FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Cohen [2026] FCAFC 144

Appeal from:	*Australian Securities and Investments Commission v Cohen* [2025] FCA 1255
File number(s):	NSD 2083 of 2025
Judgment of:	**O'BRYAN, ANDERSON AND DOWNES JJ**
Date of judgment:	16 November 2026
Catchwords:	**CORPORATIONS** – conflicted remuneration – Division 4 of Part 7.7A of the *Corporations Act 2001* (Cth) – incentives offered to sales agents in a call centre – whether sales agents provided financial product advice – whether presumption of conflicted remuneration in section 963L *Corporations Act* engaged – whether presumption rebutted – whether conflicted remuneration within meaning of section 963A(b) *Corporations Act* – whether contraventions of sections 963E(2), 963F and 963J *Corporations Act* – whether breach of section 180 *Corporations Act* by director – whether director was knowingly involved in contraventions – appeal dismissed with costs
Legislation:	*Corporations Act 2001* (Cth) ss 180, 766B(1), 961P, 963A, 963AA, 963E(2), 963F, 963J, 963L, 1317E and 1324 *Corporations Regulations 2001* (Cth) reg 7.7A.11B Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016 (Cth) Revised Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth)
Cases cited:	*Australian Securities and Investments Commission v Cohen* [2025] FCA 1255 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* (2023) 299 FCR 604; [2023] FCAFC 135 *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 *Australian Securities and Investments Commission v R M Capital Pty Ltd (ACN 065 412 820)* (2024) 172 ACSR 1;

	[2024] FCA 151 *Australian Securities and Investments Commission v Select AFSL Pty Ltd (ACN 151 931 618) (No 2)* (2022) 162 ACSR 1; [2022] FCA 786 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170; [2019] FCAFC 187 *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424; [2001] FCA 1833 *Brett Cattle Company Pty Ltd v Minister for Agriculture, Fisheries and Forestry* [2026] FCAFC 63 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	260
Date of hearing:	26 and 27 August 2026
Counsel for the Appellant:	Mr C Caleo KC, Mr T Kane, Ms M O'Brien and Mr M Brunker
Solicitor for the Appellant:	Australian Securities and Investments Commission
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Solicitor for the Respondent:	Maddocks Lawyers

ORDERS

NSD 2083 of 2025

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant
AND:	**KEITH CHARLES COHEN** Respondent

ORDER MADE BY: **O'BRYAN, ANDERSON AND DOWNES JJ**

DATE OF ORDER: **16 NOVEMBER 2026**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs of the appeal to be agreed or, failing agreement, to be assessed.

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

REASONS FOR JUDGMENT

THE COURT:

OVERVIEW

1 This is an appeal from orders of the primary judge made on 16 October 2025 dismissing the originating process filed by the appellant (**ASIC**) which sought declaratory relief, injunctive relief, disqualification orders, and orders for pecuniary penalties against the respondent to the appeal (**Mr Cohen**) and Mr Robert Oayda (a self-represented litigant who is not a party to the appeal). The reasons for that dismissal are found in *Australian Securities and Investments Commission v Cohen* [2025] FCA 1255 (**judgment** or **J**).

2 Mr Cohen was a director of various companies within a group of companies between 15 November 2017 and 2 October 2018 (**relevant period**), which group included Freedom Insurance Group Ltd (**FIG**) (a listed company), Freedom Insurance Pty Ltd (**Freedom Insurance**) (which held an Australian Financial Services Licence or AFSL), Freedom Administration Pty Ltd and Insurance Network Services Australia Pty Ltd (**INSA**). Unless it is necessary to specify otherwise, the Freedom group of companies will be described in these reasons as "**Freedom**".

3 During the relevant period, Freedom Insurance sold an insurance product known as the Freedom Protection Plan (**FPP**). The FPP was sold by sales agents who worked from a call centre, and who were employed by INSA. Those sales agents were each a representative of Freedom Insurance in its capacity as a financial services licensee: J [242].

4 During September 2017, Freedom suffered a significant downturn in its sales of the FPP. From November 2017, Freedom sought to address this slump by conducting incentive programs for the sales agents referred to as the "**Vespa Incentive**", the "**First Bali Sales Incentive**" and the "**Second Bali Sales Incentive**" (together, the "**Incentives**"). These Incentives each offered a prize: the prize in the Vespa Incentive was a Vespa motorcycle; and the prize in the First and Second Bali Sales Incentives was travel to and from, and accommodation in, Bali, Indonesia (being the **Bali 1 package** and the **Bali 2 package**).

5 The purpose of the Incentives was to motivate the sales agents either to meet a sales target given to that agent or increase the number of sales achieved by them: J [140], [149], [175].

6 Mr Adam Walker was the winner of the Vespa. There were 28 recipients of the Bali 1 package and eight recipients of the Bali 2 package.

7 In 2016 and 2017, legislative changes to the *Corporations Act 2001* (Cth) (**Act**) were proposed to be introduced by the Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016 (Cth) (**LIF Reforms**). Those changes became law in January 2018, which fell within the relevant period. It is common ground that Mr Cohen was aware of the proposed LIF Reforms in 2017.

8 At trial, ASIC alleged that the prizes each constituted conflicted remuneration within the meaning of Div 4 of Pt 7.7A of the Act. It alleged that Freedom Insurance had contravened ss 963E(2) and 963F of the Act, and that INSA had contravened s 963J of the Act, although it sought no relief against those companies, each of which had been deregistered by the time of trial.

9 As against Mr Cohen, ASIC alleged that:

(a) Mr Cohen was "knowingly concerned in, or party to" the contraventions of:

(i) ss 963E(2) and 963F of the Act by Freedom Insurance;

(ii) s 963J of the Act by INSA; and

(b) Mr Cohen, in his role as director of Freedom Insurance and INSA, contravened s 180 of the Act by failing to take reasonable steps to prevent Freedom Insurance and INSA from engaging in contraventions (actual or potential) of ss 963E(2), 963F, and 963J of the Act.

10 The primary judge conducted a trial on the question of liability with the question of penalties to be determined at a separate hearing.

11 On 16 October 2025, the primary judge ordered that the originating process be dismissed, and on 5 November 2025, the primary judge ordered that ASIC pay Mr Cohen's costs as agreed or assessed. ASIC appeals from those orders insofar as they concern Mr Cohen.

12 For the reasons which follow, we have decided that the appeal should be dismissed with costs to follow the event.

APPLICATION TO FURTHER AMEND NOTICE OF APPEAL

13 The Amended Notice of Appeal which formed the basis of the written submissions by the parties did not identify error in any factual finding by the primary judge. Nor did ASIC's submissions comply with the requirements of [4.3] of Practice Note APP 2: Content of Appeal Books and Preparation for Hearing which requires (*inter alia*) that such errors be identified, together with why each finding is said to erroneous and the evidence relied upon in support of the argument.

14 Instead, many of the grounds of appeal in the Amended Notice of Appeal, and the associated submissions, focus upon the alleged failures by the primary judge to draw inferences from, or reach conclusions based on, or give due weight to, "the entirety of the evidence". This is not a satisfactory approach because the findings of fact which are challenged are not identified and nor is the nature of the alleged error exposed.

15 As observed in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424; [2001] FCA 1833 (Allsop J, Drummond and Mansfield JJ agreeing) at [30]:

> … [T]he following can be said about the approach of those conducting an appeal. The proper approach is not to ask the court to survey all the evidence, directed by the otherwise unassailable findings on credit, and to ask it to arrive at its own conclusions, without "essaying the necessary task of positively demonstrating that the trial judge was wrong" …. *It is not appropriate to treat the appeal as though it were a new trial on the evidence and constrained merely by the unassailable factual findings. Error must be demonstrated*…. The views and conclusions of the trial judge ultimately have to be shown to be wrong. They should not be laid to one side and a simple re-argument of the case take place.
>
> (Emphasis added, citations omitted.)

16 In a similar vein, the Full Court in *Brett Cattle Company Pty Ltd v Minister for Agriculture, Fisheries and Forestry* [2026] FCAFC 63 (Colvin, Stewart and Anderson JJ) observed at [97]–[98] by reference to the grounds of appeal in that case:

> Errors of fact that may found an appeal take many different forms. However, there is no relevant error unless it is consequential. That is to say, the alleged error whether by itself or with other alleged errors must be shown to lead to a different outcome if the error is demonstrated. Well drawn appeal grounds will expose the extent to which it is necessary for more than one ground to be upheld if the appeal is to succeed. It is important that the grounds are both explicit and precise as to the consequences if some, but not all, grounds are upheld. ...
>
> Separately, in general, the appeal grounds are not presented in a way that exposes explicitly the nature of the alleged factual error. As we have indicated, there are important distinctions to be observed when it comes to alleged errors in fact-finding. The error may take the form of making a finding that is contrary to unchallenged evidence. The error may take the form of a failure to have regard to relevant evidence

> in making a factual finding. The error may take the form of a finding that is said to be against the weight of the evidence. The error may be said to be the consequence of a misunderstanding as to the nature of the evidence. The error may be said to involve the drawing of conclusions by way of inference or based on credibility findings that are glaringly improbable.

17 Because of concerns raised by the Court during the hearing of the appeal about the grounds of appeal relied upon by ASIC and the lack of any express challenge to a factual finding, ASIC applied to further amend its Amended Notice of Appeal to add this paragraph:

> 9A. The primary judge:
>
> a. erred in making the findings in J [92];
>
> b. alternatively, or in any event, ought to have found that the Respondent knew that the sales agents of Freedom Insurance were providing financial product advice to retail clients.

18 The findings at J [92] were as follows:

> It was Mr Cohen's intention when establishing Freedom and developing the funeral insurance product that the FPP would be distributed by Freedom's call centre on a "no advice" basis, in that neither general nor personal advice would be provided by call centre staff to the customer. Mr Cohen understood that the scripts that were provided to sales agents were developed on that basis.

19 The amendment application was made on the first day of the hearing of the appeal, and was not accompanied by any affidavit explaining why the ground had not been advanced at an earlier time. Mr Cohen's submissions filed in the appeal included a submission that "ASIC does not challenge any of the findings of fact made by the primary judge which are set out at J [26] to [217]": see [6]. Other submissions by Mr Cohen relied upon the unchallenged factual findings by the primary judge including, for example, [54]. The prejudice to Mr Cohen in permitting ASIC to amend the Notice of Appeal to include such a challenge at such a late stage is therefore self-evident, especially as ASIC's written submissions did not comply with [4.3] of Practice Note APP 2 in any event and the nature of the alleged error in the finding in J [92] was not explained in the proposed Amended Notice of Appeal.

20 For these reasons, the amendment application is refused.

WHETHER CONFLICTED REMUNERATION

21 The legislative provisions relied upon by ASIC to establish the alleged contraventions by Freedom Insurance and INSA are in these terms:

(a) s 963E(2) of the Act which provided:

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

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

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

(b) s 963F of the Act which provided:

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

(c) s 963J of the Act which provided:

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

22 Each of these statutory provisions required ASIC to establish the existence of conflicted remuneration along with other matters. ASIC pointed to the prizes as constituting such remuneration.

23 To establish that each of the prizes was conflicted remuneration, ASIC's pleaded case was that:

(a) in the course of selling or attempting to sell the FPP to consumers, the sales agents (as a whole):

(i) provided financial product advice within the meaning of s 766B(1) of the Act: [21] Statement of Claim;

(ii) further or in the alternative, gave information to persons in relation to a life risk insurance product within the meaning of s 963AA of the Act and reg 7.7A.11B(1) of the *Corporations Regulations 2001* (Cth): [21] Statement of Claim;

(b) pursuant to s 963L of the Act, each prize was presumed to have been conflicted remuneration within the meaning of s 963A of the Act because (*inter alia*) participating sales agents, including the prize-winning sales agent/agents, gave financial product advice to retail clients: [32.1.1], [51.1.1], [69.1.1] Statement of Claim;

(c) each prize was conflicted remuneration within the meaning of s 963A of the Act in any event because (*inter alia*):

(i) Mr Walker gave financial product advice to retail clients (in the case of the Vespa): [32.2.2] Statement of Claim;

(ii) participating sales agents, including the prize-winning sales agents, gave financial product advice to retail clients (in the case of the Bali 1 and Bali 2 packages): [51.2.2], [69.2.2] Statement of Claim;

(iii) the circumstances in which [each] Incentive was conducted (*inter alia*) could reasonably be expected to influence the financial product advice given by participating sales agents: [32.2.4], [51.2.4], [69.2.4] Statement of Claim;

(d) each prize was conflicted remuneration within the meaning of s 963AA of the Act and reg 7.7A.11B(1) of the *Corporations Regulations* because (*inter alia*):

(i) participating sales agents gave information to persons in relation to the FPP (in the case of the Vespa): [32.3.3] Statement of Claim;

(ii) a defined subset of the prize-winning sales agents gave information to persons in relation to the FPP (in the case of the Bali 1 package): [51.3.3] Statement of Claim;

(iii) participating sales agents, including the prize-winning sales agents, gave information to persons in relation to the FPP (in the case of the Bali 2 package): [69.3.3] Statement of Claim.

24 The primary judge determined that the prizes were not conflicted remuneration: J [318]. As a consequence, the primary judge concluded that no contraventions had been established, and that, accordingly, Mr Cohen could not have been involved in such contraventions: J [320]–[321].

25 Additional reasons were given by the primary judge for concluding that no contravention of s 963E had been established, which are addressed below.

Whether presumption in section 963L arose

26 Section 963L(b)(ii) of the Act contains a rebuttable presumption in these terms:

> **963L Volume-based benefits presumed to be conflicted remuneration**
>
> It is presumed for the purposes of this Division that a benefit of one of the following kinds is conflicted remuneration, unless the contrary is proved:
>
> …
>
> (b) a benefit access to which ... is wholly or partly dependent on the number of financial products of a particular class... :
>
> ...

(ii) acquired by retail clients, or a class of retail clients, to whom a financial services licensee, or a representative of a financial services licensee, provides financial product advice.

27 The expression "this Division" is a reference to Div 4 of Pt 7.7A of the Act, and each of ss 963E(2), 963F and 963J of the Act is contained within Div 4.

The primary judge's reasons

28 As to whether the presumption was engaged, the primary judge found that:

(a) each prize was a "benefit" within s 963L: J [228]. This finding is not challenged;

(b) it was common ground that the FPP was a "financial product" within s 963L: J [232]. This finding is not challenged;

(c) access to the prizes during the incentive programs was dependent on the number of FPPs acquired by retail clients: J [240]. This finding is not challenged;

(d) each sales agent was a representative of a financial services licensee: J [242]. This finding is not challenged.

29 However, in reaching the conclusion that the presumption did not apply:

(a) the primary judge was not prepared to infer that all sales agents provided financial product advice: J [267];

(b) it followed that the primary judge was not persuaded that the prize-winning sales agents provided financial product advice: J [268].

30 The first reason given by the primary judge for forming this view was that, as ASIC had not pleaded or identified the particular statements which constituted the financial product advice, this was fatal to ASIC's case.

31 As to this, the primary judge stated at J [247]–[251]:

> The allegations in ASIC's statement of claim (**SOC**) concerning the provision of financial product advice are cast at a very general level. ASIC does not identify any particular statements in the SOC.
>
> The central allegation is found in SOC [18.2], which is in the following form:
>
> > 18. In marketing and selling the Freedom Protection Plan during the Relevant Period, Freedom Insurance:
> >
> > ...
> >
> > > 18.2 provided financial product advice within the meaning of s.766B(1) of the Corporations Act to persons as retail clients; and

Particulars

The Sales Agents (defined in paragraph 20 below) provided financial product advice when they received inbound telephone calls and/or made outbound telephone calls for the purpose of marketing and selling the Freedom Protection Plan using scripts provided to Sales Agents by Freedom Insurance.

The "Sales Agents" are defined in SOC [20] as:

> … a team of people, including persons who made outbound telephone calls to, and/or answered inbound telephone calls from, consumers in order to sell, or attempt to sell, the Freedom Protection Plan to them on behalf of Freedom Insurance.

The SOC cross-references the allegation in SOC [18.2] – directly, or indirectly via SOC [21.1] – in other references within the SOC to the provision of financial product advice: SOC [12.2], [21.1], [32.1.1], [32.2.2], [51.1.1], [51.2.2], [69.1.1] and [69.2.2]. More particularly, the SOC contains allegations as to:

(1) *who* provided "financial product advice", namely:

  (a) Freedom Insurance, via the sales agents (SOC [18.2]);

  (b) the sales agents generally (SOC [21.1], [24.10], [25.9]) and more particularly:

    (i) Mr Walker (SOC [29], [32.1.1], [32.1.2] and [32.2.2]);

    (ii) the First Bali Sales Incentive prize-winners (SOC [46], [51.1.1], [51.1.2] and [51.2.2]);

    (iii) the Second Bali Sales Incentive prize-winners (SOC [65], [69.1.1], [69.1.2] and [69.2.2]); and

(2) *when* the financial product advice was provided, namely when the sales agents received inbound telephone calls and/or made outbound telephone calls for the purposes of marketing and selling the FPP using scripts provided by Freedom Insurance (particulars to SOC [18.2]); and more particularly during the periods that each of the Incentives was operative (SOC [32.1.1], [32.1.2], [32.2.2], [51.1.1], [51.1.2], [51.2.2], [69.1.1], [69.1.2] and [69.2.2]).

However, the SOC does not identify *what* the "financial product advice" was. As noted above, no particular statements are identified. Nor is there an allegation that a particular statement had characteristics which met the definition of "financial product advice". This is, of itself, fatal to ASIC's case that financial product advice was provided.

(Emphasis original.)

32 The second reason given by the primary judge for forming this view was that ASIC had failed to establish that the prize-winning sales agents had provided financial product advice. Implicit within this conclusion was that it was necessary for ASIC to prove that the prize-winning sales agents had provided such advice in order to enliven the presumption.

33 This was addressed at J [252]–[258]:

> Further, at an evidentiary level, ASIC did not seek to prove that the prize-winning sales agents provided financial product advice by adducing evidence of what each of those particular sales agents actually did and then identifying the statements made by those sales agents which were said to constitute financial product advice.
>
> That is not to say that ASIC did not adduce some evidence of what various sales agents said generally during calls to customers. In this regard, ASIC adduced evidence of some scripts used by the various sales agents and the recordings of some 15 calls made by sales agents, together with transcripts of those recordings. However, ASIC did not identify particular statements made by the sales agents and then explain why such statements satisfied the definition of financial product advice. Further, ASIC did provide some evidence of a call made by Mr Saphra but did not address which parts of that call were alleged to constitute financial product advice.
>
> With the exception of three of the 15 recorded calls, the sales agents involved therein were not prize-winning sales agents.
>
> Subsequent to the hearing, the Court wrote to the parties concerning the 15 recorded calls …
>
> ASIC's submissions in response did not invite the Court to draw any inference concerning the three identified prize-winning sales agents, relying instead upon a syllogism set out in its closing submissions and discussed below.
>
> ASIC contends, for the purposes of s 963L(b)(ii) of the Act, that it is not necessary to establish that particular financial product advice was given; and that it is sufficient to prove, in an abstract way, that the sales agents provided financial product advice from time to time. I do not accept that submission, which is contrary to the approach taken in *ASIC v CBA (FFC).*
>
> ASIC invites the Court to find that the prize-winning sales agents provided financial product advice to the retail clients, by reasoning in accordance with the following syllogism:
>
> (1) during the relevant period, *all* sales agents who were: (a) employed by INSA; and (b) representatives of Freedom Insurance, were persons who generally (or at least on some occasions) provided financial product advice (SOC [18.2] and [19] to [23]);
>
> (2) the prize-winning sales agents were: (a) employed by INSA; and (b) representatives of Freedom Insurance (SOC [29] to [31], [46] to [50] and [65] to [68]); and
>
> (3) thus, the prize-winning sales agents were persons who generally (or at least on some occasions) provided financial product advice (SOC [32], [51] and [69]).
>
> (Emphasis original.)

34 At J [265], the primary judge accepted ASIC's submission that proof of the provision of financial product advice does not necessarily require evidence from individual staff members or individual customers; and documentary evidence and inference may provide a sufficient foundation, citing *Australian Securities and Investments Commission v Commonwealth Bank*

of Australia (2023) 299 FCR 604; [2023] FCAFC 135 at [4] (Moshinsky J), [216] (O'Bryan J) and [288] (Jackman J) (***CBA***).

35 However, in reaching the conclusion at J [268] that he was not persuaded that the prize-winning sales agents provided financial product advice, and the conclusion at J [269] that the presumption in the chapeau to s 963L did not arise, the primary judge reasoned at J [266] as follows (with emphasis in original):

> ASIC relies upon the following strands of evidence in support of its contention that the Court should infer that *all* of the sales agents were providing financial product advice:
>
> (1) the authorisation in the Freedom AFSL to Freedom Insurance to provide general financial product advice. This does no more than raise the possibility that such advice was provided;
>
> (2) the training of sales agents in the use of "objection handling" techniques. However, this does not demonstrate that financial product advice was provided; nor does it, of itself, increase the likelihood that such advice was provided;
>
> (3) the QA guidelines which required the QA agents to determine whether the sales agents avoided personal and unscripted general advice. ASIC contends that the requirement to avoid personal and unscripted general advice suggests that scripted general advice was acceptable and was provided. I accept that this conclusion is open. However, the weight to be afforded to such a conclusion is dependent upon the scripts themselves, to which I know [sic] turn;
>
> (4) the scripts used by the sales agents. In this regard, ASIC tendered various scripts. However, it did not identify within those scripts the statements it contended amounted to the provision of financial product advice. Rather, ASIC invited the Court to read those scripts and to infer that sales agents were providing financial product advice. This, together with the deployment of a pleading which does not identify statements of a particular kind alleged to have constituted the provision of financial product advice, is an unsatisfactory approach, particularly in circumstances where Mr Oayda is a litigant in person, faced with a lengthy and complex trial and one in which ASIC seeks orders likely to have grave consequences for him. As a matter of procedural fairness (at least), the particular statements relied upon ought to have been identified. The Court is also entitled to expect, consistent with s 37M of the *Federal Court of Australia Act 1976* (Cth) that ASIC conduct the proceeding efficiently by identifying with some precision the statements allegedly made and why those statements constituted financial product advice; and
>
> (5) the tape recordings of 15 calls made by sales agents, together with transcripts of those calls, and a schedule (being Annexure B to ASIC's submissions), which set out extracts of those calls, but with no explanation as to which parts are contended to constitute the provision of financial product advice, or why this was so. The comments made in the previous sub-paragraph apply equally to the tape recordings and the transcripts of those recordings. As noted above, only three of the 15 calls were made by the prize-winning sales agents and ASIC did not invite the Court to draw any inferences from those three recordings.

Amended Notice of Appeal / Notice of Contention

36 By ground 1 of the Amended Notice of Appeal, ASIC complains of error by the primary judge as follows:

> 1. In determining whether the prizes were presumed to be conflicted remuneration by operation of s 963L of the Act, the primary judge erred by:
>
> a. misconstruing or misapplying ss 963A and 963L(b)(ii) of the Act as though s 963L(b)(ii) could operate in respect of a particular representative of a financial services licensee only if it were established that that particular representative actually gave financial product advice on one or more specific occasions: J [243]–[267], [276];
>
> b. concluding that it was 'fatal' to the Appellant's claim that its pleading did not identify (i) particular statements constituting financial product advice or (ii) that a particular statement had characteristics meeting the definition of financial product advice: J [251];
>
> c. requiring the Appellant to prove that particular statements were actually made by the prize-winning sales agents and how those statements constituted financial product advice: J [252]–[253], and see J [254]–[263];
>
> d. failing to draw the available inferences from the entirety of the evidence adduced by the Appellant that sales agents including the prize-winning sales agents provided financial product advice (within the meaning of ss 963A and 963L(b)(ii) of the Act properly construed): J [264]–[268].

37 By ground 1A of the Amended Notice of Appeal, ASIC contends that the primary judge erred in misunderstanding, or going behind, the concession made by Mr Cohen that the sales agents were representatives who provided financial product advice to persons as retail clients.

38 Ground 2 of the Amended Notice of Appeal states:

> 2. By reason of the errors identified in grounds 1A and 1 above, and the primary judge's findings at J [228], [232] and [240], the primary judge ought to have concluded that:
>
> a. sales agents including the prize-winning sales agents provided financial product advice (within the meaning of ss 963A and 963L(b)(ii) of the Act, properly construed);
>
> b. the prizes were volume-based benefits;
>
> c. the presumption in s 963L(b)(ii) of the Act was engaged (*contra* J [269]);
>
> d. the Respondents failed to displace the presumption; and
>
> e. the prizes were therefore conflicted remuneration for the purposes of Div 4 of Pt 7.7A of the Act;

and erred in not so concluding.

39 By ground 1 of the Notice of Contention, Mr Cohen contended that the presumption in s 963L of the Act applied only for the purposes of Pt 7.7A Div 4 of the Act, and did not apply to the claims advanced by ASIC against Mr Cohen under Pt 9.4B of the Act (being declaratory relief under s 1317E and injunctive relief under s 1324).

Whether presumption was capable of applying

40 As noted above, Mr Cohen contends that the presumption in s 963L of the Act did not apply to the claims advanced by ASIC, being a matter which he also contended at trial.

41 Mr Cohen submits that:

> … Section 963L of the Act only applies "for the purposes of [Part 7.7A, Division 4 of the Act]". It does not apply to a claim that a person is "involved" in contraventions of ss 963E, 963F or 963J of the Act. Part 7.7A, Division 4 of the Act (unlike, for example, ss 181-183) does not provide that a person who is "involved in" a contravention himself or herself contravenes the Act, and that question only arises because ancillary relief said to flow from the primary contraventions is sought against Mr Cohen under s 1324. The presumption created by s 963L was intended to only apply in relation to contraventions alleged against those paying and receiving the benefits in question, those being the persons with knowledge of the circumstances in which the benefits were given, and the factors relevant to the assessment of their influence [citing the explanatory memorandum: Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth), [2.19] and [2.20]]. Mr Cohen was not such a person and did not have available to him the full suite of material that may have otherwise been available to Freedom Insurance to rebut the presumption.

42 We do not accept this submission. First, the section does not specify that it "only applies" for the purposes of Pt 7.7A, Div 4. Rather, it "is *presumed* for the purposes of [Pt 7.7A, Div 4] that a benefit of one of the following kinds is conflicted remuneration …" (emphasis added), and thus Mr Cohen's interpretation misreads the text of the provision. Section 963L creates a presumption that there has been conflicted remuneration (and therefore a contravention) in certain circumstances, and if that contravention has been established, then it provides a sufficient basis to grant an injunction under s 1324. This construction arises out of the natural and ordinary reading of the words of the statute in context: see e.g. *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at [14] (Kiefel CJ, Nettle and Gordon JJ).

43 Second, Mr Cohen's approach requires us to read additional words of limitation into s 963L based upon a proposition derived from the extrinsic materials that the presumption was not intended by the legislature to apply to persons other than the giver or recipient of the benefit

identified in that section, and to ignore the plain meaning of the words used. Mr Cohen relies upon [2.19] and [2.20] of the Revised Explanatory Memorandum, which state:

> In an industry as complex and fast-evolving as the financial services industry, there are and will always be a wide range of remuneration arrangements. However, volume-based payments of the kind described in section 963L appear on the face of it to be inherently conflicted, since the financial adviser will have a financial incentive to maximise the value of the payments irrespective of the suitability of the products or investments for the client. *It would be legislatively impractical to define and categorise all remuneration arrangements precisely, and to prescribe in advance which are conflicted and which are not. Where there are volume-based benefit structures that are not inherently conflicted, this will be peculiarly within the knowledge of those paying and receiving the benefits. It is therefore appropriate that those parties be required to demonstrate that the benefits are not conflicted*.
>
> …
>
> The structure of the ban on conflicted remuneration recognises that employees in the financial services industry are remunerated in a variety of different ways. It also recognises that performance pay can be an important part of any remuneration arrangement, and reflects the need to strike a balance between rewarding performance and avoiding inappropriate influence over financial advice. This is why the presumptions in section 963L are linked to the potential influence of the remuneration over the advice. If an employee is remunerated based on a range of performance criteria, one of which is the volume of financial product(s) recommended, the part of the remuneration that is linked to volume is presumed to be conflicted. However, if it can be proved that, in the circumstances, the remuneration could not reasonably be expected to influence the choice of financial product recommended, or the financial product advice given, to retail clients (section 963A), the remuneration is not conflicted and is not banned. This will depend on all of the circumstances at the time the benefit is given or received. Factors that will be relevant in assessing whether a benefit could reasonably be expected to influence the advice will include the weighting of the benefit in the total remuneration of the recipient, how direct the link is between the benefit and the value or number of financial products recommended or acquired and the environment in which the benefit is given. For example, if the benefit was based on the total profitability of the licensee, it was on a small percentage of the total remuneration of the recipient, and in order to qualify for the benefit, the recipient must also satisfy other criteria, such as criteria based on consumer satisfaction and compliance with internal processes and legal requirements, it would be less likely of being able to influence the recommendations or advice provided to retail clients. Section 963L provides the industry with the flexibility to maintain broadly based performance-based remuneration arrangements without compromising the advice provided to retail clients.
>
> (Emphasis added.)

44 Notwithstanding the emphasised words in the Revised Explanatory Memorandum, neither the legislation nor the Revised Explanatory Memorandum, when read as a whole, supports the construction advanced by Mr Cohen.

45 This is especially so as the Revised Explanatory Memorandum should not be used to overcome the clear meaning of the words of the statute, as Mr Cohen seeks to do: *Saeed v Minister for*

Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23 at [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

46 Further, although Mr Cohen complains that he would not possess the requisite information to rebut the presumption, in practice, there is nothing to prevent a person who is not the giver or recipient of the benefit, such as Mr Cohen, from using available interlocutory processes (such as non-party discovery) to obtain evidence to rebut the presumption.

47 For these reasons, we do not accept that the presumption in s 963L did not apply to the claims advanced by ASIC against Mr Cohen.

ASIC's case at trial

48 The evidence adduced at trial concerned the conduct of sales agents in a call centre: see, for example, J [58]. The evidence was that the primary role of these sales agents was to convert leads (i.e. customer contact details purchased by Freedom from third parties) into sales of FPP, by making outbound calls: J [91], [105].

49 As observed above, ASIC's pleaded case for the purposes of s 963L was that the sales agents as a whole provided financial product advice in the course of selling or attempting to sell the FPP to consumers. That this was ASIC's case is made plain by the document entitled "Key Questions Arising" at [9] which contained a question asked by reference to all sales agents, and which was answered by ASIC as follows:

> Question 1 is: were the sales agents representatives who provided financial product advice?
>
> (1) ASIC says that they were: AS [E2(I)–(III)].
>
> (a) "financial product advice" means "a recommendation or a statement of opinion, or a report of either of those things, that (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or (b) could reasonably be regarded as being intended to have such an influence": s 766B(1).
>
> (b) That definition has been given an ample construction: AS [138]–[148], fnn 226–238.
>
> (c) The Freedom AFSL authorised Freedom Insurance to provide general financial product advice: T37 | FRE.0003.0002.0354 | 555
>
> (d) Key documents described Freedom Insurance and its representatives as providing general financial product advice, eg:
>
> (i) FIG Prospectus: T48 | FRE.0003.0002.0073 | 605

(ii) FPP Product Specification: T78 | SRE.001.001.0025 | 1492

(e) Scripts provided to sales agents contemplated and allowed for sales agents to give financial product advice: eg, T174–201.

(f) Training of sales agents encouraged them to engage in sales practices constituting financial product advice: eg, T202–236.

(g) ASIC's Regulatory Guide 36 (cross-selling constituting financial product advice): T27 | FRE.0003.0002.0785 | 304.

(h) In carrying out their ordinary work, under the direction of INSA (their employer) and/or Freedom Insurance (the financial services licensee in respect of which they were representatives), the sales agents ordinarily, routinely, or generally provided financial product advice: AS Annexure B.

…

(Emphasis and footnotes omitted.)

50 This case was the subject of ASIC's submissions at trial: see, for example, ASIC's Outline of Opening Submissions at [135] and [149]–[154]; ASIC's Closing Submissions at [222]–[244].

51 In support of this case, ASIC adduced evidence as to the following matters.

52 Freedom Insurance was authorised to provide general financial product advice under its AFSL. This was on the basis of an application that stated, among other things, that "the call centre scripting … will contain a limited amount of general advice".

53 Its publicly available documents indicated that Freedom Insurance used "predominately No Advice and General Advice processes" or "limited general product advice" to distribute its products. That it did so was also reflected in its internal documentation. For example, Freedom Insurance's Operations Manual indicated that the model which Freedom used to sell FPP was a general advice model.

54 Mr Adrian Turner, the Head of Sales, gave unchallenged affidavit evidence at trial that he understood that sales agents provided general financial product advice during telephone calls.

55 As part of their training, the sales agents were provided with and required to use "scripts" for the purposes of the calls: J [91], [96]. There were "intro" scripts tailored to the type of lead and "main sales" scripts specific to the cover being sold. For some parts of the scripts, sales agents were instructed to read the words in the scripts verbatim; for other parts, sales agents were told to "use your own wording to suit your style" and "put your own spin on [it]".

56 Sales agents were instructed that "[w]hen you provide General Advice it must always be scripted."

57 Extracts from recorded calls showed that sales agents frequently did go off script by recommending the consumer take up the FPP with introductions such as "good news" or "you've qualified for", even before the consumer had meaningfully engaged with the product.

58 Mr Daniel Saphra, a sales agent, gave unchallenged evidence that he often went off script and/or skipped parts of the script during sales calls, and he also heard other agents going off script.

59 The sales agents were trained to engage in certain sales techniques in order to encourage a prospective customer to acquire an FPP. If a customer raised an objection, the sales agents were trained to handle the objection by using certain techniques such as "social proofing" (that is, using language which promoted familiarity) and "being assumptive" (that is, using language which assumed the customer would purchase the insurance before they had given that indication). Examples of statements in training materials provided to sales agents included:

(a) "We've issued policies for a lot of people that said the same thing initially", "establish credibility… with the use of past success stories";

(b) "It can be useful to add that we are the 2nd largest provider of FEC in Australia based on new business annual premium income"; and

(c) "Agents should refer to other competitive advantages or areas if the customer objects again".

60 The sales agents were instructed that Freedom had been issued with an AFSL "which permits us" to "**provide general financial product advice** for life insurance products" but which warned that as its "licence only permits us to provide 'general financial product advice' **you must avoid providing any personal advice**, that is advice which takes into account a person's personal circumstances, needs or financial objectives" (emphasis original).

61 The calls were recorded and some received scores based on an "Agents Quality Rating" guide (**AQR Guide**) which included a "Product Explanation" and a "Use of Product Features" section, whereby sales agents were required to talk about perceived positive features of the product. It also contained a "Know Your Customer" section, and sales agents were instructed to use that information to establish the sale opportunity early by gathering information about the customer "then find out which of our product features might suit them".

62 The QA Marking Guidelines, a marking guide associated with the AQR Guide, required quality assurance (**QA**) agents to determine "Did the agent Avoid Personal and Unscripted General Advice", thereby reinforcing that scripted general financial product advice was acceptable.

63 Recordings of a random sample of 15 calls to customers formed part of the evidence before the primary judge. These recordings were relied upon to reflect the fact that the approach the sales agents were trained to adopt was the approach they adopted in practice.

64 ASIC also prepared and provided a table which extracted particular statements from those 15 calls to show examples of the sales agents seeking to influence the consumer whom they had called to purchase the product, as representative samples of sales calls made during the period 15 November 2017 to 15 March 2018.

Consideration

65 What constitutes "financial product advice" for the purpose of the Act is very broad: see *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at [363]–[366] (Sackville AJA); see also *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170; [2019] FCAFC 187 (Allsop CJ at [16] and O'Bryan J at [335]).

66 As Allsop CJ explained in *Westpac Securities* at [16]–[22]:

> The primary judge, correctly in my view… considered it appropriate to give a broad interpretation to "recommendation" and "statement of opinion", as words used in a provision intended to be, to a significant degree, protective….
>
> The protection of people from potentially selfishly motivated advice is not advanced by making fine logical distinctions based on overly precise linguistic choices about words of a general kind employed by Parliament in furtherance of the protective purpose. Protection from assiduous, clever and subtle advancement of another's personal interest may require a generous breadth of meaning of words that are taken from, and are intended to relate to, human relational experience, and a giving of practical flexibility in the application of those words to the reality of human experience.
>
> The question is one of the practical application of the statute to the context in question to see whether an express or implied "recommendation" (that is, a commending something by favourable representation or presentation as worthy of confidence or acceptance or as advisable or expedient) or "statement of opinion" (that is, a judgment or belief or view or estimation) was made. The two concepts are, of course, related. The opinion may be the basis of the recommendation; and the recommendation may carry with it an implied opinion.
>
> …
>
> … The complaint on the cross-appeal by Westpac is that the primary judge's meaning

> would encompass all advertising and marketing, and such are not, and could not be, advice. Thus, it was submitted the meaning given by her Honour was too wide.
>
> None of these provisions can be seen to be directed to what might be described or characterised as mere advertising. That, however, does not lead to the need for, or the appropriateness of, abstracted definition of categories of human behaviour or communication, outside the context of that actual behaviour or whole communication. The provisions are directed at the giving of advice that is contained in an express or implied recommendation or statement of opinion. That it may have some marketing or sales purpose is not the point. It is sterile to seek to draw a line between "advice" and "marketing" or "advertising", or to engage in abstracted defining of those things.…
>
> …The proper process is to examine the communication and exchange in its whole context to ascertain whether it is a recommendation or statement of opinion to the person. One does not add to this process by considering some further limitation of advice and imbuing that limiting characteristic with some element of evaluation or degree of consideration, as Westpac's submissions sought to do. There is certainly no bright line distinction to be made between "sales" and "advice". The communication or exchange may have a heavy "sales" purpose. That will not mean that it does not contain a recommendation or opinion that was intended, or could reasonably be regarded as intended, to influence a person in making a relevant decision.

67 After citing this passage with approval, Abraham J stated in *Australian Securities and Investments Commission v Select AFSL Pty Ltd (ACN 151 931 618) (No 2)* (2022) 162 ACSR 1; [2022] FCA 786 at [60] that a number of matters could be taken from *Westpac Securities*:

(a) a recommendation or statement of opinion necessarily involves something that is capable of influencing a person about a financial product or that reasonably could be regarded as having such an influence: *Westpac Securities* at [216];

(b) the terms "recommendation" or "statement of opinion" are not confined to formal advice but extend to any explicit or implicit encouragement: *Westpac Securities* at [217], [240];

(c) the terms have different meanings. A "recommendation" commends or urges a particular course of action by favourable representation or presentation, and an "opinion" is the expression of a belief, view, estimation or judgment. The two concepts are related, and often will be given together, although one can be given without the other: *Westpac Securities* at [18], [335]–[336];

(d) an implicit statement that the provider favours or commends a particular course of action without saying so in terms, or that the provider's view is that the contemplated course of action is likely to be beneficial to the client, is capable of amounting to "financial product advice": *Westpac Securities* at [16], [217]. It is not necessary for the communication to bear the character of "advice" or to be a recommendation "in the nature of advice" to constitute a recommendation: *Westpac Securities* at [216]–[217].

> Rather, the relevant communication in its whole context is to be considered, and an assessment of whether some express or implied recommendation or statement of opinion is to be made, rather than picking over decontextualised parts of a whole conversation: *Westpac Securities* at [12], [20], [217].

68 In *CBA*, the Full Court found that in order for ASIC to prove that CBA had provided financial product advice, proof was not required that CBA provided financial product advice on every occasion on which it distributed the relevant product, but that there had to be evidence from which the Court could conclude that financial product advice was given *on at least some occasions* (O'Bryan J at [204], Moshinsky J agreeing at [3] and Jackman J agreeing at [288]) (emphasis added).

69 Pausing there, the concession made by Mr Cohen at trial was to the effect that financial product advice was given on at least some occasions, on the basis that the question posed by the words in s 963A of the Act is whether the representative provides financial product advice in the course of their role in the business: see Mr Cohen's Closing Submissions at [205]. There is no reason why such a concession as to a factual matter does not extend to the same fact which is relevant to the application of s 963L of the Act.

70 The concession was repeated orally when counsel for Mr Cohen stated that:

> It's an acceptance that on occasion, sales agents provided financial product advice. … And so we accept that it's enough that if on occasion is what – which is all we say it was – sales agents gave financial product advice, then that puts you in the realm of 963A and means that you're operating outside the purview of the regulation.
>
> …
>
> And, as I've indicated, we accept the construction that ASIC advances on 963A in the sense that one just needs to ask, really, whether on occasion or from time to time general financial product advice was being given. If it was, that's your regime. And so that means – that's the operative regime. And I think that puts ASIC and Mr Cohen on the same footing in submitting that the regulation is actually not ultimately relevant to the resolution of the issues.

71 In *CBA*, the Full Court also held that in order for ASIC to prove that CBA provided financial product advice to retail clients, it was necessary to establish (on the balance of probabilities) that statements of a particular kind were made to retail clients, and that the content of those statements satisfied the definition of financial product advice. The Full Court held that proof of that fact did not necessarily require evidence from individual staff members or individual customers; the fact may be proved to the requisite standard by a combination of documentary evidence and inference (O'Bryan J at [216], with Moshinsky J agreeing at [4] and Jackman J

agreeing at [288]). As O'Bryan J emphasised at [175], the definition of conflicted remuneration in s 963A does not require proof that the licensee provides financial product advice on every occasion on which it distributes the relevant financial product, because, apart from anything else, the definition in s 963A is prospective in nature and is conditioned on the likelihood of the relevant benefit affecting the choice of financial product recommended or the financial product advice given in the future.

72 Justice O'Bryan (with Jackman J agreeing) considered that the evidence had not established that the CBA, as licensee, had given financial product advice to retail clients. As part of his Honour's reasons for that finding, O'Bryan J described the case advanced by ASIC as being "at a high level of abstraction", with the submissions and pleading not identifying the "written or spoken words that were said to constitute the financial product advice": see [207]–[210]. However, O'Bryan J did not state that this was the end of the matter or "fatal" to ASIC's case, but went on to analyse the lack of attention to the identification of specific statements in the documentary evidence relied upon by ASIC, including statements made in sales "scripts". His Honour then formed the view that ASIC had failed to discharge its burden of proving that CBA staff made statements to retail clients that satisfied the definition of financial product advice: see [211]–[220].

73 As noted above, the first reason given by the primary judge for deciding that it had not been established that financial product advice had been given was that, as ASIC had not pleaded or identified the particular statements which constituted the financial product advice, this was fatal to ASIC's case: see J [251]. With respect to the primary judge, that proposition has no proper legal basis and must be rejected. In a case such as this one, where ASIC led extensive evidence that the sales agents were providing financial product advice in the ordinary course, or alternatively on at least some occasions, and as a matter of routine, it was not necessary for ASIC to plead "decontextualised parts of a whole conversation" (to use the words of the Full Court in *Westpac Securities*), and its failure to do so was not "fatal" (as found by the primary judge). This is especially because, as the primary judge recognised at J [265], documentary evidence and inference may provide a sufficient foundation for proof of the provision of financial product advice.

74 Further, and in any event, ASIC *did* provide an extensive, detailed table which extracted specific statements made by sales agents within a random sample of 15 calls which it relied upon to establish that financial product advice was being given generally, routinely and, at the

least, on some occasions by sales agents. That table was annexed to its opening and closing submissions. This case is therefore different to *CBA* for this reason alone. We refer to *CBA* at [211] in particular.

75 The second reason given by the primary judge was that his Honour was not satisfied that the *prize-winning* sales agents provided financial product advice. However, by reaching this conclusion, the primary judge was answering the wrong question. That is for four reasons.

76 First, as a matter of construction, s 963L of the Act deems a benefit to be conflicted remuneration by reference to the terms of the benefit itself, and the words "a benefit access to which" appearing in paragraph (b) require that the question whether the sales agents were providing financial product advice to persons as retail clients falls to be addressed by reference to the entire cohort of sales agents who have access to (i.e. are offered) the benefits, having regard to the nature of their role overall as representatives of Freedom Insurance. However, the primary judge focused upon the prize-winning sales agents rather than upon the entire cohort of sales agents, which reflects a misapplication of s 963L.

77 Second, the language of s 963L is directed to the question of whether the "financial services licensee, or a representative of a financial services licensee" provides financial product advice to retail clients. That requires a characterisation of whether the business of the licensee, or the relevant representatives of that licensee engaging in that business, provide financial product advice as part of what they do. While evidence as to specific statements constituting financial product advice on identified occasions by particular representatives may be probative of that question, it is not, in itself, evidence which is required to be adduced for the presumption to arise.

78 Third, the correct question before the primary judge was that stated in Question 1 in the "Key Questions Arising" document, which had been provided by ASIC in its opening submissions, and which formed the structure of its argument and its pleaded case. As to this question, Mr Cohen conceded, in effect, that Question 1 should be answered in ASIC's favour, when he accepted with the benefit of hindsight that financial product advice had been provided to retail clients by sales agents on occasion. That concession was given in terms that align precisely with the approach taken by the Full Court in *CBA* at, for example, [204] (O'Bryan J).

79 Fourth, the outcome in *CBA* turned on the submissions and evidence which were before the Full Court in that case. By contrast, the evidence adduced by ASIC at trial in this case, and as

outlined above, was more than sufficient to establish that the sales processes utilised by the sales agents were designed to expressly or impliedly commend or urge a particular course of action, as opposed to merely informing the consumers about the basic features or administrative machinery of the FPP.

80 In particular, the sales agents were trained to persuade consumers to immediately purchase life insurance over the telephone, including by overcoming objections which they might have to such a purchase. Such calls were recorded, and a substantial proportion were monitored, to ensure that sales agents complied with the AQR Guide.

81 Further, the evidence adduced by ASIC included the random sample of 15 call recordings, and extracts from the transcripts of those recordings, which were relied upon by ASIC as proof that financial product advice was ordinarily and routinely provided to retail clients by sales agents. When the extracts are viewed as a whole, it is apparent that the way in which each of these calls was conducted reflects the training given to the sales agents, with the agents suggesting to the consumer, and seeking to influence the consumer, to purchase the FPP.

82 Notably, Mr Cohen did not challenge the representative nature of the sample provided, and did not point to any other sales calls or evidence which might suggest that financial product advice was not being provided by the sales agents generally.

83 In light of the evidence referred to above, it can be inferred that the sales agents as a cohort (of whom the prize-winning sales agents were members) were, during the relevant period, ordinarily, routinely or generally providing financial product advice.

Conclusion

84 For these reasons, the presumption in s 963L of the Act was engaged. Grounds 1A, 1 and (in part) 2 of the Amended Notice of Appeal are therefore upheld. Ground 1 of the Notice of Contention fails.

Whether presumption in section 963L rebutted

Amended Notice of Appeal / Notice of Contention

85 The primary judge did not address this issue, having found that the presumption did not arise: see J [269].

86 By ground 2 of the Amended Notice of Appeal (as set out above), ASIC complained that the primary judge ought to have found that the presumption in s 963L of the Act had not been rebutted.

87 By ground 2 of the Notice of Contention, Mr Cohen contended that:

> 2. If the presumption in s 963L of the Act applied to the claims advanced by the Appellant, it was displaced by the Respondent by reason of the following matters:
>
> a. sales agents had no choice as to the financial product sold;
>
> b. sales agents were required to follow scripts and had no choice as to any financial product advice or information given (if any such financial product advice was in fact given);
>
> c. sales agents were trained and directed to avoid giving financial product advice, and never to give unscripted general financial product advice;
>
> d. sales agents were subject to, and knew that they were subject to, quality assurance processes to monitor their conduct which could result in a loss of commission for non-compliant conduct;
>
> e. the actual purpose of the relevant incentives was to motivate sales agents to increase the volume of sales calls that they made; and/or
>
> f. the relevant non-monetary incentives were unlikely to have the requisite influence in light of the monetary commissions available to sales agents,
>
> (together, the **Expectation Factors**)
>
> (Emphasis original.)

Consideration

88 Mr Cohen bore the onus of demonstrating that the presumption, if it arose, was rebutted. He appeared to seek to do this by demonstrating that the statutory definition of conflicted remuneration was not satisfied because the Incentives, and the prizes offered under those Incentives, could not reasonably be expected to influence the financial product advice given by the representative.

89 The Expectation Factors (as defined in the Notice of Contention) will be dealt with in turn.

Sales agents had no choice as to the financial product sold

90 That the sales agents did not have a "choice" of financial product sold is neither relevant nor determinative. As observed by O'Bryan J in *CBA* at [167], with which we respectfully agree, "… [t]he possibility of conflicted remuneration within the meaning of s 963A… can apply in

circumstances where a financial services licensee has chosen to offer only a single financial product…".

Sales agents were required to follow scripts and had no choice as to any financial product advice or information given (if any such financial product advice was in fact given)

91 In fact, the evidence showed that while it is correct to say that the sales agents were required to read some parts of the scripts verbatim, for other parts they were encouraged to "use your own wording to suit your style" and "put your own spin on it". Such other parts encompassed the sales techniques taught to the sales agents, such as objection handling.

Sales agents were trained and directed to avoid giving financial product advice, and never to give unscripted general financial product advice

92 The nature of the training given to the sales agents is identified above. In particular, sales agents were directed to avoid giving *personal* financial product advice. Further and as a matter of substance, they *were* trained to give unscripted general financial product advice. The communications as a whole, including the unscripted portions in which the sales agents engaged in (for example) objection handling (being something which they were trained to do), constituted express and implied recommendations by the sales agents to acquire the FPP.

Sales agents were subject to, and knew that they were subject to, quality assurance processes to monitor their conduct which could result in a loss of commission for non-compliant conduct

93 While that might be so, it does not assist in rebutting the presumption. The QA processes involved training sales staff to find out information about customers so they could use that information to influence them to buy life insurance, and required sales agents to spruik a 12-month "free offer" and the perceived advantages of the FPP.

The actual purpose of the relevant incentives was to motivate sales agents to increase the volume of sales calls that they made

94 The purpose of the Incentives being implemented is relevant to the state of mind of Freedom Insurance, but it does not assist in rebutting the presumption as it says nothing about the impact on the state of mind of the sales agents who were motivated to increase their sales, whether by increasing the volume of sales calls or by other means.

The relevant non-monetary incentives were unlikely to have the requisite influence in light of the monetary commissions available to sales agents

95 We do not accept that the evidence established this, and we observe that the primary judge considered that the potential for the prizes to influence advice given by the sales agents was difficult to assess in the absence of evidence as to the earnings of sales agents: J [285]. Taking into account that the parties agree that the sales agents received $28 per hour plus possible commissions depending on the number of sales made, we cannot conclude that the offering of the Bali 1 and 2 packages and a Vespa was unlikely to have the requisite influence, as Mr Cohen contends.

Conclusion

96 For these reasons, the presumption was not rebutted by Mr Cohen with the consequence that the prizes were presumed to be conflicted remuneration by reason of s 963L of the Act. It follows that ground 2 of the Amended Notice of Appeal is upheld for this additional reason, and ground 2 of the Notice of Contention fails.

Whether conflicted remuneration within section 963A(b)

97 During the relevant period, s 963A(b) provided:

> ***Conflicted remuneration*** means any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it is given:
>
> ...
>
> (b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

The primary judge's reasons

98 As to whether the definition in s 963A(b) of the Act was satisfied, the primary judge found that:

(a) each of the prizes was a "benefit" within s 963A(b): J [273]. This finding is not challenged;

(b) each prize-winning sales agent was a representative of a financial services licensee: J [274]. This finding is not challenged;

(c) he was not persuaded that the prize-winning sales agents provided financial product advice to retail clients for the same reasons as given in relation to s 963L: J [276], [290]. This finding is challenged;

(d) he was not persuaded that the prizes could reasonably be expected to influence the financial product advice given by the sales agents: J [289], [290]. This finding is challenged.

99 The first reason given by the primary judge at J [281] for the last of these findings was the "absence of any clear articulation of the statements made which are alleged to constitute financial product advice given" because "no meaningful assessment of whether there is a reasonable expectation of influence can be undertaken without identifying the statements made and then considering the likely effect of the benefit upon future statements".

100 The second reason given by the primary judge is explained in J [282]–[288]:

> The second reason is that – as Justice Beach explained in *Australian Securities and Investments Commission v Westpac Banking Corporation (ACN 007 457 141) (ASIC v Westpac (Omnibus))* [2022] FCA 515; (2022) 159 ACSR 381 at 398 [91] – s 963A(b) of the Act is concerned with the capacity of a benefit to influence the content of financial product advice, not whether the benefit will influence a decision to give (or not give) such advice. In *ASIC v CBA (FFC)* Justice O'Bryan at 643 [165] (with whom Justice Jackman agreed at 672 [288]) endorsed the view expressed by Justice Beach.
>
> ASIC's submissions in support of its contention that the Incentives could reasonably be expected to influence the financial product advice given by the sales agents addressed – consistently with the allegations in SOC [32.2.3], [51.2.3] and [63.2] – the encouragement of the sales agents to sell a greater number of FPPs. For example, those submissions referred to the Incentives causing the sales agents to work harder and for longer hours (including weekends). However, as noted in the previous paragraph, s 963A(b) is not directed at influence upon the volume of sales achieved, rather it is directed at influence upon the content of advice given to the client.
>
> In the present case, the content of the financial product advice has not been identified. Thus, no meaningful assessment can be made of the capacity of the Incentives to influence such content.
>
> ASIC submitted that the value of the prizes (approximately $2,000 for each of the Bali 1 Package and the Bali 2 Package and $5,000 for the Vespa) was significant. The significance (and more particularly the potential for the prizes to influence advice given by the sales agents) is difficult to assess in the absence of evidence as to the earnings of the sales agents, although as set out at [127] above, Mr Cohen's evidence suggested in broad terms that the sales agents were well-remunerated. In any event, ASIC's submission is that the influence is upon volume of sales, not upon the content of calls.
>
> ASIC submitted that that [sic] the "Incentives were specifically designed to influence the financial product advice given by the representatives by changing the content of the financial product advice given (i.e. by objection handling more)". I do not accept this submission.

I accept that there was an increase in the use of "objection handling". However, I am not persuaded that, although objection handling may have changed what was said during the calls made, this would be expected to change the content of any financial product advice given.

ASIC's submissions included other circumstances which it contended established a reasonable expectation that the Incentives would influence the financial product advice given. These circumstances included: a contended absence of compliance requirements; and the transient nature of the sales agent workforce. There is little to be gained from analysing these circumstances when there has been no identification of the statements said to comprise the contended financial product advice.

Thus, I am not persuaded that the prizes, by reason of their nature or the circumstances in which they were given, could reasonably have been expected to have influenced any financial product advice given to retail clients of Freedom.

(Emphasis omitted.)

Amended Notice of Appeal / Notice of Contention

101 Grounds 3 and 4 of the Amended Notice of Appeal state:

> 3. In considering whether the Appellant had established that the prizes were conflicted remuneration within the meaning of s 963A(b) of the Act (having concluded that s 963L was not engaged), the primary judge further erred by:
>
> a. misconstruing or misapplying s 963A(b) as though that provision could operate in respect of a particular representative of a financial services licensee only if it were established that that particular representative actually gave financial product advice on one or more specific occasions, where s 963A(b) is prospective in nature: J [280]–[288];
>
> b. failing to conclude, on the entirety of the evidence, that the nature of the prizes or the circumstances in which they were given could reasonably be expected to influence the financial product advice given to retail clients by a representative, within the meaning of s 963A(b): J [289].
>
> 4. If (alternatively to ground 2 above) the prizes were not conflicted remuneration by operation of s 963L of the Act, then by reason of the errors identified in grounds 1A, 1 and 3 above, and the primary judge's findings at J [273], [274] and [275], the primary judge ought to have concluded that the prizes were conflicted remuneration within the meaning of s 963A of the Act (*contra* J [290]), and erred in not so concluding.

102 Ground 3 of the Notice of Contention states:

> The relevant incentives could not reasonably have been expected to influence any financial product advice given by sales agents of Freedom Insurance within the meaning of s 963A of the Act by reason of the Expectation Factors [as defined in Ground 2].

Consideration

103 Like s 963L, the question asked by s 963A is necessarily prospective and is conditioned on the likelihood of the relevant benefit affecting financial product advice given in the future: see *CBA* at [175] (O'Bryan J). The relevant inquiry posed by s 963A is to consider the position at the time the benefit is offered, and to look at the potential for that benefit to influence future financial product advice. The statutory language is thereby directed to the question of whether the "financial services licensee, or a representative of a financial services licensee" provides financial product advice to retail clients, which requires a characterisation of whether the business of the licensee, or the relevant representatives of that licensee engaging in that business, provide financial product advice as part of what they do.

104 It follows that the primary judge's finding that "no meaningful assessment of whether there is a reasonable expectation of influence can be undertaken" because ASIC had failed to identify statements said to constitute financial product advice was, respectfully, an error. For the same reasons as we gave in relation to s 963L, such an approach is erroneous because it adopts the incorrect premise that ASIC needed to identify precise statements made by particular sales agents to establish satisfaction of s 963A. That is the wrong approach in a case such as this one.

105 Applying the same reasoning, the conclusion in J [284] that no meaningful assessment could be made of the "capacity of the Incentives to influence [the] content" of the financial product advice because the content had not been identified is also an error, as was the failure to address ASIC's other submissions for this same reason at J [288].

106 As the primary judge appeared to accept at J [284] through his reference to the "capacity" of the Incentives to influence, s 963A is concerned with an *expectation* of influence, not whether there is *actual* influence upon advice given (or the content of any such advice). As O'Bryan J observed in *CBA* at [160], the phrase "could reasonably be expected to influence" in s 963A conditions the definition of conflicted remuneration on the likelihood of the relevant benefit affecting the financial product advice given in the future.

107 By its Statement of Claim, ASIC directed the primary judge to the correct, forward-looking question required by s 963A. For example, [51.2.4] pleaded that:

> … [T]he nature of the Bali 1 package, and/or the circumstances in which the Bali 1 package was given (that is, in which the First Bali Sales Incentive was conducted …) *could reasonably be expected to influence* the financial product advice given by the participating Sales Agents, including each of the [prize-winning sales agents] to retail

clients during the First Bali Sales Incentive Qualifying Period….

(Emphasis added.)

108 Such direction was also made through ASIC's Outline of Opening Submissions at [155]–[158]; Question 4 of the "Key Questions Arising" document; and ASIC's Closing Submissions at [254(2)] and [270]–[272]. See also Mr Cohen's Outline of Opening Submissions at [67] and his Closing Submissions at [208]–[251].

109 Although it was not necessary to determine whether there was actual influence upon advice given by the sales agents, the primary judge found at J [287] that there was an increase in the use of "objection handling" during the calls made.

110 As we have found, the sales agents provided financial product advice generally because they were trained to, and did, engage in "objection handling", being a sales technique which had the express purpose of influencing the consumer to acquire the FPP. Notwithstanding the express, unchallenged finding at J [287] that there was, in fact, an increase in objection handling, the primary judge found at J [289] that he was "not persuaded" that the prizes "would be expected to change the content of any financial product advice given". These two findings cannot be reconciled in light of our findings concerning the financial product advice which was routinely given by the sales agents as part of the business of Freedom Insurance.

111 That the amount of "objection handling" increased during the calls is not surprising, as it may reasonably be expected that sales agents would become more robust in their attempts to persuade the consumer to acquire the FPP as a consequence of the Incentives, and thereby increase the sales made by them.

Conclusion

112 For these reasons, the Incentives could reasonably be expected to influence the financial product advice given to retail clients by the sales agents within the meaning of s 963A(b) of the Act. Grounds 3 and 4 of the Amended Notice of Appeal are upheld and ground 3 of the Notice of Contention fails.

Whether conflicted remuneration within section 963AA and reg 7.7A.11B

113 This issue was the subject of ground 5 of the Amended Notice of Appeal and ground 4 of the Notice of Contention. We note that, based on our conclusions concerning the earlier grounds of appeal, reg 7.7A.11B has no application in this case as reg 7.7A.11B(1)(c) was not satisfied. It is therefore unnecessary to address these grounds.

WHETHER CONTRAVENTION OF SECTION 963E(2)

114 Section 963E(2) of the Act provides that:

> (2) A financial services licensee contravenes this section if:
>
> (a) a representative, other than an authorised representative, of the licensee accepts conflicted remuneration; and
>
> (b) the licensee is the, or a, responsible licensee in relation to the contravention.

The primary judge's reasons

115 The primary judge decided that contravention of s 963E(2) had not been established for three reasons:

(a) ASIC had not established that the Incentives were conflicted remuneration: J [319]–[320];

(b) ASIC had not established that the prize-winning sales agents were not "authorised representatives" of Freedom Insurance within the meaning of s 963E(2)(a): J [323]–[329];

(c) ASIC had not established that Freedom Insurance was "the, or a, responsible licensee in relation to the contravention" as required by s 963E(2)(b): J [330]–[339].

116 As to this last reason, the relevant passage of the primary judge's reasons stated at J [330]–[339]:

> *Secondly*, another element of s 963E(2) is that the impugned financial services licensee (i.e. Freedom Insurance) be "the, or a, responsible licensee in relation to the contravention".
>
> ASIC has pleaded, and Mr Cohen and Mr Oayda have denied, that Freedom Insurance was "the" responsible licensee in relation to the alleged contraventions by the prize-winning sales agents when they accepted conflicted remuneration.
>
> Section 960 of the Act defined "responsible licensee" as having the meaning given by s 961P of the Act, namely:
>
> **961P Responsible licensee**
>
> For the purposes of this Part, the, or a, responsible licensee, in relation to a contravention of a provision of this Part, is:
>
> (a) if the person who contravenes the provision is a representative of only one financial services licensee—that financial services licensee; or
>
> (b) if the person who contravenes the provision is a representative of more than one financial services licensee:

(i) if, under the rules in section 917C, one of those licensees is responsible for the person's conduct—that licensee; or

(ii) if, under the rules in section 917C, 2 or more of those licensees are jointly and severally responsible for the person's conduct—each of those licensees.

Thus, s 961P of the Act provided two methods of establishing the requisite relationship between the person who has contravened a provision of Part 7.7A (which includes ss 963E(2), 963F and 963J) and a licensee.

The first method is proof that each prize-winning sales agent was a representative only of Freedom Insurance: s 961P(a) of the Act. ASIC relied upon this method. However, I was not directed to evidence in support of the proposition that each of the prize-winning sales agents was a representative only of Freedom Insurance.

Instead, ASIC submitted that there is no evidence, nor any suggestion by Mr Cohen or Mr Oayda, that the prize-winning sales agents were representatives of any other financial services licensee and thus s 961P of the Act renders Freedom Insurance the responsible licensee. However, ASIC bears the onus of proof, and that onus is not discharged by suggesting that Mr Cohen and Mr Oayda did not adduce particular evidence.

Absent evidence capable of establishing that the prize-winning sales agents were representatives only of Freedom Insurance, I am unable to conclude that this was the case.

ASIC did not rely upon the second method, namely by proving that the sales agents were representatives of more than one financial services licensee (and how s 917C of the Act would operate on the facts). For completeness, I note that I was not directed to evidence establishing that the sales agents were representatives of more than one financial services licensee, or as to the operation of s 917C of the Act.

I note that during the course of his opening address, senior counsel for ASIC stated "[a]s we understand it, it's accepted that Freedom Insurance was the responsible licensee" (T44.5). This suggestion was not answered by senior counsel for Mr Cohen, nor by Mr Oayda. However, I do not regard such silence as an acceptance of the position, particularly in view of the pleaded denials of that proposition. Further, ASIC's closing submissions did not refer to such an understanding and instead set out the basis for its contention that Freedom Insurance was the responsible licensee (as per [334] above).

Thus, I am not satisfied that Freedom Insurance was the, or a, responsible licensee in relation to any contravention by the prize-winning sales agents.

(Emphasis original.)

Amended Notice of Appeal

117 Grounds 6 and 7 of the Amended Notice of Appeal state:

6. Having erroneously found that the Appellant did not prove that the prizes were conflicted remuneration, the primary judge further erred in concluding that:

a. the Appellant was required, but failed, positively to prove that the prize-winning sales agents were not 'authorised representatives' of a

financial services licensee: J [323]–[329];

b. the Appellant was required, but failed, positively to prove that Freedom Insurance was 'the, or a, responsible licensee' in relation to the alleged contraventions of s 963E of the Act: J [330]–[339]; and

c. the Appellant failed to establish contraventions by Freedom Insurance of s 963E of the Act.

7. By reason of the errors identified in grounds 1A–6 above, and on the entirety of the evidence, the primary judge ought to have concluded that Freedom Insurance contravened s 963E(1) [sic] of the Act on each occasion a prize-winning sales agent accepted conflicted remuneration (*contra* J [319]–[320]), and erred in not so concluding.

Consideration

118 On this appeal, Mr Cohen accepts that the prize-winning sales agents were representatives of Freedom Insurance within s 963E(2)(a). That is, each prize-winning sales agent was a representative who was *not* an authorised representative.

119 As to whether Freedom Insurance was "the, or a, responsible licensee" within s 963E(2)(b), this was a fact in issue in the proceeding, being a fact which was alleged by ASIC and denied by Mr Cohen in their respective pleadings.

120 The sales agents were call centre staff employed by INSA, and it was common ground at trial that each was a representative of Freedom Insurance as a financial services licensee. Notwithstanding his pleaded denial that Freedom Insurance was "the, or a, responsible licensee" within s 963E(2)(b), Mr Cohen did not advance any contention at trial that the sales agents were also representatives of another financial services licensee, separately from arrangements with their own employer. Nor did Mr Cohen adduce any evidence at trial to support such a contention.

121 Consistently with this conduct, when, in opening submissions, senior counsel for ASIC stated "[a]s we understand it, it's accepted that Freedom Insurance was the responsible licensee", there was never any suggestion to the contrary from Mr Cohen. ASIC's opening and closing written submissions at trial referred to the relevant statutory provisions and submitted that "[t]here is no reason to doubt that Freedom Insurance was the responsible licensee in this case". Mr Cohen did not submit to the contrary.

122 Similarly, we note that Mr Cohen did not make any submissions on this appeal to sustain the conclusions reached by the primary judge on this issue.

123 In circumstances where it was common ground that the sales agents were call centre employees who were representatives of Freedom Insurance by virtue of arrangements with their employer (INSA) and in the absence of any suggestion or evidence capable of supporting a finding that the sales agents were representatives of any other licensee, there was ample support for a finding that the sales agents were only representatives of Freedom Insurance within the meaning of s 961P(a) of the Act, and that therefore Freedom Insurance was "the, or a, responsible licensee in relation to the contravention" as required by s 963E(2)(b) of the Act. The primary judge therefore erred in failing to make such a finding.

Conclusion

124 For these reasons and having regard to ASIC's success on the earlier grounds of appeal relating to conflicted remuneration, grounds 6 and 7 of the Amended Notice of Appeal should be upheld. This has the consequence that the primary judge ought to have concluded that Freedom Insurance contravened s 963E(2) of the Act on each occasion that a prize-winning sales agent accepted conflicted remuneration, and that he erred in not so concluding.

WHETHER CONTRAVENTION OF SECTION 963F

125 Section 963F of the Act provides:

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

The primary judge's reasons

126 The sole reason given by the primary judge for concluding that s 963F of the Act was not established was that ASIC had not established that the Incentives were conflicted remuneration: see J [319]–[320]. We infer that his Honour intended to refer to the prizes rather than Incentives, having regard to the finding at J [318].

Amended Notice of Appeal / Notice of Contention

127 Ground 8 of the Amended Notice of Appeal states:

> 8. By reason of the errors identified in grounds 1A–5 above, and on the entirety of the evidence, the primary judge ought to have concluded that Freedom Insurance contravened s 963F of the Act, in circumstances where s 963F only required proof of a licensee's failure to '*take reasonable steps'* to ensure that representatives do not accept conflicted remuneration (*contra* J [320]), and erred in not so concluding.

(Emphasis original.)

128 By grounds 5 and 6 of the Notice of Contention, Mr Cohen contended that:

> 5. By confining its pleaded case to allegations that Freedom Insurance failed to take reasonable steps to ensure that the relevant incentives were not accepted, the Appellant failed, on the proper construction of s 963F of the Act, to advance sufficiently pleaded allegations of contraventions of s 963F of the Act.
>
> 6. The primary judge should have found that Freedom Insurance took reasonable steps to ensure that representatives of Freedom Insurance did not accept conflicted remuneration within the meaning of s 963F of the Act by reason of:
>
> a. its adoption of a formal compliance policy and a rise [sic] management framework to implement that policy;
>
> b. the training it provided to sales agents;
>
> c. its adoption of quality assurance processes and the conduct of those processes in practice;
>
> d. its engagement of external oversight and auditing of its quality assurance processes; and
>
> e. the Appellant's failure to adduce expert opinion evidence identifying any flaws or failures in those policies and processes.

Consideration

129 ASIC's pleaded case at trial relied on the same pleaded facts as were relied upon to allege a contravention by Freedom Insurance of s 963E of the Act, coupled with a broad allegation such as that Freedom Insurance "failed to have systems in place to ensure that the sales incentives such as the [relevant Incentive] complied with conflicted remuneration laws, before such incentives were offered and implemented".

130 No further particulars were provided of the systems which Freedom Insurance ought to have had, but did not, and nor was there any identification of the deficiencies in the processes and systems which it did have.

131 By its Closing Submissions, ASIC submitted to the primary judge that Freedom Insurance contravened s 963F each time one of the sales agents accepted the Bali 1 package, or the Bali 2 package, and when Mr Walker accepted the Vespa, as Freedom Insurance took no steps (or no reasonable steps) to ensure its representatives did not accept those prohibited benefits. Again, there was no articulation of the steps which ought to have been, but were not, taken or any analysis of the deficiencies in those steps which were taken by Freedom Insurance, coupled with submissions based on the evidence as to why those steps were not reasonable.

132 Mr Cohen submitted to the primary judge that ASIC's pleaded case was insufficient to sustain a contravention of s 963F of the Act. That is undoubtedly correct. The case as advanced before the primary judge was wholly insufficient to sustain a finding of contravention of s 963F of the Act. In this regard, we refer to and endorse the observations by Jackson J in *Australian Securities and Investments Commission v R M Capital Pty Ltd (ACN 065 412 820)* (2024) 172 ACSR 1; [2024] FCA 151 at [68]–[86]. We observe that ASIC did not submit that the approach by Jackson J to s 963F in that case was erroneous or should not be adopted.

133 On appeal, ASIC appears to seek to adopt a different approach to that taken below, and identifies factual findings made by the primary judge in the context of the breach of s 180 case brought against Mr Cohen, coupled with a submission that Mr Cohen did not lead certain evidence at trial, which "demonstrates an absence of reasonable steps having been taken".

134 However, ASIC cannot be permitted to depart from its pleaded case as this would be grossly unfair to Mr Cohen and would lead to injustice.

Conclusion

135 For these reasons, ASIC's challenge to the primary judge's conclusion that it failed to establish any primary contravention by Freedom Insurance of s 963F of the Act is rejected, and ground 8 of the Amended Notice of Appeal must fail. As for the Notice of Contention, ground 5 succeeds, and it is not necessary to address ground 6.

WHETHER CONTRAVENTION OF SECTION 963J

136 Section 963J provides that:

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

The primary judge's reasons

137 The sole reason given by the primary judge for concluding that s 963J of the Act was not established was that ASIC had not established that the Incentives were conflicted remuneration: see J [319]–[320].

Amended Notice of Appeal

138 Ground 9 of the Amended Notice of Appeal states:

> 9. By reason of the errors identified in grounds 1A–5 above, and on the entirety

> of the evidence, the primary judge ought to have concluded that INSA contravened s 963J of the Act (*contra* J [320]), and erred in not so concluding.

Conclusion

139 Having regard to ASIC's success on the earlier grounds of appeal, ground 9 of the Amended Notice of Appeal should be upheld. This has the consequence that the primary judge ought to have concluded that INSA contravened s 963J of the Act on each occasion that a prize-winning sales agent was given conflicted remuneration by INSA, and that he erred in not so concluding.

WHETHER CONTRAVENTION OF SECTION 180(1)

140 It was common ground at trial that Mr Cohen owed a duty, pursuant to s 180 of the Act, to each of Freedom Insurance and INSA, to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they: (a) were a director or officer of a corporation in the circumstances of; and (b) occupied the office held by, and had the same responsibilities within, each of Freedom Insurance and INSA: J [342].

The primary judge's reasons

Findings of fact

141 The primary judge preferred the evidence of Mr Cohen to that of Mr Malcolm McCool, a solicitor, who was called by ASIC at the trial. In this regard, the primary judge stated at J [26]–[29] in a section of the judgment entitled "Principal Findings of Fact":

> I pause to note that there are several areas in respect of which some witnesses differ in their recollections. Many of these differences were not explored or tested in cross-examination, and some are, at most, of peripheral relevance to the issues requiring determination on the pleaded case.
>
> There are, however, some areas of tension between the evidence of Mr Cohen and the evidence of Mr McCool which are of some importance to ASIC's case that Mr Cohen contravened s 180 of the Act.
>
> To the extent that there are differences between the evidence of Mr Cohen and Mr McCool, I prefer the evidence of Mr Cohen, particularly in circumstances where: (1) ASIC did not contend that Mr Cohen's evidence should not be accepted; (2) contemporaneous documents are more consistent with Mr Cohen's evidence than with Mr McCool's evidence; and (3) Mr McCool shifted during cross-examination, at times significantly, away from aspects of his affidavit evidence. For example:
>
> (1) evidence in his affidavit that he "did not take on any responsibilities for the compliance function and in particular, operational compliance" yielded in cross-examination to evidence that:
>
> (a) part of his role as Freedom's Head of Legal was to apply his legal skills to ensure that there was no non-compliance with any applicable financial services laws that related to Freedom's business;

(b) in his role as Freedom's Head of Legal, it was incumbent upon him to be aware of what was happening in the business, to apply his decades of experience as a financial services lawyer so as to identify any risks, and to take appropriate steps to address any identified risks;

(2) evidence in his affidavit suggesting that his role was limited to specific tasks when requested by Mr Cohen and that he had no involvement in, or responsibility with respect to the Incentives yielded in cross-examination to evidence that:

(a) he had been tasked by Mr Cohen with considering the effect of the legislative changes to be introduced by the Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016 (LIF Reforms) upon, inter alia, the arrangements between Freedom and its sales agents; and

(b) it was his responsibility to consider all aspects of the LIF Reforms including non-monetary incentives.

Nothing in these reasons for judgment should be taken as suggesting that Mr McCool was negligent. No such case was brought by ASIC, nor is such a case addressed herein. The observations and findings made with respect to Mr McCool are made in the context of the s 180 case brought by ASIC against Mr Cohen.

(Emphasis omitted.)

142 The primary judge made the following findings which are not challenged on this appeal.

143 On 10 July 2015, Mr Cohen entered into an employment contract with Freedom Insurance as its full-time managing director. His specific responsibilities were described in the contract as being "[t]o direct and control the Freedom group of companies [sic] operations and to give strategic guidance and direction to the business" with some specific duties identified: J [48].

144 Also on 10 July 2015, Mr McCool entered into an employment contract with Freedom Insurance as its "Head of Legal & Product Development, Company Secretary" with his specific responsibilities stated at J [49] to include:

(a) Legal, contractual, licensing and product development and related tasks; and

(b) Legal advice and guidance on contractual, licensing, product, operational and HR issues.

145 On 17 February 2016, Mr Wesley Chan of Swiss Re Life & Health Australia Limited (**Swiss Re**) forwarded to Mr Cohen and others an email from Ms Bianca Richardson, a senior policy manager with the Financial Services Council indicating that the LIF Reforms had been introduced in the House of Representatives on 11 February 2016 and providing a summary of key components covered in the Bill. Mr Cohen forwarded that email to Mr McCool: J [53]–[54].

146 On 11 April 2016, Mr McCool prepared and signed a notification to ASIC that Freedom Insurance wished to add him as a responsible manager on the Freedom AFSL, which identified that:

(a) Mr McCool was employed by Freedom Insurance as a legal adviser;

(b) it was proposed that financial services for which he would be responsible would be to "provide financial product advice" and "deal in financial product";

(c) he would spend one to three days per week on duties related to the provision by Freedom Insurance of such services; and

(d) his experience included experience in banking, general insurance, life insurance, "law firm/legal" and management with an overall type of experience as a technical adviser and in management with relevant industry experience exceeding five of the previous eight years.

(J [55]).

147 Mr McCool was added as a responsible manager, and he accepted in cross-examination that he represented that he was capable of giving legal advice in relation to Freedom's products, as to the provision of financial product advice, and dealing in financial products: J [56]–[57].

148 On 21 October 2016, Freedom and Swiss Re entered into a Product Development and Distribution Agreement: J [61].

149 Prior to entry into this agreement, Swiss Re undertook a due diligence process. Swiss Re's due diligence report included, with respect to, *inter alia*, "sales and retention" a recommendation to "proceed with no critical show stoppers identified": J [62].

150 Pursuant to this agreement, Swiss Re could conduct regular audits of Freedom's business to ensure compliance with the agreements and applicable laws. Such audits subsequently took place: J [63].

151 Mr McCool was described in a prospectus issued by FIG on 28 October 2016 as follows:

> Mr Malcolm McCool is the Group General Counsel of Freedom.
>
> Malcolm initially joined Freedom in 2011 to help facilitate the next phase of its development and has primarily been involved in project type initiatives relating to relationships with insurers and reinsurers and product and benefit fund design.
>
> **He is a senior lawyer with 30 years' experience in a range of corporate legal and management positions in the financial services industry.** For much of that period

he has been involved in the life insurance industry and has developed a unique mix of legal, product, process development and business and management skills that are ideally suited to a specialist life insurance business such as the Freedom group.

Malcolm was a founding member of ALI Group. Prior to the commencement of ALI Group in 2002, Malcolm held senior legal positions for 4 years with Westpac Banking Corporation (WBC.ASX) and became **a leading practitioner in the financial services reform laws that now regulate the insurance industry**. From 1990 Malcolm spent 8 years with Citibank group in various legal roles.

Malcolm holds a Bachelor degree in both Law and Commerce from the University of NSW.

(Emphasis added by primary judge at J [69]; see also J [64].)

152 The primary judge then referred to Mr McCool's evidence at trial at J [70]–[72]:

Mr McCool accepted in cross-examination that this description [in the prospectus] was accurate. He also accepted that:

(1) he was a senior lawyer with 30 years' experience in a range of corporate, legal and management positions in the financial services industry;

(2) he was a leading practitioner in the financial services reform laws that regulate the insurance industry;

(3) in issuing the prospectus, Freedom was representing to prospective investors that Mr McCool, as the general counsel of Freedom, would exercise all of the skills that are described in that part of the prospectus in discharging his responsibilities as the group general counsel and would be applying his legal skills to ensure that there was no non-compliance with any applicable financial services laws that related to Freedom's business; and

(4) one of the ways that he would discharge his responsibilities would be to ensure that there was no non-compliance with any applicable financial services laws.

Mr McCool also gave evidence that:

(1) he and Mr Cohen worked well as a team and their familiarity with each other, which had developed over years, allowed Mr McCool a high degree of autonomy;

(2) Mr Cohen did not try to micro-manage Mr McCool's work;

(3) he understood that Mr Cohen had a high regard for Mr McCool's skill and competence as a lawyer;

(4) he was aware of the general conflicted remuneration provisions in the Act; and

(5) it was his view in 2017 that the conflicted remuneration provisions of the Act did not apply to incentives such as the First Bali Sales Incentive and the Vespa Incentive. This was based on his understanding that Freedom operated on a "no advice" model.

As to the "no advice" model, Mr McCool gave evidence that:

(1) prior to 1 January 2018:

> The understanding was that we – that the business was doing a no

> advice model and that sales agents were not permitted to provide advice in those calls. I think we confirmed in the scripts that there was no advice in the scripts. They were purely factual. And, therefore, the conflicted remuneration provisions that related to advice which I think came into effect early in that decade didn't apply to the Freedom – to the Freedom business.;
>
> (2) and:
>
> I recall saying to Mr Cohen, prior to March 2018 and based on the scripts I had seen to that point, words to the effect, *"from what I have seen, we don't have general advice in our scripts"*. From what I had seen prior to March 2018, the content of the scripts was primarily factual, but I was unaware of the context, such as training, and management instructions that might impact how the scripts were utilised…
>
> (Emphasis original.)

153 Ms Diane Osborne was, from late 2016 until December 2017, Freedom's Head of Risk and Compliance: J [360]. Ms Osborne was described in the prospectus as follows:

> **Ms Diane Osborne is the Head of Risk Management and Compliance for Freedom.**
>
> Diane joined Freedom in 2016 and **is responsible for overseeing all regulatory requirements, risks and the day-to-day compliance issues of the Company**. Her responsibilities for the Company is to ensure all staff including management and employees adhere strictly to the Company compliance policies and procedures.
>
> **Diane comes from a background of more than 20 years' experience in financial services as a senior legal, company secretarial and compliance manager**. Prior to her current role, Dianne was General Counsel and Compliance Manager at Uniting Financial Services, General Counsel and Company Secretary at Cuscal Limited, Legal Head of Retail & Business Distribution at Westpac Banking Corporation (WBC.ASX), Legal Head of Product & Compliance at St. George Bank (subsidiary of WBC.ASX) and Global Head of Legal & Compliance at AMP Ltd (AMP.ASX).
>
> **Diane holds a Bachelor of Arts and a Bachelor of Law from Macquarie University**.
>
> (Emphasis added by primary judge at J [75].)

154 On 17 November 2016, and in connection with its proposal to list on the ASX, Freedom issued a compliance policy, which included these statements:

(a) "the Head of Legal's compliance obligations include providing specific, general and compliance advice and guidance to business units, management, Team Leaders and the Board" (which Mr McCool accepted was an accurate description: J [77]);

(b) "[as part of the Framework Governance]: Line 2: Risk & Compliance Team – provide advice, review and oversight of obligations and ensure the compliance framework is fit for purpose";

(c) "the line 2 Risk & Compliance Team and Head of Legal must meet on a regular basis to ensure that the Compliance framework is fit for purpose and is being consistently implemented. This Compliance forum should consider compliance obligations, risks, breaches and other compliance information and be attended by all line 2 Freedom compliance professionals".

(Emphasis omitted by primary judge at J [76]).

155 On 1 December 2016, FIG was listed on the ASX and from this time, the companies within Freedom operated as one business, with business and management matters relating to the respective companies being reported to the directors of FIG: J [79].

156 In 2017 and following FIG's public listing, Mr Cohen devoted less time to the day-to-day operations of Freedom and devoted more of his time to more strategic issues within Freedom: J [81]. Mr Cohen had confidence in his senior executive team to focus on the day-to-day operations of Freedom: J [83].

157 As at January 2017, Mr McCool accepted that he needed to, and did, understand how Freedom's representatives were paid: J [87].

158 On 1 February 2017, a product specification for the FPP was approved by Swiss Re and Freedom and signed by Mr Cohen. The product specification included these statements:

> The product will be distributed by [sic] on a predominantly "no advice" basis. Call centre staff may be permitted by Freedom to provide limited general financial product advice to customers or prospective customers. Where Freedom permits the provision of general advice in this manner it will be fully scripted by Freedom. Promotional material may also contain basic general advice in connection with the product.
>
> No personal financial product advice will be provided by Freedom or call centre staff to customers or prospective customers.
>
> (Emphasis omitted.)

(J [88]).

159 Freedom distributed the FPP on behalf of Swiss Re, through a combination of inbound and outbound telephone calls to or from Freedom's call centre. Sales agents working in the call centre were provided with scripts to follow in their calls which prescribed the information that the sales agents were required to provide to potential customers during the course of the call: J [91].

160 It was Mr Cohen's intention when establishing Freedom and developing the funeral insurance product that the FPP would be distributed by Freedom's call centre on a "no advice" basis, in that neither general nor personal advice would be provided by call centre staff to the customer. Mr Cohen understood that the scripts that were provided to sales agents were developed on that basis: J [92].

161 From time to time when Mr McCool was discussing product documentation, scripts and other issues within Freedom's business, Mr McCool told Mr Cohen that Freedom did not have any general advice in its scripts: J [93].

162 On about 14 June 2017, Ms Osborne prepared a Risk Management Framework Review document, which included:

> **Recommended Resolution**
>
> The Board resolved that:
>
> *1. The current risk management framework continues to be sound and sufficient for the financial year ending 30 June 2017.*
>
> *2. Statements be included in FIG's annual report confirming that the Board reviewed FIG's risk management framework during FY17 and was satisfied that it continues to be sound*
>
> **Background**
>
> In accordance with Recommendation 7.2 of the ASX Corporate Governance Principles and Recommendations, prior to 30 June 2017 the Board or the Audit and Risk Committee should:
>
> (a) undertake an annual review of FIG's risk management framework to satisfy itself that it continues to be sound; and
>
> (b) disclose in its FY17 Corporate Governance Statement, whether such a review has taken place.
>
> **Overview**
>
> Freedom has a number of policies, practices and processes which currently ensures that there are:
>
> - Adequate procedures for identifying risks;
> - Policies that are a reasonable balance between cost and risk; and
> - Measures to ensure the organisation is adequately protected.
>
> This paper seeks to provide the Board with an overview of the current risk management processes within FIG.
>
> **Controls and Management of Risks**
>
> Current controls used to manage risks include:

- Small hands-on management team aware of the primary risks facing the business and responsible for managing and monitoring those risks;
- Management structures that enable immediate and decisive action to be taken to address risks as they arise;
- Regular management meetings and interactions to enable identification of issues and risks:
- Corporate decision making which includes a discussion of the potential risks embedded in those decisions.
- Alignment of interests between management and the business
- Expertise in all relevant areas of the business including legal and financial
- Tight controls on expenditure with authorities generally limited to CEO and CFO

…

- Checklists for ensuring legal compliance
- Review and sign off approval process for documentation and processes
- Comprehensive sales agent training and Scripting for all sales calls

…

Audits and reviews (External)

Recent reviews and audits have confirmed no adverse findings. Improvements suggested have been implemented, where required, to address any issues or gaps identified. These include:

- AFSL Audits of both Spectrum and Freedom by Crowe Horwath
- A financial audit by Crowe Horwath of both Freedom and Spectrum
- A due diligence review by Swiss Re of the distribution and administration processes and controls prior to product launches
- A due diligence process conducted by Piper Alderman as part of the IPO and ASX listing process in 2016

Recent Enhancements

…

- employment of a Head of Risk and Compliance

…

(Emphasis original.)

163 In Mr Cohen's view, the controls (which we infer is a reference to the Controls and Management of Risks section) were consistent with the way in which the Freedom senior executive team operated: J [100].

164 Mr McCool understood from reading the Risk Management Framework Review document that he and other executives of Freedom were required to take immediate and decisive action where necessary to address risks as they arose and to have regular management meetings and interaction to enable the identification of issues and risks: J [101].

165 The Risk Management Framework Review document also referred to "Recent Enhancements", stating:

> As part of its aim for continuous improvement considerable progress has been made in the previous 9 months towards formally documenting and implementing the risk management process ...

(J [102]).

166 This was consistent with Mr Cohen's view of the way in which Freedom was moving. Freedom began to develop more formal practices and procedures as the organisation grew and in particular after the listing of FIG. Mr Cohen recalled numerous conversations with Mr McCool about the development of these practices and procedures within Freedom in which Mr McCool told Mr Cohen that controls and processes would be added as the organisation grew, with controls that were appropriate for its size: J [103].

167 During September 2017, Freedom suffered a significant downturn in its sales of the FPP: J [6]. The slump in sales caused a drop in the morale, and the commission earnings, of the sales agents: J [106].

168 On 8 September 2017, Mr Cohen forwarded to Mr McCool an email he had received from Ms Bronwyn Kirwan of Swiss Re concerning the LIF Reforms and a proposed review to be conducted by Swiss Re concerning remuneration. Ms Jennifer Andrews (a former CFO of Freedom), Mr McCool and Ms Norma Pezikian were involved in that review on behalf of Freedom: J [107].

169 Mr McCool understood the LIF Reforms to be an important piece of legislation and that Mr Cohen, by forwarding the email to Mr McCool, expected Mr McCool to take appropriate steps with respect to the email. He also understood that the proposed changes affected remuneration for sales agents. Mr McCool familiarised himself with the proposed changes: J [108].

170 As stated at J [109], Mr Cohen:

(a) was involved in numerous discussions about the LIF Reforms and the impact they would have on Freedom's business, both with executives at Freedom and with people at Swiss Re (and Ms Kirwan in particular);

(b) understood in 2017 that the most significant way in which the LIF Reforms could potentially impact Freedom's business was through the introduction of a cap on upfront commissions and new minimum periods for "clawbacks" of commissions where policies had lapsed;

(c) was concerned that although the LIF Reforms capped, but did not completely ban, upfront commissions, a wholesale ban on upfront commissions could be introduced in the near future. Upfront commissions were a significant proportion of Freedom's business and so a ban on upfront commissions would affect Freedom's entire business; and

(d) expected that Mr McCool would be considering the LIF Reforms and their impact on Freedom's business and based on his discussions with Mr McCool in 2017, believed he was doing that.

171 Mr Cohen was also involved in numerous discussions with Mr McCool and other members of Freedom's senior executive team and Swiss Re about whether changes would have to be made to the commission arrangements between Freedom and Swiss Re in order to comply with the new legislation. Mr McCool was advising Freedom about the impact of the LIF Reforms and working with Swiss Re to consider the impact that the reforms might have on the commission arrangements between Swiss Re and Freedom: J [110].

172 In October 2017, Ms Lisa Delahunty commenced with Freedom as a risk and compliance officer. She reported to Mr McCool and worked with Ms Osborne within the "compliance function" of Freedom: J [111].

173 On 13 October 2017, Ms Kirwan of Swiss Re sent an email to Mr Cohen and Mr McCool indicating that Swiss Re had been working through the proposed LIF Reforms and was working towards providing a formal opinion to Freedom before the end of October 2017: J [115].

174 During November 2017, Mr Cohen and Mr Oayda (a consultant to Freedom) discussed the decline in Freedom's sales and the need to act so as to arrest this slump: J [123]. Mr Oayda suggested running a competition involving a trip to Bali and setting individual targets based

upon each sales agent's experience and skill level, so as to enable all sales agents to have a good chance of qualifying for the trip if they simply worked to their ability and maintained their attendance levels. Mr Cohen agreed, considering that this would provide all of the sales agents with a chance to win; and would "lift the mood": J [124].

175 Mr Cohen viewed Mr Oayda's suggestion favourably because it involved giving sales agents individual targets relative to their ability, as opposed to being an incentive won by the agent or agents who made the highest number of sales in absolute terms. In his view, individualised targets meant that sales agents would be able to reach their targets, and obtain the incentive, simply by working consistently with the way they had worked before. Mr Cohen thought the proposed incentive would discourage absenteeism because the agents would realise that simply by coming into work every day, or perhaps working a few extra hours or on a weekend, they would be able to reach their individual target. He also considered that the targets were achievable for the sales agents without requiring them to change the way they were already working or to significantly increase the number of sales they were making: J [125].

176 The achievability of the prize was important to Mr Cohen because he felt that the sales agents had been through a difficult period (including a reduction in commissions) during the sales slump caused by lead generation issues. He wanted the sales agents to feel that the prize offered was achievable so that they would feel motivated again after a difficult period: J [126].

177 Mr Cohen did not consider the cost of each Bali trip (approximately $2,000) to be material, relative to the overall earnings of the sales agents (when they could, in some cases, earn tens of thousands of dollars in commission in addition to their base salary), or relative to the overall costs of Freedom's business: J [127].

178 The proposed Bali sales incentive was subsequently approved by Mr Cohen: J [131]. After his initial discussions about the proposal with Mr Oayda and Mr Turner in November 2017, Mr Cohen had little further involvement in the development and implementation of the proposed incentive. He was aware that it was happening from email updates he received from time to time, and it was discussed in weekly management meetings. He was also aware of decorations in the office relating to Bali, and that staff were speaking about it. However, after the initial discussions with Mr Turner and Mr Oayda, Mr Cohen left it to them to finalise the terms of the proposal, such as the eligibility criteria and its duration, and to inform the sales staff of it: J [134].

179 Mr Cohen had conversations with Mr Turner during the period of the First Bali Sales Incentive in which Mr Turner indicated that that Incentive was having the desired effect and was working very well, with sales agents and team leaders being a lot more positive: J [139].

180 Mr Oayda's evidence, which was accepted, was that: (1) the script for the sales agents did not change during the period of the First Bali Sales Incentive; (2) the QA department treated and marked the calls during the competition in the same way as it did prior to the First Bali Sales Incentive; and (3) during that Incentive no change in selling behaviour by the agents was detected by the QA team: J [145].

181 Soon after the decision to run the First Bali Sales Incentive, someone mentioned to Mr Cohen that another call centre was running an incentive involving a Vespa as a prize. Mr Cohen mentioned this to Mr Oayda and Mr Turner. They discussed the idea of running a similar incentive at Freedom involving a Vespa; and Mr Cohen agreed that such an incentive could be run. This incentive was to operate concurrently with the First Bali Sales Incentive. Mr Cohen thought of it as a small additional gesture to create some more excitement in the office and to give the sales agents something to talk about. Mr Cohen was not involved in setting the eligibility criteria for the Vespa Incentive. The Vespa was in the Freedom office on the same level as the sales agents for several weeks and, according to Mr Cohen, it created a "buzz" around the office: J [148]. Mr Cohen understood that the Vespa would be won by the sales agent who made the most sales during the operation of the Vespa Incentive: J [149].

182 During the latter part of 2017, Mr McCool was involved in Swiss Re's review of its arrangements with Freedom in the light of the LIF Reforms. During the period of that review, Mr McCool and Mr Cohen had a number of conversations concerning that review. Mr McCool gave evidence that during one conversation, the following was stated:

> Mr McCool: I can see the effort that has been made to create a compliance and customer service overlay, but even with these checks and balances, I'm not sure whether we will be compliant. It may be, but I really can't say for sure whether this complies with the conflicted remuneration changes as I don't know much about balanced scorecards. The legislation is new and I have little to go off other than the ASIC guidelines and some general commentary. We could get advice from Herbert Smith Freehills who advised Swiss Re and seemed to have a good feel for the new laws?
>
> Mr Cohen: *I don't think we need advice. I think we should go ahead with the current remuneration arrangements but should revisit if we learn anything new.*
>
> (Emphasis added by primary judge at J [155]).

183 The primary judge did not accept that Mr Cohen said the emphasised words in this conversation: J [156]. At J [157], the primary judge recorded that Mr McCool gave the following evidence at trial (with the emphasis added by the primary judge):

> ... So in addition to that line of work that involved considering the arrangements between Freedom and Swiss Re, **there was also some work to be done to consider the commission arrangements between Freedom and Freedom's sales agents**; is that right?---**That's correct**.
>
> And you say, do you, that there were some meetings that took place at the end of 2017 on that topic?---That's right.
>
> **And do you accept that it was your responsibility, as the head of legal at Freedom, to consider the effect of the legislative changes insofar as the arrangements between Freedom and Freedom's sales agents was concerned?---That was the job I had been tasked with by Keith and that's what I was doing. Yes.**
>
> And was that consideration confined to commissions paid to sales agents, or did it encompass all aspects of sales agent remuneration, including sales incentives?---**It covered all aspects**, but the focus was on the – the – the commission scheme.
>
> The focus was on the monetary commissions; is that right?---That's right.
>
> And so when you say at paragraph 52 of your affidavit – you refer there to some informal discussions with Mr Cohen as to the impact of the LIF reforms on sales agent remuneration and incentives; do you see that?---Yes.
>
> Should his Honour understand that by the word "incentives" there you're referring to monetary incentives, that is to say, commissions?---No. I believe that was meant to be a broader – broader concept, and it was to all – all remuneration paid to sales agents.
>
> So is this right, that you say – are you telling his Honour that Mr Cohen had charged you with responsibility for considering the impact of the LIF reforms on all aspects of sales agent remuneration, commissions, as well as incentives, including [n]on monetary incentives?---The reality was – is that I was aware of the legislation, had had a number of discussions with Keith, and I was obviously going to work through the legislation, obviously, because I had been learning a lot through Swiss Re, and I was going to then work with Keith to determine compliance with all level – with both monetary and non-monetary remuneration for – for agents.
>
> **So you accept, don't you, that it was your responsibility, as the head of legal to consider all aspects of the changes that were coming into effect on 1 January 2018, including the effect on the commission arrangements as well as on the non-monetary incentive that were paid to - - -?---That's what I was advising on, yes.**

184 By late November 2017, Mr McCool was aware that the First Bali Sales Incentive was running. He did not regard this as an issue because he held the view that non-monetary incentives were generally permissible under the Act, and he assumed that the First Bali Sales Incentive would end before the LIF Reforms came into effect on 1 January 2018. For that reason, Mr McCool did not consider whether the First Bali Sales Incentive complied with the LIF Reforms: J [158]. However, some of the sales agents were allowed to extend their involvement in the First Bali Sales Incentive into January 2018 for a few days: J [161]–[162].

185 Mr Cohen's understanding from the review of the LIF Reforms that was undertaken was that the LIF Reforms had necessitated some relatively minor changes to the commission arrangements between Swiss Re and Freedom, and that those changes had been implemented by the end of 2017, ready to take effect from 1 January 2018. No one within Freedom indicated to Mr Cohen that the LIF Reforms necessitated any immediate changes to Freedom's incentive programs, including the incentives that were running at the end of 2017: J [164].

186 On 1 January 2018, the LIF Reforms took effect, with the commencement of the *Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017* (Cth).

187 In around January 2018, Mr Cohen indicated to Mr Oayda and Mr Turner that he had no issue with what was then a proposal to run the Second Bali Sales Incentive: J [169]–[170]. The Second Bali Sales Incentive commenced on 15 January 2018 and was to conclude on 28 February 2018. However, it ran until 24 March 2018 for one sales agent: J [174], [187].

188 On 2 February 2018, the Vespa was presented to Mr Walker: J [181].

189 From about March 2018, and at the direction of Mr Craig Orton (who joined Freedom as Chief Operating Officer in February 2018), Mr McCool took steps to obtain advice on Freedom's approach to conflicted remuneration from external lawyers: J [184], [189].

190 Mr Cohen was aware by March 2018 that Mr McCool was arranging for external lawyers to give advice to Freedom on all of Freedom's remuneration arrangements and incentives involving their sales agents, and understood that Mr McCool was collating information for the purpose of briefing those lawyers: J [195]. Mr Cohen did not recall Mr McCool raising any specific concerns about any of Freedom's incentive programs and the application of conflicted remuneration provisions to them with him in March 2018 and as far as Mr Cohen was aware, no specific incident prompted Mr McCool to seek advice from external lawyers. Mr Cohen did not understand there to be any particular urgency with respect to the advice. Throughout 2018, on several occasions, Mr McCool said to Mr Cohen that it was possible that the "clawback" requirements could apply to agent remuneration, but he was not sure how that could work in practice; some advice on it was needed; and it may be that some "tweaks" to the agents' remuneration arrangements were needed: J [196].

191 On 29 March 2018, Mr McCool sent an email to external lawyers with a formal request for legal advice regarding sales agent incentive schemes. The covering email indicated that Freedom was:

> … very much interested in ways of improving our incentive schemes to drive the right behaviour in light of ongoing industry demands.

(J [199]).

192 On 2 May 2018, Mr McCool sent an email to Mr Orton and others, including Mr Cohen. The email referred to the need to consider, among other things, agent training, sales scripting, QA processes and agent remuneration (particularly commissions and the balanced scorecard), in light of increased "regulatory expectations". Mr Cohen understood Mr McCool to be referring in his email to ensuring compliance with requirements that had already been implemented in legislation as well as ensuring Freedom was operating consistently with ASIC's expectations, in circumstances where the industry was facing increasing scrutiny, and it was likely that regulations were going to become more stringent in the future. The email did not raise any specific concerns about any of Freedom's non-monetary incentive programs: J [202].

193 On 8 June 2018, the external lawyers provided Mr McCool with their draft advice regarding sales agent remuneration. On 19 June 2018, Mr McCool sent an email to Mr Orton and Mr Cohen concerning the draft advice, indicating that he found it very disappointing, and stating that either he could work with the lawyers to improve the advice or alternatively prepare the advice himself. It was subsequently decided between Mr Orton and Mr McCool that Mr McCool should prepare the advice given his subject matter expertise and his knowledge of Freedom's business: J [203]–[204].

194 At that time, Mr Cohen understood – based on discussions he had with colleagues in the industry and his discussions with Mr McCool about the advice – that many people in the industry were struggling to understand the implications and practical consequences of the LIF Reforms, how the requirements were going to be enforced and interpreted, and how organisations could ensure compliance: J [205].

195 In around June 2018, the directors of FIG, including Mr Cohen, received a risk and compliance report for May 2018. That report included under the heading "Compliance & Risk Initiatives":

> Freedom has received formalised legal advice recommending that Freedom address the need to undertake a comprehensive review of all scripting, training, remuneration

> programs and quality assurance processes. This review should ensure Freedoms [sic] compliance not only with existing regulatory requirements but must also address the regulators [sic] hardened approach to distributors and insurers in relation to deceptive and misleading acts and conduct expectations to meet community standards.
>
> …
>
> Quality Assurance (QA) Review & Framework – The Compliance Manager and Quality Assurance Manager to review all QA conducted across the business and document all existing processes and SLAs. The comprehensive Freedom QA Framework will be completed by the end of May 2018.

(J [206]).

196 On 5 July 2018, Mr McCool completed a detailed written advice concerning sales agent incentives. One of the assumptions that was made for the purposes of that advice was that the sales agents were "not permitted to give financial product advice (whether personal or general)": J [207].

197 Mr McCool's advice did not raise any specific concerns with respect to the Incentives: J [208].

198 On 7 September 2018, Mr McCool sent an email to Mr Cohen and the other Freedom directors, attaching a draft letter to ASIC constituting a breach notification. Mr Cohen was not involved in drafting that letter and was not asked to approve the draft letter in his capacity as managing director and CEO of Freedom. The email indicated that the draft letter had been put together by external lawyers and that Mr Orton, Mr McCool and Mr Stephen Menzies (a Freedom director who was also a lawyer) had approved it for release to ASIC. Later that day, Mr McCool sent the letter to ASIC indicating that Freedom had identified matters that appeared to be breaches of s 963E of the Act and potential breaches of s 912A of the Act in the period after 1 January 2018 by reason of the provision of non-monetary incentives: J [215]–[216].

199 The first time that Mr Cohen became aware of any potential legal concerns with respect to the Incentives was in the context of the 7 September 2018 letter sent by Mr McCool to ASIC: J [208].

200 In October 2018, Mr Cohen formally ceased his role as CEO of Freedom and as a director of the various Freedom companies: J [217].

Primary judge's analysis

201 During the relevant period, Freedom Insurance and INSA formed part of Freedom, which was headed by FIG, a company listed on the ASX. The companies within the group were each

managed by the same persons: J [348]. The business carried on by Freedom Insurance and INSA (and the Freedom group generally) was the sale of insurance products: J [349].

202 Mr Cohen was one of the directors of FIG. Mr Cohen was also the managing director and CEO of the companies in the Freedom group, including Freedom Insurance and INSA: J [350]–[351].

203 Mr McCool was, during the relevant period, a highly experienced lawyer with specific experience in the life insurance industry, and was also a responsible manager on the Freedom AFSL: J [353]–[358]. Freedom's compliance policy provided that Mr McCool's obligations, *qua* Head of Legal, included the provision of specific, general and compliance advice and guidance to business units, management, team leaders and the directors of Freedom. It also provided for the "line 2" risk and compliance team to meet with Mr McCool *qua* Head of Legal. Mr McCool regularly spoke with Ms Osborne and later Ms Delahunty as the "line 2 risk and compliance team": J [359].

204 Ms Osborne was, from late 2016 until December 2017, Freedom's Head of Risk and Compliance. Ms Osborne was also a responsible manager on the Freedom AFSL from 17 February 2017. In late 2017, Ms Osborne was replaced by Ms Delahunty, who became a responsible manager on the Freedom AFSL from 16 November 2017: J [360]–[361].

205 Day-to-day responsibility for Freedom's compliance did not rest with Mr Cohen: J [362].

206 In September 2017, Freedom experienced a significant downturn in sales. The idea for the Incentives was born from discussions about how to arrest the sales slump: J [363]–[364].

207 The proposed LIF Reforms were due to commence on 1 January 2018. There were two aspects of the LIF Reforms relevant to Freedom. The first, being the impact of those reforms upon payments made by Swiss Re to Freedom, was the subject of review by Swiss Re. Mr McCool was involved in that review and Mr Cohen was informed as to the progress of that review. The second aspect of the LIF Reforms relevant to Freedom was the impact upon payments made by Freedom to its sales agents. Mr McCool had been asked by Mr Cohen to consider this aspect: J [365].

208 It was common ground between ASIC and Mr Cohen that a reasonable director or officer in the position of Mr Cohen would have known that, as a financial services licensee, Freedom Insurance had obligations under the Act in relation to the financial services that it provided, and would have appreciated the real and foreseeable possibility that: (a) any

contraventions of those obligations may have come to the attention of ASIC; (b) ASIC may have taken regulatory action in relation to contraventions of those obligations; and (c) Freedom Insurance could have been exposed to litigation and/or reputational damage because of contraventions of those obligations: J [370].

209 The primary judge then made critical findings at J [371]–[372], [376(2)] and [377]:

> ASIC contends that Mr Cohen had (or ought reasonably to have had) knowledge or awareness of Freedom Insurance and INSA's obligations under the Act, including the prohibition of conflicted remuneration under Division 4 of Part 7.7A of the Act. Mr Cohen admits that he had (or ought reasonably to have had) a high level knowledge or awareness of those matters, but as he was not a legal practitioner he did not have (nor ought reasonably to have had) detailed knowledge or awareness of them. *ASIC has not established that Mr Cohen had such detailed knowledge. Nor has it established that Mr Cohen ought to have had such knowledge.* In this regard, I accept that Mr Cohen remained as a responsible manager on the Freedom AFSL, but *do not accept that this required him to have a detailed knowledge of the provisions of Division 4 of Part 7.7A of the Act, particularly in circumstances where Mr McCool, a specialist lawyer in this area, had been appointed as a responsible manager in 2016.*
>
> ASIC also contends that Mr Cohen had (or in the alternative ought reasonably to have had) knowledge or awareness of the sales performance of sales agents during the relevant period. Mr Cohen admits that he had (or in the alternative ought reasonably to have had) a high level knowledge of the sales performance of sales agents in the Freedom group but says that he did not have (and ought not reasonably to have had) detailed knowledge or awareness of the performance of individual sales agents on a daily, weekly or monthly basis. There is considerable ambiguity in the expression "sales performance of sales agents" – it is not clear whether it means number of sales achieved, the manner in which the sales were made, or something else. *ASIC has not established that Mr Cohen had any detailed knowledge. Nor has ASIC established that the "sales performance of sales agents" is a matter that Mr Cohen ought to have known, beyond the high level knowledge that Mr Cohen has admitted.*
>
> …Mr Cohen, *qua* managing director, was charged with the responsibility of ensuring that Freedom's compliance framework was fit for purpose and that Freedom's senior managers and team leaders were aware of their obligations and had implemented processes to adhere to and sustain compliance. There is no allegation that Mr Cohen failed to discharge this responsibility.
>
> …[D]ay-to-day responsibility for compliance matters did not rest upon Mr Cohen and there was a compliance team headed by Mr McCool.
>
> (Emphasis added.)

210 Mr Cohen knew about the Incentives being offered to sales agents: J [381]–[386].

211 The primary judge concluded at J [387]–[391] that ASIC had established the following conduct of Mr Cohen:

(a) that Mr Cohen approved and/or authorised the expenditure of monies on each of the Incentives, and the offering of each of the prizes as a means of increasing sales of the FPP;

(b) that Mr Cohen took no steps to prevent the Incentives taking place, nor any steps to prevent the giving of the prizes to, or acceptance of the prizes by, the prize-winning sales agents;

(c) that Mr Cohen received reports and/or updates on the progress of each of the Incentives; and

(d) in the case of the Vespa Incentive, that Mr Cohen observed the Vespa sitting in the sales area of the Freedom offices, until about late January or early February 2018, when he observed that it was no longer there.

212 The primary judge concluded at J [396]–[400] that Mr Cohen had not taken the following steps:

(a) Mr Cohen did not take steps to prevent sales agents from participating in each of the Incentives and from accepting the prizes. Mr Cohen took no steps to prevent the Incentives taking place, nor any steps to prevent the giving of the prizes to, or acceptance of the prizes by, the prize-winning sales agents;

(b) before the start of the Incentives, Mr Cohen did not seek legal or regulatory compliance advice about the impact of the conflicted remuneration provisions on the Incentives;

(c) Mr Cohen did not take steps to prevent the development and implementation of the Incentives by Freedom Insurance or INSA;

(d) Mr Cohen did not take steps to prevent Freedom or INSA paying for the prizes offered to the recipients of the Incentives.

213 At J [404]–[421], the primary judge stated:

> I am not persuaded that the conduct and omissions which have been established constitute a contravention of s 180 of the Act for the following reasons.
>
> *First*, in view of the management structure within Freedom and the events which occurred, Mr Cohen was entitled to rely upon others, and in particular Mr McCool, with respect to potential non-compliance with the conflicted remuneration provisions by dint of the Incentives. In particular, Mr Cohen was entitled to rely upon Mr McCool in circumstances where:

(1) Mr Cohen, as managing director of a relatively recently listed company had many responsibilities including pursuit of the St Andrews acquisition ([81] to [82] above);

(2) Mr Cohen had confidence in his experienced executive team, including Mr McCool ([83] above);

(3) Mr McCool was a highly experienced lawyer and a leading practitioner in the area of financial services laws ([69] to [70] above);

(4) Mr Cohen had known and worked with Mr McCool in several organisations over a number of years ([41] and [71(1)] above);

(5) Mr McCool was, as represented in the prospectus and as he acknowledged in cross-examination, a person who, in the discharge of his responsibilities as group general counsel, was expected to apply his legal skills to ensure compliance with applicable financial services laws ([70] above);

(6) as Mr McCool accepted, it was incumbent upon him to be aware of what was happening in the business, to apply his decades of experience as a financial services lawyer so as to identify any risks and to take appropriate steps to address any identified risks ([355] above); and

(7) Mr Cohen had asked Mr McCool to consider the impact of the LIF Reforms ([157] above).

ASIC submitted that Mr Cohen was not entitled to rely upon Mr McCool, in circumstances where (it submitted) Mr Cohen was micro-managing that business.

In support of this submission, which appeared to be an attempt to draw an analogy with the facts of *Australian Securities and Investments Commission v Select AFSL Pty Ltd (ACN 151 931 618) (No 2)* [2022] FCA 786; (2022) 162 ACSR 1 (Abraham J), ASIC relied principally upon the following evidence:

(1) Mr Cohen's retention of a significant shareholding in the Freedom group. I accept that this might have given Mr Cohen another reason to be vigilant in his roles as managing director and CEO, however I am not persuaded that it establishes that Mr Cohen was a micro-manager of that business;

(2) the proximity of the offices occupied by senior management, including Mr Cohen, and that the whole of Freedom's operations filled two floors of the Bond Street building ([52] above). I regard this to be of little moment; and

(3) the following passage of transcript of the cross-examination of Mr McCool:

> And we will come to it later, but when in 2018 you decided that it was prudent to obtain advice from Freehills, that was a step that you took, wasn't it?---That advice was at the instruction of Craig Orton.
>
> And you say you couldn't have taken that step without Mr Orton's instruction?---**The arrangements in this organisation was that it was Keith's – Keith's business, and he – he ran it, and there was no way in the world that I would have gone and got external legal advice without his approval.**
>
> You see, can I suggest to you that you're mistaken about the fact that it was Keith's business, aren't you, Mr McCool, because what we've been through is that the company was an ASX listed company and you had obligations to all of the shareholders; did you understand that?---

> **I understand that, but what – that's not how the business was run. It was run by Keith**.
>
> Well, Mr Cohen was the CEO, so is that – is that – you're saying - - - ?---That's right, and I went to the CEO, and if – and he ultimately made the decisions, and this was not a large organisation. It was a small – small business that – it still only had limited management, and Keith – Keith instructed me what to do. I told him what I thought and it was ultimately – he made the calls.
>
> (emphasis added)

ASIC submitted that this transcript – which concerned the process at Freedom for obtaining external legal advice – summarised succinctly Mr Cohen's role in the business. I do not accept that submission. This evidence is relevant to the proposition that Mr Cohen's approval was required before external legal advice was obtained. However, it does not prove generally that Mr Cohen's approval was required for all aspects of the business.

ASIC has not established that Mr Cohen was micro-managing the business. Mr McCool's evidence in cross-examination does not establish such a proposition; and ASIC's proposition that Mr Cohen was micro-managing the business sits most uneasily with:

(1) the contemporaneous documents recording the division of responsibilities within Freedom, such as the prospectus and the compliance policy discussed above; and

(2) Mr McCool's evidence that Mr Cohen allowed him a high degree of autonomy and did not try to micro-manage his work ([71(1) and (2)] above).

Secondly, the conflicted remuneration provisions in Division 4 of Part 7.7A of the Act are not readily understood. There is a considerable degree of complexity, as is illustrated by the permutations in the case as framed by ASIC in this proceeding, the length of the submissions provided by the parties addressing these permutations, and the analysis set out at Part C above. As senior counsel for Mr Cohen submitted, Mr Cohen was not a lawyer and cannot have been expected to have anything but a high level understanding of those provisions. This is particularly so when Freedom had employed Mr McCool, a highly experienced lawyer with a speciality in this area.

Thirdly, the evidence establishes that: (1) Mr McCool was charged by Mr Cohen with considering the effect of the LIF Reforms upon the remuneration of sales agents, including incentives ([157] above); and (2) no-one within Freedom (including Mr McCool) notified Mr Cohen that the Incentives would contravene the Act, following the introduction of the LIF Reforms ([164] above).

Fourthly, Mr McCool formed the view that the conflicted remuneration provisions prior to the LIF Reforms were not applicable to incentives offered by Freedom ([158]) above).

Fifthly, the absence of evidence (as opposed to assertion) as to the actions that would have been taken by a reasonable person. ASIC has not established that a reasonable director would have known or acted in the manner pleaded: cf *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552; (2016) 340 ALR 75 at 156 to 157 ([398] to [401]) (Edelman J).

Finally, I am not persuaded that there was, to a reasonable officer in the position of Mr Cohen, a foreseeable risk of harm to Freedom Insurance or INSA arising from Mr

Cohen's conduct or omissions that outweighed the potential benefits to those companies from the Incentives.

In ***Diakyne*** *Pty Ltd (ACN 099 168 402) v Ralph* [2009] FCA 721; (2009) 72 ACSR 450, Justice Jagot explained at 469 [84]:

> The principles relating to the application of these statutory provisions were also largely agreed. Those principles have been identified on numerous occasions. The parties in the present case referred particularly to the observations in *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72; [2002] NSWSC 171 at [372], [458] and [735] (*Adler*); *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; 71 ACSR 368; [2009] NSWSC 287 at [236]–[257] and *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395; 11 ACSR 162. Among other matters, those decisions identify that:
>
> (1) Sections 180, 181 and 182 involve duties owed to the corporation.
>
> (2) The requirement of reasonable care and diligence is objective in the sense that it involves asking what an ordinary person of ordinary prudence, with the knowledge and experience of the director, might be expected to have done in all of the circumstances at the relevant time of the conduct if he or she were acting on his or her own behalf.
>
> (3) Putting the test another way, was the director cognisant of circumstances of "such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into": *Vrisakis* at WAR 450; ACSR 212 citing *Overend & Gurney Co v Gibb & Darby* (1872) LR5HL 480 at 486–7 (*Overend*).
>
> (4) The circumstances of the corporation at the time are thus relevant to the content of the duty to act with reasonable care and diligence.
>
> (5) Directors are not required to exhibit a greater degree of skill than may reasonably be expected from persons of commensurate knowledge and experience in the circumstances and are entitled to rely on others except where an exercise of ordinary care would deny reliance.
>
> (6) **There can be no failure to exercise reasonable care and diligence unless at the relevant time harm to the interests of the corporation is reasonably foreseeable by reason of the conduct and, to determine breach, the foreseeable risk of harm must be balanced against the potential benefits which might be expected to accrue to the corporation**.
>
> (7) Where the matter involves a potential conflict between the director's duties to the corporation and a personal interest, "the duty of care and diligence falls to be exercised in a context requiring special vigilance": *Adler* at [372].
>
> (emphasis added)

The foreseeable risk of harm is particularised in two ways, namely that:

(1) it was foreseeable that failing to take reasonable steps, or any steps, to prevent contraventions of ss 963E(2), 963F and s 963J of the Act, would expose Freedom Insurance and/or INSA to the risk of reputational harm, litigation and/or regulatory action (and/or be exposed to liability for relief sought in litigation and/or regulatory action), in circumstances where the consequences of such contraventions were significant and serious, and the burden of taking alleviating action was minimal; and

(2) Mr Cohen exposed Freedom Insurance and/or INSA to a foreseeable risk of harm, because his conduct created a significant risk of non-compliance with financial services laws, and was likely to result in future contraventions by those companies, whether or not those contraventions ultimately eventuated, in circumstances where the consequences of the contraventions were significant and serious, and the burden of taking alleviating action was minimal.

The assessment of foreseeable risk must be undertaken by reference to the circumstances existing at the time of the alleged conduct and the alleged failures to act; and not using hindsight. Those circumstances relate to the period in which the Incentives were on foot. As is clear from the events of 2018 recounted at [183ff] above, there was a marked change in the circumstances which existed after the Incentives. Such circumstances are not relevant to the assessment of foreseeable risk.

As noted above, Mr McCool was of the view in 2017 that: (1) the sales agents were operating on a "no advice" model; and (2) the conflicted remuneration provisions of the Act were not applicable to the incentives offered by Freedom.

In circumstances where Mr McCool, a highly experienced lawyer in this field, did not consider the conflicted remuneration provisions applied, a conclusion that the risk that the Incentives would contravene those provisions was reasonably foreseeable to a person in Mr Cohen's position is far from obvious. Indeed, the proper conclusion is that such reasonable risk was not foreseeable to a person in Mr Cohen's position.

Further, it is necessary to balance any foreseeable risk of harm against the potential benefits which might be expected to accrue to Freedom: see e.g., *Diakyne* at [84(6)].

I am not satisfied that the potential foreseeable harm was not outweighed by the potential benefits to Freedom. Such evidence as there was concerning the potential benefits (again to be assessed without hindsight) that may have flowed from the Incentives (see e.g., the evidence at [166] above concerning the increased sales of policies during the First Bali Sales Incentive) suggests that there were considerable potential benefits available to Freedom.

(Emphasis original.)

Amended Notice of Appeal

214 Ground 11 of the Amended Notice of Appeal states:

The primary judge erred in concluding that the Respondent did not contravene s 180(1) of the Act (J [18], [404]–[421]) in circumstances where the primary judge:

a. erred as identified in grounds 1A–10 above;

b. failed to give due weight to the entirety of the evidence adduced by the

Appellant in relation to the Respondent's role (J [65], [84], [99]–[100], [116], [351], [362], [369], [373]–[377], [381]–[391], [405], [413]);

c. misunderstood the Appellant's allegation that the Respondent had, or ought to have had, knowledge or awareness of the prohibition of conflicted remuneration and the sales performance of sales agents, by elevating it to the standard of "detailed" knowledge, when the Appellant's case did not rise so high and the Appellant did not so submit (J [371], [372], [404], [410], [411], [413]);

d. misconstrued the Appellant's submission that the Respondent exercised a "significant degree of control over Freedom's operations" by elevating it to the standard of "micro-managing", when the Appellant's case did not rise so high and the Appellant did not so submit (J [404]–[409]);

e. failed to find that the Respondent failed to take reasonable steps, when the primary judge found that the Respondent did not take any of the steps set out in J [396]–[400]; and

f. failed to find that there was, to a reasonable director in the position of the Respondent, a foreseeable risk of harm to Freedom Insurance and INSA arising from the Respondent's conduct or omissions that outweighed the potential benefits to them from the Incentives (J [414], [418]–[421]).

Consideration

215 It will be immediately apparent from the Amended Notice of Appeal that none of the relevant findings of fact by the primary judge are challenged by ASIC. It will also be apparent from the authorities cited in connection with the refusal to grant ASIC leave to further amend its Amended Notice of Appeal that the complaint that the primary judge "failed to give due weight to the entirety of the evidence adduced by the Appellant in relation to the Respondent's role" is wholly unsatisfactory.

216 By his submissions, Mr Cohen emphasises the unchallenged findings of the primary judge. The failure by ASIC to challenge these factual findings, including by the identification of *error*, is a significant impediment to its success on this ground of appeal, which ASIC does not overcome by littering its submissions with footnote references to evidence with the intention (it seems) of overturning factual findings by indirect means.

217 With this in mind, we turn to deal with ASIC's submissions.

218 First, ASIC complains that the errors identified in grounds 1A–10 of its Amended Notice of Appeal "pervade" the primary judge's conclusion in relation to s 180(1) of the Act. We do not agree. There is no evidence of this in the analysis of the s 180(1) case, and the primary judge expressly acknowledged that ASIC's case under s 180 did not depend on proof that the underlying alleged contraventions occurred: see J [394].

219 Second, ASIC complains that:

> … [T]he trial judge failed to consider and/or give due weight to the submissions and evidence adduced by ASIC in relation to Mr Cohen's corporate roles. There is undoubtedly a place for evidence of the position, responsibilities, experience and skills of the particular director or officer in the s 180(1) inquiry. ASIC summarised the evidence on these matters at AWCS [477]–[495] (and [496]-[515]). This includes, critically: Mr Cohen's 25 years of experience in the life insurance industry; his experience in compliance matters; his role as Responsible Manager under Freedom's AFSL; the seniority of his positions at Freedom and INSA; his heavy involvement in and ultimate responsibility for day-to-day management decisions (notwithstanding the late 2016 listing of the ultimate holding company FIG, and noting that for most of 2017 he was acting COO); and flow of information to him about compliance (and operational) matters. The extent of Mr Cohen's seniority and experience, his central role in the business operations and the burden of his responsibilities at Freedom belies the trial judge's conclusions that: Mr Cohen operated in a high-level role away from day-to-day compliance matters; he was entitled to rely on others with respect to Freedom's compliance with conflicted remuneration provisions; and the risk that the Incentives might lead to non-compliance with the Act was not foreseeable to a person in Mr Cohen's position. His Honour failed to have regard to significant parts of the evidence relied on by ASIC and erred in his weighing of the evidence.
>
> (Footnotes omitted.)

220 It is difficult to understand this submission as ASIC neither identifies nor explains the errors in the disputed factual findings, other than seeking that an inference be drawn that identified, significant parts of the evidence were either overlooked or not given sufficient weight. Absent such identification and explanation, we decline to review the evidence ourselves and decide whether we would have come to the same view as the primary judge. To expect that this will occur misconceives the role of the Full Court in an appeal such as this.

221 Third, ASIC complains that the primary judge erred in elevating ASIC's submissions as to Mr Cohen's knowledge or awareness of the conflicted remuneration provisions and the sales performance of sales agents to one of "detailed knowledge" and that it never made such a submission. This complaint is directed at the critical finding in J [371]–[372].

222 However, while ASIC might not have used the precise phrase "detailed knowledge" in its submissions in relation to those matters, the effect of its opening and closing submissions at trial was that Mr Cohen was required to have, or ought to have obtained, such knowledge.

223 For example, in its closing submissions, ASIC submitted as follows:

> Here, ASIC's position is that it was *imperative for a director in Mr Cohen's position and with his skills and experience* to have:
>
> (1) *known that, as a financial services licensee, Freedom Insurance had obligations under the Act in relation to the financial services that it provided*, and appreciated

the real and foreseeable possibility that:

(a) any contraventions of those obligations might come to the attention of ASIC;

(b) ASIC might take regulatory action in relation to contraventions of those obligations; and

(c) Freedom Insurance could be exposed to litigation and/or reputational damage because of contraventions of those obligations;

(2) *known that the financial services laws in Division 4 of Part 7.7A of the Act had commenced prior to the start of the Incentives*;

(3) *been aware of ASIC's regulatory guidance in respect of the conflicted remuneration provisions within Division 4 of Part 7.7A of the Act, as published by ASIC in March 2013, and updated in late 2017 to address the amendments to those provisions which came into effect on 1 January 2018*;

(4) *taken steps before the start of the Incentives to inform himself and advise other employees of INSA about obligations under the provisions of Division 4 of Part 7.7A of the Act and the changes to those provisions which came into effect on 1 January 2018*;

(5) before the start of the Incentives, sought and heeded legal or regulatory compliance advice about the impact of conflicted remuneration provisions on those Incentives, and taken steps to apply that advice when considering whether to implement and develop the Incentives;

(6) *known that the Incentives would (or realistically might) result in Freedom Insurance and/or INSA breaching financial services laws, and in particular, ss 963E, 963F and/or 963J of the Act*;

(7) prevented the development and implementation of the Incentives by Freedom Insurance; and

(8) not have caused or allowed INSA to pay for, and provide the benefits offered to the recipients of the Incentives.

(Emphasis added.)

224 ASIC submitted that Mr Cohen "was ultimately responsible for day-to-day management decisions of the Freedom Group" and that he:

(a) received reporting and had access to information about the business operations of Freedom in his role as Managing Director and CEO;

(b) was aware of and reviewed the sales scripts used by the sales agents; and

(c) had knowledge of the performance of the sales team and took an active interest in the performance of the sales agents.

225 ASIC submitted that Mr Cohen "exercised a significant degree of control over Freedom's operations", that "there was a simplicity to Freedom's business, which was focused on selling

insurance from call centres" and that "at a practical level, Freedom remained Mr Cohen's business", which was run by a "very small management team" with "Mr Cohen at the helm".

226 ASIC submitted that Mr Cohen knew:

(a) that the scripts used by sales agents allowed them to put their own "spin" on it, do parts of their calls unscripted, and that the sales agents were skilled in selling products;

(b) that the Incentives were of significant value. Mr Cohen knew the approximate value of the Vespa ($5,000) and Bali Packages ($2,000). Mr Cohen knew the average age of sales agents was 25 years and they were commission driven, a high proportion were inexperienced and were in Australia on working holiday visas and were keen on doing further travelling;

(c) of concerning sales practices generally, and that these practices existed prior to Incentives and included problematic introductions, selling free cover and use of undue pressure; and

(d) that the QA process was not picking up all problematic sales practices.

227 ASIC also submitted that it was simply not credible that Mr Cohen did not realise that sales agents were routinely providing financial product advice on calls, in exercising sales skills as they were trained to do, and putting their own spin on things as the script permitted them to do.

228 In circumstances where ASIC contended that it was *imperative* that Mr Cohen have *actual knowledge* of matters such as ASIC's regulatory guidance in respect of the conflicted remuneration provisions within Div 4 of Pt 7.7A of the Act (for example), we do not consider that the primary judge's characterisation of ASIC's submissions was an error.

229 Similarly, no error has been shown as the primary judge was (in effect) characterising ASIC's extensive submissions concerning Mr Cohen's knowledge and awareness of Freedom's operations as "detailed". Such characterisation was accurate.

230 Fourth, ASIC complains that the primary judge misconstrued its submission as to the degree of control exercised by Mr Cohen at Freedom, and that it never submitted that Mr Cohen "micro-managed" Freedom's business. Rather, it says that its submission was that Mr Cohen exercised a "significant degree of control over Freedom's operations". Taking into account the extensive submissions by ASIC at trial about the degree of control and involvement by Mr Cohen in Freedom's operations, some of which are referred to above, this complaint is more about semantics than substance.

231 Fifth, ASIC complains that the primary judge erred in failing to find that Mr Cohen failed to take reasonable steps consistent with his duty under s 180(1) of the Act, submitting that his Honour failed to engage with the substance of the issue, and with particular submissions advanced by it.

232 Again, we disagree. The primary judge's reasons were comprehensive, and his analysis turned on findings of fact which are not challenged in this appeal, including the complexity of the regulatory scheme and changes, and the critical role of Mr McCool on whom Mr Cohen justifiably relied: see, for example, J [405], [410], and [418]–[419]. No error has been shown.

233 Sixth, ASIC complains that the primary judge erred in failing to find a foreseeable risk of harm to Freedom and INSA arising from Mr Cohen's conduct or omissions that outweighed the potential benefits from the Incentives. By its submissions, it contends that the primary judge failed to grapple with certain evidence, and provides extensive references to that evidence. However, this complaint goes nowhere in circumstances where there is no challenge in the appeal to the factual findings by the primary judge, including as to the state of knowledge of Mr Cohen.

234 Seventh, ASIC complains that the primary judge erred in concluding that Mr Cohen was entitled to rely on others, in particular Mr McCool, with respect to potential non-compliance with the conflicted remuneration provisions. ASIC submits that a director is not entitled to rely on others where "they know, or by the exercise of ordinary care should know, facts that would deny reliance". ASIC submits that these matters were within, or ought fairly to have been within, Mr Cohen's knowledge. However, again, this complaint goes nowhere in circumstances where there is no challenge in the appeal to the factual findings by the primary judge, including as to the state of knowledge of Mr Cohen.

235 Finally, ASIC complains about the primary judge's conclusion that he was not persuaded that there was potential foreseeable harm that outweighed the "considerable potential benefits" available to Freedom in terms of increased sales of the FPP. ASIC submits that while the balancing exercise must not be taken literally, it is nevertheless an exercise that must be undertaken and that in this case, the potential harm for Freedom was significant. ASIC submits that the potential benefits of an increase in sales were well outweighed by the potential risks, and that the primary judge failed to account for the fact that the burden of taking alleviating action was minimal.

236 As to this last point, the primary judge referred (twice) to ASIC's contention that the burden of taking alleviating action was minimal at J [416], but ultimately decided that the risk that the Incentives would contravene the conflicted remuneration provisions was not foreseeable to a person in Mr Cohen's position at J [419]. As this finding is based on extensive unchallenged findings of fact, the lack of express reference to the minimal burden of taking alleviating action in the balancing exercise does not assist ASIC as, even if it were an error, we would have reached the same conclusion as the primary judge. Further and for the same reasons, we do not agree that the potential benefits of an increase in sales were well outweighed by the potential risks because, based on the primary judge's findings, such risks were not reasonably foreseeable.

Conclusion

237 For these reasons, ground 11 of the Amended Notice of Appeal must fail.

WHETHER MR COHEN WAS KNOWINGLY CONCERNED

238 Amongst other provisions, ASIC relied upon s 1324(1)(e) of the Act, which provides a power to seek an injunction where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of the Act.

239 The primary judge found that, as the contraventions had not been established, Mr Cohen could not have been involved in them: J [320]–[321].

Amended Notice of Appeal / Notice of Contention

240 Ground 10 of the Amended Notice of Appeal states:

> 10. By reason of the errors identified in grounds 1A–9 above, and on the entirety of the evidence, the primary judge ought to have concluded that:
>
> a. the Respondent was knowingly concerned in, or party to, Freedom Insurance's contraventions of ss 963E and 963F of the Act (*contra* J [321]); and
>
> b. the Respondent was knowingly concerned in, or party to, INSA's contraventions of s 963J of the Act (*contra* J [321]);
>
> and erred in not so concluding.

241 At the hearing of the appeal, ASIC submitted that, in the alternative to the Full Court making such findings, the issue of whether Mr Cohen was knowingly involved ought to be remitted to the primary judge.

242 By grounds 7 and 8 of the Notice of Contention, Mr Cohen contended that:

> 7. The Appellant advanced no pleaded allegation that the Respondent had actual knowledge of each of the essential elements of any of the contraventions of the Act alleged to have been engaged in by Freedom Insurance or INSA, including without limitation:
>
> a. knowledge that any particular sales agents provided financial product advice to retail clients within the meaning of s 766B of the Act;
>
> b. knowledge of the existing remuneration available to sales agents, including all monetary and non-monetary benefits apart from the relevant incentives; and
>
> c. knowledge of the individual sales targets allocated to particular sales agents in respect of the two Bali incentives,
>
> (the **Relevant Elements**).
>
> 8. The primary judge should have found that the Respondent was not knowingly concerned in any of the alleged contraventions of the Act by Freedom Insurance or INSA because:
>
> i. the Respondent did not have actual knowledge of each of the essential elements of any such contravention, including without limitation because:
>
> 1. he lacked knowledge of the Relevant Elements;
>
> 2. he gave unchallenged evidence that he did not consider the value of the relevant incentives material compared to sales agents' monetary commissions;
>
> 3. he was aware of widespread use of non-monetary incentives in the insurance industry; and
>
> 4. he had expressly charged Freedom Insurance's general counsel with responsibility for considering and advising him as to the lawfulness of all incentives given to sales agents and was not advised of any non-compliance; and
>
> ii. the Respondent did not engage in any conduct which could properly be said to implicate him in, or which had a practical connection to, any such contravention.
>
> (Emphasis original.)

Consideration

243 To establish that Mr Cohen was "knowingly concerned in, or a party to" the contraventions of the Act by Freedom Insurance or INSA, ASIC needed to prove that Mr Cohen had knowledge of all of the essential facts or circumstances that constitute the contraventions. By its closing submissions at trial, ASIC accepted this.

244 ASIC submitted to the primary judge that, in the case of Freedom Insurance's contraventions, the essential facts that constitute the contraventions of s 963E are that:

(1) Incentives were conducted, comprising benefits that were offered to sales agents;

(2) the qualifying criteria for the benefits offered under each of the Incentives was linked to the volume of sales made by sales agents; and

(3) (if arises) the Incentives had the characteristics required to qualify as conflicted remuneration despite the presumption;

(4) sales agents were representatives of Freedom Insurance;

(5) the sales agents engaged in conduct that constituted the provision of financial product advice and the provision of information;

(6) sales agents engaged in that conduct in respect of persons who were retail clients (namely, individuals who are not sophisticated investors); and

(7) the benefits were accepted by sales agents.

245 ASIC submitted at trial that the same essential facts constituted the contraventions of s 963F by Freedom Insurance, with the addition of Freedom Insurance not taking reasonable steps to ensure its representatives did not accept the benefits. ASIC further submitted that, in the case of contraventions of s 963J by INSA, the same essential facts as for s 963E applied, with the addition of INSA being the employer entity that gave the benefits to the sales agents.

246 Thus, on ASIC's own case at trial, an essential fact for each of the contraventions was that sales agents engaged in conduct that constituted the provision of financial product advice.

247 However, the primary judge made the following unchallenged findings which demonstrate, or from which it can be inferred, that Mr Cohen did not have knowledge to the requisite standard that sales agents engaged in conduct that constituted the provision of financial product advice:

(a) Mr Cohen's intention when establishing Freedom was that the relevant products would be distributed on a "no advice" basis, in that neither general nor personal advice would be provided by call centre staff to the customer: J [92];

(b) it was Mr McCool's view in 2017 that the conflicted remuneration provisions of the Act did not apply to incentives such as the First Bali Sales Incentive and the Vespa Incentive. This was based on his understanding that Freedom operated on a "no advice" model: J [71(5)]; [418];

(c) from time to time when Mr McCool was discussing product documentation, scripts and other issues within Freedom's business, Mr McCool told Mr Cohen that Freedom did not have any general advice in its scripts: J [93];

(d) Mr McCool had been tasked by Mr Cohen with considering the effect of the legislative changes to be introduced by the LIF Reforms, and it was his responsibility to consider all aspects of the LIF Reforms including non-monetary incentives (being Mr McCool's evidence admitted during cross-examination): J [28(2)];

(e) Mr Cohen's understanding from the review of the LIF Reforms that was undertaken was that the LIF Reforms had necessitated some relatively minor changes to the commission arrangements between Swiss Re and Freedom, and that those changes had been implemented by the end of 2017, ready to take effect from 1 January 2018. No one within Freedom indicated to Mr Cohen that the LIF Reforms necessitated any immediate changes to Freedom's incentive programs, including the incentives that were running at the end of 2017: J [164];

(f) on 5 July 2018, Mr McCool completed a detailed written advice concerning sales agent incentives. One of the assumptions that was made for the purposes of that advice was that the sales agents were "not permitted to give financial product advice (whether personal or general)": J [207];

(g) Mr Cohen was entitled to rely upon others, and in particular Mr McCool, with respect to potential non-compliance with the conflicted remuneration provisions: J [405]; and

(h) the first time that Mr Cohen became aware of any potential legal concerns with respect to the Incentives was in the context of the 7 September 2018 letter sent by Mr McCool to ASIC: J [208].

248 At J [72], the primary judge recorded that, as to the "no advice" model, Mr McCool gave evidence that (with emphasis in original):

(1) prior to 1 January 2018:

> The understanding was that we – that the business was doing a no advice model and that sales agents were not permitted to provide advice in those calls. I think we confirmed in the scripts that there was no advice in the scripts. They were purely factual. And, therefore, the conflicted remuneration provisions that related to advice which I think came into effect early in that decade didn't apply to the Freedom – to the Freedom business;

(2) and:

> I recall saying to Mr Cohen, prior to March 2018 and based on the scripts I had seen to that point, words to the effect, *"from what I have seen, we don't have general advice in our scripts"*. From what I had seen prior to March 2018, the content of the scripts was primarily factual, but I was unaware of the context, such as training, and management instructions that might impact how the scripts were utilised…

249 Based on these findings, ASIC did not establish that Mr Cohen had knowledge to the requisite standard that sales agents engaged in conduct that constituted the provision of financial product advice, being an essential element of each of the contraventions.

250 The primary judge made a further finding that Mr Cohen did not consider the cost of each Bali trip (approximately $2,000) to be material, relative to the overall earnings of the sales agents (when they could, in some cases, earn tens of thousands of dollars in commission in addition to their base salary), or relative to the overall costs of Freedom's business: J [127]. It follows from this finding that, even if financial product advice was being given (and Mr Cohen's knowledge of that fact had been established), Mr Cohen's understanding was that the Incentives could not reasonably be expected to influence that advice.

251 Accordingly, ASIC did not establish that Mr Cohen had knowledge to the requisite standard that the Incentives had the characteristics required to qualify as conflicted remuneration within the meaning of s 963A, and that even if the presumption in s 963L applied, he did not have knowledge to the requisite standard that it was not capable of being rebutted.

252 As to Mr Cohen's knowledge of the essential facts that constitute the contraventions of s 963E of the Act (in addition to the above), ASIC did not submit at trial, or adduce evidence to prove, that Mr Cohen had knowledge to the required standard that Freedom Insurance was "the, or a, responsible licensee" within the meaning of s 963E(2)(b). Indeed, ASIC did not even list this as one of the essential elements of the contravention of s 963E(2) in its submissions to the primary judge. Nor did ASIC contend on appeal that Mr Cohen had such knowledge, and that the primary judge erred in failing to make such a finding (and why that was the case). While there might have been no real dispute at trial that Freedom Insurance was "the, or a, responsible licensee" within the meaning of s 963E(2)(b) of the Act as a matter of fact, that lack of dispute does not extend to a conclusion that Mr Cohen knew this fact during the relevant period; nor does it mean that Mr Cohen accepted that he had such knowledge.

253 This provides an additional reason to conclude that the primary judge did not err in failing to find that Mr Cohen had knowledge to the requisite standard of the essential facts that constitute the contraventions of s 963E of the Act.

254 As to Mr Cohen's knowledge of the essential facts that constitute the contraventions of s 963F of the Act (in addition to the above), ASIC did not submit at trial, or adduce evidence to prove, that Mr Cohen had knowledge to the required standard of (a) the steps in fact taken by

Freedom Insurance to ensure that its representatives do not accept conflicted remuneration, and (b) the facts relied upon by ASIC to contend that such steps were not reasonable including, for example, the steps which ASIC contends ought to have been taken but which were not taken: see *R M Capital* at [78]–[80].

255 This provides an additional reason to conclude that the primary judge did not err in failing to find that Mr Cohen had knowledge to the requisite standard of the essential facts that constitute the contraventions of s 963F of the Act.

Conclusion

256 For these reasons, ground 10 of the Amended Notice of Appeal fails. It is therefore unnecessary to deal with grounds 7 and 8 of the Notice of Contention.

DELAY

257 By ground 12 of the Amended Notice of Appeal, ASIC advances a complaint concerning the delay by the primary judge in delivering judgment, and seeks that certain inferences be drawn by reason of that delay. However, as Mr Cohen submits, the bare fact of delay in the delivery of judgment affects both parties, and it does not relieve ASIC of the obligation to identify appealable error by the primary judge or lower the appellate standard to be applied. Further, ASIC failed to establish that the primary judge's findings were in any way influenced by matters on which delay may have had any material effect.

258 For these reasons, ASIC's criticisms of the primary judge's delay do not advance its position on the appeal, and it is noteworthy that no oral submissions were made concerning this ground. Ground 12 therefore fails.

RELIEF

259 By ground 9 of the Notice of Contention, Mr Cohen contended that the Court would not in the proper exercise of discretion grant the relief sought by ASIC. In light of the conclusions we have reached, it is unnecessary to address this ground.

CONCLUSION

260 The appeal should be dismissed with costs to follow the event.

I certify that the preceding two hundred and sixty (260) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices O'Bryan, Anderson and Downes.

Associate: 

Dated: 16 November 2026