 *Second*, BPS first issued the Qoin NCP Product in January 2020. At that time, BPS was purporting to act in its capacity as an authorised representative of Billzy and, again, PNI had no involvement in the issue of the Product at that time. The primary judge ultimately concluded that BPS was not exempt under s 911A(2)(a) in respect of its earlier arrangements with Billzy such that BPS had issued the Qoin NCP Product and gave financial product advice without holding an AFSL as required by s 911A(1). The result is that BPS had been issuing the Qoin NCP Product without holding an AFSL prior to the PNI AR Agreement, though it had been purporting to issue that Product as an authorised representative of Billzy.

109 *Third*, the principals of BPS sought out AFSL holders for the very reason that they could not issue the Qoin NCP Product without a licence. This led to the initial Billzy arrangement. The financial services business that BPS conducted had no connection with the financial services businesses that were conducted by PNI. The true character of the arrangement between BPS and Billzy and later PNI was, as bluntly put by Mr Theodorou (Billzy’s Lead Compliance Manager) and accepted by Mr Wiese to be, “AFSL provisioning”: T91.27–92.15. The expression “AFSL provisioning” refers to a practice whereby the issuer of a financial product seeks out an AFSL holder to avoid the need to obtain an AFSL licence for itself. Irrespective of its lawfulness, the factual question raised by such a practice is whether the relevant financial service provided by the authorised representative is, as a result, provided in that person’s capacity as an authorised representative of the relevant AFSL holder.

110 *Fourth*, all of the relevant documents relating to the issue of the Qoin NCP Product – including the White Paper, the Qoin Guide, the Combined FSG/PDS and the Terms of Use – were prepared and issued by BPS well before any of its dealings with PNI. Other than some bare references in the White Paper and the Combined FSG/PDS to the fact that BPS was an authorised representative of Billzy or PNI, the documents were the product of BPS’ work and referred to the fact of the relevant facilities and services being made available by BPS.

- 111 The Terms of Use did not refer to PNI or any other AFSL holder. The relevant contractual relationship was that as between BPS and relevant users. The Terms of Use demonstrate that BPS was dealing in its own right and not on behalf of another entity, with BPS directly conferring contractual benefits on, and assuming contractual obligations owed to, a user. By way of example, under cl 3(c) BPS granted users a licence “to use the Site and the App and the Services” (including the Q Wallet and any web sites) and under cll 3(a)-(b) BPS made certain representations and provided certain warranties to the user.
- 112 Likewise, the Terms of Use contemplated the user conferring contractual rights on, and assuming contractual obligations owed to, BPS in its own right. For example, the user provided warranties and made representations to BPS under cll 2 and 5, agreed to indemnify BPS under cl 8 and conferred BPS with unilateral rights to terminate the “Agreement” or amend the Terms of Use under cll 15 and 16.
- 113 That BPS was acting in its own capacity (and not as a representative of PNI) is also evident from an examination of the other documents set out at [29]–[49] above. There was no substantive change to these critical documents or, more relevantly, to the relevant financial product upon entry into the PNI AR Agreement.
- 114 *Fifth*, as noted above at [54]–[61], there was some evidence that Billzy and PNI had taken steps towards monitoring BPS’ services by preparing a compliance plan, holding monthly compliance meetings, and apparently maintaining document control over the PDS. However, as set out above at [55], these steps occurred in circumstances where BPS had already prepared a draft of the PDS and had provided it to Billzy, which was later provided to PNI with limited changes. Further, the so-called “compliance” measures adopted by PNI were characterised by the Bartercard Group’s Group Risk Manager, Mr Quinn, as being “less formal”: Quinn Affidavit at p 14 [86]. In any event, as noted above, these obligations and liabilities arose regardless of whether BPS was providing particular services in its capacity as authorised representative or not. The fact that Billzy and PNI took the steps referred to above does not lead to the conclusion that BPS actually provided the financial services in its capacity as an authorised representative.
- 115 When all these facts are viewed in their context, it is plain that, other than appointing BPS as its authorised representative, PNI had little to do with the issue of the Qoin NCP Product. This conclusion is consistent with the terms of the PNI AR Agreement. As set out above, Recital B

recorded that it was BPS that had requested PNI to appoint it as its authorised representative to “authorise [BPS] to provide the Specified Financial Services to enable [BPS] to promote and distribute the Product”. Clause 2.2(b) contained an acknowledgement that BPS had sought its “own independent legal advice in relation to its appointment as an Authorised Representative of the Licensee and confirms the terms of the AFSL are sufficient to enable the Company to promote and operate the Product”. In other words, a central premise of the PNI AR Agreement was that PNI was not making any representation as to whether BPS’ appointment as an authorised representative or the terms of PNI’s AFSL would be sufficient to enable BPS to issue the Qoin NCP Product. Further, cl 6.1 of the PNI AR Agreement placed all responsibility for the issue of the FSG and PDS on BPS.

116 The plain terms of the PNI AR Agreement confirm what is evident from the objective facts: that, in issuing the Qoin NCP Product, BPS was acting on its own behalf and not as a representative of PNI. The fact that (as the primary judge reasoned) the terms of PNI’s AFSL and the PNI AR Agreement permitted BPS to issue the Qoin NCP Product did not answer the central question as to whether, in truth and in substance, the provision of that financial service was being conducted by BPS “as representative of” PNI. It was not. It follows that BPS was required to hold an AFSL as required by s 911A(1).

117 It further follows that BPS was not exempt under s 911A(2)(a) of the Act during the period of the operation of the PNI AR Agreement and that it was not acting as a representative of PNI during the PNI Period in issuing the Qoin NCP Product and providing general financial advice in relation to that product. To the extent the primary judge found to the contrary, her Honour erred.

118 As a result of the above conclusions, it is not necessary to decide whether an authorised representative can be an issuer of a financial product and to consider the arguments relied upon by ASIC in support of that contention that relied upon the balance of the scheme of Pt 7.6 of the Act.

119 It is also unnecessary to consider whether a person who issues a financial product can never act in their capacity as an authorised representative of an AFSL holder, or whether an AFSL holders needs to be involved in some way in the issuing of the relevant financial product. The outcome of the appeal is peculiar to the facts and highlights that the answers to these questions will likely be fact dependent.

7. DISPOSITION

120 For the foregoing reasons, Order 3 of the orders made by the primary judge should be set aside. In its place, it should be declared that BPS contravened s 911A(1) of the Act. There should be no order as to the costs of the appeal, other than that ASIC pay the costs of the *amicus curiae*.

I certify that the preceding one hundred and twenty (120) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Collier, Markovic and Shariff.

Associate:



Dated: 30 May 2025