FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Latitude Finance Australia (No 4) [2026] FCA 989

File number(s):	NSD843 of 2022
Judgment of:	**O'BRYAN J**
Date of judgment:	28 July 2026
Catchwords:	**CONSUMER LAW** – pecuniary penalties for contraventions of ss 12DA(1), 12DB(1)(a), 12DB(1)(i) and 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* (Cth) – where misleading conduct continued for 19 months and involved thousands of advertisements viewed by millions of Australians – where contravening conduct assessed as a single course of conduct for penalty purposes – where both defendants equally responsible for the misleading conduct – where both defendants' legal compliance procedures were wholly inadequate – where one defendant adduced evidence of steps taken to improve compliance procedures – where defendants exhibited different levels of contrition – where a higher penalty is warranted to deter repetition and motivate improvement of compliance processes – differential penalties imposed on the defendants **CONSUMER LAW** – injunctions sought under s 12GD of the *Australian Securities and Investments Commission Act 2001* (Cth) – where contravening advertisements ceased soon after concerns were notified to defendants – where no repetition of contravening advertisements – where it is not necessary, to protect the public interest, to grant injunctions in the terms proposed
Legislation:	Australian Consumer Law ss 232, 246, 247; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DL, 12GBCA(2)(a), 12GBCA(2)(b), 12GBB(5)(b), 12GD, 12GLA(1), 12GLA(2)(d), 12GLB(1)(a); 327
Cases cited:	*ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 *ACCC v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 *ACCC v Harvey Norman Holdings Ltd* [2011] FCA 1407; ATPR 42-384

ACCC v Meta Platforms Inc [2023] FCA 842

ACCC v Samsung Electronics Australia Pty Ltd [2022] FCA 875

ACCC v The Good Guys Discount Warehouses (Australia) Pty Ltd [2025] FCA 1085

ASIC v GE Capital Finance Australia [2014] FCA 701

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 75 FCR 238

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405

Australian Competition and Consumer Commission v Harris Scarfe Australia [2009] FCA 54; ATPR 42-271

Australian Competition and Consumer Commission v On Clinic Australia Pty Ltd [1996] FCA 721; 35 IPR 635

Australian Competition and Consumer Commission v Panasonic Australia [2010] FCA 856

Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc [1999] FCA 18; 161 ALR 79

Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc (1999) 95 FCR 114

Australian Competition and Consumer Commission v Telstra Corporation [2007] FCA 2058

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640

Australian Competition and Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2) [2002] FCA 1548

Australian Competition and Consumer Commission v Yazaki Corporation (2018) 262 FCR 243

BMW Australia Ltd v ACCC [2004] FCAFC 167; 207 ALR 452

Commonwealth Director of Public Prosecutions v Michael Snounou (No 3) [2024] NSWSC 636

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

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482

ICI Australia Operations Pty Ltd v Trade Practices Commission (1992) 38 FCR 248

Islam v R [2015] NSWCCA 233

Luxottica Retail Australia Pty Ltd v Specsavers Pty Ltd (No 2) [2010] FCA 644

Markarian v The Queen (2005) 228 CLR 357

Medical Benefits Fund of Australia Ltd v Cassidy (2003)

135 FCR 1

Melway Publishing Pty Ltd v Robert Hicks Pty Limited (2001) 205 CLR 1

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285

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

Trade Practices Commission v Carlton & United Breweries Ltd (1990) 24 FCR 532 at 542

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

Trade Practices Commission v TNT Australia Pty Ltd (1995) ATPR 41-375 at 40,169

Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission (2021) 284 FCR 24

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	233
Date of hearing:	13 and 14 November 2025
Date of last submissions:	21 November 2025
Counsel for the Plaintiff:	Ms N Sharp SC with Ms A Hammond and Mr S Speirs
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the First Defendant:	Mr J Sheahan KC with Ms M Hall
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Counsel for the Second Defendant:	Mr P Crutchfield KC with Mr N Walter
Solicitor for the Second Defendant:	Arnold Bloch Leibler

ORDERS

NSD843 of 2022

BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Plaintiff
AND:	**LATITUDE FINANCE AUSTRALIA ACN 008 583 588** First Defendant
	HARVEY NORMAN HOLDINGS LTD ACN 003 237 545 Second Defendant

ORDER MADE BY:	**O'BRYAN J**
DATE OF ORDER:	**28 JULY 2026**

THE COURT ORDERS THAT:

Pecuniary penalties

1. The First Defendant pay to the Commonwealth an aggregate pecuniary penalty in the sum of $20 million for its contraventions of ss 12DB(1)(a), 12DB(1)(g), 12DB(1)(i) and 12DF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) within 28 days of the date of this order.

2. The Second Defendant pay to the Commonwealth an aggregate pecuniary penalty in the sum of $35 million for its contraventions of ss 12DB(1)(a), 12DB(1)(g), 12DB(1)(i) and 12DF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) within 28 days of the date of this order.

Adverse publicity orders

3. Within 28 days of the date of these orders, the First Defendant cause to be published, for a period of not less than 90 days, the adverse publicity notice in the form set out in the Annexure to these orders in colour, displayed by a PDF and/or webpage copy via a link in an immediately visible area of the web address "https://www.latitudefinancial.com.au/" in font no less than 11 point and no smaller than 50% of the size of the homepage banner, identified by the following crawlable text: "Notice ordered by Federal Court in ASIC case against Latitude and Harvey Norman for misleading conduct".

4. Within 28 days of the date of these orders, the Second Defendant use all reasonable endeavours to cause to be published, for a period of not less than 90 days, the adverse publicity notice in the form set out in the Annexure to these orders in colour, displayed by a PDF and/or webpage copy via a link in an immediately visible area of the web address "https://www.harveynorman.com.au/" in font no less than 11 point and no smaller than 50% of the size of the homepage banner, identified by the following crawlable text: "Notice ordered by Federal Court in ASIC case against Latitude and Harvey Norman for misleading conduct".

5. If the adverse publicity notice referred to in order 4 is not published on the web address in compliance with the requirements specified in order 4, the Plaintiff has liberty to apply for further orders for the publication of adverse publicity notices by the Second Defendant.

Costs

6. Subject to order 7, the Defendants pay the Plaintiff's costs of and incidental to the proceeding, to be agreed or assessed, in equal shares.

7. Notwithstanding order 6, the order of the Court dated 11 July 2023, by which the Plaintiff was ordered to pay the Defendants' costs of the interlocutory application dated 1 June 2023, remains in effect and the Plaintiff is not entitled to recover its costs in respect of that application under order 6.

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

ANNEXURE

ADVERSE PUBLICITY NOTICE PUBLISHED BY ORDER OF THE FEDERAL COURT OF AUSTRALIA

[insert Latitude and Harvey Norman logos]

Misleading Representations and Conduct Liable to Mislead the Public by Latitude and Harvey Norman during 1 January 2020 to 11 August 2021

Following successful action by the Australian Securities and Investments Commission (**ASIC**), on 18 October 2024, the Federal Court of Australia found that Latitude Finance Australia (**Latitude**) and Harvey Norman Holdings Limited (**Harvey Norman**) made misleading representations, engaged in misleading conduct and engaged in conduct liable to mislead the public in their 1 January 2020 to 11 August 2021 national television, radio and newspaper advertising campaign promoting a no deposit and 60 months interest free payment method for buying goods at Harvey Norman, Domayne and Joyce Mayne stores. Latitude and Harvey Norman were each ordered by the Federal Court on 28 July 2026 to pay penalties of $20 million and of $35 million, respectively, to the Commonwealth in respect of this conduct.

Latitude and Harvey Norman failed to disclose in those advertisements that:

(a) an essential precondition for acquiring goods pursuant to the advertised payment method was that the consumer has or enters into a continuing credit contract linked to a credit card; and

(b) a consumer taking up the advertised payment method would, in addition to the purchase price, be required to pay a $25 establishment fee (during the period 1 January 2020 to 15 March 2021) and ongoing monthly account service fees, which since 1 January 2020 have increased from $5.95 per month to $10.95 per month.

The Federal Court has also ordered Latitude and Harvey Norman to pay ASIC's costs of the litigation and issue this adverse publicity notice.

The 18 October 2024 judgment can be found on the Federal Court's website at [*insert link*], the 28 July 2026 judgment can be found on the Federal Court's website at [*insert link*] and ASIC's media release is at [*insert link*].

REASONS FOR JUDGMENT

O'BRYAN J:

A. INTRODUCTION

1 This proceeding concerns an advertising campaign conducted by Harvey Norman Holdings Ltd (**Harvey Norman**) and Latitude Finance Australia (**Latitude**) between 1 January 2020 and 11 August 2021 (**relevant period**).

2 During the relevant period, Harvey Norman (through its controlled entities) conducted a retail franchise business in Australia by which it granted franchises of retail businesses under the trading names Harvey Norman, Domayne and Joyce Mayne for the retail sale of furniture, domestic appliances and computing and software products (referred to collectively as **Harvey Norman franchisee stores**). Latitude was a credit provider licensed under the *National Consumer Credit Protection Act 2009* (Cth).

3 During the relevant period, Harvey Norman and Latitude prepared and published (in newspapers, on the radio and on television) a large number of advertisements across Australia which promoted the purchase of home and electrical goods from Harvey Norman franchisee stores by equal monthly payments of the purchase price for the goods over 60 months on "no deposit" and "no interest" terms (which are referred to herein as the "**interest free promotions**" or simply the "**promotions**"). The newspaper advertisements were published in 168 newspapers; the radio advertisements were broadcast on 143 radio stations; and the television advertisements were broadcast on at least 900,000 occasions on 367 specified stations. The offer made in each of the advertisements applied for a short period only (approximately seven days). The advertisements did not disclose that, to take advantage of the promotion, consumers were required to enter into a continuing credit contract with Latitude that was linked to a credit card account (the "**GO Mastercard**") and were liable for an establishment fee and monthly account service fees in respect of the linked credit card account in amounts determined by Latitude from time to time. Before 16 March 2021, consumers were required to pay an establishment fee of $25.00 and a monthly account service fee of $5.95. On and from 16 March 2021, the monthly account service fee was increased to $8.95 per month. From early 2023, the monthly account service fee increased to $9.95 per month. The current monthly account service fee is $10.95 per month.

4 The Australian Securities and Investments Commission (**ASIC**) brought this proceeding against Harvey Norman and Latitude alleging that, by publishing certain advertisements in newspapers and broadcasting certain advertisements on radio and television, Harvey Norman and Latitude engaged in misleading and deceptive conduct in contravention of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).

5 A trial before Yates J was conducted on issues of liability by reference to 11 representative advertisements, being five newspaper advertisements, three radio advertisements, and three television advertisements. The content of each of the representative advertisements was described in detail, and reproduced, in the reasons of the primary judge: *Australian Securities and Investments Commission v Latitude Finance Australia (No 2)* [2024] FCA 1205 (Yates J) (**liability judgment** or **LJ**). Justice Yates found that Harvey Norman was responsible for the publication and broadcasting of the advertisements (LJ [13]) and that Latitude was involved in developing and approving the content of the advertisements (LJ [59]). Justice Yates further found that ASIC had established the alleged contraventions of ss 12DA(1), 12DB(1) and 12DF(1) of the ASIC Act (LJ [507]) and, on 5 November 2024, made the following two declarations (reflecting the two branches of ASIC's case) pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and s 12GBA(1) of the ASIC Act:

> 1. From 1 January 2020 to 11 August 2021, the Defendants together advertised in newspapers and on the radio and television that a payment method was available for purchasing eligible goods from Harvey Norman stores that comprised 60 equal monthly payments on no deposit and interest free terms (advertised payment method), when in fact an essential precondition for acquiring goods pursuant to the advertised payment method was that the consumer enter into a continuing credit contract that was linked to a credit card, and thereby on each occasion that an advertisement the subject of the proceedings was published or broadcast to a consumer, the Defendants:
>
> (a) in trade and commerce, and in relation to financial services (namely, a credit facility or dealing in a credit facility), engaged in conduct which:
>
> (i) was misleading or deceptive, or likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act; and
>
> (ii) was liable to mislead the public as to the nature or characteristics of the financial services offered, in contravention of s 12DF(1) of the ASIC Act; and
>
> (b) in trade and commerce, in connection with the supply or possible supply of financial services or in connection with the promotion by any means of the supply or use of financial services (namely, a credit facility or dealing in a credit facility), made a false or misleading representation:

(i) that services were of a particular standard, quality, value or grade, in contravention of s 12DB(1)(a) of the ASIC Act; and

(ii) concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, in contravention of s 12DB(1)(i) of the ASIC Act.

2. From 1 January 2020 to 11 August 2021, the Defendants together advertised in newspapers and on the radio and television that a consumer taking up the advertised payment method would only be liable to pay the price of the goods by way of 60 equal monthly payments, when in fact a consumer would also be required to pay an establishment fee (during the period 1 January 2020 to 15 March 2021) and ongoing monthly account service fees, and thereby on each occasion that an advertisement the subject of the proceedings was published or broadcast to a consumer, the Defendants:

(a) in trade and commerce, and in relation to financial services (namely a credit facility or dealing in a credit facility), engaged in conduct which was misleading or deceptive or likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act; and

(b) in trade and commerce, in connection with the supply or possible supply of financial services or in connection with the promotion by any means of the supply or use of financial services (namely, a credit facility or dealing in a credit facility), made a false or misleading representation:

(i) that services were of a particular standard, quality, value or grade, in contravention of s 12DB(1)(a) of the ASIC Act; and

(ii) concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, in contravention of s 12DB(1)(i) of the ASIC Act; and

(iii) with respect to the price of services, in contravention of s 12DB(1)(g) of the ASIC Act.

6 An appeal against the liability judgment was dismissed by the Full Court: *Latitude Finance Australia v Australian Securities and Investments Commission* [2025] FCAFC 124 (**appeal judgment** or **AJ**).

7 Justice Yates retired from the Court prior to the appeal judgment being delivered. As a consequence, the proceeding was allocated to my docket to hear and determine all remaining questions as to relief. A further hearing was conducted before me in relation to the form of relief to be granted, including the imposition of pecuniary penalties against the defendants, injunctions restraining the defendants from engaging in further contraventions, the making of an adverse publicity order, and the award of costs (**relief hearing**). These reasons concern the remaining issues of relief.

8 At the relief hearing, ASIC sought the imposition of penalties pursuant to s 12GBB(3) of the ASIC Act fixed in the sum of $50 million against Harvey Norman and $35 million against Latitude. Harvey Norman submitted that the Court should instead impose a penalty of $24 million against it. Latitude submitted that the Court should impose a penalty substantially lower than that sought by ASIC, but did not propose a specific figure.

9 ASIC also sought injunctions pursuant to s 23 of the FCA Act and/or s 12GD(1) of the ASIC Act restraining Harvey Norman and Latitude, and their agents separately or together, from engaging in further contraventions for a period of five years. Harvey Norman did not oppose the imposition of the proposed injunctions. Latitude opposed the imposition of any injunction and, in the alternative, submitted that the injunction should be for only two years and that certain amendments to the proposed orders be made.

10 ASIC also sought punitive adverse publicity orders under s 12GLB(1)(a) of the ASIC Act and, in the alternative, non-punitive adverse publicity orders under ss 12GLA(1) and (2)(d) of the ASIC Act. Harvey Norman did not oppose the imposition of adverse publicity orders requiring the company to publish a notice on its website. However, it did oppose any order requiring the publication of a notice in print or on television or radio. Latitude opposed the imposition of any adverse publicity order and, in the alternative, submitted that any order should be limited to a press release or confined to a subset of GO Mastercard customers (being those whose first expenditure on the card was on a Harvey Norman 60 month interest free plan) and on Latitude's website home page.

11 ASIC also seeks its costs of the proceedings, both at the liability and relief stages, on the ordinary basis. Both defendants agreed with that position.

12 Both the liability trial and the relief trial were strongly contested. Although the relief trial involved a relatively short hearing, the parties made reference to extensive evidence adduced both at the liability trial and at the relief trial. It has been necessary to consider that evidence in some detail. All parties were guilty of exaggerating the effect of the evidence in their submissions.

13 For the reasons that follow, I consider that an aggregate penalty of $35 million ought to be imposed on Harvey Norman and an aggregate penalty of $20 million ought to be imposed on Latitude. I will also make the adverse publicity order sought by ASIC, albeit in a modified form, but not the injunctive order.

B. OVERVIEW OF THE EVIDENCE

14 At the relief hearing, the parties relied on the evidence adduced at the liability hearing and adduced supplementary evidence relevant to issues of relief. For that purpose, the parties prepared a combined electronic court book for the relief hearing (comprising a confidential and non-confidential volume) which contained the evidence from the liability hearing they relied on plus the supplementary evidence.

15 Some evidence at the liability hearing was admitted subject to certain limitations, including a restriction that certain documents be admitted for the limited purpose of proving the involvement of Kay (known as Katie) Page, the Chief Executive Officer of Harvey Norman, in the advertising campaign (LJ [81]-[83]). Justice Yates ruled that these documents were not permitted to be used to prove that Harvey Norman deliberately misled consumers, or deliberately sought to minimise the credit card aspect of the GO Mastercard in the advertisements, because ASIC had not alleged in its concise statement that Latitude or Harvey Norman deliberately engaged in misleading or deceptive conduct or deliberately made false representations, or acted with any other particular state of mind (LJ [82]). Justice Yates' ruling might be thought to be inconsistent with the decision of the Full Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 (***Reckitt Benckiser***), in which the Full Court said (at [124]) that deliberateness of a contravention has "always been a matter relevant to penalty for contraventions of consumer protection laws" and it was unnecessary for the ACCC to plead any particular state of mind in order to make submissions in relation to deliberateness in a penalty context. Despite that decision, ASIC did not apply to re-tender those documents on the issue of deliberateness at the relief hearing without the limitation imposed by Yates J. For that reason, I will continue to treat those documents as subject to the use limitation imposed by Yates J.

16 ASIC's supplementary evidence at the relief hearing consisted of the tender of documents, being additional documents included in the court book for that purpose and a supplementary bundle marked as exhibit A1.

17 Harvey Norman's supplementary evidence also consisted of the tender of documents, being a small number of additional documents included in the court book for that purpose and a supplementary bundle marked as exhibit H1.

18 Latitude's supplementary evidence consisted of the tender of a supplementary bundle of documents marked as exhibit L1 and the following affidavits that were read at the relief hearing:

(a) the affidavit of Tiffany Heather Barton (General Counsel for Latitude Financial Services Australia Holdings Pty Ltd, the parent company of Latitude) affirmed 25 September 2025 and its exhibit;

(b) the affidavit of Andrew John Whitley (Senior Manager of Remediation and Regulation Analytics, Latitude) sworn 25 September 2025 and its exhibits;

(c) the affidavit of Suhita Sarkar (Head of Engineering and Platform Delivery at Latitude) affirmed 25 September 2025 and its exhibit; and

(d) the affidavit of Domenic Mathew Gatto (a partner at King & Wood Mallesons, Latitude's solicitors) affirmed 25 September 2025 and its exhibit.

19 Of the witnesses who gave evidence for Latitude, only Ms Barton was cross-examined. Ms Barton's affidavit was relatively brief. She gave evidence concerning Latitude's internal legal compliance procedures relevant to the obligations imposed by the Australian Consumer Law and the equivalent provisions in the ASIC Act, and the specific legal compliance procedures taken by Latitude with respect to the advertisements which are the subject of this proceeding. Ms Barton also expressed Latitude's contrition for contravening the ASIC Act, deposing:

> I confirm that Latitude acknowledges and accepts responsibility for what has occurred in relation to its unlawful conduct that gives rise to contraventions of ss 12DA, 12DB and 12DF of the ASIC Act. Latitude apologises unreservedly to its customers and anyone else who was misled by this conduct.

20 In cross-examination, Ms Barton agreed that Latitude's acknowledgement and acceptance of responsibility for the contraventions occurred after the Full Court delivered judgment on the appeal. Ms Barton agreed that, as at the date of the relief hearing, Latitude had not communicated any apology to its customers. Ms Barton also confirmed that, as at the date of the relief hearing, Latitude had not offered any compensation, such as a refund of fees or interest, to customers who had signed up to a GO Mastercard as part of the Harvey Norman promotions during the relevant period. It was put to Ms Barton that Latitude's apology, as expressed in her affidavit, was merely performative and proffered in an attempt to reduce the amount of the pecuniary penalty that might otherwise be imposed in this proceeding. Ms Barton disagreed, stating that it is an apology that her CEO and she had agreed would be published on Latitude's website following the outcome of the relief hearing.

21 I consider that Ms Barton was an honest witness, and I accept the answers that she gave. Although Latitude has not, in public communications with its customers, voluntarily acknowledged its involvement in misleading conduct or offered any form of remediation, I do not consider that the apology proffered through Ms Barton's affidavit is merely "performative", as submitted by ASIC. As discussed later in these reasons, the evidence supports a conclusion that Latitude seeks to comply with its obligations under the consumer protection laws in the ASIC Act. There is no evidence that Latitude has conducted its business in wilful disregard of its legal obligations. In those circumstances, there is no reason to doubt the sincerity of the apology expressed by Ms Barton on behalf of the company.

C. PENALTIES: RELEVANT STATUTORY PROVISIONS AND LEGAL PRINCIPLES

Applicable statutory provisions

22 ASIC seeks pecuniary penalties under s 12GBB of the ASIC Act which, at the commencement of the relevant period, provided as follows:

> **12GBB Pecuniary penalty orders**
>
> *Application for order*
>
> (1) ASIC may apply to a Court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.
>
> (2) ASIC must make the application within 6 years of the alleged contravention.
>
> *Court may order person to pay pecuniary penalty*
>
> (3) If a declaration has been made under section 12GBA that the person has contravened the provision, the Court may order the person to pay to the Commonwealth a pecuniary penalty that the Court considers is appropriate (but not more than the amount specified in section 12GBC).
>
> (4) An order under subsection (3) is ***a pecuniary penalty order***.
>
> *Determining pecuniary penalty*
>
> (5) In determining the pecuniary penalty, the Court must take into account all relevant matters, including:
>
> (a) the nature and extent of the contravention; and
>
> (b) the nature and extent of any loss or damage suffered because of the contravention; and
>
> (c) the circumstances in which the contravention took place; and
>
> (d) whether the person has previously been found by a court

> (including a court in a foreign country) to have engaged in any similar conduct.

23 A subsequent amendment to that provision during the relevant period is not relevant to the determination of relief in this proceeding.

24 Thus, s 12GBB empowers the Court to impose a pecuniary penalty upon a person who has contravened a civil penalty provision, provided a declaration has been made under s 12GBA that the person has contravened the provision. As set out earlier, on 5 November 2024 Yates J declared that each of Harvey Norman and Latitude had engaged in conduct in contravention of ss 12DB(1) and 12DF(1) of the ASIC Act, which are civil penalty provisions: s 12GBA(6)(b). The defendants were also declared to have breached s 12DA(1), which is not a civil penalty provision, though this breach is relevant to injunctive and other ancillary relief sought by ASIC.

25 The maximum penalties applicable to a body corporate for a contravention of s 12DB(1) or 12DF(1) are specified in ss 12GBC and 12GBCA(2) which, as operative during the relevant period, were in the following form:

> **12GBC Maximum pecuniary penalty**
>
> The pecuniary penalty must not be more than the pecuniary penalty applicable to the contravention of the civil penalty provision.
>
> **12GBCA Pecuniary penalty applicable**
>
> …
>
> *Pecuniary penalty applicable to the contravention of a civil penalty provision—by a body corporate*
>
> (2) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by a body corporate is the greatest of:
>
> (a) 50,000 penalty units; and
>
> (b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and
>
> (c) either:
>
> (i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or
>
> (ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

26 As explained in *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd (No 2)* [2024] FCA 1086 at [22]-[24], s 12GBCA(2)(a) was in a different form between 13 March 2019 and 22 June 2020. However, it was amended to the form specified above by the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020* (Cth) (see s 3 and Sch 3, item 3) with retrospective effect. Pursuant to s 327 of the ASIC Act, the amendment (which corrected a drafting error) applies retrospectively to contraventions of a civil penalty provision if the conduct constituting the contravention occurs wholly on or after 13 March 2019.

27 The applicable maximum penalty is the greater of the three amounts specified in s 12GBCA(2):

(a) With respect to s 12GBCA(2)(a), which stipulates 50,000 penalty units per contravention, the value of a penalty unit is specified by s 4AA of the *Crimes Act 1914* (Cth). For contraventions between 1 July 2017 and 30 June 2020, a penalty unit was $210. For contraventions between 1 July 2020 until 31 December 2022, a penalty unit was $222. The relevant period encompasses part of both these periods. In its submissions, ASIC adopted the lower amount of $210. On that basis, the maximum penalty calculated under para (a) is $10.5 million per contravention.

(b) With respect to s 12GBCA(2)(b), ASIC submitted that it is not possible to determine the benefit derived and detriment avoided because of the defendants' contraventions. Accordingly, para (b) is not applicable.

(c) With respect to s 12GBCA(2)(c), the maximum penalty is capped by para (c)(ii) at 2.5 million penalty units which equals $525 million per contravention. In respect of para (c)(i), ASIC submitted that the calculation should be made by reference to each defendant's annual turnover for the 12-month period ending at the end of January 2020, as the contraventions began on 1 January 2020. Harvey Norman's consolidated revenue for FY2019 (financial year ending 30 June 2019) was $3.42 billion and FY2020 (financial year ending 30 June 2020) was $3.55 billion. Taking the mid-point between those consolidated revenue figures (to approximate the 12-month period ending in January 2020) and dividing it by 10, ASIC submitted that the maximum penalty for Harvey Norman under para (c)(i) is $348 million for each contravention. Harvey Norman did not contest that figure. Latitude's consolidated revenue for FY2019 (financial year ending 31 December 2019) was $1.06 billion. Dividing that figure by

10, ASIC submitted that the maximum penalty for Latitude under para (c)(i) is $106 million for each contravention. Latitude did not contest that figure.

28 It follows that the maximum penalty per contravention applicable to Harvey Norman is $348 million and that applicable to Latitude is $106 million per contravention.

29 In considering the sufficiency of a proposed civil penalty, regard must ordinarily be had to the maximum penalty. The maximum penalty provides a "yardstick", to be taken into account and balanced with all other relevant factors: *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 (***Pattinson***) at [53]-[54] and *Reckitt Benckiser* at [155]-[156] (see also, in a criminal sentencing context, *Markarian v The Queen* (2005) 228 CLR 357 at [31], to which both *Pattinson* and *Reckitt Benckiser* refer). However, as has been observed in many cases in recent years, the statutory maximum penalties that are now applicable to contraventions of the consumer protection laws (both the Australian Consumer Law and the equivalent provisions of the ASIC Act) typically have very little practical application and, for that reason, provide little if any guidance to the Court in determining an appropriate penalty to be imposed. That is because the maximum penalty is applicable to each act or omission that constitutes a contravention of the law and the maximum penalty has been increased to a level that can have no meaningful relationship to the potential harm caused by each such act or omission. Taking the present case as an example, the likely harm caused by a single act of contravention in the present case is potentially a few hundred dollars or possibly a thousand dollars, whereas the maximum penalty that applies to the single act of contravention is hundreds of millions of dollars. The disparity between potential harm and maximum penalty is multiplied when (as is usual) there is a large number of contraventions. In the present case, the newspaper advertisements were published in 168 newspapers; the radio advertisements were broadcast on 143 radio stations; and the television advertisements were broadcast on at least 900,000 occasions on 367 specified stations. A separate contravention has occurred on each occasion that the advertisements were viewed by a consumer, because each such occasion involved an act of misleading conduct. In all likelihood, the contraventions number in the millions and the theoretical maximum penalty is in the trillions of dollars. It must be questioned whether the statutory maximum penalties have any utility as, for all practical purposes, the Court must approach the determination of penalty as if there is no maximum penalty. Indeed, in the present case, ASIC seeks a penalty against each company which is far less than the maximum penalty applicable for a single contravention. As observed by the Full Court in *Reckitt Benckiser* (at [157]), where there is no meaningful overall maximum penalty, the

assessment of the appropriate penalty must be assessed by reference to factors other than the statutory maximum.

Applicable principles

30 The principles applicable to the assessment of an appropriate penalty for contraventions of the consumer protection laws have been stated in many cases. The following is a summary of those principles.

31 First, the Court may impose a penalty in respect of each contravention, subject to the maximum penalty which is stated to apply to each act or omission that constitutes a contravention.

32 Second, the penalty to be imposed is a penalty that the Court considers appropriate.

33 Third, s 12GBB(5) of the ASIC Act requires the Court to take into account four specific matters and all other relevant matters. The four specific matters are: (i) the nature and extent of the contravention; (ii) the nature and extent of any loss or damage suffered because of the contravention; (iii) the circumstances in which the contravention took place; and (iv) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

34 As to 'all other relevant matters', in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; ATPR 41-076 (***CSR***), in the context of a contravention of provisions of Pt IV of the *Trade Practices Act 1974* (Cth), French J listed a number of other matters potentially relevant to the assessment of penalty under s 76 of that Act. Those matters have become known as the 'French factors' and relevantly include:

(a) the size and financial position of the contravening company;

(b) the deliberateness of the contravention and the period over which it extended;

(c) whether the contravention arose out of the conduct of senior management or at a lower level;

(d) whether the company has a corporate culture conducive to compliance with the Act as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and

(e) whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention.

35 In *Pattinson*, the plurality observed in respect of the French factors (at [19], citations omitted):

> It may readily be seen that this list of factors includes matters pertaining both to the character of the contravening conduct … and to the character of the contravenor … . It is important, however, not to regard the list of possible relevant considerations as a "rigid catalogue of matters for attention" as if it were a legal checklist. The court's task remains to determine what is an "appropriate" penalty in the circumstances of the particular case.

36 Fourth, and as noted earlier, in considering the sufficiency of a proposed civil penalty, regard must ordinarily be had to the maximum penalty. However, where the theoretical maximum penalty is in the billions or trillions of dollars, the overall maximum penalty is not likely to be a meaningful factor and the appropriate penalty must be assessed by reference to other factors: *Reckitt Benckiser* at [157].

37 Fifth, in determining the appropriate penalty for a multiplicity of civil penalty contraventions, the Court may have regard to two common law principles that originate in criminal sentencing: the 'course of conduct' principle and the 'totality' principle: *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 (***Yazaki Corporation***) at [226]. Under the 'course of conduct' principle, the Court considers whether the contravening acts or omissions arise out of the same course of conduct or the one transaction, to determine whether it is appropriate that a 'concurrent' or single penalty should be imposed for the contraventions: *Yazaki Corporation* at [234]. The principle guards against the risk that the respondent is punished twice in respect of multiple contravening acts or omissions that should be evaluated, for the purposes of assessing an appropriate penalty, as a lesser number of acts of wrongdoing: *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1 at [39] (Middleton and Gordon JJ). The 'totality' principle operates as a 'final check' to ensure that the penalties to be imposed on a wrongdoer, considered as a whole, are just and appropriate and that the total penalty for related offences does not exceed what is proper for the entire contravening conduct in question: *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40,169 (***TNT Australia***); *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238 at 53; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [132].

38 Sixth, the principal object of imposing pecuniary penalties in civil proceedings is deterrence, both to deter repetition of the contravening conduct by the contravener (specific deterrence) and to deter others who might be tempted to engage in similar contraventions (general deterrence): *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***TPG***) at [65] (French CJ, Crennan, Bell and Keane JJ); *Commonwealth of*

Australia v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482 (***FWBII***) at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ) and at [110] (Keane J); *Pattinson* at [9] and [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). In *FWBII*, the plurality (at [55]) stated that the purpose of civil penalties "is primarily if not wholly protective in promoting the public interest in compliance", endorsing the view of French J in *CSR* at [40]:

> The principal, and I think probably the only, object of the penalties … is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.

39 The penalty should therefore be fixed with a view to ensuring that the amount is not such as to be regarded by the contravener or others as an acceptable cost of doing business: *TPG* at [66] (French CJ, Crennan, Bell and Keane JJ) citing *Singtel Optus v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 (***Singtel***) at [62]-[63] (Keane CJ, Finn and Gilmour JJ).

D. FACTUAL FINDINGS RELEVANT TO PENALTY

The defendants' involvement in the contravening conduct

40 As stated earlier, Justice Yates found that both Harvey Norman and Latitude were liable for the contravening conduct. ASIC seeks a pecuniary penalty against each. It is therefore appropriate to begin by considering the involvement of each of the defendants in the contravening conduct. This section commences with an overview of the business of each defendant, followed by consideration of the agreement between them pursuant to which the promotions were conducted (called the Program Agreement). The Program Agreement determined the responsibilities of each of the defendants for the advertisements and the distribution of the financial benefits generated by the promotions between the defendants.

Harvey Norman's business

41 During the relevant period, Harvey Norman was the ultimate holding company of the Harvey Norman Group. Harvey Norman's FY20 Annual Report disclosed that, during that financial year (which coincides with the relevant period of the contravening conduct), Harvey Norman conducted business in Australia and internationally. Its Australian business included the franchise of retail stores operating under the trading names Harvey Norman, Domayne and Joyce Mayne, which sell furniture, domestic appliances and computing and software products. The contravening advertisements concerned the Australian franchise business. In Australia, Harvey Norman also owns or controls other non-franchised retail and wholesale operations

under various brand names. Harvey Norman's international business includes the operation of company owned retail stores in New Zealand, Malaysia, Singapore, Ireland, Slovenia and Croatia.

42 Harvey Norman's Annual Reports for financial years ending 30 June 2020 to 2025 record the following consolidated revenue and reported profit after tax and non-controlling interests (**NCI**). Harvey Norman also provided the revenue derived from franchisees and other sources, which is relevant to assessing Harvey Norman's gain from the unlawful conduct.

Year	Consolidated Revenue	Reported Profit after Tax & NCI	Net assets
FY2020	$3.55b	$480.54m	$3.48b
FY2021	$4.439b	$841.41m	$3.89b
FY2022	$4.506b	$811.53m	$4.29b
FY2023	$4.275b	$539.52m	$4.47b
FY2024	$4.11b	$352.45m	$4.54b
FY2025	$4.47b	$518.02m	$4.84b

43 As noted above, the contravening advertisements related to the Australian franchise business. The FY20 Annual Report disclosed that, at that time, Harvey Norman had 194 franchised stores (168 under the trading name Harvey Norman, 19 under the trading name Domayne and 7 under the trading name Joyce Mayne), and 539 independent franchisees across its three brands. As is apparent from those figures, a single franchise store may have a number of franchisees conducting different parts of the retail business (for example, the homewares section may be conducted by a different franchisee to the computer products section). Harvey Norman's profit before tax from its Australian franchise business in FY20 was $348.59 million, comprising a little more than half of overall profit before tax, and in FY21 it increased to $628.19 million, again comprising a little more than half of overall profit before tax.

Latitude's business

44 Latitude is a subsidiary of Latitude Group Holdings Limited (**Latitude Group**), which listed on the Australian Securities Exchange in April 2021. Latitude Group's prospectus dated 30 March 2021 explained that Latitude Group traces its corporate history back to a range of acquisitions made by GE Capital in Australia and New Zealand. In 2015, a consortium of investors acquired the business from GE Capital and the business was subsequently renamed Latitude Financial Services.

45 In its prospectus, Latitude Group described itself as a “leading Instalments and Lending business, with 2.77 million customer accounts and more than 3,400 merchant partners (with over 10,600 outlets) in Australia and New Zealand” and stated that Latitude Group’s “merchant base covers major retailers across a wide range of living and lifestyle goods, including Apple, Harvey Norman, The Good Guys, JB Hi-Fi, Samsung and Luxury Escapes”. Latitude Group’s Instalments business included ‘buy now, pay later’ products LatitudePay and GenoaPay and credit cards Latitude GO, Latitude Gem and CreditLine which “allow customers to purchase goods with long-term (up to 60 months) interest free credit, and use the card as a general purpose credit card, if enabled with Scheme functionality”. Latitude Group’s Lending business provided customers with access to an array of personal finance products including credit cards, personal loans and car loans.

46 Latitude Group’s annual reports for the financial years ending 31 December 2021 to 2025 record the following total operating income, net profit/loss after tax and net assets:

Year	Operating income	Net profit/loss after tax	Net assets
FY2021	$818.2m	$160.3m	$1.57b
FY2022	$709.1m	$36.3m	$1.47b
FY2023	$657.5m	($159.1m)	$1.23b
FY2024	$729.1m	$21.6m	$1.22b

47 Latitude Group’s financial statement for the 6 months ending 30 June 2025 records total operating income of $407.7m, net profit after tax of $39.2m and net assets of $1.22b.

48 The contravening advertisements concerned the Instalments business and, specifically, Latitude’s GO Mastercard product. Latitude Group’s prospectus contained the following description of the Instalments business involving the credit cards Latitude GO, Latitude Gem and CreditLine:

> **2.3.2.3 Latitude GO, Latitude Gem and CreditLine**
>
> Latitude GO, Latitude Gem and CreditLine allow its customers to purchase selected items from Latitude’s network of merchant partners on instalments, with an interest free period typically longer than that offered by a credit card (for Latitude, between three and 60 months). Instalments purchases are also typically larger in value and less frequent than average general purpose credit card transactions. The average value of a Latitude Instalments transaction over the 12 months to 31 December 2020 was A$1,515.
>
> Latitude has A$3.7 billion of Instalments products receivables from a base of more than 1.8 million customer accounts as at 31 December 2020. Approximately 57% of

the receivables are in an interest free period as at 31 December 2020.

In addition, Latitude GO and Latitude Gem can be used for purchases wherever Mastercard and Visa are accepted and for cash withdrawals via ATMs. Those transactions are referred to as general purpose credit card usage and settle via the Scheme network.

A typical Instalments transaction involves:

- **Sale and credit application**: The merchant, either via advertising or in-store communications, offers sales 'interest free' at specified terms which will vary depending on the product sold. If the customer does not have an existing Instalments card, they can apply in-store or online. The customer is subject to credit assessment and additional checks in accordance with all responsible lending requirements, which for Latitude's offer can be credit approved within 60 seconds should the customer meet the required credit and identity checks and scoring criteria. Upon approval, customers are issued an account number with an approved credit limit for the interest free purchase. The credit limit may be for more than the value of the immediate item being acquired. A physical card will also be mailed to the customer. Once approved, the customer is able to use their approved product to make a purchase immediately;

- **Payment and fees**: Latitude settles the relevant transaction amount with the merchant less a merchant service fee that takes into account factors such as the interest free period and product category. The customer subsequently pays an annual fee or a monthly account keeping fee. Where a balance remains outstanding at the end of the interest free period, interest will be payable on that balance at that date. Late payment fees may also be charged if applicable; and

- **Repeat usage**: The customer can use the card to make further interest free or everyday credit card purchases at any time, subject to their credit limit. Instalments purchases can be made at any merchant offering Instalments terms. Latitude's Scheme-enabled Instalments products may be used as general purpose credit cards wherever Mastercard or Visa cards are accepted.

2.3.2.4 Latitude GO, Latitude Gem and CreditLine business model

The economics of Latitude GO, Latitude Gem and CreditLine can be described as follows:

- **The merchant pays Latitude a merchant service fee**, which takes into account the length of the interest free period the merchant offers (currently between three and 60 months), and the average loss rates for the product type, individual retailer or the retailer's industry. This fee is received upfront, with Latitude recognising the revenue over the interest free period (for further information on Latitude's accounting policies, refer to Section 4);

- **The customer pays Latitude fees and interest (where relevant)**, including an annual fee or monthly account keeping fee (in Australia) or an establishment fee (in New Zealand), as well as late fees or cash withdrawal fees as applicable. Interest will be charged to the customer if the balance is not paid off within the relevant interest free period. Interest may also be charged on any general purpose credit card purchases (subject to the relevant credit card periods for statement cycles) and cash withdrawals;

- **An interchange fee**, received by Latitude where the Scheme-enabled Instalments products are used as a general purpose credit card, on the

Mastercard or Visa network;

- **Loss rates**: Latitude is fully responsible for the credit decisioning and collection process and bears the loss for unpaid accounts; and
- **Marketing**: the promotion of the Instalments product would typically be led by the merchant to trigger the generation of their own revenue.

49 Latitude Group's prospectus disclosed (p 46) that the "Interest Free Instalments" component of Latitude Group's business (which included the GO Mastercard) comprised 57% of Latitude Group's lending product portfolio (being the proportion of group gross loan receivables as at 31 December 2020).

The Program Agreement

50 The contravening advertisements were implemented pursuant to the terms of the Program Agreement. The Program Agreement was originally entered into between GE Capital and Harvey Norman on 8 June 2005. The Agreement was amended and restated on 22 September 2010 and further amended by a Deed of Variation dated 9 March 2015 and a letter agreement dated 24 August 2020.

51 The stated purpose of the Program Agreement is to introduce Latitude to Harvey Norman customers (being persons who acquire goods at a Harvey Norman franchise store). Latitude agreed to provide credit facilities to those customers in connection with the "Co-Brand Card Program" (being a credit card program offered by Latitude under a card scheme having the features specified in the agreement). At all relevant times, the agreed Co-Brand Card was the GO Mastercard. Harvey Norman agreed to actively support and promote the GO Mastercard, and use its reasonable commercial endeavours to facilitate franchisees doing likewise. Latitude agreed to provide a training program for Harvey Norman franchisees and their staff in relation to the opening of new GO Mastercard accounts, the use of the card, and Latitude's standard operating procedures.

52 Under the Program Agreement, Harvey Norman and Latitude undertook certain responsibilities with respect to the promotion of the Co-Brand Card Program. The Agreement contemplated an annual marketing plan which, amongst other things, governed the contributions that each company would make to the joint promotion of the Program. The parties agreed that advertising of the Program would be by Generic Publications, Harvey Norman's in-house advertising agency. By cl 5.9, Harvey Norman agreed that if it planned a promotion that referred to the Co Brand Card, it would give Latitude prior notice of the promotion, including the form of promotion (for example, television or print) and the details of the promotion. By cl

5.12, Harvey Norman agreed to use its best endeavours to facilitate each Harvey Norman franchisee promoting the Co-Brand Card Program as the preferred method of credit payment for goods and services. Each of Harvey Norman and Latitude agreed to submit to the other for approval any marketing or promotional material prepared by them referring or relating to the Program.

53 Under the Program Agreement, Latitude agreed to make two forms of payment to Harvey Norman that are referrable to GO Mastercard accounts created as a result of the Program Agreement.

54 First, cl 6.7 required Latitude to pay Harvey Norman a ‘new account incentive payment’ being an amount paid for each new account opened as a result of Harvey Norman’s introduction under the Program Agreement. During the relevant period, the new account incentive payment was $33 for each new account opened (cl 1 of the Deed of Variation). Evidence of payments made between the defendants indicates that part of the new account incentive payment ($23) was paid to and retained by Harvey Norman while the balance ($10) was paid to Harvey Norman franchisee staff who opened the new account.

55 Second, cl 6.10 required Latitude to pay Harvey Norman a ‘volume payment’ calculated as a percentage of the total dollar value of transactions made by Harvey Norman customers using a GO Mastercard. Cl 1 of the Deed of Variation defined the volume payment as follows:

> Volume Payment means, from 1 December 2014, as the context requires:
>
> (a) an amount equal to 17 basis points of the total dollar value of:
>
> (i) Interest Free Transactions; and
>
> (ii) Other Interest Free Transactions; or
>
> (b) an amount equal to 13 basis points of the total dollar value of:
>
> (i) cash withdrawals made by a Cardholder using a Co-Brand Card; and
>
> (ii) Card Scheme transactions made by a Cardholder using Co-Brand Card.

56 Under the Program Agreement, Latitude also agreed to make several other forms of payment to Harvey Norman. However, those payments have little if any relevance to the assessment of penalty. One of those obligations is historical: the ‘volume rebate’ payable to Harvey Norman ceased in 2010. Another of the obligations is not affected by the number of GO Mastercard accounts that are opened: cl 8 of the Deed of Variation and the letter agreement dated 24 August

2020 required Latitude to pay Harvey Norman certain payments in return for Harvey Norman granting Latitude exclusivity, being annual lump sum payments.

Incremental revenue earned by reason of the promotions

57 It should be noted at this point that the incremental revenue earned by Harvey Norman by reason of the promotions was not confined to payments made by Latitude under the Program Agreement. The promotions were intended to generate sales of goods at Harvey Norman franchise stores. As discussed in more detail below, Harvey Norman earned franchise fees from its franchisees calculated as a percentage of gross franchisee revenue and also a financial accommodation fee from its franchisees related to credit provided to franchisees.

58 As summarised in Latitude's Group prospectus (and reproduced above), on each interest free sale, Latitude earned:

(a) from the merchant, a merchant service fee; and

(b) from the customer, an establishment fee and a monthly account keeping fee, as well as late fees or cash withdrawal fees as applicable, with interest being charged if the balance was not paid off within the relevant interest free period.

59 Latitude also earned fees and revenue on any future use of the GO Mastercard, including:

(a) from the customer, interest charged on any general purpose credit card purchases (subject to the relevant credit card periods for statement cycles) and cash withdrawals; and

(b) interchange fees.

60 Of course, Latitude's revenue was offset by costs incurred in conducting its business, including the fees payable to Harvey Norman, finance costs, losses for unpaid accounts and marketing expenses.

The involvement of the defendants' employees in approving the contravening advertisements

61 In relation to the involvement of each of the defendants in the contravening conduct, Yates J made the following findings (at LJ [57]-[80]):

> 57 In the relevant period, Bradley Symmons held the position within Latitude of General Manager Retail Australia, Harvey Norman. He reported to Paul Varro who was a director of Latitude and Latitude Financial Services Australia Holding Pty Ltd. In the relevant period before June 2020, Mr Varro held the position of Executive General Manager, Latitude Pay and Insurance. In the

relevant period after June 2020, he held the position of Chief Commercial Officer. Mr Varro reported to Ahmed Fahour, Latitude's Chief Executive Officer and also a director of Latitude Financial Services Australia Holdings Pty Ltd.

58 In the relevant period, James Monahan held the position within Latitude of Program Leader Commercial, Harvey Norman. He reported to Mr Symmons.

59 The evidence establishes that Latitude was involved in developing and approving the content of advertisements placed by Harvey Norman for the promotions involving Latitude and the GO Mastercard. This included signing off on the disclaimers and disclosures made in the advertisements to which I have referred, based on Latitude's advertising and brand guidelines. Mr Symmons was the person carrying out this task, although from time to time Mr Monahan undertook this role (e.g., when Mr Symmons was absent). Mr Monahan also carried out six-monthly audits of the advertising campaigns to check that they had been signed-off in accordance with Latitude's guidelines.

60 Although there was no formal process to do so, Mr Symmons kept an eye out (and ear out) for Harvey Norman advertisements in respect of promotions involving Latitude. He would, for example, make copies of newspaper advertisements and share these with others within Latitude, including Mr Varro.

61 Mr Symmons was the "main interface" with Harvey Norman. He would make recommendations to Harvey Norman about the interest-free promotions it should run, based on Harvey Norman's previous advertising campaigns and what Harvey Norman's competitors were currently doing in the market. He would provide the pricing for these recommendations.

62 The key elements of these recommendations were the length of the interest-free period; the type of promotion (e.g., interest-free with equal instalment repayments, interest-free with minimum repayments, or interest-free with deferred repayments); the customer's minimum spend associated with the promotion; and the cost of the promotion (i.e., the merchant service fee and what Latitude was going to charge the Harvey Norman franchisees).

63 The evidence includes recommendations made by Mr Symmons on 17 March 2020 (for April and May 2020) and on 30 April 2020 (for May and June 2020). The recommendations were sent to Chris Mentis. Mr Mentis was the Chief Financial Officer, the Company Secretary, and an Executive Director of Harvey Norman. Mr Mentis reported to Kay (known as Katie) Page, the Chief Executive Officer of Harvey Norman.

…

65 Typically, Mr Mentis and Ms Page would meet to discuss Latitude's recommendations with a view to putting those recommendations to Harvey Norman franchisees for adoption. Mr Mentis was one of the people within Harvey Norman who approved whether a particular advertisement offering an interest-free promotion was published. On occasion, Ms Page was involved in giving that approval.

66 From time to time, and without the intervention of Latitude, Mr Mentis and Ms Page would meet and decide on interest-free promotions to be recommended to Harvey Norman franchisees, including the particulars of the promotion. The factors informing those decisions included the current market

conditions; the interest-free offerings of competitors; the costs of the promotion to franchisees; and the impact of any existing restrictions placed on Harvey Norman stores due to the Covid-19 pandemic (different jurisdictions had different lockdown laws affecting store openings, the engagement with customers, and the ability to effect product deliveries).

67 Once a decision was made, Mr Mentis or Ms Page (or both) advised representatives of Generic Publications (which functioned as Harvey Norman's inhouse advertising agency with a focus on advertising production) of the upcoming interest-free promotion and provided them with details that generally consisted of the promotional period; the number of applicable interest-free months (e.g., 60 months interest-free); whether the promotion would or would not require a deposit or instalment payments (and, if so, the amount of the deposit and instalment payments); the minimum purchase price for the promotion; the goods to which the promotion applied; the goods that were excluded from the promotion; the dollar amount of any gift card; and whether the promotion would be advertised.

68 Generic Publications would then prepare the advertising materials, which typically included terms and conditions, posters for stores, print advertisements (including catalogues and newspaper advertisements), scripts and graphics for television and radio advertisements, and memoranda to franchisees containing details of the recommended promotion.

69 Templates were used to create these materials. The range of materials produced were substantially similar for every interest-free promotion. The materials generally did not change from promotion to promotion, other than in respect of the particulars of the interest-free promotion.

70 Once the materials were prepared, they were given to Daniel Child (the Chief Operating Officer of Generic Publications prior to 1 March 2021) for review, and then to Mr Mentis for approval.

71 Once approved, materials pertaining to the print advertisements (other than the memoranda to franchisees) were sent to Mr Symmons for review and comment. Latitude typically provided its approval for the print advertisements subject to the correction of minor typographical errors. After this review and certain other administrative steps, the print advertisements were published. Publication was on Ms Page's direction.

72 Generic Publications liaised with DMC Digital Pty Limited (DMC), a production house, for the creation of television advertisements.

73 After DMC created the advertisements, they would be submitted to Generic Publications for approval. Kristie Gee (the Head of Television and Radio at Generic Publications, who reported to Ms Page) would give the advertisements to Mr Mentis for review and approval. The terms of the offer in the advertisements were, like the newspaper advertisements, based on templates approved by Latitude. Mr Symmons was involved in this process from time to time.

…

77 Ms Page gave instructions to Ms Gee about booking television campaigns involving the promotions. This was usually done by telephone or via WhatsApp.

78 Scripts for radio advertisements were prepared by Generic Publications once

television advertisements had been finalised. Those Voice Over Guys (a firm) recorded and mixed the advertisements.

79 As with the television campaigns, Ms Page issued instructions to Ms Gee regarding the booking of radio campaigns.

80 ASIC submits that the Court should find that Ms Page and Mr Mentis were "intimately involved in all aspects of the advertising" and that the process was "micro-managed" by Ms Page. It is not clear to me what the word "intimately" adds to the findings I have made. Further, I am not satisfied that Ms Page "micro-managed" the process by which the newspaper, television, and radio advertisements were devised, created, and published or broadcast. On Harvey Norman's part, these campaigns were undertaken under the overall direction and control of Ms Page with significant management involvement from Mr Mentis, Mr Anderson, Mr Childs, and Ms Gee, as I have described, along with Martin Anderson (General Manager of Generic Publications until June 2021).

Overall assessment

62 On the basis of the evidence summarised above, I conclude that Harvey Norman and Latitude were equally responsible for the contravening advertisements. The promotions were conducted pursuant to the terms of the Program Agreement. The Program was a mutually beneficial commercial arrangement by which Latitude was given the opportunity to offer instalment payment facilities to Harvey Norman franchisees' customers, and Harvey Norman franchisees were given the opportunity to offer goods for sale on instalment payment terms arranged through Latitude. Both Harvey Norman and Latitude wished to make the promotions, and both benefited from the promotions.

63 During the relief hearing, neither Harvey Norman nor Latitude formally submitted that the other bore a greater share of responsibility for the contravening advertisements, and neither submitted that there should be a difference in the penalty imposed on each of them by reason of having a different level of responsibility. However, in the course of oral argument, Senior Counsel for Harvey Norman submitted that the evidence supports a conclusion that, as between the two companies, Latitude was responsible for ensuring that the advertisements complied with the consumer protection laws. In support of that submission, reference was made to Yates J finding at LJ [59] (reproduced above) and Ms Barton's evidence concerning Latitude's advertising guidelines. I reject that submission: it is not supported by the Program Agreement or Ms Barton's affidavit and it involves a misreading of Yates J's findings.

64 As set out above, the Program does not allocate between the parties responsibility for ensuring that the advertisements comply with the consumer protection laws. Instead, by cll 5.13 to 5.16, each party was required to obtain the approval of the other for any marketing materials used to promote the Co-Brand Card Program or that refer to or relate to the Program. To the extent that

any greater responsibility for advertising materials rested with one of the parties, arguably it rested with Harvey Norman because, by cll 5.6 to 5.8, the parties agreed that advertising would be developed and placed by Generic Publications, Harvey Norman's in-house advertising agency.

65 The findings made by Yates J at LJ [58]-[80] do not suggest that, as between the defendants, Latitude had responsibility for ensuring that the advertisements complied with the consumer protection laws. The findings support the conclusion that each of the defendants sought approval for each promotion and associated advertising materials from the other, consistently with the terms of the Program Agreement. At LJ [59], Yates J found that Latitude was involved in developing and approving the content of advertisements placed by Harvey Norman for the promotions. That is not a finding that Latitude had responsibility for compliance as between the defendants. His Honour also found that Latitude 'signed off' on the disclaimers and disclosures made in the advertisements based on Latitude's advertising and brand guidelines. Again, that is a description of the steps taken by Latitude, not a finding that Latitude had responsibility for compliance as between the defendants. That is clear from the remainder of his Honour's findings: that Latitude made recommendations about promotions to Harvey Norman (being the terms of the promotion, not the marketing of the promotion); that Harvey Norman would consider and determine whether to proceed with a promotion; when a decision was made by Harvey Norman, instructions were given to Generic Publications with the relevant details; Generic Publications would then prepare the advertising materials; when the advertising materials were prepared, they were given to Mr Child (CEO of Generic Publications) and Mr Mentis (CFO, Company Secretary and Executive Director of Harvey Norman) for approval; once approved, the advertising materials were sent to Mr Symmons (a manager at Latitude with the title General Manager Retail Australia, Harvey Norman) for review and comment.

66 Ms Barton's evidence does not contradict those findings. Ms Barton merely explained the steps taken by Latitude, when reviewing advertising materials, to ensure compliance with Latitude's legal obligations under relevant laws, including the National Consumer Credit Protection Act, the Australian Consumer Law, the ASIC Act and Corporations Act.

67 It follows that the assessment of an appropriate penalty for each of Harvey Norman and Latitude should begin from the position that each defendant was equally responsible for the

contravening advertisements. Whether a higher penalty should be imposed on one defendant compared to the other will depend on other relevant factors, which are considered below.

Nature and extent of contravening conduct

68 Justice Yates found that the advertisements misled consumers in two ways. First, the advertisements did not disclose to consumers that, to take advantage of the promotion, the consumer was obliged to apply and be approved for a credit card issued by Latitude and then use that credit card in the Harvey Norman store. Second, consumers were not told that they must also pay an establishment fee and monthly account service fees on their credit card account.

69 Justice Yates found that the financial arrangement that was promoted was "fundamentally different" to the arrangement that consumers were obliged to enter into (LJ [388]), and that the failure to disclose the nature of the financial arrangement was "not trivial" (LJ [389]). The Full Court rejected the defendants' argument that consumers would have understood the advertisements to reflect an offer to acquire goods involving the provision of finance that came with a further cost to them (AJ [40]):

> An ordinary and reasonable consumer would have understood from the promotion that they would not be required to pay anything more for the finance. That does not involve an extreme or fanciful reaction … . It simply reflects the promotion advertised by Harvey Norman and Latitude.

70 The terms of the promotion shown in small print in the newspaper advertisements contained no reference to the GO Mastercard, although they noted that credit was provided by Latitude. The extended terms (appearing only in some of the newspaper advertisements) did reference the GO Mastercard, however this was "buried" in the fine print, with much of the fine print having nothing to do with the financial terms of the offer (LJ [419]). The radio advertisements made no reference to Latitude or the GO Mastercard, and noted only in fast-paced audio, that "fees and exclusions" applied (LJ [423]-[435]). The television advertisements made no reference to the GO Mastercard, though noted in small print that credit was provided by Latitude (LJ [442]).

71 Justice Yates found, and the Full Court agreed, that the conduct was not remedied by the ancillary statements that accompanied the advertisements marked by an asterisk in fine print, or spoken during the television and radio advertisements (LJ [381]-[382]; AJ [67]).

72 In relation to the extent of the contravening conduct, the defendants published a large number of advertisements across newspaper, radio, and television media during the relevant period, being a period of around 19 months. The newspaper advertisements were published in all Australian capital cities, as well as regional hubs across 168 newspaper publications. In many cases the newspaper advertisements were large front page or ‘wrap around’ advertisements. The television advertisements were broadcast on at least 900,000 occasions across 367 specified television stations during the relevant period. The radio advertisements were broadcast across 143 specified radio stations. The defendants admitted that the number of advertisements numbered in the thousands.

73 The target audience for the advertisements comprised persons who are purchasers of home and electrical goods such as those advertised in the advertisements – in other words, the Australian public at large.

74 It is not possible to know how many consumers were misled by the conduct. ASIC submitted, and I accept, that it is realistic to conclude that millions of Australians were exposed to the advertisements and it is appropriate to assess the penalty on this basis: *ACCC v Samsung Electronics Australia Pty Ltd* [2022] FCA 875 at [64] (Murphy J); *ACCC v The Good Guys Discount Warehouses (Australia) Pty Ltd* [2025] FCA 1085 at [92] (O’Bryan J).

Consumer harm

Categories of consumer harm

75 Justice Yates found that the contravening advertisements were likely to cause consumers to form an erroneous belief about two matters: first that they could acquire the advertised products on the interest free terms, without assuming any other contractual or financial commitments; and second that they would not be liable for any other material fees or charges.

76 The defendants submitted that, ultimately, no harm was likely to be suffered by consumers because, if they chose to purchase a product on the terms of the offer, they would learn that they had to acquire a GO Mastercard and be informed of the terms of the card. This would occur when the consumers engaged in the instore credit application process or, if purchasing goods online, when engaging with the online GO Mastercard application.

77 There is force in that submission, but it does not appropriately acknowledge all forms of consumer harm that are likely to arise from the contravening conduct, and it assumes that the

credit application process would always be effective in correcting the erroneous impression created by the advertisements.

78 First, consumers may invest time in investigating a purchase on the assumed terms of the offer, before realising that the terms are different and deciding not to proceed. This is a waste of the consumer's time and in and of itself is a disadvantage suffered by consumers as a result of the contravening conduct.

79 Second, consumers may invest time in investigating a purchase on the assumed terms of the offer, before realising that the terms are different, but having invested time and having become emotionally invested in the purchase, elect to proceed notwithstanding that the consumer finds the terms unattractive. In such circumstances, the misleading advertisement affects the consumers' buying decisions in a manner that makes the purchase decision sub-optimal. The distortion of consumer choice is a non-monetary harm which is a serious matter when imposing a pecuniary penalty: *ACCC v Meta Platforms Inc* [2023] FCA 842 at [37] (Abraham J). See also: *Reckitt Benckiser* at [114] (Jagot, Yates and Bromwich JJ); *ACCC v SmileDirectClub LLC* [2022] FCA 1343 at [53] (Anderson J).

80 Third, the credit application process may not inform the consumer of the material terms of the transaction, or may not do so fully. The evidence (set out in the following section) indicates that the credit application process would not always correct the misleading impression created by the advertisements. In so far as consumers proceeded with the sales transaction on a misapprehension of the financial terms, two categories of harm occur: first, consumers unwittingly enter into a continuing credit contract with Latitude that was linked to a GO Mastercard credit card account; and second, consumers unknowingly became liable for an establishment fee and monthly account service fees in respect of the GO Mastercard account.

81 It was implicitly assumed by the parties that consumer harm was largely confined to the category of consumers who had not previously made a purchase at a Harvey Norman store in response to the promotions and who did not already have a GO Mastercard. If a consumer had previously made a purchase in response to one of the promotions, they would have received a GO Mastercard and, within a relatively short space of time, become aware of the fees applicable to that credit card. The consumer would have incurred the establishment fee with their first purchase and, accordingly, would not incur a further establishment fee when making a further purchase through the promotions. The consumer would also have become aware of the monthly

account keeping fee that applied to GO Mastercards. I consider the assumption made by the parties to be reasonable.

Credit application process

82 As stated above, the defendants submitted that consumers who purchased a product on an interest free promotion would learn through the instore or online credit application process that a condition of the credit is that they had to acquire a GO Mastercard, and that the terms of the card included the establishment fee and monthly account fees. This part of the reasons assesses the evidence concerning the effectiveness of the credit application process to communicate those matters to consumers.

Instore application process

83 At the liability hearing, Latitude adduced evidence from Blake Smith, a Program Leader at Latitude, concerning the instore application process for obtaining credit pursuant to the interest free promotions and completing the purchase of goods, including the training instructions for Harvey Norman franchisee staff, which were developed by Latitude and provided to franchisees. Between September 2018 and July 2022, Mr Smith held the role of Account Manager, Retailer Partnerships, at Latitude and was responsible for the training, monitoring and supervision of approximately 96 merchants including Harvey Norman franchise stores. Mr Smith affirmed an affidavit on 24 October 2024 and was not cross-examined.

84 Mr Smith deposed that Latitude provided merchants with a Merchant Operating Guide which contained guidelines to be followed by individual merchants (including individual Harvey Norman franchisees) when offering or accepting Latitude products for use in connection with the purchase of retail goods. The Guide stipulated that merchants must ensure that all staff involved with the processing of applications or transactions regularly attend training programs so that they are able to understand and comply with the operating guidelines. Latitude undertook to provide the necessary training materials to merchants. Mr Smith deposed that training modules were available to Harvey Norman franchisees through Latitude's Sales Merchant Portal (**SMP**) and Harvey Norman's knowledge-management platform called 'Vibe'. The SMP provided merchants and their staff with access to a number of functions including, relevantly, processing new applications for Latitude products (including the GO Mastercard) and a library of training and user guide materials including training on products and processes. Mr Smith deposed that accreditation courses (uploaded by Latitude annually) were accessible

to Harvey Norman franchisee staff on Vibe, which provided staff with access to modules to complete on induction.

85 Mr Smith deposed that Harvey Norman franchisee staff were required to undertake and complete a series of training and knowledge modules comprising:

(a) an online accreditation course, called ‘Knowledge Check’, which included a review of obligations relevant to the processing, transacting and offering of Latitude interest free plans and which was required to be completed both at the time of onboarding and as part of mandatory annual training for all salespeople; and

(b) the delivery of in-person sessions with a Latitude Account Manager (such as Mr Smith), based on modules created by Latitude about engaging with prospective interest free customers and the sale of Latitude credit products.

86 Salespeople employed by Harvey Norman franchisees had to complete the Knowledge Check prior to gaining access to the ‘New Application’ screen on the SMP. Salespeople could only process an instore application with Latitude through accessing and using the SMP, but they would not have access to the ‘New Application’ screen unless the Knowledge Check had been completed and a pass rate of 100% obtained. Mr Smith exhibited screenshots of the Knowledge Check module. The information conveyed on those screenshots was undoubtedly important, but much of it consisted of fairly generic exhortations to act in a fair and reasonable manner. The questions at the end of the module, for which a 100% pass rate was required, were multiple choice questions involving relatively simple and generic topics. Strikingly, the instructions in Knowledge Check stated that salespeople should inform customers that the application was for a credit card and that fees and charges *may* apply. At least in the case of the GO Mastercard, that instruction was deficient because fees and charges would certainly apply. If a salesperson followed that instruction, a customer may have continued under a misapprehension that the only fees payable were late fees where instalment payments were missed.

87 The consumer evidence given at the liability hearing indicates that, upon deciding to purchase goods under the promotion instore, consumers attended a computer workstation at which a salesperson made an application for credit from Latitude. Mr Smith’s evidence confirms that the application was made through Latitude’s SMP. One of the training modules exhibited to Mr Smith’s affidavit (titled ‘System & Processing Training’) contained screenshots of the pages that would appear when a salesperson commenced a ‘New Application’ through the

SMP. The application process included several phases, including “Terms & Conditions”, “Customer Review” and “Response”, which are discussed below.

88 The training module instructed salespeople that, before beginning a New Application, they provide customers with a “Conditions of Use” booklet. Mr Smith deposed that, during the majority of the relevant period (until 7 July 2021), each Conditions of Use booklet had an individual booklet number to which a unique customer code was attached. Salespeople were required to input the unique code shown on the Conditions of Use booklet provided to the customer during the application process on SMP. The Conditions of Use booklet was a lengthy document that set out the terms of use for the credit card. The terms were drafted in legal language and would likely have been difficult for a consumer to interpret. Common experience suggests that it is unlikely that a consumer would have read the Conditions of Use at the point of sale, or would have been encouraged to do so. The version of the booklet that was used from May 2019 until June 2020 had a large picture of the GO Mastercard on the cover, thereby alerting a consumer (who looked at the booklet) to the fact that the credit may include a credit card. Versions of the booklet used from June 2020 onwards (being the remainder of the relevant period) did not show a picture of the GO Mastercard on the front page, but did include the words “Latitude GO Mastercard”.

89 During the “Terms and Conditions” phase of the New Application process, the salesperson was instructed:

> Make sure your customer provided:
>
> The opportunity to view the Key facts about this credit card on the screen; and/or
>
> Print a copy for the customer directly from SMP and allow them time to read it before continuing with the application

90 Thus, the salesperson had the choice to show the customer the application screen or print a copy of the Key Facts Sheet. The training module depicted a screenshot of the Key Facts Sheet for the Latitude GEM Visa card as it would appear on screen. It is difficult to assess how much information a consumer would have absorbed from looking at the screen. First, the information appears to be displayed in relatively small font. Second, a difficulty with the information conveyed is that it related to the ordinary conditions applying to a credit card, and made very little reference to the conditions applying specifically to the interest free promotional sales. Certainly, the information included the name of the product (‘Latitude GEM Visa’) and referred to an annual fee and late payment fee (but not the monthly account fee). However, in circumstances where the consumer was responding to an interest free promotion on the sale of

goods, it is reasonable to question whether the Key Facts Sheet would have been understood by all ordinary consumers.

91 Mr Smith exhibited a copy of the Key Facts Sheet in printed form, which would be the document given to the customer if the customer requested a printed copy from the salesperson. The printed document was clearer, in that it contained a picture of the Latitude GO Mastercard and stated the applicable establishment fee and monthly account fee. However, it suffered from the same difficulty that most of the information contained in the document related to the ordinary conditions applying to a credit card, and made very little reference to the conditions applying specifically to the interest free promotional sales.

92 The next screen required the salesperson to "Confirm with the customer that their key credit card requirements are met by the … GO Mastercard" by reading out the following statement and ticking a box:

> I understand that GO MasterCard is a general purpose credit card that can be used to buy products and services from merchants who accept MasterCard. …
>
> By making this application, I confirm that my key credit card requirements are met by the GO Mastercard.

93 It can be questioned whether the second statement quoted above would have been meaningful to consumers in circumstances where they were likely purchasing a single item from the Harvey Norman franchise store on an interest free promotion.

94 The next screen required the salesperson to discuss the credit limit with the customer, which would have alerted many consumers to the fact that they were applying for a credit card.

95 The next screen required the salesperson to "Make sure the customer is aware of the … monthly fee" (which was then displayed on the screen).

96 At the final step in the "Terms and Conditions" phase, the salesperson was instructed to confirm that the customer is aware of all key facts, has had the opportunity to read all key facts, and/or has been provided with a hard copy (being a print out of the key facts and the Conditions of Use booklet).

97 The New Application process continued with personal and financial information for the customer.

98 At the “Customer Review” phase of the application, salespeople were instructed that it was a requirement for the customer to review their application information, and that this could be done in one of three ways, identified as:

> 1. By viewing your screen (if possible).
> 2. By printing the application summary via the available 'Print' button and providing it to the customer.
> 3. By email which is sent to the customer's email address as entered in this application. (this occurs automatically)

99 The application information displayed on the screen was very limited and included bullet points that the Latitude GO Mastercard “meets your key credit card requirements” and that the customer had “read and understood the Privacy Notice, Key Fact Sheet and Conditions of Use”.

100 At the “Response” phase, the application would be approved, conditionally approved, approved with a lower limit or declined. If the application was approved, the salesperson was instructed to print the contract and allow the customer the opportunity to read it. The salesperson could then click a button confirming that the customer agreed to be bound by the contract. The screenshot indicated that the button confirming agreement could not be clicked unless the “Print Contract” button had been clicked first. A copy of an example contract was included in evidence. The contract refers in the first line to the “Latitude GO Mastercard” and notes the establishment fee, account service fee and annual percentage rate under the heading “The things you need to know!”.

Online application process

101 Mr Smith also exhibited a document titled “GO Card Re-brand” dated June 2020, which Mr Smith said showed updates to website content made at around that time. At the relief hearing, Latitude submitted that the document contained screen shots of Latitude’s website from June 2020 reflecting the online processes if consumers sought to make purchases in response to the interest free promotions online. It is not possible to determine from Mr Smith’s evidence, and the content of the document, whether that submission is correct. Mr Smith merely describes the document as “updates to website content”, which is a vague statement. It is not clear that the document contains screen shots of Latitude’s website. The pages contain the Harvey Norman trading name at the top. It is also not clear that the document contains screen shots of a live website. The document appears to contain instructions concerning changes that had been made, or were to be made, to a website. The exhibit provides no clear evidence about the online application process.

102 As stated earlier, Latitude adduced evidence at the relief hearing from Mr Sarkar who is Latitude’s Head of Engineering and Platform Delivery. Mr Sarkar deposed that during the relevant period, Latitude’s credit card origination system was called ‘Orion’ (which was decommissioned in December 2024). Orion facilitated the credit card application process for Latitude credit cards, including the GO Mastercard. Mr Sarkar deposed that he conducted a search for all records relating to version releases of the GO Mastercard application landing page during the relevant period as well as the GO Mastercard application landing page that was live immediately before the relevant period. Mr Sarkar explained that ‘version releases’ are essentially changes to the GO Mastercard application landing page and that not all changes are customer facing (some relate to back-end changes to the application process). Mr Sarkar identified 6 version releases to the landing page during the relevant period that contained changes visible to customers who accessed the landing page and obtained screenshots of those pages, which were exhibited to his affidavit. The website pages exhibited to Mr Sarkar’s affidavit are clearly identified as pages through which a consumer could apply for a GO Mastercard. Many of the pages state that the “GO Mastercard offers a range of Interest Free Plans”, although those statements are not expressly linked with the purchase of goods at Harvey Norman franchisee stores. Only one of the pages contains a Harvey Norman logo with the banner “Interest Free – Shop Interest Free online today”. At the bottom of the page is the statement “Apply Online - Apply for a Latitude GO Mastercard now and if approved, start shopping Interest Free right away”.

103 Mr Sarkar’s evidence does not explain or illustrate the online application process. In particular, the evidence does not explain or illustrate the process by which a consumer shops online (presumably through the Harvey Norman website) and, if the consumer chooses an interest free payment method, is informed of the credit terms and conditions (including the GO Mastercard) and is directed to the Latitude GO Mastercard application landing page.

104 Given the inadequacy of the evidence concerning the online sales process, I am unable to accept the defendants’ submissions that the online process would have necessarily corrected the erroneous impression created by the advertisements.

Consumer and survey evidence

105 Four consumers gave evidence at the liability trial about their personal experience of the instore sales process. At that time, the defendants objected to the evidence on the ground of relevance in so far as the evidence went beyond the deponents’ identification and understanding of the

advertisements they had seen or heard, although the defendants accepted that the evidence may be relevant to the question of relief (LJ [180]). Justice Yates ruled that the evidence was admitted in the liability hearing to determine whether the consumers continued to be affected by the understandings they had of the advertisements they saw or heard, notwithstanding the instore process (LJ [201]-[205]). Following that ruling, the defendants elected not to cross-examine the consumer witnesses.

106 Justice Yates made findings with respect to the evidence of each of the consumers. It is convenient to reproduce his Honour's findings in so far as they relate to the instore selling process:

(a) Mr Harris purchased a television set and PlayStation4 (PS4) in July 2020 from a Harvey Norman store at Noarlunga in South Australia (LJ [114]). After hearing multiple radio advertisements, Mr Harris thought he would be borrowing money from Harvey Norman. He did not recall seeing or hearing anything about a finance company, GO Mastercard, a credit card, or any fees; at that time, he did not need a new credit card and was not intending to sign up for a new credit card (LJ [116]). At the store, Mr Harris said that the salesperson completed the application for him by typing details into a computer; Mr Harris was not given any paperwork at the time, and did not sign anything (LJ [118]). Mr Harris said that, at this time, he still thought that he was applying for an interest-free loan that required him to make equal monthly repayments, and that no deposit was required; he was not told about the repayments he would need to make, although he assumed that they would be "the purchase price divided by 60"; he was not told that there was a $25 establishment fee or any other fees associated with the offer (LJ [119]). Sometime after, Mr Harris received a letter from Latitude that included a "Financial Table"; the letter stated that Mr Harris would be charged fees in relation to his account, including a $25 establishment fee and a $5.95 monthly account fee; Mr Harris was surprised and sent an email to Latitude complaining about the monthly service fee because this had not been explained to him upfront (LJ [123]). Mr Harris received a GO Mastercard credit card in another letter (LJ [125]).

(b) Mr Hill purchased a laptop computer from a Harvey Norman store at Goulburn in June 2021 after seeing multiple advertisements for the 60 months interest-free promotion on television (LJ [128]). At the time of viewing the advertisements, Mr Hill understood that the money to purchase the goods at Harvey Norman would be borrowed from Latitude, instead of Harvey Norman, but he did not think that Latitude was providing a credit card (LJ [130]). Mr Hill attended the Goulburn store on about 5 June 2021 and, after choosing the computer he wanted to buy, he told the salesperson that he wanted to make the purchase "on the 60-months interest-free loan" (LJ [133]). Mr Hill said that the salesperson completed an application in relation to the interest free offer but that at no stage during the application process did the salesperson tell him that he was applying for a credit card; he was not given any details about the application or any written information about the interest free offer; the application was completed by the salesperson at a desk near the laptop section (LJ [134]). At no stage during the application process did the salesperson tell Mr Hill that he was required to apply for, and be approved for, a GO Mastercard in order to take advantage of the interest free offer or that he would be charged a monthly account service fee or any other fees (LJ [136]). Mr Hill remembered signing a document while at the store, but he did not remember what it was; he only glanced at it and did not read it; he said that "it just seemed like general contract paperwork that I did not understand because of its legal jargon" (LJ [137]). On 10 June 2021, Mr Hill received an email from "Latitude GO Mastercard" informing him that his "Latitude GO Mastercard is on the way"; he later received a letter from Latitude enclosing the plastic card; Mr Hill said that he was surprised because he "did not know what it was for" (LJ [138]).

(c) Mr North purchased a television set from a Harvey Norman store at Campbelltown in December 2020 after seeing a number of different Harvey Norman advertisements on television advertising the 60 months interest-free promotion (LJ [148]). After viewing the advertisements, Mr North understood that he would be able to pay off a purchase over a 60 month period without being charged interest, and that there would be no interest or fees charged in connection with the repayments; he did not think that he would need to sign up for a credit card in order to take advantage of the 60 months interest free offer (LJ [151]). Mr North attended the Harvey Norman store at Campbelltown on 13 December 2020 and negotiated a purchase (LJ 153]). Mr North gave evidence of the salesperson completing the application on a computer in the store and asking Mr North questions about his financial circumstances; the salesperson informed Mr North that there were "some contracts" to sign, which Mr North did; after this, the salesperson gave him "a lot of paperwork", including receipts and a booklet; Mr North said that "there was a tonne of pages of fine print" and he did not read the paperwork; Mr North did not understand that he had signed up for a credit card and the salesperson did not mention a monthly account keeping fee, payment processing fee or any other fees associated with the interest free purchase; Mr North did not recall talking to the salesperson about a credit limit (LJ [157]). On 17 December 2020, Mr North received an email from Latitude informing him that his GO Mastercard was "on its way"; it was only then that he realised that he had signed up for a credit card when purchasing the television set from Harvey Norman, even though he had no need for a further credit card and had not intended to sign up for one (LJ [158]). Later, when receiving an account statement, Mr North was surprised to learn that he was being charged a monthly account fee (LJ [162]).

(d) Ms Jenkins purchased kitchen appliances from a Harvey Norman store at Bundall in February 2020 after seeing a Harvey Norman advertisement in the Sunday Telegraph advertising the 60 months interest-free promotion (LJ [166]). After viewing the advertisement, Ms Jenkins did not think that the Harvey Norman interest-free offer involved her having to sign up, and be approved, for a credit card and, although she thought that a monthly account-keeping fee might be involved, she had not thought that an account-keeping fee would have to be paid "on top of the minimum required monthly payment" (LJ [171]). Ms Jenkins and her husband attended the Harvey Norman store at Bundall on 2 February 2020 and, after selecting the items she wanted to purchase, she presented herself to a salesperson at an island bench which had a computer workstation (LJ [172]). The salesperson obtained financial information from Ms Jenkins and entered details into the computer (LJ [173]). At no stage in this process was Ms Jenkins told that she was applying for a credit card (LJ [174]). The following day, Ms Jenkins received an email or text that informed her that she had been approved for a GO Mastercard with a credit limit of $10,000; it was only at this point that she realised that she had signed up for a credit card (LJ [175]). On 7 February 2020, Ms Jenkins received an email telling her that her credit card was "on the way" and the card arrived a few days later in the mail (LJ [176]). When Ms Jenkins received her first statement from Latitude, she noticed that she had been charged an establishment fee of $25.00 and a monthly account service fee of $5.95 (LJ [177]).

107 The defendants submitted, and I accept, that the consumer evidence, summarised above, cannot be regarded as representative of the experience of all consumers purchasing goods under the interest free offers during the relevant period. The evidence concerns four consumers selected by ASIC. Nevertheless, at the liability hearing, ASIC also adduced evidence of surveys

conducted by Latitude which indicated that the experiences of the four consumer witnesses were not isolated.

108 At the liability hearing, Yates J considered that the survey evidence had no bearing on the issues that had to be determined at that stage. His Honour described the evidence and made the following findings at [206]-[213]:

> 206 ASIC contends that Latitude's own documents and research reveal that some Harvey Norman customers were not aware that they had signed up for a credit card account even after they had completed the GO Mastercard application process.
>
> 207 In this connection, ASIC refers to items in Latitude's KYI (i.e., Know Your Intermediary) Forum Presentations for 11 June 2020, 9 July 2020, and 10 September 2020. The presentations for 11 June 2020 and 10 September 2020 covered a range of retailers (intermediaries) and recorded two instances where Harvey Norman customers had complained that they were unaware that they had applied for a credit card.
>
> 208 The data in the 9 July 2020 presentation, which also covered a range of retailers, revealed that approximately one-fifth of Latitude's customers who had signed up for a GO Mastercard, and completed a survey, had done so not realising that they were applying for a credit card or that fees and charges would be applied.
>
> 209 ASIC also refers to responses to questions in surveys that Latitude had conducted which, taken by themselves, indicate that some of its customers were unaware that they were applying for a credit card.
>
> 210 The information and data referred to in the preceding paragraphs suffer from two fatal deficiencies.
>
> 211 First, none of it is linked to the promotion or any advertisements dealing with the promotion, let alone the representative advertisements.
>
> 212 Secondly, and in any event, apart from the two instances of complaints referred to in [207] above, the data aggregates the instore experiences of customers of numerous stores, not just Harvey Norman stores.
>
> 213 Because of these deficiencies, this evidence is of no assistance in determining the question before me.

109 Whilst recognising the limitations of certain evidence as identified by Yates J, I consider that the survey evidence has probative weight on the question of consumer harm. Harvey Norman and Latitude undertook the evidentiary burden of showing that, notwithstanding the misleading impression created by the contravening advertisements, any erroneous impression would have been corrected by the credit application process. For the reasons explained above, the evidence that was adduced about the credit application process is not entirely convincing on that question. The survey evidence also creates doubt about the effectiveness of the credit

application process. Some of the survey evidence relates directly to the GO Mastercard, which is the Harvey Norman co-branded credit card.

110 The KYI Forum Presentations contain very detailed data concerning Latitude's 'merchant' finance business. The KYI Forum Presentation contained the following information:

(a) Under the heading 'Merchant Related Complaints', the June 2020 presentation contained the volume of complaints in respect of Harvey Norman (which was described as one of the top 3 merchants), The volume of complaints in the prior 3 months was 13 in March, 6 in April and 11 in May. The volume of complaints categorised as "Insufficient info about product/features" was 2 in April and 6 in May. The Presentation gave a case example for the Harvey Norman store in Bundall which was as follows:

> **Harvey Norman Bundall**
>
> Customer noted that he was confused why he had received a credit card after buying merchandise from Harvey Norman on interest free. Customer wasn't happy about having taken out a credit card and not happy to be charge account servicing fees. He believes that he was not made aware that it would be a credit card.

(b) Under the heading 'Customer Instore Survey', the June 2020 Presentation contained data generated from a "Review of first instore purchase survey sales process questions". The Presentation notes that "Customers answer questions through the Medallia platform about their instore application experience to ensure the correct processes were followed. In respect of the GO Mastercard, the survey comprised 67 customers in February, 88 customers in March and 72 customers in April and generated the following results:

Question	**Feb 2020**	**March 2020**	**April 2020**
Aware applying for a credit card	80.6%	75.0%	79.2%
Aware of fees and charges	82.1%	73.9%	80.6%
Choice of credit limit	80.6%	69.3%	77.8%
Copy of contract	88.1%	87.5%	87.5%

(c) The data presented in the July and September 2020 Presentations was similar. The 'Customer Instore Survey' for the GO Mastercard for May 2020 involved 107 customers, for June 2020 involved 91 customers and for July involved 102 customers and generated the following results:

Question	May 2020	June 2020	July 2020
Aware applying for a credit card	78.5%	87.9%	77.5%
Aware of fees and charges	72.0%	73.6%	73.5%
Choice of credit limit	73.8%	79.1%	78.4%
Copy of contract	84.1%	89.0%	86.3%

111 In my view, the survey evidence undermines the confident assertion made by Harvey Norman and Latitude at the relief hearing that any misapprehension that consumers may have had as a result of the contravening advertisements would have been corrected through the credit application process. The survey evidence indicates that the credit application process was far from perfect, with a substantial proportion of survey respondents indicating that they were not aware that they were applying for a credit card and were not aware of the fees and charges that would apply.

Conclusions on the credit application process

112 It can be accepted that, during the relevant period, Latitude had processes in place to train Harvey Norman franchisee staff in relation to the terms and conditions of Latitude's merchant finance products, including specifically the GO Mastercard, and in relation to Latitude's instore credit application process. The training and instore credit application process were intended to ensure that consumers were informed that, to purchase a product under an interest free promotion, the consumer would be required to obtain a GO Mastercard and would incur an establishment fee and monthly account fees.

113 Nevertheless, the evidence strongly suggests that the training and instore credit application process were far from perfect in communicating those essential matters to consumers when seeking to purchase a product on an interest free promotion. Limitations with respect to the instore credit application process have been noted above. The evidence of the consumer witnesses indicates that, for those persons at least, the training and application process was insufficient to inform them that the credit arrangement involved a credit card contract and the imposition of additional fees and charges. Latitude's internal survey data strongly suggests that the experience of those witnesses was not isolated, and it is possible that as many as 20% of

consumers were unaware that they were signing up for a credit card, and up to 25% were unaware of the applicable fees and charges.

Quantification of consumer harm

114 As noted earlier, s 12GBB(5)(b) of the ASIC Act stipulates that, in determining a pecuniary penalty, the Court must take into account the nature and extent of any loss or damage suffered because of the contravention. The quantification of loss or damage suffered because of the contravention is often difficult and usually can only be approximated. Nevertheless, the relevance and importance of this factor is demonstrated by the statutory obligation to take it into account. The objective of the prohibitions against misleading and deceptive conduct in trade or commerce is to protect Australian consumers against harm caused by such conduct. As recognised by s 12GBB(5)(b), an important starting point for the assessment of penalty is therefore an assessment of the nature and extent of the harm, or the potential for harm, caused by the contravening conduct.

115 The categories of consumer harm were stated earlier. Certain of the categories are not amenable to any form of quantification.

116 The first category of harm is the waste of consumers' time: consumers may invest time in investigating a purchase on the assumed terms of the offer, before realising that the terms are different and deciding not to proceed. This includes consumers who may not have entered a Harvey Norman franchisee store or otherwise investigated a purchase but for the misleading impression conveyed by the advertisements. This is a disadvantage suffered by consumers as a result of the contravening conduct, but it is not possible to quantify the detriment suffered.

117 Similarly, the second category of harm is the distortion of consumer choice – the misleading advertisements entice consumers into the store where they elect to proceed with a transaction because they have invested time in investigating a purchase, but where if they knew the true facts they would have made a different purchase choice. Again, it is not possible to quantify that detriment.

118 The third category of harm arises where the credit application process does not inform the consumer that they are entering into a credit card contract with Latitude. Even if the consumer subsequently chose to use the GO Mastercard, the misleading conduct distorted their choice of card. At the liability hearing, Mr Ebstein gave evidence that there were a very large number of credit card issuers in Australia, that there was variation in the different kinds of fees and charges

that accompany particular credit cards, and that it pays to shop around for a credit card that suits your individual circumstances. As submitted by ASIC, the misleading conduct is analogous to the provision of unsolicited credit cards, which is prohibited by s 12DL of the ASIC Act because of the consumer harm associated with credit card debt.

119 The fourth category of harm also arises where the credit application process does not inform the consumer that they are entering into a credit card contract with Latitude, and the consumer is unaware that they will become liable for an establishment fee and monthly account service fees in respect of the GO Mastercard account. Before 16 March 2021, consumers were required to pay an establishment fee of $25.00 and a monthly account service fee of $5.95 per month. On and from 16 March 2021, the monthly account service fee was increased to $8.95 per month. From early 2023, the fee was increased to $9.95 per month. The current monthly account service fee is $10.95 per month. During the relevant period, Latitude received at least 887 complaints from consumers in relation to the establishment fees and monthly account service fees it charged in connection with the GO Mastercard, with 851 complaints in relation to the account service fees and 36 complaints in relation to the establishment fee.

120 At the liability hearing, Alicia Lam, a Data Analyst in the Enforcement Data and Analytics Team at ASIC, undertook analysis of consumer data produced by Latitude in response to compulsory notices issued by ASIC and on discovery. Although ASIC sought data for the whole of the relevant period (that is, 1 January 2020 to 11 August 2021), it appears from Ms Lam's affidavit that Latitude only produced data until 31 July 2021. The reason for that was not explained in Ms Lam's affidavit, but it may have been because ASIC's compulsory notice was issued on 11 August 2021 and data may not have been available to Latitude for the period after 31 July 2021 (I will refer to the period analysed by Ms Lam, 1 January 2020 until 31 July 2021, as the 'data period'). Ms Lam reduced the scope of the data to include only consumers who:

(a) were approved for a GO Mastercard during the data period;

(b) took up a 60 month interest free offer for their first interest free purchase;

(c) made their first interest free purchase in a Harvey Norman franchisee store; and

(d) spent a minimum of $1,000 on their first 60 month interest free purchase in the Harvey Norman franchisee store,

and referred to those consumers as the **Relevant Cohort**. As noted earlier, it was implicitly assumed by the parties that consumer harm was largely confined to the category of consumers who had not previously made a purchase at a Harvey Norman franchisee store in response to the promotions and who did not already have a GO Mastercard. Thus, the Relevant Cohort satisfied that limitation.

121 Ms Lam undertook an analysis of the establishment and monthly account fees charged to the Relevant Cohort, making the following assumptions for the fee analysis:

(a) the monthly account keeping fee was $5.95 per month for the period 1 January 2020 to 15 March 2021;

(b) the monthly account keeping fee was $8.95 per month for the period 16 March 2021 to 31 July 2021;

(c) the establishment fee was $25 for the period 1 January 2020 to 15 March 2021 and was not charged from 16 March 2021;

(d) all consumers took at least 60 months to pay off their interest free purchases; and

(e) all consumers' monthly billing cycle starts on the day they are approved for the GO Mastercard and the monthly account keeping fee is charged on the last day of the billing cycle.

122 Ms Lam's analysis revealed that:

(a) the Relevant Cohort of Consumers was 36,133 people, with 23,104 having made a purchase instore and 13,029 having made a purchase online;

(b) the aggregate value of their first interest free purchases was approximately $129.3 million;

(c) the total amount of the establishment fees charged to this cohort was $735,900; and

(d) the total amount of the monthly account fees charged to this cohort was $18,758,238.

123 At the liability hearing, Andrew Whitley, Senior Manager of Remediation and Regulation Analytics at Latitude, also analysed data maintained by Latitude in relation to consumers who had a GO Mastercard. Mr Whitley extracted data in relation to the Relevant Cohort examined by Ms Lam, save that Mr Whitley extended Ms Lam's data period to encompass the whole of the relevant period (that is, until 11 August 2021). The data extracted by Mr Whitley revealed that the Relevant Cohort size for the whole of the relevant period was 39,774 people (understandably, an increase from Ms Lam's calculation) and that 25,359 people had

completed the credit application process instore and 14,415 had completed the credit application process online.

124 For the purposes of the relief hearing, Mr Whitley responded further to Ms Lam's analysis of the total amount of the fees charged to the Relevant Cohort. Latitude's solicitors asked Mr Whitley to extract data of the actual aggregate amount of the establishment fee and monthly account fee charged to the Relevant Cohort in the period until 1 September 2025. For accounts opened in the period 1 January 2020 until 31 August 2020, that date of 1 September 2025 is more than 60 months after the account was opened and would therefore capture all monthly account fees that would apply to an account holder who repaid the 60 month interest free purchase over the whole of the 60 months. For accounts opened on and after 1 September 2020, the date is less than 60 months after the account was opened and therefore may not capture all monthly account fees that would apply to an account holder.

125 It should be noted that Mr Whitley was instructed by Latitude's solicitors to confine the Relevant Cohort to Ms Lam's data period; that is, consumers who opened an account in the period 1 January 2020 to 31 July 2021 (rather than 11 August 2021). No explanation was given for limiting the period in that manner. It is apparent from Mr Whitley's earlier affidavit that he could readily have extracted data for the whole of the relevant period. An available inference is that Mr Whitley was instructed in that manner so as to present a lower overall figure for fees charged to consumers, excluding consumers who opened accounts between 1 August and 11 August 2021 from the analysis. If that were correct, it would reflect poorly on Latitude's approach to the relief hearing.

126 Mr Whitley's analysis calculated the total amount of the establishment fees charged to the cohort as $580,425 and the total amount of the monthly account fees charged to the cohort as $10,258,161. Mr Whitley's analysis also appeared to produce a 'count' for the cohort of 32,444, which is even lower than Ms Lam's count of 36,133 people (using the same restricted period to 31 July 2021). Mr Whitley did not comment on that lower count in his affidavit.

127 Part of the explanation for the lower monthly account fees is likely to be because Mr Whitley's data extended to 1 September 2025, rather than 11 August 2026 (being 60 months after the end of the relevant period). Another part of the explanation is the possibility that some members of the Relevant Cohort paid off their first 60 months interest free purchase earlier than 60 months, and either cancelled their GO Mastercard or did not use it for any other purchases, thereby terminating their monthly account fees earlier than 60 months. Mr Whitley undertook an

analysis of the time in which customers paid off their 60 month instalment interest free plans and the rate at which the value of the 60 month instalment interest free plans are paid down (referred to as the payout curve). The graphs presented by Mr Whitley are difficult to interpret, and ASIC elected not to cross-examine Mr Whitley. Doing the best I can, without any real assistance from the parties, the graphs appear to show that the percentage of 60 month interest free instalment plans still open at the 50th month was 23% (in other words, 77% of instalment plans had been paid out by that time) and the average balance of amounts owing as at the 50th month was 4% of the initial purchase. The latter figure indicates that, for the plans still being paid at the 50th month, the consumer was paying out the plan in accordance with the required instalment payments (as, at the 50th month, the balance would be expected to be one sixth of the purchase price and only 23% of plans remained, giving a percentage of the initial purchase of approximately 4%). The figures support the conclusion that, on average, customers paid off their instalment plans earlier than 60 months.

128 Accepting that only a proportion of the Relevant Cohort would have been unaware, at the time of purchase, of the fees that were charged on the GO Mastercard (the survey evidence suggesting around 25% of consumers), and accepting that on average consumers paid off their instalment purchases faster than 60 months, the consumer harm associated with being misled about the applicable fees is likely to be less than $5 million.

Competitive harm

129 Misleading conduct not only harms consumers; it may also harm competitors and thereby harm competition. Misleading conduct may enable a competitor to gain an unfair advantage over competitors who comply with the law: *Reckitt Benckiser* at [149].

130 Harvey Norman conceded that, in publishing false or misleading advertisements, its competitors may have been disadvantaged. The concession was appropriately made. The scale of the 60 months interest free promotions during the relevant period suggests that the promotions were competitively important to Harvey Norman. However, the evidence before the Court did not include any detailed analysis, by the board or management of Harvey Norman, of the effectiveness of the promotions in winning sales from Harvey Norman’s competitors. The evidence is therefore insufficient to enable the Court to assess, on a quantitative or qualitative basis, the competitive effects of the misleading conduct.

131 In contrast to Harvey Norman, Latitude submitted that it is not clear what, if any, impact the contravening conduct may have had on Latitude’s competitors. Latitude cited expert evidence

given at the liability hearing by Mr Ebstein that the 60 month interest free plans were a "very niche" product in the market, and submitted that the only way of accessing the benefit of the offer was via an existing or new Latitude GO Mastercard. Although buy now pay later products were offered as interest free products, Mr Ebstein gave evidence that the typical repayment period for a buy now pay later product was four to six weeks (in contrast to the 60 months repayment period offered through the Latitude GO Mastercard). Latitude submitted that the contravening conduct did not draw credit card customers away from its competitors, as the supply of new Latitude GO Mastercard credit card services was accretive to the card services market, not in substitution for the services of others. In other words, the conduct did not affect other credit card providers as it only caused new customers to enter the credit card market, who would not have otherwise sought out or obtained a credit card. The essential thrust of the submission was that Latitude's finance product was unique and there were no close substitutes.

132 ASIC did not adduce evidence that contradicted Latitude's submission. In particular, no evidence was adduced that other consumer credit companies were, during the relevant period, offering consumer credit on similar terms. The Court can take judicial notice of the fact that consumer credit was generally available during the relevant period through credit cards or personal loans. However, those products do not typically offer interest free periods. In comparing consumer credit products, account must be taken of the establishment fee and monthly account fees charged on the Latitude GO Mastercard. However, when converted to an annual interest rate, the monthly account fees charged on the Latitude GO Mastercard were relatively modest, and likely to be much lower than interest rates applicable on other available credit cards and personal loans. For example, the monthly account fee of $5.95 comprises an annual fee of $71.40. On a purchase of $1,000, the fee equates to an annual interest rate of only 7.14%. On a purchase of $2,000, the fee equates to an annual interest rate of only 3.57%.

Financial and other benefits to defendants

Overview

133 The 60 month interest free promotions, that were the subject of the contravening advertisements, generated revenue for both Harvey Norman and Latitude. As described in more detail below, Harvey Norman earned revenue from the sale of goods pursuant to the promotions in the form of fees paid by franchisees under franchise agreements and fees paid by Latitude under the Program Agreement. Latitude earned revenue from the provision of credit to the purchasing consumers.

134 It is necessary to distinguish, however, between the financial and other benefits derived by the defendants from the promotions and the financial and other benefits derived by the defendants from the contravening conduct. The financial benefits derived by the defendants from the relevant promotions can be calculated as the incremental revenue earned by each in connection with the sale of goods and provision of credit pursuant to the promotional offers. The financial benefits derived by the defendants from the contravening conduct are limited to that proportion of the incremental revenue that would not have been earned but for the contravening conduct.

135 As discussed in the context of consumer harm, some consumers may have been informed of the terms of the promotional offer at the point of sale and, having considered the terms, elected to proceed with the purchase because they considered that those terms were attractive. The benefits derived by Harvey Norman and Latitude from those sales are not benefits that arise from the contravening conduct. However, some consumers may not have learned of the terms of the promotional offer at the point of sale and acquired the goods and credit on an incorrect understanding of the financial arrangement caused by the contravening conduct. The benefits derived by Harvey Norman and Latitude from those supplies are benefits that arise from the contravening conduct.

136 It is not possible to estimate the proportion of consumers who fall within each of those categories. However, as discussed earlier, consumers who may have been misled by the contravening conduct will be a subset of the Relevant Cohort who were the subject of evidence given by Ms Lam and Mr Whitley, as discussed above in the context of consumer harm. The Relevant Cohort are consumers who made a 60-month interest free purchase as their first purchase on a GO Mastercard during the relevant period. In estimating the financial and other benefits derived by the defendants from the contravening conduct, all that can be done is estimate the total incremental revenue earned by each of Harvey Norman and Latitude from sales made pursuant to the promotional offer to the Relevant Cohort, and recognise that only a proportion of that incremental revenue reflects benefits derived from the contravening conduct.

137 ASIC's estimates of the financial benefits derived by Harvey Norman and Latitude from the contravening conduct were exaggerated by its failure to distinguish between the benefits of the promotions and the benefits of the contravening conduct. ASIC's calculations of benefits were generally based on the total number of new GO Mastercard accounts issued during the relevant period (being 127,642), rather than the GO Mastercard accounts issued to the Relevant Cohort (which, on Mr Whitley's calculation, was 39,774). ASIC's calculations also took into account

all transactions undertaken on the accounts during the relevant period, and not merely the first 60 month interest free transaction. ASIC submitted that the financial and other benefits derived by the defendants from the contravening conduct included the benefits derived from the subsequent use of the GO Mastercard both in Harvey Norman stores and elsewhere. I do not accept that submission. When making a subsequent purchase, the consumer would be using the GO Mastercard as a credit card. Consumers can be taken to understand the usual terms and conditions of a credit card. In any event, by the time a consumer used the GO Mastercard for a subsequent purchase, they would in all likelihood have received a copy of the terms and conditions and one or more credit card statements. It follows that the consumer will have elected to use the card with knowledge of the terms and conditions. In those circumstances, any benefits flowing to Harvey Norman and Latitude from the further use of the GO Mastercard cannot be characterised as benefits of the contravening conduct.

138 As discussed above, Ms Lam calculated the Relevant Cohort as comprising 36,133 people, but her data was limited to purchases in the period to 31 July 2021. Mr Whitley calculated the Relevant Cohort as comprising 39,774 people across the whole of the relevant period (to 11 August 2021). I will therefore use the latter figure.

Harvey Norman

139 Harvey Norman generated revenue from the promotions through two main sources: fees from Latitude and fees from franchisees.

Revenue derived from Latitude

140 As discussed earlier, under the Program Agreement Latitude agreed to make two forms of payment to Harvey Norman that are referrable to GO Mastercard accounts created as a result of the Program Agreement: the new account incentive payments and volume payments.

141 The new account incentive payment during the relevant period was $33 for each new GO Mastercard account, of which $23 was paid to Harvey Norman and $10 was paid to Harvey Norman franchisee staff. The revenue earned by Harvey Norman from the Relevant Cohort (using Mr Whitley's calculation of 39,774) was $914,802. Again, only a proportion of that amount would be a result of the contravening conduct.

142 The volume payment was a percentage of the total dollar value of transactions made on the GO Mastercard. During the relevant period, the volume payment was 0.17% of the total dollar

value of interest free transactions (**promotional transactions**) and 0.13% of the total dollar value of cash withdrawals and card scheme transactions (**non-promotional transactions**).

143 In respect of promotional transactions, as stated above, the aggregate value of the first interest free transactions by the Relevant Cohort was approximately $129 million, generating a volume payment for Harvey Norman of $219,300. Again, only a proportion of that amount would be a result of the contravening conduct.

144 In respect of non-promotional transactions, ASIC and Harvey Norman provided the Court with competing calculations of the volume payment likely to have been received by Harvey Norman. However, it is questionable whether the volume payments made for non-promotional transactions is referable to the contravening conduct. Necessarily, when making a non-promotional transaction, the consumer is aware that they have been issued a GO Mastercard and has elected to use the card for a non-promotional transaction. By definition, the consumer is no longer misled. A further problem with the calculations proffered by ASIC and Harvey Norman is that the calculations were confined to non-promotional transactions that occurred during the relevant period. There is no logical reason to confine the transactions to that period. If the transactions are referable to the contravening conduct (presumably on the basis that the contravening conduct resulted in the consumer acquiring the card), then the benefit derived by Harvey Norman from use of the card would continue until the card was cancelled. ASIC's calculations suffered from the further problem that it took into account all GO Mastercards issued during the relevant period, not merely the cards issued to the Relevant Cohort. For those reasons, I do not place any weight on ASIC's calculations. Harvey Norman's calculations generated a modest sum in any event (a figure of less than $300,000).

Revenue from franchisees

145 During the relevant period, Harvey Norman received fees from its franchisees calculated as a percentage of gross franchisee revenue. The percentage was negotiated individually with each franchisee. However, the average percentage across all franchisees can be calculated from Harvey Norman's annual reports. In FY20, total franchisee revenue was $6.16 billion and franchisee fees received by Harvey Norman were $780 million, which gives an average percentage fee of 12.66%. In FY21, total franchisee revenue was $6.952 billion and franchisee fees received by Harvey Norman were $1.076 billion, which gives an average percentage fee of 15.48%. For present purposes it is sufficient to take an average of those two financial years, giving a percentage fee of 14.07%. The aggregate value of the first interest free transactions by

the Relevant Cohort was approximately $129 million, generating franchisee revenue for Harvey Norman of $18.15 million. Again, only a proportion of that amount would be a result of the contravening conduct.

146 During the relevant period, Harvey Norman also earned revenue associated with the GO Mastercard and interest free promotions through a 'financial accommodation fee' charged to franchisees. The revenue was earned through Harvey Norman's subsidiary, Derni Pty Ltd, which provided financial accommodation (such as loans) to franchisees in the form of a revolving line of credit. The financial arrangements between Derni and Harvey Norman franchisees is explained in Harvey Norman's annual reports. In broad terms, Derni provides a revolving line of credit to franchisees in return for a fee to cover the interest expense. The parties' submissions did not explain why the revolving line of credit would be utilised for the interest free promotional sales when those sales were financed by Latitude. In any event, the amount of the financial accommodation fee that would have been received by Harvey Norman in respect of the first interest free transactions by the Relevant Cohort was a relatively modest amount of approximately $500,000. Again, only a proportion of that amount would be a result of the contravening conduct.

147 It is also relevant to take into account the broader commercial benefit derived by Harvey Norman from the misleading advertisements. The advertising campaign conducted by Harvey Norman in respect of the promotions was very extensive. The impression conveyed by the advertisements was that consumers could acquire certain products during the period of the offer in Harvey Norman franchisee stores on 60 months interest free terms. The advertising message was very attractive and it is likely that Harvey Norman's overall franchise business benefitted from that message beyond the sales that were made under the promotion. It is not possible to estimate the value of that indirect benefit to Harvey Norman, but it can reasonably be regarded as significant.

Overall

148 The above analysis suggests that Harvey Norman generated substantial revenue from the contravening conduct. It is not possible to estimate the amount with precision, but assuming that up to 25% of the Relevant Cohort proceeded with a 60 month interest free transaction on a mistaken assumption about the terms of the offer, it is reasonable to estimate Harvey Norman's incremental revenue as in the vicinity of $5 million. As noted, it is likely that Harvey Norman also gained indirect benefits to its franchise business from the misleading impression

conveyed by the advertisements. It must also be acknowledged that the above figures are for incremental revenue and do not take account of incremental expenses (about which there was no clear evidence).

Latitude

149 As stated earlier, during the relevant period Latitude earned revenue from interest free sales at Harvey Norman franchisee stores from both the customer (including the establishment fee, monthly account fee, late payment fees and interest if the balance was not paid off within the relevant interest free period), and from the franchisee in the form of a merchant service fee.

Revenue from cardholders

150 In relation to revenue from cardholders, the benefit to Latitude from the contravening conduct is broadly equivalent to the harm suffered by consumers from paying the establishment fee and monthly account fees when they entered into the interest free transaction unaware of those fees. The evidence concerning the estimation of that harm has been set out earlier, where I found that the amount was likely to be significantly less than $5 million. Whilst Latitude may also have earned late payment fees when consumers did not pay instalments on time, and may have earned interest if there was an outstanding balance after 60 months, there is no finding that consumers were unaware of the potential for late payment fees and interest charges in those circumstances. It follows that the revenue earned on those categories of fees and charges did not result from the contravening conduct. Similarly, while Latitude earned fees and charges on subsequent transactions entered into by consumers on their GO Mastercard, such transactions would have occurred with knowledge of relevant fees and charges and therefore are not referable to the contravening conduct.

Revenue from franchisees

151 In relation to revenue from franchisees, Latitude collected a merchant service fee which was paid directly to Latitude and was calculated as a percentage of the value of the goods purchased using the GO Mastercard. During the relevant period, the merchant service fee for goods purchased using the 60-month interest free promotion was 10.95%. Thus, in respect of the first interest free transactions by the Relevant Cohort, which totalled approximately $129 million, Latitude earned $14,125,500. Again, only a proportion of that amount would be a result of the contravening conduct.

Overall

152 The above analysis suggests that Latitude generated substantial revenue from the contravening conduct. It is not possible to estimate the amount with precision, but assuming that up to 25% of the Relevant Cohort proceeded with a 60 month interest free transaction on a mistaken assumption about the terms of the offer, it is reasonable to estimate Latitude's benefit as in the vicinity of $4 to 5 million. It must also be acknowledged that the above figures are for incremental revenue and do not take account of incremental expenses. The incremental expenses include amounts payable by Latitude to Harvey Norman under the Program Agreement comprising the new account incentive payment and the volume payment, although those amounts are relatively modest. Incremental expenses would also include the cost of funds to Latitude in respect of the first interest free transactions by the Relevant Cohort. However, no calculations for the costs of funds were presented by the parties. Latitude submitted that reference could also be made to its average profit-to-revenue ratio as disclosed in its annual reports. In my view, that ratio does not assist for two reasons. First, it is a ratio that applies to the whole of Latitude's business and not the GO Mastercard segment. Second, the ratio is based on all expenses and not incremental expenses.

Involvement of senior management and deliberateness of contraventions

153 In relation to Latitude, Justice Yates found (at LJ [59]) that Latitude was involved in developing and approving the content of advertisements placed by Harvey Norman for the promotions. This included signing off on the disclaimers and disclosures made in the advertisements based on Latitude's advertising and brand guidelines. Mr Symmons was the person carrying out this task, although from time-to-time Mr Monahan undertook this role (e.g., when Mr Symmons was absent). Mr Monahan also carried out six-monthly audits of the advertising campaigns to check that they had been signed off in accordance with Latitude's guidelines. Justice Yates also found (at LJ [61]) that Mr Symmons was the "main interface" between Latitude and Harvey Norman and that he would make recommendations to Harvey Norman about the interest-free promotions it should run, based on Harvey Norman's previous advertising campaigns and what Harvey Norman's competitors were currently doing in the market. He would also provide the pricing for these recommendations. Mr Symmons' title was "General Manager Retail Australia, Harvey Norman". Mr Symmons reported to Paul Varro, a director of Latitude and Latitude Financial Services Australia Holdings Pty Ltd and who also, during the relevant period, held the position of Executive General Manager, Latitude Pay and Insurance, and then Chief Commercial Officer. At the relief hearing, ASIC accepted that Mr Symmons is appropriately

described as "senior middle management" and that Mr Symmons was not in Latitude's senior leadership team.

154 In relation to Harvey Norman, ASIC submitted that senior management was intimately involved in the contravening conduct. ASIC submitted that the advertising campaigns were undertaken under the overall direction and control of Ms Page, an Executive Director and the CEO of Harvey Norman, with significant management involvement from Chris Mentis (CFO, Company Secretary and Executive Director of Harvey Norman), Martin Anderson (General Manager of Generic Publications), Daniel Child (Chief Operating Officer of Generic Publications) and Kristie Gee (Head of Television and Radio at Generic Publications).

155 Justice Yates made the following findings with respect to the approval of the contravening advertisements within Harvey Norman:

(a) Mr Mentis received recommendations from Mr Symmons in relation the promotions (LJ [61]-[64]).

(b) Mr Mentis and Ms Page would meet to discuss Latitude's recommendations with a view to putting those recommendations to Harvey Norman franchisees for adoption. Mr Mentis was one of the people within Harvey Norman who approved whether a particular advertisement offering an interest free promotion was published. On occasion, Ms Page was involved in giving that approval (LJ [65]).

(c) From time to time, and without the intervention of Latitude, Mr Mentis and Ms Page would meet and decide on interest free promotions to be recommended to Harvey Norman franchisees, including the particulars of the promotion (LJ [66]).

(d) Once a decision was made, Mr Mentis, Ms Page, or both, advised representatives of Generic Publications, Harvey Norman's in-house advertising agency, of the upcoming interest free promotion and provided them with details that generally consisted of the promotional period; the number of applicable interest-free months (eg, 60 months interest-free); whether the promotion would or would not require a deposit or instalment payments (and, if so, the amount of the deposit and instalment payments); the minimum purchase price for the promotion; the goods to which the promotion applied; the goods that were excluded from the promotion; the dollar amount of any gift card; and whether the promotion would be advertised (LJ [66]).

(e) Generic Publications would then prepare the advertising materials, which typically included terms and conditions, posters for stores, print advertisements (including catalogues and newspaper advertisements), scripts and graphics for television and radio advertisements, and memoranda to franchisees containing details of the recommended promotion (LJ [68]). Templates were used to create these materials. The range of materials produced were substantially similar for every interest-free promotion. The materials generally did not change from promotion to promotion, other than in respect of the particulars of the interest-free promotion (LJ [69]).

(f) Once the materials were prepared, they were given to Mr Child for review and then to Mr Mentis for approval (LJ [70]).

(g) Publication was on Ms Page's direction (LJ [70]). Sometimes, Ms Page was involved in approving radio and television advertisements, although the evidence indicates that responsibility for legal compliance rested with Mr Mentis and Mr Symmons (LJ [74]).

156 At the liability trial, Yates J declined to draw an inference that Ms Page "micromanaged" the advertising process (LJ [498]):

> … As I have stated at [80], I am not satisfied that Ms Page "micromanaged" the process by which the newspaper, television, and radio advertisements were devised, created, and published or broadcast. However, I have found that, within Harvey Norman these advertising campaigns were undertaken under the overall direction and control of Ms Page with significant management involvement from Mr Mentis and other senior employees within Harvey Norman. I regard those findings as fully supported by the evidence, including the information provided by Ms Page and Mr Mentis in examinations conducted by ASIC. In light of that evidence, I see no reason why it was incumbent on Harvey Norman to call Ms Page and Mr Mentis as witnesses. There is no occasion for drawing the inferences that ASIC seeks against Harvey Norman.

157 ASIC did not allege that Harvey Norman and Latitude had deliberately engaged in misleading or deceptive conduct; however, ASIC alleged that both defendants, through their senior management, made decisions on how to present the advertisements and what aspects of the advertisements to emphasise. Harvey Norman and Latitude's actions were intentional in the sense that the design and implementation of the advertisements was deliberate and not inadvertent. ASIC further submitted that in making these decisions about the design and presentation of the advertisements, Harvey Norman and Latitude "courted the risk" of engaging in contravening conduct and that this warrants a higher penalty, citing *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 (***Coles***) at [73]-[75] (Allsop CJ).

158 The findings made by Yates J establish that Harvey Norman's senior management, including its CEO, Ms Page, were involved in the development and publication of the contravening advertisements. That fact demonstrates the commercial importance of the contravening

advertisements to Harvey Norman as a sales strategy. Further, the evidence establishes that Harvey Norman senior management were provided with copies of at least some of the contravening advertisements and that they were aware of the content of the advertisements.

159 It is reasonable to infer that senior management of Harvey Norman (and middle management of Latitude) were involved in the advertising decision to promote and emphasise certain attractive features of the promotional offers (that the purchase price would be repayable in instalments over 60 months without interest being charged) whilst avoiding reference to other features (the necessity to obtain a credit card account and the fees associated with that account). That is not to conclude that management at either company knew or believed that the contravening advertisements were misleading. ASIC did not advance that submission and therefore no such finding should be made. It is to conclude, however, that management at both companies paid insufficient attention to the question whether the advertisements were misleading.

160 At trial and on appeal, Harvey Norman and Latitude submitted that consumers would not be so naïve as to believe that they could purchase products on terms that allowed them to repay the purchase price over 60 months interest free. The submission was rejected both at trial and on appeal. The submission betrays a failure by both companies, at senior levels, to appreciate the importance of truthful advertising.

Past contraventions

161 ASIC referred to a number of previous occasions in which ASIC or other regulators have taken action against Latitude, Harvey Norman or their related entities or predecessors in respect of misleading conduct.

162 In August 2006, GE Money (the previous owner of the business now conducted by Latitude) agreed to refund a $25 establishment fee to 2,500 customers after concerns were raised by ASIC regarding a potentially misleading statement on GE Money's website stating that there was no annual fee for the GO Mastercard. I do not place any weight on this incident given that the conduct was not engaged in by Latitude (but by the previous owner of the business), there was no finding of misleading conduct and the conduct occurred many years ago.

163 In 2011, Harvey Norman was found by the Court to have engaged in misleading conduct in contravention of the Australian Consumer Law: *ACCC v Harvey Norman Holdings Ltd* [2011] FCA 1407; ATPR 42-384. In that proceeding, Harvey Norman had made representations in

catalogues and on a website about the price of specified goods. Harvey Norman admitted liability. Justice Collier found (at [34]) that the catalogues and website misleadingly represented that a significant condition to which the promotion of the goods was subject did not exist – that is, that the advertisements in the catalogues were only being made in respect of a single Harvey Norman franchise store and not in respect of Harvey Norman franchise stores generally. Justice Collier noted (at [37]) that although that condition was disclosed in fine print, it was unlikely to be seen by an ordinary consumer reading the catalogue or viewing the website. This past contravention weighs somewhat in favour of a higher penalty, given that the conduct is of a similar nature to the contravening conduct in this proceeding in that it entails a failure to disclose the full conditions of a promotion. I note, however, that the contravention occurred a significant time in the past.

164 In 2014, GE Capital Finance Australia (the previous owner of the business now conducted by Latitude) was found by the Court to have engaged in misleading conduct in contravention of the ASIC Act*: ASIC v GE Capital Finance Australia* [2014] FCA 701. The Court found that, during 2012, Latitude had made false or misleading representations to credit card customers when seeking to obtain their consent to receiving invitations to raise their credit card limit. I also do not place any weight on this prior contravention given that the conduct was not engaged in by Latitude (but by the previous owner of the business), the conduct was very different to the present case and occurred many years ago.

Compliance culture

165 ASIC submitted that neither Harvey Norman nor Latitude had a culture of ensuring compliance with the ASIC Act, and Harvey Norman's compliance culture appears to be particularly weak.

Harvey Norman

166 In relation to Harvey Norman, the evidence adduced with respect to its compliance systems and training can be described as paltry. No witness was called to give evidence about Harvey Norman's compliance systems and training during the relevant period or presently.

167 At the relief hearing, Harvey Norman tendered two training presentations in relation to the Australian Consumer Law prepared by one of its related entities, Yoogalu Pty Limited. The first, dated 25 June 2018 and entitled "*Essential Information and ACL 101*", focuses solely upon the consumer guarantees in the Australian Consumer Law. The second, dated 7 June 2019 and entitled "*Advertising Compliance Policy*", includes reference to the prohibitions against

misleading conduct in the Australian Consumer Law but is brief in its overall content. Neither presentation makes any reference to the ASIC Act. There is no evidence as to the persons who attended either presentation.

168 The second presentation included an image of a "GP Advertising Compliance Checklist". It can be inferred that 'GP' is an abbreviation of Generic Publications, Harvey Norman's in-house advertising agency. Such a checklist was shown to Generic Publications' Head of Television and Radio, Ms Kristie Gee, during a compulsory examination pursuant to s 19 of the ASIC Act conducted on 22 November 2021. Ms Gee confirmed that she had never used a "GP Advertising Compliance Checklist" in the course of her work. Ms Gee also did not recognise a "Generic Publications Procedures & Compliance Manual" when shown and stated that she had never seen a compliance manual at work.

169 The General Manager of Generic Publications until June 2021, Mr Martin Anderson, was similarly vague about legal compliance training during his compulsory examination on 9 September 2021. He confirmed that he had not received any training regarding legal prohibitions concerning misleading or deceptive conduct in the period from 1 January 2020 until his retirement.

170 Harvey Norman tendered (without objection) an extract of the compulsory examination of Mr Child (Chief Operating Officer of Generic Publications prior to 1 March 2021) conducted by ASIC on 1 September 2021. Mr Child was asked whether anyone at Generic Publications reviews the advertisements that are produced by Generic Publications to ensure that they comply with the law, and he responded:

> Generic Publications staff broadly check advertisements and to the best of our ability and understanding ensure that they comply with any rules that are in place.

171 Mr Child was asked whether staff receive training about complying with the law in relation to advertising, and he responded:

> Generic Publications staff undergo training. Some of that - there are modules of that which cover advertising, compliance, consumer law. So it's - so I say they're fairly general in nature and the principles are reasonably well understood by all Generic Publications staff.

172 In response to further questions, Mr Child confirmed that no training was given in relation to compliance with the financial services laws and that Generic Publications did not have any lawyers in house that reviewed advertising material, although he believed that there were

lawyers at Harvey Norman and that “at times they would have viewed or reviewed advertisements with interest-free components”.

173 I place little weight on the statements made by Mr Child in the compulsory examination, even though it was admitted into evidence without objection. The statements are not only hearsay but also lack any detail or specificity.

174 During his compulsory examination on 14 September 2021, Mr Mentis stated that he had not received any training in relation to the laws prohibiting misleading or deceptive conduct.

175 Harvey Norman also tendered an email from Daniel Rohde of Yoogalu Pty Ltd to Mr Symmons of Latitude discussing learning modules titled “Ready 4 Interest Free” and “Ready 4 Latitude Pay”. The email and its attachment provide no substantive evidence about the content of the modules and whether and how they were used.

176 Overall, Harvey Norman failed to establish that, during the relevant period, it had an effective system for seeking to ensure compliance with the consumer protection laws. That is a very serious matter for a company the size and scale of Harvey Norman, the principal business of which is the franchise of retail stores selling furniture, domestic appliances and computing and software products to the Australian public at large.

177 As to the present position, Harvey Norman tendered a further document titled “Advertising Compliance Policy” dated May 2025 issued by the General Manager of Generic Publications. No evidence was adduced as to the manner in which the document was used within Harvey Norman or Generic Publications. In particular, whilst the document requires that compliance training and auditing occur within the organisation, no evidence was adduced to demonstrate that training and auditing is now occurring, how widespread the training is and the nature and depth of the training.

178 I accept ASIC’s submission that Harvey Norman’s compliance culture appears to be particularly weak.

Latitude

179 In relation to Latitude, Ms Barton gave evidence with respect to Latitude’s compliance systems during the relevant period and as at the date of the relief hearing. During the relevant period, Ms Barton held the position of Senior Legal Counsel of Latitude Financial Services Australia

Holdings Pty Ltd, the parent company of Latitude; in October 2022, Ms Barton became the General Counsel Latitude Financial Services Australia Holdings Pty Ltd.

180 As to the relevant period, Ms Barton's evidence commenced with the finding made by Yates J (at LJ [59]) that Latitude was involved in developing and approving the content of contravening advertisements and this included signing off on the disclaimers and disclosures made in the advertisements based on Latitude's advertising and brand guidelines, which was carried out by Mr Symmons. Ms Barton deposed that, although she was not involved in the development and implementation of Latitude's advertising guidelines, she was aware that they were developed by Latitude's compliance and legal teams for use by Mr Symmons (and Mr Monahan) in reviewing, approving and auditing the disclaimers and disclosures that were to be included in any advertisements undertaken in conjunction with Harvey Norman for the purposes of ensuring that Latitude complied with its legal obligations including under the National Consumer Credit Protection Act, the Australian Consumer Law, the ASIC Act and Corporations Act. However, Ms Barton further deposed that Latitude acknowledged that the advertising guidelines, and associated review, approval and audit process, were inadequate for the purposes of ensuring that advertisements did not mislead reasonable consumers as found by the Court.

181 Latitude's acknowledgment about the inadequacy of the advertising guidelines was properly made. A copy of the advertising guidelines was in evidence. They constituted a one and a half page document which contained template statements to be used in the interest free advertisements, including the "Headline" statements "XX days/months/years 0% interest. No deposit. 0% interest with monthly payments". The document merely evidences that, at some point, someone approved the use of the headline statements and the fine print disclaimers. However, neither the document itself nor Ms Barton's affidavit affords any evidence of when and how the guidelines were created or of Latitude's legal compliance procedures more generally during the relevant period.

182 Ms Barton deposed that, following ASIC's notification of its concerns with the interest free advertisements in July 2021, Latitude altered its process for approving advertisements relating to interest free promotions with Harvey Norman. Under the altered process, Latitude's General Counsel must review and approve substantive changes to the template form of the proposed advertisement before it is approved within Latitude for broadcast or publication. Ms Barton further deposed that, since she became General Counsel, her practice is to seek legal advice

from at least one external law firm as to the application of the ASIC Act and the Australian Consumer Law to any template advertisement before it is approved for publication or broadcast.

183 On the evidence before me, I am not satisfied that, during the relevant period, Latitude had a satisfactory process in place to ensure that advertisements complied with the relevant consumer protection laws. However, Ms Barton's evidence satisfies me that, at least in relation to interest free advertisements, Latitude has now implemented a procedure to ensure compliance.

Cooperation

184 ASIC submitted that this is not a case in which any reduction in the quantum of penalty should be made on account of the defendants' cooperation. Harvey Norman submitted that recognition should be given for the facts that the defendants moved swiftly to amend the advertisements to address ASIC's concerns and that certain procedural steps were agreed between the parties to shorten the trial.

185 Cooperation with a regulator that leads to the narrowing or resolution of proceedings has long been regarded as a relevant factor in the assessment of penalty and can properly reduce the penalty that would otherwise be imposed. However, cooperation is typically recognised where there has been an admission of liability which avoids long and expensive litigation: see for example *Trade Practices Commission v Carlton & United Breweries Ltd* (1990) 24 FCR 532 at 542 per Northrop J; *TNT Australia* at 40,169; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (***NW Frozen Foods***) at 291 per Burchett and Kiefel JJ.

186 Conversely, the fact that a respondent defends proceedings is not an aggravating factor and will not result in any additional penalty beyond what would otherwise be the case: *Australian Competition and Consumer Commission v IPM Operation & Maintenance Loy Yang Pty Ltd (No 2)* [2007] FCA 11 at [61]-[65] (Young J). As observed by Burchett J in *TNT Australia* (at 40,170):

> The contravener who fights the case to the bitter end will obtain no discount, but the penalty imposed will be the proper penalty, and no more.

187 In the present case, Harvey Norman and Latitude fought the allegations to the bitter end. No additional penalty is to be imposed on that account, but nor is there any warrant to reduce the penalty that is otherwise justified. The matters referred to by Harvey Norman with respect to

the conduct of the trial are nothing more than is required by a litigant in complying with its obligations under s 37M of the FCA Act. Such compliance does not result in any reduction in penalty. As to the amendment of the advertisements, the defendants gain credit for bringing the contravening conduct to an end sooner than might otherwise be the case. That credit is taken up in the duration of the contravening conduct.

Contrition

188 As observed by the Full Court in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24 at [153], a contravener who has displayed no contrition or remorse, and no insight into their contravening conduct, would generally expect a higher penalty than would a contravener who has shown genuine contrition and remorse. That is because the requirement of specific deterrence is generally considered to be greater in the case of a contravener who has shown no contrition or insight into their offending behaviour.

Harvey Norman

189 At the relief hearing, Senior Counsel for Harvey Norman made an apology on behalf of Harvey Norman for its unlawful conduct. The apology was expressed to be to the Court and to Harvey Norman's customers.

190 ASIC submitted that little weight should be given to the apology in circumstances where no executive of Harvey Norman has been willing to make an apology on oath or affirmation, citing *Commonwealth Director of Public Prosecutions v Michael Snounou (No 3)* [2024] NSWSC 636 at [241]; *Islam v R* [2015] NSWCCA 233 at [98].

191 I accept ASIC's submission. In the circumstances of this case, which involved a lengthy trial and appeal on the issue of liability, an apology from the bar table during the hearing on relief is not persuasive evidence of Harvey Norman's contrition and remorse for its unlawful conduct.

192 Indeed, a striking feature of this case is Harvey Norman's unwillingness, through a senior executive, to give evidence about Harvey Norman's compliance procedures during the relevant period, why the procedures were inadequate to prevent the contravening conduct, and the steps that have been taken to prevent future contraventions. In the absence of such evidence, the apology from the bar table rings hollow.

193 Statements made by Harvey Norman's Chairman, Gerry Harvey, at the company's annual general meeting in October 2024, shortly after the liability judgment was handed down,

evidence both a lack of contrition and a lack of concern about the prospect of consumers being misled by the company's advertisements. In an article published in The Sydney Morning Herald, which was tendered without objection, Mr Harvey was quoted as stating, with respect to this proceeding:

> Everyone, if you're a big business, takes a hiding.
>
> So the reality is it has no influence whatsoever. People didn't stop shopping at Qantas, they didn't stop shopping at Woolworths. With a bit of luck, they won't stop shopping at Harvey Norman. We all get hammered.

194 The article stated that Mr Harvey declined to comment on the Court's ruling at trial in this proceeding or Harvey Norman's basis for appeal, and quoted Mr Harvey as saying his lawyers would "come and do nasty things to me" if he commented on the matter before the courts. Mr Harvey was then quoted as stating:

> I have very strong opinions on all of that, and I'm not allowed to say what I think. I hate the idea of being gagged. If I had my way, I'd be out there screaming at the top of my lungs about the injustices, and yet I can't do it. I've got to play along with it.
>
> The whole legal system is completely f---ed in Australia.

195 Mr Harvey is entitled to express his opinions, including about the legal system. However, Mr Harvey's opinions indicate that the Chairman of Harvey Norman's sole focus is upon the perceived injustice suffered by Harvey Norman, and a complete disregard for the potential harm suffered by consumers from Harvey Norman's misleading conduct.

196 Taking the evidence as a whole, I am not persuaded that Harvey Norman has demonstrated any contrition for its wrongful conduct.

Latitude

197 As stated earlier, Ms Barton expressed Latitude's contrition for contravening the ASIC Act, deposing:

> I confirm that Latitude acknowledges and accepts responsibility for what has occurred in relation to its unlawful conduct that gives rise to contraventions of ss 12DA, 12DB and 12DF of the ASIC Act. Latitude apologises unreservedly to its customers and anyone else who was misled by this conduct.

198 ASIC submitted that little weight should be given to Latitude's apology as it was provided only at this late stage in the proceedings, is perfunctory, and demonstrates no insight into the nature or wrongfulness of the conduct. For the reasons given earlier, I do not accept that submission. Although Latitude has not, in public communications with its customers, voluntarily acknowledged its involvement in misleading conduct or offered any form of remediation, I do

not consider that the apology proffered through Ms Barton's affidavit is merely "performative", as submitted by ASIC.

199 Taking the evidence as a whole, I consider that Latitude has demonstrated a strong intention to avoid future contraventions of the consumer protection laws in the ASIC Act.

E. DETERMINATION OF APPROPRIATE PENALTIES

200 ASIC sought the imposition of penalties in the sum of $50 million against Harvey Norman and $35 million against Latitude. Harvey Norman submitted that the Court should instead impose a penalty of $24 million. Latitude submitted that the Court should impose a penalty substantially lower than that sought by ASIC, but did not propose a specific figure.

201 I have concluded that Harvey Norman and Latitude were equally responsible for the misleading advertisements. All other things being equal, it would be appropriate to impose the same penalty on each defendant. It must be determined whether there is sufficient reason to impose differential penalties on the defendants.

202 The misleading conduct was serious and extensive. The defendants misrepresented the nature of the financial transaction being offered (a continuing credit contract) and the fees and charges that applied to the financial transaction. Those are matters that are of importance to consumers. The misleading conduct continued for 19 months and it involved thousands of advertisements that would have been viewed by millions of Australians.

203 Notwithstanding the scale of the contravening conduct, ASIC submitted, and the defendants agreed, that the contravening conduct should be assessed as a single course of conduct for penalty purposes. That is because the content of the advertisements and the reasons they were found to be misleading were materially the same across each of the newspaper, radio and television media. Although the advertisements related to different promotions over the 19 month period, the essential nature of the promotions, and the content of the advertisements, remained the same throughout.

204 Although the misleading impression created by the advertisements would, in the majority of cases, have been corrected at the point of sale, in a minority of cases that would not have occurred, causing consumers financial harm. The quantifiable harm to consumers is likely to be less than $5 million. However, it is likely that consumers suffered harm that is financially unquantifiable. Consumers may have invested time in investigating a purchase on the assumed terms of the offer, before realising that the terms were different and deciding not to proceed,

which is a waste of the consumer's time. Some consumers, when informed of the true terms of the offer, may have found the terms unattractive but elected to proceed because they had invested time and had become emotionally invested in the purchase, which involves a distortion of the consumer's buying decision. The misleading advertisements were also likely to have disadvantaged competing retailers of furniture, domestic appliances and computing and software products.

205 It is likely that both defendants benefited financially from the misleading conduct. I have estimated the incremental revenue earned by each from the contravening conduct as about $5 million, although that figure does not take account of incremental expenses. It is also likely that Harvey Norman gained indirect benefits to its franchise business from the misleading impression conveyed by the advertisements.

206 This case is typical of many cases that regularly come before the Court. The defendants advertised a retail offer to consumers, being the purchase of goods on terms that enabled payment by instalments, but the advertisements contained half-truths, presenting the offer as more attractive than it was. In engaging in such conduct, the defendants put sales and their commercial interests above the interest of consumers, and also distorted the markets in which competing goods and finance are offered. The regularity with which similar cases come before the Court demonstrates the need for the Court to impose penalties that act as a strong deterrent to such conduct, and which will motivate the companies concerned to improve their compliance processes.

207 Both defendants are large and sophisticated enterprises. The Harvey Norman group of companies is many times larger than the Latitude group of companies, which has some bearing upon the quantum of penalty necessary to achieve deterrence.

208 Relatively senior management of both defendants were involved in the contravening conduct. Although it could be said that more senior management was involved at Harvey Norman, I do not consider that to be a significant factor in this case. The contraventions were not deliberate in the sense that senior managers were aware that the advertisements were misleading. Their involvement in the conduct was due to the importance of the interest free promotions as a sales strategy, rather than for the purpose of legal compliance. The failure in this case related to the inadequacy of the defendants' legal compliance procedures.

209 During the relevant period, the compliance processes of both defendants were wholly inadequate to prevent the contravening conduct. Indeed, the evidence suggests that neither company had a suitable process for ensuring that their advertising complied with the consumer protection laws. Given the scale and sophistication of both defendants, that is an extraordinary state of affairs. It is particularly striking in the case of Harvey Norman, given the size of the company. Latitude adduced evidence of the steps that it has now taken to improve its processes in that regard. In contrast, Harvey Norman failed to adduce any satisfactory evidence about its current compliance processes. That is a distinguishing feature between the two defendants.

210 Relatedly, the defendants have also exhibited a different level of contrition. In addition to adducing evidence as to its renewed compliance processes, Latitude's General Counsel, Ms Barton, offered an apology to Latitude's customers on behalf of the company. In contrast, no executive or legal counsel of Harvey Norman gave evidence about the company's compliance procedures or offered an apology, and public statements made by Harvey Norman's Chairman show a disregard for the potential harm suffered by consumers from Harvey Norman's misleading conduct.

211 Taking into account all of the considerations referred to in these reasons, I consider that a higher penalty should be imposed on Harvey Norman in comparison to Latitude. A higher penalty is warranted to deter repetition and to motivate Harvey Norman to improve its compliance processes. An aggregate penalty of $35 million will be imposed in respect of Harvey Norman's contraventions of ss 12DB(1) and 12DF(1) of the ASIC Act, and an aggregate penalty of $20 million will be imposed in respect of Latitude's contraventions of ss 12DB(1) and 12DF(1) of the ASIC Act. I consider that penalties in those amounts will be sufficient to ensure that neither defendant regards the penalties as merely the cost of doing business.

F. INJUNCTIONS

212 ASIC sought injunctions under s 12GD of the ASIC Act restraining Latitude and Harvey Norman and their agents, separately or together, for a period of five years, from advertising that a payment method is available for purchasing goods from Harvey Norman, Domayne and Joyce Mayne stores comprising periodic repayments over a specified term on no deposit and interest free terms, without disclosing the following matters when those matters are true:

(a) a precondition for acquiring goods pursuant to the payment method is that the consumer must be party to, or enter into, a continuing credit contract that is linked to a credit card;

(b) a consumer taking up the payment method will be liable to pay, in addition to the price of the goods, ongoing monthly account service fees for the agreed term (and the monthly amount of that fee); and

(c) a consumer taking up the payment method will be liable to pay, in addition to the price of the goods, an establishment fee (and the amount of that fee).

213 Although ASIC formulated the injunction as binding upon the defendants' respective agents, I have assumed that ASIC intends the injunction to bind the defendants when acting via agents. It is not permissible for the Court to impose an injunctive order binding upon agents of the defendants who are not parties to this proceeding and are unidentified.

214 ASIC submitted that the Court is warranted in granting such an injunction for the following reasons:

(a) Harvey Norman and Latitude's contraventions are a particularly egregious example of the very conduct that the statutory provisions are designed to address;

(b) the Court made extensive findings in the Liability Judgment about the involvement of senior management in the contraventions;

(c) ASIC is not aware that the defendants had or now have any compliance program or formal internal structure to ensure compliance with the ASIC Act;

(d) advertisements published since after the end of the relevant period do not demonstrate a sufficient commitment to clear and prominent disclosures to customers, and suggest a tendency towards backsliding by the defendants; and

(e) the payment method (and, in particular, the GO Mastercard) is extremely profitable to, or has the potential to generate substantial profits for, Harvey Norman and Latitude.

215 Harvey Norman did not oppose the grant of the injunction. Latitude submitted that an injunction is not needed to achieve deterrence in the presence of pecuniary penalties and declarations. Latitude also submitted that a number of aspects of the injunction rendered it problematic from a compliance perspective.

216 Section 12GD of the ASIC Act is in similar terms to s 232 of the Australian Consumer Law (and its predecessor provisions) and s 80 of the *Competition and Consumer Act 2010* (Cth) has been interpreted in the same manner. The statutory power to grant injunctions is wide and devoid of traditional constraints, although traditional equitable principles remain relevant to the exercise of the power: *ICI Australia Operations Pty Ltd v Trade Practices Commission*

(1992) 38 FCR 248 (***ICI Australia***) at 256-7 (Lockhart J) and 267 (Gummow J). While the prospect of repetition is a relevant discretionary consideration, the statute expressly states that the power may be exercised even where there is no reason to apprehend continuing or future contraventions: *BMW Australia Ltd v ACCC* [2004] FCAFC 167; 207 ALR 452 (***BMW Australia***) at [36]. As stated by French J in *ICI Australia* (at 268):

> There is room within the statutory framework and the policy that underlies it for an injunction which is intended not to restrain an apprehended repetition of contravening conduct but to deter an offender from repeating the offence.

217 Nevertheless, as observed by the Full Court in *BMW Australia* (at [39]), a relevant factor to consider in determining whether to grant a statutory injunction is whether the existing sanctions for the conduct that is to be the subject of the injunction, found in the statute itself, are required to be supplemented by the availability of the range of sanctions applicable to a breach of the injunction (namely, contempt of court). The purpose of granting an injunction to restrain conduct already prohibited by statute can only be to supplement the statutory remedies with the additional prospect of contempt of court proceedings if the injunction is breached. In each case, it is a question whether the conduct concerned warrants the application of those potentially more severe consequences. Observations to the same effect were made by the Full Court in *ACCC v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 at [110].

218 Injunctions must be granted in clear and unambiguous terms which leave no room for the persons to whom they are directed to wonder whether or not their future conduct falls within the scope or boundaries of the injunction. *ICI Australia* at 259; *Melway Publishing Pty Ltd v Robert Hicks Pty Limited* (2001) 205 CLR 1 at [26] (Gleeson CJ, Gummow, Hayne and Callinan JJ). Orders which are likely to involve evaluative judgments or significant debates on their interpretation are not likely to be given the court's sanction: *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* [1999] FCA 18; 161 ALR 79 at [26] (French J).

219 It can be accepted that the form of injunction proposed by ASIC closely matches the conduct that the Court has found to be a contravention of the ASIC Act. Nevertheless, for the following reasons, I am not persuaded that an injunction should be granted in the present case.

220 First, as submitted by Latitude, the contravening advertisements ceased soon after ASIC notified its concerns to the defendants, and the contravening conduct has not been repeated. Whilst ASIC criticised subsequent advertisements published by the defendants in respect of interest free promotions, ASIC has not issued proceedings alleging that the subsequent

advertisements are misleading. I am therefore not prepared to reach any such finding. On the evidence before me, the defendants have not engaged in further contravening conduct of a similar kind. Latitude has taken significant steps to ensure that it has adequate compliance procedures in place to prevent repetition.

221 Second, although the conduct to be enjoined by the injunction closely matches the conduct that the Court has found to be a contravention of the ASIC Act, the proposed terms of the injunction may give rise to difficulties of interpretation and application. Each of the words and phrases 'payment method', 'periodic repayments', 'continuing credit contract that is linked to a credit card', 'monthly account service fees' and 'establishment fee' require interpretation. In the context of the advertisements the subject of the present proceeding, the words have a clear meaning. The difficulty is that the words may come to be interpreted and applied in the context of different promotional offers and financial arrangements which are not foreseen today. Given the potential for future disagreement over the meaning of those words in a given context, the question must be considered whether it is necessary, to protect the public interest by deterring repetition of the contravening conduct, to impose additional sanctions on the defendants beyond that which is already imposed by the law.

222 In my assessment, it is not necessary, to protect the public interest, to grant injunctions in the terms proposed by ASIC. The defendants did not deliberately contravene the ASIC Act and have not been shown to be recidivists. The defendants are subject to the statutory prohibitions against misleading conduct in the ASIC Act and the Australian Consumer Law. Under those statutes, the Court is empowered to impose very large pecuniary penalties on the defendants if they engage in misleading conduct in the future, and the Court will not hesitate to do so. I consider that the existing legislative sanctions are sufficient to protect the public interest by deterring repetition of the contravening conduct.

G. ADVERSE PUBLICITY ORDERS

223 ASIC seeks punitive orders under s 12GLB(1)(a) of the ASIC Act requiring the defendants to publish an adverse publicity notice, which details the nature of the contravening conduct and the penalty amount imposed by the Court. ASIC relied on s 12GLA in the alternative.

224 The orders sought by ASIC require the adverse publicity notice to be:

(a) published in 168 newspapers three times per week for two weeks (for daily publications) and one time per week for six consecutive weeks (for weekly publications);

(b) broadcast (for at least 25 seconds in primetime) on 367 television stations four times per week on each station for two weeks;

(c) broadcast (for at least 25 seconds in primetime) on 138 radio stations four times per week on each station for two weeks; and

(d) published on the Harvey Norman and Latitude websites for no less than 90 days.

225 By those orders, ASIC seeks to mirror the range of media used for the contravening advertisements.

226 Harvey Norman did not oppose an order requiring the publication of the adverse publicity notice on the website 'www.harveynorman.com.au', which is the website promoting goods sold at Harvey Norman franchisee stores and online. In its written submissions, however, Harvey Norman referred to a 'complexity' with the proposed order in that the website is not operated by Harvey Norman but is operated by an independent franchisee called eComm Store Pty Ltd. No evidence was adduced with respect to the ownership or control of eComm Store Pty Ltd, or any agreement that exists between Harvey Norman and eComm Store Pty Ltd. At the relief hearing, Harvey Norman informed the Court that it had been able to secure the agreement of eComm Store Pty Ltd for the publication of the adverse publicity notice, but for a period of 45 days rather than the 90 days sought by ASIC. Harvey Norman resisted an order requiring the publication of the adverse publicity notice in newspapers and on television and radio stations as proposed by ASIC on the basis that the order would be excessive and because the proceeding has already attracted significant media attention and will likely attract further attention upon the publication of these reasons. In support of that submission, Harvey Norman tendered a sample of newspaper articles commenting on this case, including the judgment of the Full Court.

227 Latitude opposed any adverse publicity order being made on the basis that the orders are not necessary to achieve the rationales for which they are made, being (amongst other things) to alert consumers to the conduct, dispel false impressions, and to deter repetition of the conduct. This submission was largely made on the basis that the conduct occurred a significant time ago and there have been several years of new campaigns in the interim. This created a risk that the proposed publicity notices would create further confusion for consumers, rather than dispel it.

Latitude also noted that Ms Barton had undertaken to publish an apology on the Latitude website.

228 Sections 12GLA and 12GLB of the ASIC Act are in similar terms to ss 246 and 247 of the Australian Consumer Law (and their predecessor provisions) and have been interpreted in the same manner. The authorities establish that the purpose for making such orders include:

(a) to protect the public interest by dispelling incorrect or false impressions that were created by the misleading conduct: *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 (***Medical Benefits Fund***) at [49] (Stone J); *Australian Competition and Consumer Commission v On Clinic Australia Pty Ltd* [1996] FCA 721; 35 IPR 635 at 641 (Tamberlin J);

(b) to alert consumers to the fact that there has been misleading conduct, thereby informing them that they might have some remedy if they relied upon any of the misleading or deceptive conduct: *Medical Benefits Fund* at [53] (Stone J); *Australian Competition and Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548 at [22] (French J); and

(c) aiding the enforcement of the primary orders and assisting in preventing repetition of the contravening conduct: *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 95 FCR 114 at [49] (French J).

229 However, corrective advertising may be refused where there has been a considerable lapse of time since the contravening conduct, and where it is unlikely that consumers continue to labour under a misapprehension as a result of the contravening conduct: *Australian Competition and Consumer Commission v Harris Scarfe Australia* [2009] FCA 54; ATPR 42-271 at [115] to [120] (Mansfield J); *Australian Competition and Consumer Commission v Telstra Corporation* [2007] FCA 2058; ATPR 42-207 at [5] (Gordon J); *Luxottica Retail Australia Pty Ltd v Specsavers Pty Ltd (No 2)* [2010] FCA 644 at [10] to [12] (Perram J); and *Australian Competition and Consumer Commission v Panasonic Australia* [2010] FCA 856; 269 ALR 622 at [62] to [64] (Mansfield J).

230 There are competing considerations in this case. On the one hand, the contravening conduct occurred many years ago, effectively ceasing on 11 August 2021. Given the publicity surrounding this proceeding, it is unlikely that consumers who have shopped at Harvey Norman, and particularly those consumers who purchased goods pursuant to a 60 months interest free promotion during the relevant period, are unaware of the proceeding and the

outcome. It follows that two of the objectives of making such an order, dispelling incorrect or false impressions and alerting consumers that they may have a remedy, are unlikely to have any real significance in this case. Further, I accept Latitude's submission that publication of the adverse publicity notice through the mainstream media may cause confusion. Typically, the attention given to advertisements in mainstream media is fleeting and, since August 2021, Harvey Norman and Latitude have continued to advertise interest free promotions with corrected advertisements. There is a real potential for the public to misunderstand the adverse publicity notices if broadcast in the mainstream media. On the other hand, I consider that there is a public interest in informing consumers in a relevant way about the contravening conduct. Providing such information in a targeted way will assist in preventing repetition of the contravening conduct. This is particularly the case where neither of the defendants has, to date, issued any form of public acknowledgment to its customers of the contravening conduct.

231 Weighing the competing considerations, I consider it appropriate to make an adverse publicity order limited to publication on the websites 'www.harveynorman.com.au' and 'www.latitudefinancial.com.au'. The publication should continue for a period of 90 days, which will ensure that persons who commonly shop at Harvey Norman franchisee stores, or who commonly obtain consumer credit through Latitude, are made aware of the contraventions that have occurred.

232 As noted above, at the relief hearing Harvey Norman informed the Court that the website 'www.harveynorman.com.au' is not controlled by it but is controlled by eComm Store Pty Ltd, however Harvey Norman had been able to secure the agreement of eComm Store Pty Ltd for the publication of the adverse publicity notice for a period of 45 days (but not 90 days). In those circumstances, the order that will be made in respect of Harvey Norman will be that it use all reasonable endeavours to procure that eComm Store Pty Ltd publishes the adverse publicity notice for a period of 90 days. However, if the adverse publicity notice is not published for that period, ASIC will be granted liberty to apply to the Court for the original orders sought by ASIC involving publication of the adverse publicity orders through mainstream media.

H. COSTS

233 Save in one respect, neither defendant opposed an order that they pay ASIC's costs of the proceeding, both at the liability and the relief stages, and it is appropriate that such an order be made. Latitude noted that, by an order of the Court dated 11 July 2023, ASIC was ordered to pay the defendants' costs of the interlocutory application dated 1 June 2023. That order will

remain in effect, and ASIC will not be entitled to recover its costs in respect of that application. As there is no apparent risk that the defendants will be unable to satisfy an order for costs in favour of ASIC, the order will specify that the defendants are liable for ASIC's costs in equal shares.

I certify that the preceding two hundred and thirty-three (233) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate:

Dated: 28 July 2026