FEDERAL COURT OF AUSTRALIA

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

File number: NSD 1447 of 2019

Judgment of: **ABRAHAM J**

Date of judgment: 8 July 2022

Catchwords: **CONFLICTED REMUNERATION –** alleged contraventions of ss 963E, 963F and 963J of the *Corporations Act 2001* (Cth) by the first and second defendants – where agents participated in certain sales incentives – whether benefits received by agents pursuant to certain sales incentives were conflicted remuneration within the meaning of s 963A – where benefits received were non-monetary benefits – where agents provided financial product advice within the meaning of s 766B(1) – – where benefits received could reasonably be expected to influence the financial product advice given – whether the volume-based presumption in s 963L applies – where the first defendant contravened s 963E when each of its agents accepted the conflicted remuneration and it was the responsible licensee – where the first defendant failed to take reasonable steps to ensure that agents did not accept the conflicted remuneration contrary to s 963F – where the second defendant contravened s 963J by giving each of the agents the conflicted remuneration – contraventions established

CONSUMER LAW – financial services – sale of insurance products – sales and retention conduct – whether agents engaged in misleading or deceptive conduct contrary to s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) – whether false and/or misleading statements were made contrary to s 12DB(1) of the ASIC Act – whether agents engaged in unconscionable conduct contrary to s 12CB(1) of the ASIC Act – whether agents' conduct was unduly harassing or coercive contrary to s 12DJ(1) of the ASIC Act – consideration of meaning of coercion in context of s 12DJ(1) of the ASIC Act – where consumers were vulnerable and/or in a weaker bargaining position – where most pleaded contraventions are established

BANKING AND FINANCIAL INSTITUTIONS – sale

of insurance products to retail clients – meaning of financial product advice – consideration of s 766B(1) of the Corporations Act – where the first defendant is the holder of an Australian Financial Services License (AFSL) – alleged contraventions of ss 912A(1)(a) and 912A(1)(c) by the first defendant – whether the first defendant, through use of its 'Refer a Friend' program, failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly contrary to s 912A(1)(a) – whether the first defendant, by contravening ss 963E and 963F, failed to comply with the financial services laws in Pt 7.7A Div 4 of the Corporations Act contrary to s 912A(1)(c) – whether the first defendant, by contravening ss 12DA(1), 12DB(1), 12DJ(1) and 12CB(1) of the ASIC Act, failed to comply with the financial services laws contrary to s 912A(1)(c) – contraventions of ss 912A(1)(a) and 912A(1)(c) established

DIRECTOR'S DUTIES – alleged contraventions by the fourth defendant of his duty of care and diligence in s 180(1) of the Corporations Act owed to the first and second defendants – whether the fourth defendant failed to take reasonable steps to prevent the first and second defendants from engaging in contraventions of ss 963E, 963F and 963J of the Corporations Act – where there was a foreseeable risk that the giving and accepting of conflicted remuneration would expose the first and second defendants to harm – breach of s 180(1) established

CORPORATIONS – attribution of conduct of directors, employees or agents under s 12GH of the ASIC Act – consideration of role of Retention Agents – accessorial liability – whether the fourth defendant was knowingly involved under s 79 of the Corporations Act in contraventions by the first and second defendants of ss 912A(1)(a) and 912A(1)(c) and ss 963E, 963F and 963J – accessorial liability established

EVIDENCE – whether certain statements are properly characterised as admissions – where admissions were made by persons in examinations under s 19 of the ASIC Act and before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – failure by the defendants to call evidence from certain witnesses – whether *Jones v Dunkel* inferences can be drawn

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth)

Competition and Consumer Act 2010 (Cth)

Corporations Act 2001 (Cth)

Corporations Amendment (Future of Financial Advice) Act 2012 (Cth)

Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth)

Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth)

Evidence Act 1995 (Cth)

Insurance Contracts Act 1984 (Cth)

Royal Commissions Act 1902 (Cth)

Trades Practices Act 1974 (Cth)

Cases cited:

Adams v Director of the Fair Work Building Industry Inspectorate [2017] FCAFC 228; (2017) 258 FCR 257

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) [2009] HCA 41; (2009) 239 CLR 27

Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd [2013] FCAFC 29; (2013) 296 ALR 465

Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788 [2021] FCAFC 121; (2021) 396 ALR 27

Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 5) [2012] FCA 908

Australian Competition and Consumer Commission v Accounts Control Management Services Pty Ltd [2012] FCA 1164

Australian Competition and Consumer Commission v ACM Group Ltd (No 2) [2018] FCA 1115

Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3) [2019] FCA 1982

Australian Competition and Consumer Commission v Birubi Art Pty Ltd [2018] FCA 1595

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 634; (2014) 317 ALR 73

Australian Competition and Consumer Commission v IMB Group Pty Ltd [2003] FCAFC 17

Australian Competition and Consumer Commission v Keshow [2005] FCA 558

Australian Competition and Consumer Commission v Maritime Union of Australia [2001] FCA 1549; (2001) 114 FCR 472

Australian Competition and Consumer Commission v

McCaskey [2000] FCA 1037; (2000) 104 FCR 8

Australian Competition and Consumer Commission v Panthera [2020] FCA 340; (2020) 143 ACSR 486

Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40; (2021) 388 ALR 577

Australian Competition and Consumer Commission v Radio Rentals Ltd [2005] FCA 1133; (2005) 146 FCR 292

Australian Competition and Consumer Commission v Safety Compliance Pty Ltd [2015] FCA 211

Australian Competition and Consumer Commission v Telstra Corporation Ltd [2021] FCA 502; (2021) 392 ALR 614

Australian Competition and Consumer Commission v Ultra Tune Australia Pty Ltd [2019] FCA 12

Australian Securities and Investments Commission v Adler [2002] NSWSC 171; (2002) 168 FLR 253

Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3) [2020] FCA 208; (2020) 275 FCR 57

Australian Securities and Investments Commission v Avestra Asset Management Limited (in liq) [2017] FCA 497; (2017) 348 ALR 525

Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq) [2012] FCA 414; (2012) 88 ACSR 206

Australian Securities and Investments Commission v Cassimatis (No 8) [2016] FCA 1023; (2016) 336 ALR 209

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2020] FCA 790

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

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

Australian Securities and Investments Commission v Healey [2011] FCA 717; (2011) 196 FCR 291

Australian Securities and Investments Commission v Kobelt [2019] HCA 18; (2019) 267 CLR 1

Australian Securities and Investments Commission v Maxwell [2006] NSWSC 1052; (2006) 59 ACSR 373

Australian Securities and Investments Commission v MLC Nominees Pty Ltd [2020] FCA 1306; (2020) 147 ACSR 266

Australian Securities and Investments Commission v Rich [2009] NSWSC 1229; (2009) 236 FLR 1

Australian Securities and Investments Commission v

Warrenmang Limited [2007] FCA 973

Australian Securities and Investments Commission v Westpac Banking Corporation [2022] FCA 515

Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) [2018] FCA 751; (2018) 266 FCR 147

Australian Securities and Investments Commission v Westpac Securities Administration Ltd [2019] FCAFC 187; (2019) 272 FCR 187

Banque Commerciale S.A., En Liquidation v Akhil Holdings Ltd [1990] HCA 11; (1990) 169 CLR 279

Barton v Armstrong [1976] AC 104

Bonette v Woolworths Ltd (1937) 37 SR (NSW) 142

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; (2004) 218 CLR 592

Campbell v Backoffice Investments Pty Ltd [2009] HCA 25; (2009) 238 CLR 304

Campomar Sociedad Limitada v Nike International Ltd [2000] HCA 12; (2000) 202 CLR 45

Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447

Commonwealth Bank of Australia v Kojic [2016] FCAFC 186; (2016) 249 FCR 421

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission [2007] FCAFC 132; (2007) 162 FCR 46

Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner [2017] FCAFC 77; (2017) 251 FCR 528

Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40

Cribb v Kingsbury (No 2) [2021] FCA 1397

EZY Accounting 123 Pty Ltd v Fair Work Ombudsman [2018] FCAFC 134; (2018) 360 ALR 261

Fair Work Ombudsman v Devine Marine Group Pty Ltd [2014] FCA 1365

Gore v Australian Securities and Investments Commission [2017] FCAFC 13; (2017) 249 FCR 167

Hodges v Webb [1920] 2 Ch 70

Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd [1978] HCA 11; (1978) 140 CLR 216

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

JWR Productions Australia Pty Ltd v Duncan-Watt (No 2) [2020] FCA 236; (2020) 377 ALR 467

Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; (2011) 243 CLR 361

Lisciandro v Official Trustee in Bankruptcy [1995] ATPR 41-436

Marsden v Amalgamated Television Services Pty Ltd [2001] NSWSC 510

Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2020] HCA 29; (2020) 381 ALR 601

NMFM Property Pty Ltd v Citibank Ltd (No 10) [2000] FCA 1558; (2000) 107 FCR 270

Paciocco v Australian and New Zealand Banking Group Ltd [2015] FCAFC 50; (2015) 236 FCR 199

Paciocco v Australian and New Zealand Banking Group Ltd [2016] HCA 28; (2016) 258 CLR 525

Perpetual Trustee Company Ltd v Burniston (No 2) [2012] WASC 383; (2012) 271 FLR 122

Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd [2016] FCAFC 78; (2016) 250 FCR 136

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

Rural Press Ltd v Australian Competition and Consumer Commission [2003] HCA 75; (2003) 216 CLR 53

South Sydney District Rugby League Football Club Ltd v News Ltd [2000] FCA 1541; (2000) 177 ALR 611

Stubbings v Jams 2 Pty Ltd [2022] HCA 6; (2022) 96 ALJR 271

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

Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177

Termite Resources NL (in liq) v Meadows, in the matter of Termite Resources NL (in liq) (No 2) [2019] FCA 354: (2019) 370 ALR 191

Thorne v Kennedy [2017] HCA 49; (2017) 263 CLR 85

Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389

Unique International College Pty Ltd v Australian Competition and Consumer Commission [2018] FCAFC 155; (2018) 266 FCR 631

Universe Tankships Inc of Monrovia v International

	Transport Workers Federation [1983] 1 AC 366 *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3; (2021) 270 CLR 118 *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	1399
Date of hearing:	31 May 2021, 1-4 June 2021, 7-9 June and 11 June 2021
Counsel for the Plaintiff:	Ms N Sharp SC with Ms G Walker, Ms P Abdiel, Ms K Grenfell and Ms M Caristo
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendants:	Mr A Cheshire SC with Mr S Jayasuriya
Solicitor for the Defendants:	Kardos Scanlan

ORDERS

NSD 1447 of 2019

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

ORDER MADE BY: **ABRAHAM J**

DATE OF ORDER: **8 JULY 2022**

THE COURT ORDERS THAT:

1. The parties are to confer and provide draft orders to chambers (within a timeframe to be agreed between the parties and the Court):

   (a) giving effect to these reasons for judgment in *Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 2)* [2022] FCA 786; and

   (b) providing for a timetable progressing this matter to hearing on penalty.

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

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REASONS FOR JUDGMENT

ABRAHAM J:

1 In summary, the Australian Securities & Investments Commission (ASIC) alleges that during 1 February 2015 to 19 March 2018 (the relevant period), Select AFSL Pty Ltd (the first defendant or Select), held an Australian Financial Services Licence (AFSL) and through its trading names "Let's Insure" and "FlexiSure" sold a range of insurance products. Through various contractual and financial arrangements, Select sub-contracted many of its sales and retention responsibilities to BlueInc Services Pty Ltd (the second defendant or BlueInc Services) and Insurance Marketing Services Pty Ltd (the third defendant or IMS), which in turn employed or contracted Sales Agents and Retention Agents, who at all relevant times were agents of Select. Mr Russell Howden (the fourth defendant) is the sole director, secretary and managing director of Select, BlueInc Services and IMS (together, the Corporate Defendants). The Corporate Defendants are all ultimately 100% owned by BlueInc Group Pty Ltd (BlueInc Group) (with Mr Howden also being its sole director and secretary), which in turn is 100% owned by Howden Family Holdings Pty Ltd (Howden Family Holdings). Mr Howden and his wife are the ultimate beneficiaries of that trust.

2 There are four components to ASIC's claim.

3 *First*, alleged conflicted remuneration contraventions contrary to ss 963E, 963F and 963J of the *Corporations Act 2001* (Cth) by Select and BlueInc Services by reason of four non-monetary benefits, being the Gold Coast cruise (the Cruise Incentive), the Vespa scooter (the Vespa Incentive), the Las Vegas Trip (the Las Vegas incentive) and the Hawaii Trip (the Hawaii Incentive), which were offered and provided to Sales Agents to incentivise them to sell products (collectively, the Incentives; each, an Incentive) (the Conflicted Remuneration Contraventions). It is alleged that BlueInc Services provided non-monetary benefits to its employees in contravention of s 963J, and that Select contravened s 963E when its Sales Agents accepted the conflicted remuneration. Select also allegedly contravened s 963F as it failed to take reasonable steps to ensure that the Sales Agents did not accept the Incentives.

4 *Second,* alleged consumer contraventions of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) by all three Corporate Defendants, relating to 14 consumers (collectively, the Consumers; each, a Consumer), 12 of whom were vulnerable consumers (of whom 10 are Indigenous) and the other two in a weaker bargaining position (the

ASIC Act Contraventions or Consumer Contraventions). In relation to sales and retention conduct, it is alleged that false and/or misleading (or misleading or deceptive) representations were made contrary to ss 12DA and 12DB of the ASIC Act; that nearly all of the Consumers were coerced, contrary to s 12DJ(1); and that all were treated unconscionably, contrary to s 12CB(1). A number of the Consumers were also alleged to be unduly harassed contrary to s 12DJ(1) when they sought to cancel their policies or when Select continually sought payment of insurance premiums from them.

5 *Third*, alleged breaches by Select of AFSL general obligations provisions imposed upon it as the holder of an AFSL under ss 912A(1)(a) and 912A(1)(c) of the Corporations Act, on the basis that Select was not providing financial services efficiently, honestly and fairly in relation to the "Refer a Friend" program from January 2015 to May 2017, and was not compliant with financial services law in relation to: (i) the Conflicted Remuneration Contraventions; and (ii) the Consumer Contraventions (AFSL General Obligations Contraventions).

6 *Fourth*, alleged breaches by Mr Howden of his director's duties, contrary to s 180(1) of the Corporations Act, as Mr Howden failed to take reasonable steps, or any steps at all, to prevent Select and/or BlueInc Services from contravening, or potentially contravening, ss 963E, 963F and 963J of the Corporations Act, and thereby exposed those entities to a foreseeable risk of harm arising from their contraventions, or potential contraventions, of the Corporations Act (Directors' Duties Contraventions).

7 It is also contended that Mr Howden was an accessory, within the meaning of s 79 of the Corporations Act, to the Conflicted Remuneration Contraventions and the AFSL General Obligations Contraventions.

8 With very limited exception, the claims are all in issue.

9 For the reasons below:

(1) the Conflicted Remunerations Contraventions are established;

(2) some of the Consumer Contraventions are established, and in respect to each Consumer, at least one contravention is established;

(3) the AFSL General Obligations Contraventions are established; and

(4) the Directors' Duties Contraventions are established.

10 At the outset it should it be noted for completeness that it was agreed between the parties that the legislation applicable at the time included the ASIC Act compilation No. 51 (dated 1 July 2014), Corporations Act compilation No. 72 (dated 19 March 2016) (for the Las Vegas Incentive/Hawaii Incentive) and Corporations Act compilation No. 68 (dated 19 December 2014) for all other purposes.

Factual Background

11 An Amended Statement of Agreed Facts (ASOAF) dated 17 December 2020 between ASIC and the Corporate Defendants was tendered pursuant to s 191 of the *Evidence Act 1995* (Cth). It does not bind Mr Howden, and therefore it is necessary to consider the underlying evidence.

12 Select was established on 5 July 2011, with Mr Howden as its sole director. Mr Howden has over 20 years' experience in the insurance industry in Australia. At all material times, Mr Howden was the sole director, secretary and managing director of the Corporate Defendants and BlueInc Group.

13 At all material times, Mr Howden was the sole director and secretary of Howden Family Holdings, which owned:

(1) 50% of the ordinary shares issued in BlueInc Group in the period 10 January 2008 to 14 June 2009;

(2) 100% of the ordinary shares issued in BlueInc Group in the period 15 June 2009 to 27 June 2017 (at which point the ordinary shares were cancelled);

(3) 100% of the C and D Class shares issued in BlueInc Group in the period 27 to 29 June 2017;

(4) 100% of the C Class and 90% of the D Class shares in the period 30 June 2017 to 15 October 2018; and

(5) 100% of the C Class and 92% of the D Class shares in the period from 16 October 2018.

14 At all material times, Mr Howden was the husband to the sole shareholder of Howden Family Holdings. Mrs Howden owned all the shares in that company. Mr Howden was also a director of Integrated Event Solutions (NSW) Pty Ltd (Integrated Event Solutions).

15 Since 22 August 2011, Select has held an AFSL that authorises it to provide general financial product advice and deal in life risk insurance products to retail clients, pursuant to which it marketed and distributed various Let's Insure and FlexiSure insurance products. Mr Howden

was a Responsible Manager under the AFSL throughout the relevant period. The issuer of the insurance products sold by Select was St Andrew's Life Insurance Pty Ltd (St Andrew's or the Insurer). St Andrew's paid commissions to both Select and BlueInc Services. Select ultimately sub-contracted its obligations and commission under its agreement with St Andrew's to IMS, which in turn sub-contracted many of these obligations to BlueInc Services. The internal structuring of the entities ultimately saw IMS and BlueInc Services perform obligations and incur expenses on behalf of Select.

16 Select marketed and distributed the Let's Insure and FlexiSure products through an in-house call centre (Call Centre), which was maintained and operated by IMS. The Call Centre was staffed by Sales Agents and Retention Agents, although I note there is an issue about the characterisation of persons as Retention Agents, and the role they played, to which I will return. Suffice to say at this stage, Sales Agents primarily made outbound telephone calls to, and answered inbound telephone calls from, potential consumers for the purpose of selling insurance products. In doing so, they provided financial product advice under Select's AFSL. Retention Agents dealt with existing customers. Those internally described as "retention agents" primarily addressed requests to cancel policies and dishonoured premium payments. All Sales Agents and Retention Agents were either employees of BlueInc Services or contracted by BlueInc Services or IMS from labour hire agencies.

17 There was a high staff turnover, with the majority of staff contracted on a temporary basis. A high proportion of the Sales Agents were backpackers or other temporary visitors to Australia.

18 Leads (contact details of potential consumers) came into the Call Centre from a variety of sources, including inbound and outbound telephone calls and digital streams, such as online surveys and social media engagement. Select also utilised a referral program, called "Refer a Friend", which encouraged consumers who took out Let's Insure Funeral Cover or FlexiSure Life Cover to provide contact details of family and friends. It did so by offering that consumer a $20 Coles Myer gift card for each person they referred to Select who went on to take out a policy. I will return to this scheme in more detail below.

19 Sales Agents were provided training on Select's products, including by being given telephone scripts, and were subject to quality assurance (QA) processes conducted by Select. They were also provided training on handling objections and the use of sales techniques, such as appealing to a consumer's impulses and using third party examples to influence the consumer's decision making process. Sales Agents worked in separate sub-teams for the sale of different products,

and reported to Team Leaders, who in turn reported to Sales Managers/Head of Sales. Sales Managers ultimately reported to Mr Howden and Select's Compliance Committee, which comprised the Responsible Managers on Select's AFSL and the head of the compliance function. Retention Agents were also provided training on Select's products, compliance, and handling objections, and were subject to Select's QA process.

20 The remuneration of Sales Agents was linked to the number of sales they made as, although they were paid a base salary, they earned commission on products sold and could obtain benefits as a result of sales. There were also incentive schemes in place, which are discussed in more detail below.

21 The sales team grew significantly during 2015, the time during which most of the Consumer Contraventions are alleged to have occurred. For example, the Compliance Report for December 2014 to January 2015 records 43 Sales Agents and six Retention Agents, but by October 2015, there were 74 Sales Agents and 10 Retention Agents. Select's financial statements reflect its commission revenue also grew, from $12.729 million in 2015 to $19.058 million in 2017.

22 The evidence establishes that the sales conduct at the Call Centre occurred in a very competitive environment. Sales Agents were under pressure to meet daily sales targets, which increased over time as the business grew. The number of sales each Sales Agent made and the value of those sales, were recorded on a leader board visible to all staff and regularly updated throughout the day to rank the top performing agents. The Sales Agents who recorded lower sales on any one day would be identified in emails sent to the entire sales floor by the Head of Sales, and those who made no sales in the morning session would be ridiculed, for instance, by being required to wear an inflatable doughnut or by having their chair taken away. A bell on the sales floor was rung every time a sale was made. Each month, a "Top Dog Chair" was awarded to the top performing Sales Agent for that month.

23 Senior management developed and implemented a range of incentives, some of which were run concurrently. In addition to the Incentives, the subject of the Conflicted Remuneration Contraventions, other incentives were offered at times. This included $1000 Flight Centre vouchers for Sales Agents who became part of the "Million Dollar Club" by achieving one million dollars of sold premiums. Also on offer, during monthly "Super Sales Days", were gift cards, $100 pre-paid VISA cards and iPads.

24 This was a competitive, sales driven culture designed to sell more products, by inter alia, rewarding the top performers. These practices were known to, and endorsed by, senior management, including Mr Howden, and set the culture of the sales environment.

25 That is the context in which ASIC contends these claims arise, and in which the Incentives were offered.

Let's Insure and FlexiSure products

26 During the relevant period, Select marketed and distributed insurance products issued by St Andrew's under the brand name "Let's Insure" and in the period 7 January 2015 to 12 August 2016 also under the brand name "FlexiSure". Select owns the brand names Let's Insure and FlexiSure**.**

27 The core Let's Insure product was Let's Insure Funeral Cover, which Select promoted and distributed until 19 March 2018. Although marketed as a funeral protection product, it in fact provided for a lump sum benefit. Premiums were fixed, stepped or capped. Where fixed or stepped premiums were selected, consumers could also take out optional Accidental Death Cover (ADC) of up to $32,000, optional Accidental Serious Injury Cover (AIC) of up to $32,000 or optional Household Expenses Cover (HEC) that provided for the payment of $800 per month from between three and 20 months. In 2016, consumers could also take out an optional Accidental Death Cover Booster of up to $96,000 (ADC Booster).

28 Select also sold standalone Accident Cover (Let's Insure AC), comprising AIC and ADC of up to $600,000, with optional Children's Cover (CC). Another standalone Let's Insure product was Easy Life Insurance of up to $500,000, with a terminal illness benefit included, and with optional Accident Cover (Easy Life AC) of up to $500,000 and optional CC. Easy Life Insurance was guaranteed cover, meaning that the policyholder did not need to undertake medical tests and it was not underwritten. Finally, Select sold a standalone life insurance product called Let's Insure Life Cover of up to $1.5 million.

29 The core FlexiSure product was a life insurance product marketed under the name FlexiSure Life Cover. During the relevant period, it provided for cover between either $50,000 and $750,000, or $15,000 and $500,000. Consumers could also take out optional cover for accidental death and accidental serious injury (FlexiSure AC) between either $15,000 and $500,000, or $50,000 and $500,000, and optional CC (which covered accidental death or defined trauma events), which provided for a lump sum payment of $10,000 to $50,000.

30 The Corporate Defendants did not contest that each of the Let's Insure products and FlexiSure products marketed and distributed by Select during the relevant period were: marketed and distributed to retail clients; a "financial product" within the meaning of Ch 7 of the Corporations Act; and a "financial product" within the meaning of s 12BAA of the ASIC Act.

31 Although the Corporate Defendants had initially challenged that the Let's Insure Funeral Cover was not a "financial product" within the meaning of Ch 7 of the Corporations Act or s 12BAA of the ASIC Act, that challenge was abandoned at the commencement of closing submissions.

Attribution of Call Centre conduct

32 As explained above, the Call Centre was staffed by Sales Agents and Retention Agents.

33 The inter-company arrangements were such that each of the Corporate Defendants played a role in the conduct of the Call Centre.

34 Select was the holder of the AFSL pursuant to which financial services were able to be provided. Select had no employees or contracted staff. Rather, BlueInc Services and IMS provided staff for the conduct of Select's business. BlueInc Services was the employing entity within the BlueInc Group. IMS (and occasionally BlueInc Services) engaged temporary staff for the Call Centre through labour hire providers.

35 The Corporate Defendants admit that:

(1) the conduct of Sales Agents in all of their dealings with potential customers is attributable to Select, both in terms of the ordinary principles of agency (as reflected in s 12GH(2)(a) of the ASIC Act and s 769B(1)(a) of the Corporations Act), and for the purposes of Pt 2, Div 2 of the ASIC Act and Ch 7 of the Corporations Act; and

(2) the conduct of Sales Agents in respect of the Consumers is taken to have been engaged in by Select by reason of s 12GH(2)(a) of the ASIC Act.

36 As to BlueInc Services or IMS, it is also admitted that:

(1) Sales Agents and Retention Agents who were engaged through labour hire providers by BlueInc Services were agents of BlueInc Services and their conduct is taken to have been engaged in by BlueInc Services;

(2) the conduct of those Sales Agents and Retention Agents employed by, or engaged for, BlueInc Services towards the Consumers is taken to have been engaged in by BlueInc Services;

(3) Sales Agents and Retention Agents who were engaged through labour hire providers by IMS were agents of IMS and their conduct is taken to have been engaged in by IMS; and

(4) the conduct of those Sales Agents and Retention Agents engaged by IMS towards the Consumers is taken to have been engaged in by IMS.

37 The Sales Agents and Retention Agents who were employed by BlueInc Services were agents of BlueInc Services and their conduct is taken to have been engaged in by BlueInc Services.

38 The Corporate Defendants also admit that all Sales Agents and Retention Agents were representatives of Select as a financial services licensee for the purposes of Ch 7 of the Corporations Act, regardless of whether they were employees of BlueInc Services or were engaged through labour hire agencies by IMS or BlueInc Services.

39 However, there is a live issue between the parties as to whether the conduct of Retention Agents in their dealings with customers, can be attributed to Select. In essence, this is said to be based on the nature of the role the Retention Agents undertook. It is appropriate to address this issue at the outset.

Relevant legal principles

40 Section 12GH(2) of the ASIC Act provides:

> **12GH Conduct by directors, employees or agents**
>
> …
>
> (2) Any conduct engaged in on behalf of a body corporate:
>
> (a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;
>
> is taken, for the purposes of this Division, to have been engaged in also by the body corporate.
>
> …

41 Section 769B(1) of the Corporations Act is in materially identical terms to s 12GH(2) of the ASIC Act, and applies for the purposes of Ch 7 of the Corporations Act.

42 Those sections (and their statutory counterparts, for example in the *Competition and Consumer Act 2010* (Cth) (CCA)), expand the concept of attribution beyond the common law which is intended to make proof of corporate responsibility easier: *Perpetual Trustee Company Ltd v Burniston (No 2)* [2012] WASC 383; (2012) 271 FLR 122 at [274]-[275]. The purpose of such provisions is to attribute liability to a corporation for the acts of others and to facilitate proof of corporate responsibility beyond the position which would otherwise obtain at common law: *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 (*Walplan*) at 36-38.

43 Both limbs of the sections require that the person in question engage in conduct "on behalf of" the relevant corporation. This essentially requires that the individual act in the course of the corporation's business, affairs or activities or as the representative of the corporation, however it is "neither necessary nor sufficient" that the conduct be engaged in for the benefit of the corporation: *NMFM Property Pty Ltd v Citibank Ltd (No 10)* [2000] FCA 1558; (2000) 107 FCR 270 (*NMFM*) at [1243]-[1244] per Lindgren J. In this context, the phrase "on behalf of" suggests some involvement by the person concerned with the activities of the corporation; it conveys a meaning similar to the phrase "in the course of the body corporate's affairs or activities" and encompasses acts done by a corporation's employees in the course of their employment, but it is not confined to the employment relationship: *Walplan* at 37. The phrase conveys that something is done "for" the company: *Lisciandro v Official Trustee in Bankruptcy* [1995] ATPR 41-436 at 40,903-40,904; *NMFM* at [1244]; *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78; (2016) 250 FCR 136 at [78]-[80] per Davies, Gleeson and Edelman JJ. As to the second limb, in *Walplan* at 37, Lockhart J observed (in respect to s 84(2) of the *Trades Practices Act 1974* (Cth)) that:

> …the second limb of the subsection extends the corporation's responsibility to the conduct of other persons who act at the behest of a director, agent or servant of the corporation. Hence the phrase 'on behalf of' casts a much wider net than conduct by servants in the course of their employment, although it includes it.

44 The word "agent" is used in both limbs of the sections, and is not defined.

45 Central to the concept of agency is the proposition that the agent is representing the principal; "the agent [is] acting or having actual or apparent authority to act as representative of, or for, or on behalf of, the principal": *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2013] FCAFC 29; (2013) 296 ALR 465 at [73], citing *NMFM* at [522].

46 There will generally be a requirement or duty not to act otherwise than in the interests of the principal: *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [177]. The

formation of a relationship of agency may be constituted by either express or implied agreement. Agency is express when the principal agrees with the agent that the agent will act on behalf of the principal. Whether an implied agency arises depends on whether it is reasonable to infer from the words and acts of the parties that they intended to form a relationship of agency: *Bonette v Woolworths Ltd* (1937) 37 SR (NSW) 142.

47 Whether a relationship of agency exists depends not on the terminology adopted by the parties, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. The actual incidents and content of the relationship (the 'factual relation') to which the parties have consented may demonstrate that, as a matter of fact, they have consented to an agency relationship. The consent of the parties need not necessarily be to a relationship that the parties understand or accept to be one of principal and agent. Rather, it is sufficient if what they have agreed to is a state of fact that amounts in law to such a relationship, notwithstanding that it may have been the subject of express disclaimers. In such circumstances, the courts may infer an agency: *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541; (2000) 177 ALR 611 at [132]-[135].

Submissions

ASIC's submissions

48 In summary, ASIC contended that there are three primary reasons why the conduct of the Retention Agents in relation to the Consumers is attributable to Select. *First*, the contractual arrangements of the Corporate Defendants establish that it was Select's obligation to provide retention services to St Andrew's. This stands to reason given that Retention Agents provided financial product advice and it is necessary that they did so pursuant to Select's AFSL, and this is reinforced by the fact that retention services financially benefited Select. As such, even though Select sub-contracted the performance of retention services within the corporate group, those who performed such services did so on behalf of Select. *Second*, in all dealings with the Consumers, the Retention Agents held themselves out as acting on behalf of Select (through its brands Let's Insure and FlexiSure). *Third,* Select consented to the Retention Agents so doing, trained them and monitored their conduct. ASIC submitted that these factors establish agency at common law, and in any event, that attribution can be made to Select pursuant to s 12GH(2) of the ASIC Act and 769B(1) of the Corporations Act (given that control over the agents was exercised by Mr Howden as its sole director). ASIC identified five strands of evidence which, it submitted, supported the contention.

Corporate Defendants' submissions

49 The Corporate Defendants submitted that the issue is which entity had the obligation to provide the services performed by the Retention Agents. They submitted that BlueInc Services had the obligation to provide these services to St Andrew's. Therefore, when employees or agents of BlueInc Services were performing retention functions, they did so for and on behalf of BlueInc Services in furtherance of BlueInc Services' obligation to provide these services to St Andrew's. Similarly, when employees or agents of IMS were performing retention functions, they were doing so on behalf of BlueInc Services.

50 The Retention Agents were personnel who made outbound telephone calls to and answered inbound telephone calls from existing Let's Insure or FlexiSure customers in relation to dishonoured payments, requests to cancel Let's Insure products or FlexiSure products or to field consumer service queries. Retention Agents included: personnel whose primary functions related to providing general client services; and personnel whose primary functions related to dishonoured premium payments and requests to cancel insurance products.

51 The Corporate Defendants submitted that BlueInc Services contracted with St Andrew's to provide the services performed by the Retention Agents by entering into an Administrative Services Agreement with St Andrew's dated 23 April 2013 (Administrative Agreement), which was varied and restated in 2015 and 2017. They submitted that pursuant to cl 3.1 of the Administrative Agreement, BlueInc Services agreed "to provide the Administrative Services and St Andrew's [agreed] to acquire the Administrative Services" and BlueInc Services "[agreed] to perform its obligations under this Agreement for the benefit of St Andrew's". Pursuant to cl 4.1(a), BlueInc Services was required to provide the Administrative Services in compliance with the Service Levels. Clause 5.1 reiterated that "St Andrew's appoints Blue Inc [BlueInc Services] to provide the Administrative Services in accordance with this Agreement". The "Key Service Functions" performed by BlueInc Services pursuant to the Administrative Agreement included "Cancellations" and "Lapse notice issue". The "Contract Administration" functions they were to perform included "Cancellations", "Lapse notice issue", "Renewal notice issue" and "Direct debit/Credit card dishonour advices to Clients". In relation to "Complaints & Service Issues", specific functions included "Maintain a register of complaints". The Corporate Defendants submitted that the functions BlueInc Services were to perform for St Andrew's pursuant to the Administrative Agreement correspond precisely to the functions performed by Retention Agents.

52 In their written submissions in closing, the Corporate Defendants' position appeared to change. While maintaining the above position, they accepted for the first time, that:

> … to the extent the Retention Agents provided financial product advice, they were doing so for and on behalf of Select, pursuant to its ASFL.

53 However, the Corporate Defendants submitted:

> But this is largely a false issue … Cancellations, seeking premium payments and automatically increasing premiums … are all administrative in nature. The issue, therefore, is who the Retention Agents were performing these functions on behalf of.

54 In oral submissions, the Corporate Defendants contended that in Select's contract with St Andrew's, they had agreed to set up the Call Centre and to provide advice pursuant to its financial services licences, and, therefore, insofar as any financial advice was given, that Retention Agent giving the advice was wearing "a Select hat". They submitted that Retention Agents, depending on the content of the call, "may have different hats". That is a matter that can coexist: "one can carry out two services for different organisations". And, "otherwise, effectively, the contract between St Andrew's and BlueInc is being given no content".

ASIC's reply

55 ASIC submitted that the concession is well made, but while presented as a minor concession, it is, in fact, a large concession because that was all that the Retention Agents were doing in their attempts to persuade consumers in the circumstances to hold onto their policies rather than cancel them. ASIC also noted what it said was a further concession in oral submissions when it submitted that it was the Retention Agent's job to encourage a person to keep their policy.

56 In this regard, ASIC referred to the observations of the Full Court in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* [2019] FCAFC 187; (2019) 272 FCR 187 (*Westpac Securities – Full Court*) at [12], [20], [217] and [241], that one must look at the whole of the conversation to discern when financial product advice is being given because, often, that advice in a sales context, is being given implicitly. I note that this issue was not the subject of appeal to the High Court: *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3; (2021) 270 CLR 118 (*Westpac Securities – High Court*).

Financial product advice

57 Given the nature of this submission, and the concession made, it is appropriate at this stage to refer to the concept of financial product advice. Section 766B(1) of the Corporations Act defines financial product advice as follows:

> **766B Meaning of financial product advice**
>
> (1) For the purposes of this Chapter, 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.
>
> …

58 The approach to assessing whether such advice is given is described in *Westpac Securities – Full Court* at [16]-[22] where Allsop CJ observed:

> [16] The primary judge, correctly in my view, at [83]-[93] of the reasons, 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. In particular, I agree with the approach of Sackville AJA in *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at [365]-[366], referred to by the primary judge at [85]:
>
> 365 The construction of s 766B(1) must take into account that the language encompasses a recommendation or statement of opinion that is intended to influence a person in making a decision relating to a financial product or could reasonably be regarded as having such an influence. A person wishing to influence another person (the client) to make a decision relating to a financial product … may do so in ways other than by express recommendations or explicit statements of opinion. Information or other material may be presented to the client in a form implying that the presenter favours or commends a particular course of action without saying so explicitly. Similarly information or other material may be presented in a form that implies that the presenter's view is that the contemplated course of action is likely to be beneficial to the client.
>
> 366 The authorities have accepted that the statutory language should be given a broad interpretation. Specifically, they support the proposition that a person may provide information or present material in a way that implicitly makes a recommendation or states an opinion in relation to a financial product.
>
> [17] 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.

[18] 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 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.

[19] That said, the distinction made by the primary judge at [94]-[97] of the reasons between "opinion" and "fact" or "statement of opinion" and "statement of fact", by reference to principles of evidence, is likely to complicate the enquiry without warrant. One could well imagine a communication that was in overall terms an implied recommendation or opinion being made up of statements of interconnected facts, designed by its and their structure, to appear as a recommendation for some conduct or view. The unnecessary complexity, with respect, can be seen in [98] and [99] of the reasons.

[20] The task is to look at the communication or exchange, in its whole context, and assess whether some express or implied recommendation or statement of opinion is made. This is unlikely to be assisted by minute examination of parts of the text of a flowing, whole, engaged human conversation with all its implicit, as well as explicit, content. One can well understand that in some contexts mere statements of fact will not qualify as recommendations or statements of opinion. That is not, however, a conclusion that is to be drawn by an abstracted distinction between statements of fact and inference or by the deconstruction of text, but rather by looking at, or listening to, the whole of the communication or exchange, in its context.

[21] Westpac also argued before the primary judge that the words "recommendation" and "statement of opinion" were to be understood by reference to "advice". Thus, it was submitted that the word being defined may properly influence the interpretation of the definition: *Rennie Golledge Pty Ltd v Ballard* (2012) 82 NSWLR 231 at [129] and the cases there cited. So, the recommendation or statement of opinion was to be seen as one which contained some element of estimation or judgment as opposed to a mere advertisement or "sales pitch". This was reinforced, it was submitted, by the reference in s 766B(1) to a "report" of the advice. 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.

[22] 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. It is a question of characterisation in all the circumstances. Bearing in mind the view of the High Court as to the circularity that must be recognised in construing a definition by reference to the meaning of the term defined (*Owners of Ship Shin Kobe Maru v Empire Shipping Company Inc* (1994) 181 CLR 404 at 419 and however that case may now stand with the approach to construction laid down in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71]) this submission of Westpac cannot be accepted in its terms: *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation* (2011) 199 FCR 226 at [100]-[107]. The question is whether, on its proper characterisation, the communication or exchange was a recommendation or statement of opinion given by someone to another for that other's consideration in connection with making the decision in s 766B(1). I would accept that in some circumstances what might otherwise be seen to be a recommendation might only meaningfully and rationally be described or characterised as part of mere puffery in an advertisement and could not meaningfully and rationally be described or characterised as advice. That conclusion is likely, however, to be reached by an examination of the applicability of the Chapter as a whole. 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. How broad the definition may reach may be better tested in other circumstances. Here, the relational exchanges and the engagement in conversation designed to influence customers to make a financial decision constitute the very kind of context and circumstance to which the Chapter and the Division were intended to be directed.

59 Although this matter was before the High Court, the Full Court's findings on this aspect were not in issue: *Westpac Securities – High Court* at [25].

60 A number of matters can be taken from those passages, and others in *Westpac Securities – Full Court.* 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 – Full Court* at [216]. The terms 'recommendation' or 'statement of opinion' are not confined to formal advice but extend to any explicit or implicit encouragement: *Westpac Securities – Full Court* at [217], [240]. 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 – Full Court* at [18],

[335]-[336]; *Westpac Securities – High Court* at [49]. 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 – Full Court* at [16], [217], and see *Westpac Securities – High Court* at [12]. 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 – Full Court* 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 de-contextualised parts of a whole conversation: *Westpac Securities – Full Court* at [12], [20], [217].

Consideration

61 ASIC's submission must be accepted.

62 At the outset I observe that the Corporate Defendants' position in closing submissions, that Retention Agents in any one call may be carrying out two services depending on the content of the call, was advanced without a reference to any individual call, nor what aspect of the call was said to be on behalf of Select, and what was not. That is, the Corporate Defendants did not contend or identify, by reference to any call, that the contravention has not been established because an aspect of the call said to found the contravention was part of the retention function as opposed to the provision of advice on the part of Select. Moreover, the acceptance in closing that encouraging a customer to keep a policy is the job of the Retention Agent undercuts the submission as to the nature of the role of the Retention Agent being administrative, which underpinned its submission as to the lack of attribution.

63 Given the Corporate Defendants' reliance on the Administrative Agreement, it is necessary to consider the relevant contracts.

64 Select and BlueInc Services had separate contracts with the policy issuer, St Andrew's.

65 From 23 April 2013, Select and St Andrew's were parties to a Distribution Agreement, which was varied, restated and/or renewed in 2015, 2016, 2017 and 2018, and then ultimately terminated on 4 April 2018 (Distribution Agreements).

66 Under these Distribution Agreements, Select agreed to market and distribute an agreed suite of life risk insurance policies to "maintain and operate a call centre and website to provide advice"

about the products and to maintain and operate an electronic or automatic underwriting system by which all discretionary underwriting cases were referred to St Andrew's, and where clients were sent an email with a welcome letter, PDS, Financial Services Guide (FSG) and policy schedule on the issue of a policy. As a result, consumers who acquired the guaranteed acceptance policies (being products that were not discretionary) were not referred to St Andrew's. The telephone scripts approved by Select reflect that for the guaranteed acceptance policies, such as Let's Insure Funeral Cover, the acquisition of the policies occurred during telephone calls with Sales Agents. The Distribution Agreements then tasked Select with sending the consumer all of the relevant policy documents. As ASIC contended, essentially, by Select taking on the obligation for the system, there was no role for St Andrew's to play in the process of issuing the policies for guaranteed acceptance products.

67 Select and St Andrew's acknowledged that "any financial services" provided by Select in relation to the products would be on Select's behalf and under its AFSL. In return, St Andrew's agreed to pay a commission on all policies sold for as long as they remained in force subject to certain clawback rights. The initial agreement had a term of four years, with renewal options. By the 2015 renewal, Select and St Andrew's included products marketed under the FlexiSure brand and clarified that the Call Centre was to provide "general advice".

68 As ASIC contended, the following can be drawn from the Distribution Agreements: *first,* Select was obliged to operate the Call Centre; *second,* they contemplated that the Call Centre staff would provide financial product advice, as St Andrew's required Select to hold an AFSL and Select expressly acknowledged that financial services were provided on behalf of Select and under its AFSL; *third,* no distinction is made between Sales Agents and Retention Agents, and as admitted by the Corporate Defendants, both Sales Agents and Retention Agents were 'representatives' of Select's AFSL; and *fourth,* it was in Select's financial interest to retain or 'save' policies, as it was entitled to a flow of commission under the Distribution Agreements "for so long as the Policies remain in force". As such, the Retention Agents employed or contracted by either IMS or BlueInc Services were carrying out an essential role in the course and furtherance of Select's business, namely the retention of its products by customers (which in turn fed into the commission paid to Select).

69 Turning to the Administrative Agreements between St Andrew's and BlueInc Services. They entered into an Administrative Services Agreement dated 23 April 2013, which was varied and restated in 2015 and 2017. As explained above, the Corporate Defendants rely on this

agreement to contend that BlueInc Services had the obligation to provide these services to St Andrew's (not to Select) and, therefore, when employees or agents of BlueInc Services were performing Retention functions, they did so for and behalf of BlueInc Services.

70 However, the submission is premised on the basis that the Retention Agents were performing administrative tasks, a premise which, at least in part, is now accepted to be incorrect.

71 In any event, under the Administrative Agreement, BlueInc Services carries on the business of an administrator of life insurance policies. This agreement sets out the terms and conditions on which St Andrew's appoints BlueInc Services to provide the Administrative Services. I note that there is no requirement that BlueInc Services hold a financial services licence (which it does not). Therefore, the agreement does not encompass the giving of financial product advice. Administrative services are defined. It is readily apparent considering the tasks listed that the service functions are purely administrative. For example, they include the issue of lapse notices or renewal notices or cancellations and set time frames in which the tasks are to be performed (for example, two days after the notification of the cancellation). The tasks do not include retention of a policy. That is, BlueInc Services has an administrative function of notifying cancellation and effecting that cancellation.

72 It follows that the conduct of the Retention Agents, whose role is to persuade the customer not to cancel their policy, is not administrative within the Administrative Agreement.

73 Contrary to the Corporate Defendants' submission, that conclusion does not render the Administrative Agreement as having no content. Rather, such administrative tasks are no doubt undertaken, but that is not the role of a Retention Agent.

74 Other evidence also supports the conclusion that the conduct of the Retention Agents was on behalf of Select in such a way as to attribute liability to it.

75 Indeed, Select made admissions to ASIC in response to a question in an ASIC Notice of Direction under s 912C(1) of the Corporations Act (s 912C(1) Notice) dated 23 October 2018, that BlueInc Services was providing the customer retention services to Select and not to St Andrew's, and that Select provided them to St Andrew's. In the s 912C(1) Notice, Select was asked "to detail the services that were provided by each BlueInc Group entity in relation to the policy of each of the relevant customers during the relevant period". In its response to ASIC, Select stated that "Select AFSL's principal outsource agreements are with BlueInc Services Pty Limited (administration, information technology, customer retention…)".

76 In so far as the Corporate Defendants contended that the concept of a Retention Agent was one, in effect, created by ASIC (and rather, that the tasks of such agents were administrative), that submission cannot be accepted.

77 The Retention Agent role was an established and recognised role within Select. So much is apparent from a response by Select to ASIC to a question in a s 912C(1) Notice which describes Select's post-policy holder interaction, (including changes to Direct Life Insurance policies and enquiries by policy holders about their policy), as being done by either the customer service team or the retention team. It described the retention team as dealing mainly with inquiries relating to policy cancellations and premium dishonours. The Retention Agents were trained in dealing with complex inquiries and complaints. The team is managed by a Team Leader who reports directly to the Retention Manager. The organisational chart of BlueInc Group also treats 'Retention' as an established area, and separate from client services. Employment documents listed 'Retention' as a separate department.

78 Moreover, compliance reports for Select record, inter alia, "in accordance with the AFSL authorisations, all representatives including Retention staff are trained to follow general advice scripts, prepared and signed off by general advice accredited personnel". It can readily be inferred this was necessary because the Retention Agents were providing financial advice to customers. The Retention Agents conduct was monitored by Select, as evidenced by the compliance reports. Such training and monitoring steps in that regard would not be required if the Retention Agents were performing administrative tasks under the Administrative Agreement.

79 The evidence also establishes that Retention Agents, like Sales Agents, were paid a commission for saving policies, and targets were set as to the percentage of policies to be saved.

80 *Finally*, as explained in more detail when considering the Consumer Contraventions, a consideration of the calls by the Retention Agents with the Consumers demonstrates that the Retention Agents were providing financial product advice. Indeed, the calls commenced with the Retention Agent telling the Consumer, as he or she was required to do by the script provided by Select, that "I am only able to provide general advice". This reflects the nature of the call that followed. Indeed, it appears that so much is now conceded.

81 The ordinary common law principles of agency as reflected in s 12GH(2)(a) of the ASIC Act and s 769B(1)(a) of the Corporations Act are established in respect to the Retention Agents. I

also accept ASIC's submission that, even if that were not so, the evidence establishes extended statutory agency given that control over the agents was ultimately exercised by Mr Howden in his capacity as the sole director of Select, within s 12GH(2)(b) of the ASIC Act and s 769B(1)(b) of the Corporations Act.

82 I am satisfied that the conduct of the Sales and Retention Agents is attributable to Select. In particular, I am satisfied that the conduct of each of the Sales and Retention Agents who made telephone calls to Consumers the subject of the Consumer Contraventions is attributable to Select.

83 In relation to the Consumer Contraventions, BlueInc Services is also liable for the same contraventions as alleged against Select due to the conduct of its employees, as is IMS for contraventions due to the conduct of persons it engaged through hire labour agencies. The relevant Agents are identified when addressing the Consumer Contraventions.

Evidence

84 Some facts were agreed between ASIC and the Corporate Defendants in these proceedings as reflected in the ASOAF, as mentioned above. It is to be recalled, however, that those facts are not agreed as between ASIC and Mr Howden.

ASIC's evidence

85 ASIC tendered a significant amount of documentary evidence.

86 In addition, an affidavit was read from each Consumer, subject to rulings on objections to aspects of the evidence.

87 The Consumers were not required for cross-examination. I accept their evidence. I will consider this evidence when addressing the Consumer Contraventions.

88 ASIC also relied on the following further affidavits:

(1) Affidavit of Deborah Lilian Armstrong affirmed on 7 May 2019. Ms Armstrong is a financial counsellor in Maningrida, Northern Territory;

(2) Affidavit of Nicole Rose Casley affirmed on 12 September 2019. Ms Casley is a Policy Advisor in the Indigenous Outreach Program at ASIC;

(3) Affidavit of Nadyezhda Pozzana affirmed on 1 November 2019. Ms Pozzana is a Certified Interpreter with the Aboriginal Interpreter Service, which is a part of the

Northern Territory Department of Local Government, Housing and Community Development;

(4) Affidavit of Cameron Luke Villarosa affirmed on 6 February 2020. Mr Villarosa is a lawyer in the Financial Services Enforcement team at ASIC; and

(5) Two affidavits of Dr Diane Eades affirmed on 12 August 2020, annexing an expert report and associated briefing material.

89 ASIC also relied on s 79 notices, containing transcripts from a number of examinations conducted pursuant to s 19 of the ASIC Act, which were admitted subject to objections. The Defendants did not require any of the s 19 examinees for cross-examination.

Patrick Hoey's evidence

90 ASIC also read an affidavit of Patrick Hoey affirmed on 10 July 2020 (subject to the rulings as to the limited objections). Mr Hoey had been an employee of BlueInc Services from about January 2013 to June 2017. He was initially hired as a Sales Consultant and reported to Renni Atwal, Head of Sales, who oversaw the sales floor. Later in July 2013, Mr Hoey commenced as Business Development Manager, reporting to both Mr Atwal and Mr Howden. From this time until January 2016, Mr Hoey was a senior member of the sales team reporting to Mr Atwal. Between February and June 2016, Mr Hoey left BlueInc Services to return to Ireland for personal reasons. In about June 2016 he came back to Australia, and returned to work at BlueInc Services in the role of Sales Coach where he reported to Adit Shah, who had taken over the role of Head of Sales. He was subject to cross-examination. I accept his evidence.

91 It is appropriate to first summarise briefly his evidence by affidavit.

92 The sales culture at BlueInc Services was very competitive.

93 Mr Hoey's evidence was that all Sales Agents had a 'dashboard' on their computer screen and could see the amount of sales they and everybody else working on the sales floor had made. There was a leader board displayed on the dashboard and on televisions in the office that would be regularly updated throughout the day. During the course of a day when sales were low, the Head of Sales would send an email to the whole floor including Mr Howden setting out the number of sales made by each Sales Agent, and if a Sales Agent had made no sales, their name would be highlighted in yellow.

94 Various practices encouraged or rewarded sales, in which Mr Hoey participated. A bell attached to the wall in the middle of the sales floor was rung each time a person made a sale. If a Sales Agent had not made a sale before lunch, on more than one occasion they were told by Mr Atwal to buy the whole team doughnuts, given the number zero on the leader board resembled a doughnut. At least in 2016 and 2017, a similar practice existed whereby agents who had made zero sales were required to wear an inflatable doughnut until they made a sale. Around 2014, the top five sales agents, including Mr Hoey, also attended a 'Wolf of Railway Street' seminar to meet and hear from Jordan Belfort, the 'Wolf of Wall Street'. Sales culture practices (such as Mr Atwal asking the Sales Agents to jump up, raise their hands and yell "sales, sales, sales") inspired by this seminar were witnessed by Mr Howden in the years following that seminar.

95 Three more practices for motivating Sales Agents referred to in Mr Hoey's evidence are notable: the 'Million Dollar Club', the 'Top Dog Chair' and 'Super Sales Days'. If a Sales Agent reached a million dollars in premiums, they joined the Million Dollar Club (which Mr Hoey did on more than one occasion). The agent's name was placed on a plaque, they won a $1,000 Flight Centre voucher and they received a glass trophy. The Top Dog Chair was a particular chair (at one time a big leather chair and at another a big race car chair) given to the top Sales Agent to sit in for the month until they were knocked off as 'Top Dog' by another Sales Agent. Mr Howden was present at various presentations of the Top Dog Chair. Super Sales Days were longer days usually held on the last day of the month, where Sales Agents collected prizes allocated to numbered balloons in the office. The prizes included coffee vouchers, Coles Myer gift cards, prepaid VISA cards of up to $100 in value, and an iPad.

96 During Mr Hoey's employment, a number of sales incentives were offered. These included team incentives, as well as individual incentives such as the Cruise Incentive, Vespa Incentive and Las Vegas Incentive. Mr Hoey's evidence was that these incentives motivated him to sell more. He went on the cruise offered by the Cruise Incentive and his evidence was that it was a "leisure trip" which did not involve any work or training. Mr Hoey also won the Vespa offered by the Vespa Incentive and was presented with the keys by Mr Howden in front of everyone in the office. Rebecca Dudbridge received the second place prize, which was a $2,000 cash prize. Mr Hoey agreed to sell the Vespa to one of his colleagues for $4,000. After Mr Hoey's colleague changed his mind, the colleague then offered to sell the Vespa on Mr Hoey's behalf and did so online. BlueInc Services paid the sale proceeds to Mr Hoey through his salary as commission, which was taxed. The Vespa remained in the office until it was sold. The

relevance of this to the question of whether the Vespa was a monetary or non-monetary benefit is discussed below.

97 Mr Hoey was aware that the Las Vegas Incentive was launched in 2016, but he was in Ireland at the time this Incentive was running.

98 Mr Hoey also gave evidence about the circumstances surrounding the termination of his employment with BlueInc Services, which are summarised below.

99 Mr Hoey was purportedly given a "2nd formal warning" dated 31 July 2015 in relation to an "unethical sale where it was unclear the customer was aware of what they had purchased", which was signed by Mr Shah. However. Mr Hoey did not recall ever receiving or signing that document at the time or attending any meeting with Mr Shah.

100 Around late 2015, Mr Hoey recalled having a conversation with Mr Atwal and Mr Howden where concerns were raised about a number of sales in certain Indigenous areas and the use of the Refer a Friend program. I note that this spike in sales to Indigenous customers is examined in closer detail below when considering the QA system and in relation to the Refer a Friend program and the alleged s 912A contraventions. Mr Hoey's evidence was that he was not given any formal warning at that meeting.

101 In February 2017, Mr Hoey said that he signed a Final Formal Warning, which was also signed by Mr Shah, in respect to "excessive use" of the Refer a Friend program (despite the fact that the document was dated 5 October 2015). Mr Hoey recalled that Ms Dudbridge was also asked to sign a Formal Warning, bearing the same date (5 October 2015). Copies of the warnings were tendered. Mr Hoey's evidence was that Mr Shah gave him this letter in February 2017. He recalled that Mr Shah was not his manager in October 2015, as he reported to Mr Atwal at that time.

102 It suffices to note at this point that ASIC claims that the formal warnings given to Mr Hoey and Ms Dudbridge dated 5 October 2015 were not created contemporaneously bur rather were backdated and in fact created in February 2017. It will be necessary to return to that issue below.

103 In or around June 2017, Mr Hoey decided to leave BlueInc Services. He recalled having a conversation with Mr Howden where he told Mr Howden about his plans to move to England and that he would be resigning from the company. Shortly thereafter, Mr Hoey said that he was "sacked" in a meeting with Mr Howden and Mila Gmitrovic, Head of Human Resources. He

was told that the reason his employment was being terminated was due to the calls he made in 2015 "based on the Refer a Friend program and a spike in sales to Indigenous areas". Mr Hoey understands that Ms Dudbridge was "sacked" on the same day.

104 Mr Hoey gave evidence on the events that followed the 2015 spike in sales to Indigenous customers, which the Corporate Defendants and Mr Howden attribute to Mr Hoey's conduct and the conduct of Ms Dudbridge, and for which Mr Hoey's employment with BlueInc Services was apparently terminated.

105 Mr Hoey was cross-examined, including on the following topics.

106 In relation to the sales culture in which the various incentives were offered, Mr Hoey maintained that "[i]t was a hard push sales culture which was a uniform approach across the whole floor" and that it was "enforced from the top down".

107 Mr Hoey was cross-examined on having received and given training to other Sales Agents that included training to avoid unconscionably and coercively selling policies, making misleading representations or harassing consumers. The Corporate Defendants also put to Mr Hoey that he knew what constituted misleading, unconscionable and coercive conduct, and did not need somebody to tell him not to engage in that conduct. Mr Hoey accepted that proposition, although he on occasions responded that he knew not to engage in such conduct, "generally speaking". For some of Mr Hoey's answers, particularly in relation to harassment, there was some hesitation because it depended on the meaning of the term. In relation to the question about unconscionable conduct, Mr Hoey's response included that "obviously sometimes other factors play a part when it comes to the incentives and so forth." Mr Hoey was also cross-examined on being paid a salary and commission, and the effect of a non-compliant sale on that. He was also asked about non-complaint sales in respect to the Incentives. Mr Hoey's evidence on those topics referred to the sales culture.

108 Mr Hoey was cross-examined on winning the Vespa in the Vespa Incentive and the circumstances of its sale and receipt of its proceeds.

109 Mr Hoey gave evidence in cross-examination that he considered himself motivated to sell more insurance policies by participating in the Cruise Incentive and the Vespa Incentive.

Dr Diana Eades' evidence

110 ASIC also read the affidavits of Dr Diana Eades affirmed on 12 August 2020. Dr Eades is a sociolinguist specialising in communication with Aboriginal people who speak varieties of English, including the use of gratuitous concurrence by Aboriginal people. The Defendants did not object to any part of her evidence. However, she was required for cross-examination. I accept her evidence.

111 Dr Eades' doctorate is in linguistic anthropology and sociolinguistics and she has almost 40 years' experience in research, teaching and the practical application of her training and research. Dr Eades is a Fellow of the Australian Academy of the Humanities, was the head of its linguistics section between 2012 and 2015, and is presently an Adjunct Professor at the University of New England. It was not in contest that Dr Eades has specialised knowledge in the use of gratuitous concurrence by Aboriginal people, and that that knowledge is based on her training in linguistic anthropology and sociolinguistics, and her almost 40 years of study and experience. The Corporate Defendants accepted that her training and experience is "undoubtedly extensive".

112 In her report, Dr Eades described gratuitous concurrence as:

> …the sociolinguistic term for a conversational pattern which has been recognised by some observers since the first half of the 20lh century, and which appears to often impact Aboriginal communication with non-Aboriginal Australians, especially in institutional settings. As I have previously described (e.g. Eades 2013), it can be explained as:
>
> > saying "yes" (or "yeah" or "mm' or nodding their head) in answer to a question, (or "no", "nuh" or shaking their head to a negative question), regardless of whether or not the person agrees with what they are being asked, and sometimes regardless of whether they even understand the question
>
> The expectation in Anglo conversations is that an unqualified answer such as "yes", "yeah", "mm" or "Okay" to a question is a definite agreement (in contrast to answers such as "maybe", 'I'm not sure", "yes, I think so"). Thus any subsequent answer that is not consistent with this unqualified yes type answer is seen by Anglo speakers as a contradiction or inconsistency. In contrast, speakers who use answers of gratuitous concurrence sometimes intend to communicate politeness, cooperation, compliance or even submissiveness. Sometimes such answers may communicate superficial, temporary or contingent agreement.
>
> When an Aboriginal person uses gratuitous concurrence but their answers are interpreted according to non-Aboriginal expectations, this necessarily entails a degree of miscommunication, because there is a divergence in what the two parties think has been communicated. This divergence can often remain undetected, affecting the basis for communication later on in the conversation.

113 Dr Eades' expert opinion contained in her report is that each of David Mirrawana, Jennifer Yalumul, Georgina Gaykamangu, Geraldine Campbell, Edmund Nundhirribala, Cynthia Mirniyowan and Derek Wurrawilya, to varying degrees, used gratuitous concurrence in their calls with agents. The primary focus of the analysis was the main sales calls, as they were the longest or, in some cases, the only calls available. In the cases of Mr Mirrawana, Ms Yalumul, Ms Gaykamangu, Ms Campbell and Mr Nundhirribala, the main sales calls provided sufficient material to enable the opinion to be formed. In the case of Ms Mirniyowan and Mr Wurrawilya, recourse was had to other calls available. Dr Eades' evidence is that gratuitous concurrence was more prominent in some of the calls than in others (for example, there was only one example for Mr Wurrawilya and it is also present to a lesser extent for Ms Mirniyowan).

114 In forming that opinion Dr Eades undertook a close linguistic analysis of what each of the Consumers actually said and did not say in answer to particular questions in the recorded calls. She looked for "patterns" and drew on direct, indirect, and wider evidence about the linguistic, educational and social circumstances of the relevant Consumers. She concluded that the nature of the sales calls and the use of legal language provided certain common features which increased the probability that a consumer's reply used gratuitous concurrence. This is particularly so in respect of the question posed towards the end of calls as to whether the consumer had understood everything discussed in the call, as well as asking a consumer whether an answer was "a clear yes".

115 Take the following example in respect to Mr Hoey's sales call on 23 March 2015 with Mr Mirrawana, who Dr Eades concludes more probably than not used gratuitous concurrence:

> 1. PATRICK: (03:40) Okay, (ah) cool. So, David, you'll receive your policy documents by post, together your policy documentation, ah, I 'm sure you will, just keep that x safe it's for your future reference. And David lastly, just wanna confirm, you're happy and understood evering we discussed today? (fast, unclear}
>
> 2. MR MIRRAWANA: Sorry?
>
> 3. PATRICK : Yep, oh sorry David just looking here so, David I just need to confirm, that postal, x so if I post that there to Private Mail Bag 102, Winnellie, 0822, you'll receive that okay, is that correct?
>
> 4. MR MIRRAWANA: Yep, yep.
>
> 5. PATRICK: (04:09) Beautiful so David, congratulat- you've got yourself covered again just want to confirm, you're happy and understood evering we discussed today is that correct?
>
> 6. MR MI RRAWANA: No worries.

7. PATRICK: No worries. Is that a clear yes?

8. MR MIRRAWANA: All clear.

9. PATRICK: All clear beautiful okay. [Um

10. MR MIRRAWANA: [I got] all the key, yeah.

116 In respect to this exchange, Dr Eades observes:

> This confusion indicates it is unlikely that Mr Mirrawana understood the intended meaning of the question "Is that a clear yes", and he was probably trying to answer in a way that matched the question, rather than actually communicating whether he consented.
>
> Thus Mr Mirrawana's "all clear" answer in line 8 is probably gratuitous concurrence because the answer "I got all the key, yeah" indicates his mishearing and misunderstanding of the question about "a clear yes" in line 7. As explained above, this is typical of partial speakers using echo answers to scaffolded questions (Section 4.7.1.4). The answer produced, which "echoes" part of the question, would seem appropriate and thus keeps the conversation moving, by using words the speaker has heard rather than really understanding what the question means and trying to express what the speaker thinks about it.

117 This particular call is discussed in more detail below in respect to the Consumer Contraventions.

118 Dr Eades was cross-examined on the following topics.

119 She was questioned about the complexity of the analysis she used, and the length of time it took her to develop her analysis and reach her conclusions. However, Dr Eades gave evidence that if she were called upon to make a less formal and detailed view, it would have been a much less laborious process, which “wouldn’t take a huge amount of time”. Dr Eades also noted that her opinions were not just based on her expertise and knowledge in the area of gratuitous concurrence, but on “the many, many red flags that appear in those conversations”.

120 Dr Eades was further cross-examined about the meaning of Aboriginality generally. It was put to Dr Eades that Aboriginal people are “not a homogenous group”, Aboriginal people can live in urban areas, and whether a person is “Aboriginal” depends partly on their ancestry, and whether they have been accepted by their group, mob or tribe as being an Aboriginal person.

Defendants’ evidence

121 The Defendants did not call any evidence, but the Corporate Defendants tendered some documentary evidence.

122 The documents included:

(1) Documents relating to St Andrews' application to use the Westpac direct entry system and the authorisation of account access for accounts held with Westpac;

(2) Offers of employment from BlueInc Services for various Sales and Retention Agents;

(3) Emails between staff of St Andrew's and BlueInc Services attaching feedback on scripts for policies and programs;

(4) Documents relating to employee visa applications;

(5) Various curricula vitae;

(6) Information packs and fact sheets on policies sent to Consumers;

(7) Scripts for selling insurance products;

(8) Tax invoice for the Cruise Incentive;

(9) Tax invoices for services provided by contractors;

(10) PAYG payment summaries;

(11) National Police Check application forms;

(12) Final formal warning to Mr Hoey dated 5 October 2015;

(13) Documents relating to the sale and purchase of the Vespa;

(14) Documents relating to the Las Vegas Incentive;

(15) Employment personal detail forms and related documents;

(16) Product Disclosure Statements and Policy Booklets;

(17) Select Portfolio & Claims Analysis;

(18) Letters between ASIC and Bird & Bird; and

(19) Summaries and extracts relating to outbound sales and employee remuneration during incentive schemes.

Jones v Dunkel

123 The unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case: *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 (*Jones v Dunkel*); and see *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361 at [63]-[64]. The trier of fact may also draw an inference unfavourable to that party with greater confidence.

124 ASIC submitted that the Court can and should draw *Jones v Dunkel* inferences in respect to the Defendants failing to call certain persons as witnesses.

125 Most attention in this regard was focussed on Mr Howden who it was contended was uniquely placed to give evidence across all issues in these proceedings. As mentioned above, he is the sole director of all three Corporate Defendants, the Managing Director of the BlueInc Group, and was a Responsible Manager under Select's AFSL during the relevant period.

126 ASIC identified three topics in particular on which such evidence could have been given. *First*, the Incentives, including Mr Howden's involvement in their creation, approval and running, their purpose, the impact they had on agents' behaviour and performance while they were operating and the selection of the recipients. *Second*, the Refer a Friend program, including the creation, approval and running of the program, the quality of the leads generated through the Refer a Friend program, the way in which Sales Agents utilised the leads generated through the Refer a Friend program, the point in time at which he and the Corporate Defendants became aware that the Refer a Friend program had resulted in the spike in sales in postcodes with a high proportion of Indigenous residents, and the extent to which blame should properly be placed on Mr Hoey and Ms Dudbridge. *Third*, the steps, if any, that he took as director to inform himself of the Corporate Defendants' obligations under the conflicted remuneration provisions of the Corporations Act and to prevent the provision of the Incentives. ASIC expanded upon why it said Mr Howden could give evidence on each topic that would assist with the issues to be decided.

127 The Defendants submitted that the issues turn on the documentary evidence and the legal characterisation that should be given to the evidence. It was submitted that there is no unexplained failure to give evidence on an issue. It was submitted that it should be borne in mind that ASIC bears the onus of making out its allegations to the *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 (*Briginshaw*) standard. It was also submitted that no inference should be drawn in respect to the Corporate Defendants' failure to call Mr Howden, as he invoked his penalty privilege, and that in *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510 Levine J recognised that refusal to waive privilege may be an acceptable explanation for why a witness was not called.

128 I will address this issue during my consideration of the claims. Suffice to say at this stage, I do not accept the Defendants' submission that Mr Howden could not have given evidence relevant to the issues. The topics identified by ASIC referred to above are relevant.

129 It is also appropriate at this stage to address the Defendants' submission about the claim of penalty privilege.

130 In *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229; (2009) 236 FLR 1 at [460], Austin J said:

> The matter was addressed by the Court of Appeal in *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1 at [652]-[661] per Giles JA, with whom Mason P and Beazley JA agreed. That was a case in which, inter alia, pecuniary penalty orders were made, and so the defendants were protected by the penalty privilege, even before the High Court held in *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 that the penalty privilege extended to civil penalty proceedings seeking disqualification orders. Giles JA considered whether the availability of the penalty privilege, which he recognised to be an extension of the privilege against self-incrimination, is inconsistent with the application of the *Jones v Dunkel* principle. He concluded (at [661]):
>
> > In the end the argument must be that it would not be consistent with this stance against self-incrimination for an inference adverse to the person from whom a civil penalty is claimed to be drawn because of the failure of the person to give evidence. That reasoning did not find favour in *RPS v R* [(2000) 199 CLR 620; [2004] HCA 3], in which the "right to silence" was not thought to be a useful basis for reasoning: at [22]. To say that a person cannot be forced to give evidence against himself, by providing discovery or answering interrogatories or, in a criminal context, making a statement to the police, says little when it comes to the giving of evidence in the person's own case. In ordinary civil proceedings the defendant cannot be forced to give evidence in his own case. Civil penalty proceedings are no different in that respect. In my opinion it was open for *Jones v Dunkel* inferences to be drawn against Mr Adler, Adler Corporation and Mr Williams in these proceedings.

131 In *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2017] FCAFC 77; (2017) 251 FCR 528, the Full Court observed at [54]:

> Nor did the Appellants put in issue the fact that *Jones v Dunkel* could be invoked in proceedings of the present kind, being proceedings of a quasi-criminal nature and where civil penalties may be imposed: *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 at [459] to [463], (2009) 236 FLR 1 at 98 to 100 per Austin J ("*Rich*"). In subsequently applying this decision, Gilmour J in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586, (2009) 264 ALR 201 at 225 observed:
>
> > [100] Finally, in *Rich*, Austin J concluded at [458] that, having considered the reasoning in [*Dyers v The Queen* [2002] HCA 45, (2002) 210 CLR 285] and [*Adler v Australian Securities and Investments Commission* [2003] NSWCA 131, (2003) 179 FLR 1], the principle in [*Jones v Dunkel*] is applicable against either party to civil penalty proceedings.
> >
> > [101] ASIC seeks to draw [*Jones v Dunkel*] inferences against FMG by reason of the failure of Forrest and the other executives to give evidence. ASIC does not seek to draw the inferences against Forrest himself. Forrest has relied on the privilege against self-incrimination and the privilege against exposure to penalty, privileges which are not available to corporations … However, even if ASIC had sought to draw inferences against Forrest as well as the corporate entity, on my review of the authorities it would not have been precluded from doing so. There is no reason therefore, in these circumstances, why the

> inferences cannot, as a matter of law, be drawn against FMG in the present proceedings. The question which then arises is whether I should draw such an inference in the manner urged by ASIC.
>
> [102] The authorities state that two inferences are involved in the rule in [*Jones v Dunkel*]. First, a court might infer that the evidence of the absent witness would not have assisted the party that failed to call that witness; second, a court might draw, with greater confidence, any inference unfavourable to the party that failed to call that witness, if that witness appears to be in a position to cast light on whether the inference should be drawn …

132 And see *Adams v Director of the Fair Work Building Industry Inspectorate* [2017] FCAFC 228; (2017) 258 FCR 257 at [146]-[147]; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* [2007] FCAFC 132; (2007) 162 FCR 466 at [76].

133 There is no reason as a matter of law why inferences cannot be drawn in this case.

134 There are a number of other witnesses in respect to whom ASIC contends inferences ought also to be drawn. It is submitted that they are in the Defendants' "camp", have not been called and are witnesses whose evidence might be expected to have elucidated particular matters.

135 They are Daryl Banks and Eugeniu Jalba who are both on the Executive Team of Momentum Life Ltd, which is wholly owned by BlueInc Group and as such controlled by Mr Howden. Mr Banks was the Sales Agent who sold insurance to Irshad Hussain. He was also one of the recipients of the Cruise, the Las Vegas Trip and the Hawaii Trip. His evidence would have, inter alia, elucidated the circumstances of the call with Irshad Hussain (including his state of knowledge), the impact of the Incentives on his behaviour and his observations regarding that of other Sales Agents. Evidence could also have been given of the Refer a Friend program. Mr Jalba was the Head of Finance and Operations for the BlueInc Group. He was the Responsible Manager on Select's AFSL from about July 2015. He managed the customer service team of BlueInc Services, supervised the retention team and had the compliance team sitting under him. He attended the monthly compliance meetings. His evidence would have elucidated, inter alia, what if any role compliance played in the Incentives, and the adequacy or otherwise of the compliance system to identify and address the breaches occurring on calls to customers by reason of the Refer a Friend program. I accept ASIC's submission that such evidence would be relevant, and in the circumstances they are witnesses that might be expected to have been called.

136 A submission was also made about five Retention Agents who made calls to the Consumers the subject of the Consumer Contraventions who are still employed by BlueInc Services, or were employed by BlueInc Services at the time the proceedings were commenced. It suffices to say that their roles varied in respect to their involvement with the Consumers, with some being very limited (and relating to only three Consumers). It is only in the retention context. That said, their knowledge of the Consumers' circumstances was a live issue, with the Defendants contending generally that the Agents could not have known the features alleged by ASIC, and their evidence would have elucidated this topic. However, for the purpose of my conclusions I have not drawn any inferences from the absence of their evidence.

137 It is timely to recall at this stage, that it must be borne in mind that ASIC bears the onus of making out its allegations: s 140 of the Evidence Act, and given the allegations, there is no issue taken with the Defendants' submission that it is to the *Briginshaw* standard.

Preliminary observations

138 Before addressing ASIC's claims, it is appropriate to address two of the Defendants' submissions at the outset.

The number of claims

139 The Corporate Defendants complain of the number of claims made in relation to this conduct. The purpose of this complaint is unclear, for although the claims are denied, the Corporate Defendants do not suggest there was anything preventing ASIC from bringing the allegations. It was not suggested there was any impediment to the matter proceeding to hearing.

140 Nonetheless, although one might properly question the number of claims made (in particular, in relation to some of the Consumer Contraventions, with numerous claims pursued for one individual call), such questioning does not detract from the underlying conduct. The focus on the number of complaints does not assist in resolving the claims, and ought not to distract from the issues being determined. As a general proposition it may be accepted that some conduct may amount to a contravention of more than one provision. That said, the efficacy of alleging multiple contraventions for the same conduct must be questioned, particularly if doing so does not substantially affect any penalty to be imposed, yet it may impact on the duration or complexity of the hearing. Whether that is so will depend on the given case.

The pleadings

141 The Defendants' submission was also replete with assertions that certain matters were not pleaded by ASIC, or that its pleading was deficient. The Defendants repeatedly asserted that they were holding ASIC to their pleadings. ASIC challenges those assertions.

142 In that context, although some individual submissions will be addressed later in these reasons it is appropriate to make a number of general observations.

143 *First*, notably, the Defendants do not suggest that they did not know the case alleged against them.

144 *Second*, the pleading is to be assessed against the purpose it is to serve. It is important in that context to remember, as Dawson J said in *Banque Commerciale S.A., En Liquidation v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279 at 293, "[p]leadings are but a means to an end and not an end in themselves".

145 In *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 at [13], the Court observed that:

> It is well-established that the main purposes of pleadings are to give notice to the other party of the case it has to meet, to avoid surprise to that party, to define the issues at trial, to thereby allow only relevant evidence to be admitted at trial and for the trial to be conducted efficiently within permissible bounds: see, eg *Dare v Pulham* [1982] HCA 70; (1982) 148 CLR 658 (at 664–665). However, it is also well-established that pleadings are not an end in themselves, instead they are a means to the ultimate attainment of justice between the parties to litigation: see *Banque Commerciale S.A. (in liq) v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279 (at 293) per Dawson J who cites Isaacs and Rich JJ in *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)* [1916] HCA 81; (1916) 22 CLR 490 (at 517). For these reasons, the courts do not, at least in the current era, take an unduly technical or restrictive approach to pleadings such that, among other things, a party is strictly bound to the literal meaning of the case it has pleaded. The introduction of case management has, in part, been responsible for this change in approach: see the observations of Martin CJ in *Barclay Mowlem Construction Limited v Dampier Port Authority* [2006] WASC 281; (2006) 33 WAR 82 (at [4]–[8]). Even before the widespread use of case management, the High Court reflected this approach in decisions such as *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 (at 668–669) per Stephen, Mason and Jacobs JJ and *Water Board v Maustakas* [1988] HCA 12; (1988) 180 CLR 491 (at 497) per Mason CJ and Wilson, Brennan and Dawson JJ.

146 This was recently cited with approval in *Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788* [2021] FCAFC 121; (2021) 396 ALR 27 at [152].

147 *Third*, the pleading is to be read as a whole and in context. It does not advance the Defendants' case to consider matters pleaded in isolation. For example, in respect to vulnerability or the personal circumstances of the Consumers, it is not appropriate to consider each characteristic

in isolation and separately from the others pleaded. Some submissions as to the pleadings are artificial, very technical, and not borne out by a proper reading of the Further Amended Statement of Claim (FASOC). To take only two examples at this stage. *First*, it was submitted that although ASIC characterised or described particular calls as the Consumers being railroaded, that allegation is not pleaded. However, in respect to each Consumer it was pleaded that certain conduct constituted, inter alia, undue pressure. In the context in which it appears, that is a synonym for what was submitted. *Second*, it was submitted that cold-calling was not an integer of unconscionability as it was not pleaded, and the anti-hawking provisions were not alleged. However, in respect to the Consumers, it is pleaded in respect to coercion that they were telephoned without prior notice. The pleading in relation to unconscionability, refers to the matters pleaded in respect to coercion and encompasses that conduct. Of course, those examples also further illustrate that a pleading must be read in its context and not in isolation.

Conflicted Remuneration Contraventions

148 This category of claims relates to four incentive schemes offered by Select to its Agents: the Cruise Incentive, the Vespa Incentive, the Las Vegas Incentive and the Hawaii Incentive.

149 In summary, it is contended that: Select contravened s 963E when the relevant Sales Agents accepted the Incentives because Select's representatives accepted conflicted remuneration and it was the responsible licensee in relation to the contravention; and that Select contravened 963F of the Corporations Act in respect to each of the relevant Sales Agents accepting the Incentives. Further, ASIC contends that BlueInc Services contravened s 963J by giving the relevant Sales Agents the Incentives. It is also alleged that Mr Howden aided, abetted, counselled or procured, or alternatively, induced and was knowingly concerned in and party to, each of Select and BlueInc Services' contraventions pursuant to s 79 (FASOC [30]-[81]).

150 The Incentives were planned and promoted by staff including Mr Howden, who ultimately approved all of the Incentives and their budgets. The Incentives were heavily promoted, including by email, posters on the office walls, and displays such as the Vespa being displayed in the Call Centre.

151 It is necessary to describe at the outset how the scheme operated.

The Incentives

Gold Coast Cruise

152 In the period of February 2015 to June 2015 (Cruise Incentive qualifying period), Sales Agents who sold Let's Insure Funeral Cover or Let's Insure Life Cover were able to participate in a sales incentive program named the "Let's Insure Sailors' Sales Incentive" (Cruise Incentive).

153 The benefit offered was a four night cruise package including accommodation, meals, a drinks package and two days annual leave (the Cruise). It was agreed that the Cruise Incentive was a non-monetary benefit.

154 The Cruise Incentive operated as follows: every sale of a Let's Insure Funeral Cover or Let's Insure Life Cover product during the period February 2015 to June 2015 earned one point and two points were deducted for any sale where commission was clawed back due to QA breaches. The ten Sales Agents with the most points at the completion of the qualifying period won the Cruise and three Wild Cards and two Sales Team Leader spots were also available.

155 There was an issue between the parties as to the types of QA breaches which resulted in a two point deduction. ASIC contended that point deductions resulted from five breaches relating to: call recording; general advice warning; omission of any exclusion; failure to obtain clear "Yes" to start the policy; and failure to obtain Direct Debit Authority. This contention was said to be based on the detailed presentation given to Sales Agents in 2015 at the commencement of the Cruise Incentive. The presentation listed these five breaches, and is said by ASIC to be the most reliable evidence of the terms of the Cruise Incentive.

156 The Corporate Defendants contended that the circumstances for QA breaches were broader and encompassed any breach of compliance or QA standards in calls with potential customers. They gave three reasons for this. *First,* it is consistent with the responses given by employees and former employees of the Corporate Defendants in their s 19 examinations. Mr Atwal, former Head of Sales for Select, said that there were compliance factors for all of the incentives and Sales Agents lost points for breaches of QA standards, including "missing certain parts of the script [that were] mandatory". Mr Banks, who was a Sales Agent, Sales Manager and Team Leader for Select, said that under the incentives there were penalties for uncompliant sales. Simon Hudson, former Sales Agent for Select, believed there was a two-point deduction for QA fails, which was when a Sales Agent received below 90% on the QA sheet. Mr Howden said there was a rule under the incentives that for every failed sale Sales Agents lost two points.

Second, it is consistent with the contemporaneous PowerPoint presentation used to promote the Cruise Incentive which advised in bold, underlined letters: "[y]ou will be deducted 2 points for every incident". Although the PowerPoint presentation gave specific examples of breaches which would result in the loss of points (such as the "omission of any exclusion"), there is nothing to indicate that the loss of points was limited to those breaches. *Third*, it is consistent with Select's response to a s 912C(1) Notice dated 15 March 2019, where Select responded to ASIC's query about the manner in which qualification points were earned for the Cruise Incentive with: "[e]very failed call resulted in a deduction of 2 points".

157 I accept ASIC's submission as to the scope of the breaches. The PowerPoint presentation, which was for the purpose of explaining the scheme, did not, when referring to breaches, refer to *all* breaches. Nor did it suggest that the breaches referred to were merely *examples* of breaches. Although, as the Corporate Defendants submitted, the presentation advised in bold, underlined letters, "[y]ou will be deducted 2 points for every incident", there is a larger context in which that statement appeared. On the same slide, immediately above that bold and underlined statement, is the question: "What can hinder my chances?" That question is followed by the answer: "[a]ny sale in which a commission is clawed back, due to any of *the following* breaches" (emphasis added), then it lists in dot points the five breaches to which ASIC referred. Plainly, the types of breaches are so confined. If the claw back was for *all* breaches, the presentation could easily have said so. It did not. The PowerPoint presentation is the only contemporaneous record.

158 The following individuals qualified for and went on the Cruise: Mr Shah; Amy Gibbons; Clare McParland; Clare Sadler; David Liu; Gregory Chadwick; Lee Marshall; Matthew Canning; Mr Hoey; Ms Dudbridge; Mr Hudson; Sinead Keane; George Flegg; Hugo Thompson; and Mr Banks. Each of the Sales Agents (except for Mr Banks) was an employee of BlueInc Services; and a representative of Select within the meaning of Ch 7 of the Corporations Act. I note that ASIC does not make a claim that BlueInc Services contravened s 963J in respect to Mr Banks (FASOC [34] and [41]).

159 The Corporate Defendants submitted that the five individuals who went on the Cruise as a result of receiving a Wild Card or by virtue of being the chosen Sales Team Leaders did not receive the benefit of the Cruise as a result of the number of Let's Insure Funeral Cover or Let's Insure Life Cover products they sold. These five individuals qualified, the Corporate Defendants submitted, for reasons unconnected with the points-based sales criteria.

160 ASIC's case is that the benefit given to all 14 individuals constituted conflicted remuneration. The last sentence in [0] above was an agreed fact between both ASIC and the Corporate Defendants. The PowerPoint presentation states that to qualify for a Wild Card, Sales Agents must: "[h]ave an exceptional work ethic", "[d]rive & motivate team members", and participate in the "[o]ngoing promotion of the incentive". The two Sales Team Leaders also sold policies during the Cruise Incentive qualifying period – they acted as Sales Agents and provided financial product advice. One of the Sales Team Leaders sold the policy to Ms Shadforth; the other, to Mr Mtawale (both the subject of the Consumer Contraventions). The two Sales Team Leaders, Mr Shah and Mr Thompson, in the Cruise Incentive qualifying period sold at least 79 and 112 policies respectively. These persons were participating in the volume based Incentive. All 14 individuals were acting as Sales Agents in participating in the Incentive during the qualifying period. As such, they were providing financial product advice in the course of the calls during the qualifying period. That they might have ultimately qualified, for example, as a Wild Card, does not alter that.

161 The Cruise departed on 16 July 2015 and returned on 20 July 2015. It was a leisure trip: it did not involve training, nor anything work related.

Vespa Scooter

162 In the period 9 February 2015 to 30 June 2015 (Vespa Incentive qualifying period), Sales Agents who sold Let's Insure Funeral Cover or Let's Insure Life Cover were able to participate in a sales incentive program named the "Vespa Sales Battle" (Vespa Incentive).

163 The benefit offered was a "brand new Vespa", promoted as having a value of $6,000. The Vespa Incentive operated as follows. A Sales Agent earned one point in the period 9 February 2015 to 29 May 2015 for every sale of a relevant Let's Insure product (First Round). The ten Sales Agents with the most points at the end of the First Round qualified to participate in a second round from 1 to 30 June 2015 (Second Round) and the ten Sales Agents in the Second Round had their points balance reset to zero and earned one point in the Second Round for every sale of a relevant Let's Insure product. The Sales Agent with the most points at the completion of the Second Round won the Vespa.

164 The promotional material for the Vespa Incentive does not contain any reference to points being deducted in any circumstances. ASIC submitted that there is no basis to find there was any such practice. The Corporate Defendants submitted that Sales Agents lost two points for any breaches of QA or compliance standards on calls with potential customers, which was what

they contended in relation to the Cruise Incentive. The Corporate Defendants relied on three points to establish this submission. *First*, they relied on the s 19 examination responses referred to at [0] above. *Second*, they pointed to the Vespa Incentive running at the same time as the Cruise Incentive, from February 2015 to June 2015. The obvious inference is that the incentives had the same qualifying criteria. It was said to be inconceivable that Sales Agents would lose points for a QA fail in one incentive but not the other, such that the same call could result in an agent earning one point in the Vespa Incentive but losing two points in the Cruise Incentive. *Third*, they submitted the qualifying criteria is consistent with Select's response to a s 912C(1) Notice dated 15 March 2019, where Select responded to ASIC's query about the manner in which qualification points were earned for the Vespa Incentive with: "[e]very failed call resulted in a deduction of 2 points".

165 The Vespa Incentive appears to have been marketed and promoted differently to the Cruise Incentive. The Vespa Incentive was referred to as a "sales battle" setting up a two-stage competition between the Sales Agents. The Vespa was physically present on the sales floor throughout the Vespa Incentive. There is some logic in the Corporate Defendants' submission that it would be rather unusual to have deductions for QA and compliance breaches for one incentive and not another that is running at the same time. That said, in relation to the Cruise Incentive, I find that not all breaches of QA led to a clawback of points. Although I am inclined to accept there was clawback for some breaches, the number would not have been any greater than that which occurred for the Cruise Incentive.

166 The Vespa Incentive was won by Mr Hoey.

167 The Corporate Defendants challenged the alleged fact that Mr Hoey actually received the Vespa; their case was that Mr Hoey was awarded $4,000 cash instead. Whether Mr Hoey received a monetary or non-monetary benefit was said to be relevant to whether the Corporate Defendants can rely on the exemptions in s 963B.

168 Mr Hoey's evidence was that he was presented with the keys to the Vespa by Mr Howden in front of the other staff. At that time, Mr Hoey could not drive, and a co-worker offered to buy the Vespa from him. Mr Hoey and the co-worker agreed on a purchase price of $4,000. Sometime later, the co-worker changed his mind about the Vespa, and sought to sell it online. Mr Hoey did not deal with the actual sale process. The Corporate Defendants' submission that the Vespa was sold "without [Mr Hoey's] involvement and with little knowledge on his part" is inconsistent with the unchallenged evidence. There is also no basis to the Corporate

Defendants' assertion that Mr Hoey never owned the Vespa. When Mr Hoey won the Vespa and was handed the keys, the Vespa became Mr Hoey's to sell, and he did precisely that.

169 The purchase sum appears to have been paid to BlueInc Services, and ultimately paid to Mr Hoey by BlueInc Services, which was described, in my view rather curiously, as a commission. Although the Corporate Defendants submitted that the benefit Mr Hoey ultimately received was solely monetary, that does not detract from or undercut the evidence that the benefit that was offered and given was the Vespa, a non-monetary benefit.

170 As ASIC submitted, there is no suggestion in any of the promotional material at the time that a cash prize was available in place of the Vespa. In response to a request by ASIC in a s 912C(1) Notice to Select dated 15 March 2019 concerning the Vespa Incentive to provide "the name of the Select AFSL employee, agent and/or representative who won the Vespa scooter", Select responded "Patrick Hoey". Further, during Mr Howden's s 19 examination, he stated that Mr Hoey won the Vespa and then sold it to somebody else, which is consistent with Mr Hoey's evidence.

171 I am satisfied that the Vespa Incentive was an offer of a non-monetary benefit. Consequently, the exception contended for by the Corporate Defendants does not apply.

172 Pausing there, before moving on to the 2016 and 2017 incentives, it is appropriate to refer to the evidence of Mr Howden in his examination before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) where he acknowledged, inter alia, that "the Vespa scooter and the cruise…drove wrong behaviours in those two agents" (plainly referring to the behaviour of Mr Hoey and Ms Dudbridge). Moreover, during his s 19 examination in May 2019, Ms Howden accepted that the Vespa Incentive "inappropriately motivated staff".

173 Further, in Select's written submission to the Royal Commission (which was authorised to be filed by Mr Howden), it was conceded, inter alia, that:

> The particular incentive schemes that appear to have led to the sales spike in 2015, such as the Vespa prize, were therefore not incentives where none previously existed, but rather additional incentives on top of the existing ones. It appears that the nature and magnitude of the additional incentives led representatives into failing to follow the practices required of them.

Las Vegas Trip

174 In the period January 2016 to March 2016 (Las Vegas Incentive qualifying period), Sales Agents who sold Let's Insure Funeral Cover, Let's Insure Life Cover or FlexiSure Life Cover were able to participate in a sales incentive program named the "Let's Insure 1st Quarter 2016 Incentive" (Las Vegas Incentive).

175 The benefit offered was a seven day package including flights to Las Vegas, accommodation, breakfasts and four days of annual leave (Las Vegas Trip).

176 The Las Vegas Incentive operated as follows. The three Sales Agents in each team who had the highest number of sales in a relevant Let's Insure or FlexiSure product at the end of February 2016 advanced to the final of the Las Vegas Incentive. A total of 15 Sales Agents advanced to the final of the Las Vegas Incentive and those 15 Sales Agents had their Las Vegas Incentive points balance re-set to zero at the beginning of March 2016. Of those in the final, the Sales Agents in each team with the highest number of qualifying sales at the end of March 2016 qualified for the Las Vegas Trip. The two Team Leaders with the most number of sales at the end of March 2016 also qualified for the Las Vegas Trip and two Wild Cards were also available. The PowerPoint presentation of this Incentive refers to terms and conditions applying ("T & C apply"). Those terms and conditions were simply described as "Deductions for: QA fails [;] Behavioural issues".

177 The Corporate Defendants submit that the same scheme operated, as in the Cruise Incentive and Vespa Incentive, whereby a person lost points for QA breaches. The submission is, in effect, put on the same basis as the previous Incentives addressed above. One problem with that submission is that the Cruise Incentive did not provide that points were clawed back for all breaches of QA; it referenced only particular breaches. As for the Vespa Incentive, it was silent on whether points were deducted for QA breaches. It is in this context that the PowerPoint presentation for the Las Vegas Incentive refers simply to "QA fails" and "behavioural issues". No further detail is provided. I will return to the issue of the QA assessments below at [0]-[0]. The inclusion of "behavioural issues" is different to what was included in the previous Incentives.

178 It was agreed that the Las Vegas Incentive was an offer of a non-monetary benefit.

179 The ASOAF records that it is agreed that eight Sales Agents qualified for and went on the Las Vegas Trip: Ms Sadler; Danielle Keane; Mr Banks; Mr Liu; Mr Suett; Matalena Wilson; Ms

Dudbridge; and Zara Linehan. Each of the Sales Agents was an employee of BlueInc Services (except for Mr Suett, about whom the parties were initially in dispute); and a representative of Select within the meaning of Ch 7 of the Corporations Act. However, the Amended Factual and Legal Issues for Determination, records at [14] that the position of Mr Suett was no longer in issue.

180 The Las Vegas Trip was given to the eight Sales Agents by BlueInc Services, in that BlueInc Services paid for the Las Vegas Trip and provided the Sales Agents on the Las Vegas Trip with four days of annual leave.

181 The Sales Agents departed for the Las Vegas Trip on 20 April 2016 and returned on 26 April 2016. It was a leisure trip: it did not involve training, nor anything work related.

Hawaii Trip

182 In the period 1 July 2017 to 30 November 2017 (Hawaii Incentive qualifying period), ASIC alleges that Sales Agents who sold Let's Insure Funeral Cover, Let's Insure Easy Life Insurance and Let's Insure Life Cover were able to participate in an incentive named the "BlueInc Group 2017 Excellence Conference Incentive" (Hawaii Incentive).

183 The benefit offered was a seven night package including flights to Honolulu, Hawaii, five nights' accommodation, an arrival dinner, travel insurance, transport and four group excursions (Hawaii Trip). Mr Howden announced the Hawaii Incentive to Sales Agents, during which Polynesian dancers performed. It was developed, coordinated and implemented by Integrated Event Solutions. Mr Howden was a director of Integrated Event Solutions. It was agreed that the Hawaii Incentive was a non-monetary benefit.

184 ASIC submitted that the Hawaii Incentive operated as follows. A Sales Agent earned three points for every sale of a Let's Insure Product. Points were also awarded for: full fortnightly attendance (10 points); the top fortnightly seller (15 points); and the runner up fortnightly seller (10 points).

185 The following people were said to qualify for the Hawaii Trip: the three Sales Agents in each team of the Let's Insure Funeral Cover Division who had the most points at the end of the qualifying period; the two Sales Agents selling Let's Insure Easy Life Insurance who had the most points at the end of the qualifying period; the Sales Agent selling Let's Insure Life Cover who had the most points at the end of the qualifying period; one Team Leader for each of the

Funeral Division and Life Division with the highest policy count; and one Wild Card from each of the Funeral Division and Life Division.

186 Unlike their approach to the preceding Incentives, the Corporate Defendants take issue with ASIC's characterisation of the Hawaii Trip as part of an incentive scheme. Rather, the Corporate Defendants contend that the Hawaii Trip was not a sales incentive at all, but a "selection process". The process was used to select which employees would go on the BlueInc Group Excellence Conference; a conference with attendees from all departments within the BlueInc Group for the purpose of recognising excellence and commitment to the organisation. The number of sales made by a Sales Agent was only one factor in this selection process.

187 The Corporate Defendants' submission was directed to two documents, the first of which describes the Hawaii Incentive to employees. That document sets out that the Hawaii Incentive was open to a wide range of departments: Administration, Analytics, Customer Service, Finance, HR, IT, Marketing, Quality Assurance and Retention. The Corporate Defendants drew attention to what the document specifies is required to win a spot on the Hawaii Trip – in respect to Sales Agents, "To win, you must maintain an overall QA of over 90% during the competition period!". The second document is Select's response to ASIC's s 912C Notice dated 15 March 2019, in which Select states that "[t]he incentive was open to all BlueInc Group staff, across all departments and companies". For Sales Agents to be selected, they "must achieve a minimum of 300 compliant sales across the competition period and show dedication to the role, commitment to the team and good overall timekeeping and attendance".

188 On the other hand, ASIC alleges that the Hawaii Incentive was a sales incentive. ASIC submitted that the Hawaii Incentive being open to other parts of the business does not detract from the fact that it was a sales incentive for the sales teams. It was submitted that there was different qualifying criteria to the Incentive depending on which aspect of the business was participating. The criteria that applied to group services did not apply to the sales teams, which were subject to specific criteria specified in the document. For sales team members, the criteria commenced by stating: "the most sales over the competition period will win!". It also stated that the "winning Team Leaders will be those with the highest policy count!".

189 ASIC submitted that the Hawaii Incentive was promoted as such. A staff newsletter included a message from Mr Howden in which he wished "good luck to everyone vying for a ticket to Hawaii". On the same page, Mr Shah, the Senior Sales Manager of Funeral Sales, referred to "competition and rivalry between staff and teams" being at a new level because "[e]veryone is

eager to secure their spots for this amazing once in a lifetime trip", and Mr Banks, the Sales Manager of Life Sales, also referred to the Hawaii Incentive and said his team was "eager to set more [sales] records!". The Hawaii Incentive was further promoted by posters on display in the Call Centre.

190 I am satisfied that properly considered, the Hawaii Incentive, in so far as it applied to the Let's Insure sales team, was a sales incentive. Contrary to the Corporate Defendants' submission, the Incentive was not "all about compliance".

191 The following individuals went on the Hawaii Trip: Benjamin Moore; Daniel Saphra; Mr Shah; Mr Banks; Francis Teague; Jason Downing; Jessica Lane; Paris Brookes; and Tex Jacks. Each was an employee of BlueInc Services and a representative of Select within the meaning of Ch 7 of the Corporations Act. The Hawaii Trip was given to the individuals by BlueInc Services, in that BlueInc Services paid for the Hawaii Trip. The Corporate Defendants admit that seven of those Sales Agents received the Hawaii Trip solely as a result of selling Let's Insure Funeral Cover, Let's Insure Easy Life Cover or Let's Insure Life Cover. However, it was contended by the Corporate Defendants that Mr Shah and Mr Banks, who were Team Leaders, were selected by Mr Howden to go on the Hawaii Trip as a reward for their commitment and not on the basis of qualifying because of the sales they had made. It may be accepted that at times Mr Shah and Mr Banks acted as Sales Agents. They were both Sales Managers during the relevant time. It can be inferred that demonstrating commitment, given their positions, would include any sales made by them. ASIC submitted that Mr Shah made at least three calls shortly before the qualifying period (in February and late April 2017), and Mr Banks sold at least four policies during the qualifying period (being July 2017 to November 2017). They were providing financial product advice in the course of the calls during the qualifying period. That they may have ultimately obtained the Incentive on the basis of being a Team Leader does not alter that. I note that the Incentive was open to "all Let's Insure sales team members". For those sales team members, the criteria commenced with the statements recited above at [0].

192 The Sales Agents (along with Mr Howden and other employees) departed on 15 December 2017 and returned on 21 December 2017.

Quality Assurance

193 The Corporate Defendants submitted that various arrangements – the existence of the QA programme, that calls were being monitored, that Sales Agents were aware that calls were being assessed, and that Sales Agents knew they would lose points if a call was rejected – rebut

any suggestion that incentive programmes would lead to inappropriate calls being made. Although, at a level of generality, the logic of the submission may have some attraction, in reality, the submission does not assist the Corporate Defendants. *First*, not all calls were assessed. *Second*, as is apparent from the Consumer Contraventions, many of those calls that were assessed as passing QA, plainly, even on a brief reflection, should not have. These include sales calls which the Corporate Defendants now admit were unconscionable. *Third*, it does not necessarily follow, simply because a call fails the QA standard, that the sale is clawed back.

194 I note that Stephen Hitchcock, the Head of Compliance and Quality Assurance from October 2012 to September 2015, worked at most one day per week, and ordinarily one day per fortnight, and was only present in the office on an ad hoc basis from July 2015. There were only between three and five people in the QA team, between January 2015 and July 2016. According to the Compliance Reports this was required to increase from five to 11 members in the period July 2016 to July 2017 to meet its workload (although there were some issues with retention of staff). In this context, the Defendants submitted compliance was actively monitored and that during the period of the Incentives, between 16 to 37 percent of all sales calls were randomly checked for compliance each month. However, the reports referred to in support reflect that in 2015, the figure was between 15 and 17 percent. A compliance report did not record 30 percent until July 2017. The Defendants' submission that based on those compliance reports cited during the relevant period call monitoring frequently exceeded 30 percent of all calls is misleading. I note that Mr Howden accepted in the Royal Commission that in 2015 only one in ten calls were monitored and more junior Sales Agents were listened to more frequently than more senior Sales Agents.

195 In October 2016, St Andrew's conducted a portfolio review and discovered a "spike" in the sale of funeral insurance in the period of January 2015 to September 2015 by Select to consumers in 43 postcodes identified as having a high concentration of Indigenous residents. Thereafter, Select (including Mr Howden) investigated the matter and attributed the spike to an abuse of the Refer a Friend program, as well as the Cruise Incentive and the Vespa Incentive. During the Royal Commission, Select blamed the spike on two 'rogue' Sales Agents, Mr Hoey and Ms Dudbridge, who in fact were two of Select's most senior Sales Agents. I note that these persons had their employment terminated, but only shortly prior to the Royal Commission, and not at the much earlier time when Select became aware of the conduct and brought it to the Sales Agents' attention. I note also that although at the Royal Commission Select sought to

attribute blame to these two Sales Agents, the remaining 46 percent of the sales identified in that spike were made by 51 other Sales Agents.

196 Select admitted in the Royal Commission the following:

> The particular incentive schemes that appear to have led to the sales spike in 2015, such as the Vespa prize, were therefore not incentives where none previously existed, but rather additional incentives on top of existing ones. It appears that the nature or magnitude of the additional incentives led representatives into failing to follow the practices required of them. As such, it will clearly not be repeated and has formed part of Select's learning experience from which its protocols and structures continue to be refined.

197 This submission was authorised by Mr Howden before it was provided to the Commission. I note that although the spike was brought to Select's attention in 2016, a further incentive was nonetheless offered in 2017, being the Hawaii Trip.

198 Mr Howden also gave evidence to the Royal Commission (admissible against Select) that in respect to the 2015 spike, and the sale to Ms Marika, Select's systems failed to prevent an abuse of Refer a Friend by certain representatives.

199 I note, in any event, that the QA assessment appeared at times to reflect an assessment of whether a Sales Agent had complied with the sales script, as opposed to an assessment of the quality of the call. Moreover, it was St Andrew's, not Select, who noticed the spike in sales to the Indigenous community, subsequently bringing it to the attention of Select. Only then did Select investigate. That is, the QA process implemented by Select did not pick up this concerning spike in sales, nor that it occurred at a time when incentive schemes, for example, the Vespa Incentive, were being offered. This is the context in which the Corporate Defendants' submission must be considered. If plainly inappropriate calls passed QA, the quality assurance standards would be no deterrent. Or, to put it another way, if the Sales Agents were not being pulled up for inappropriate calls, a particular type of conduct would be seen as acceptable to the Corporate Defendants.

200 Pausing there. An issue arose as to when Select became aware of the spike in sales to postcodes identifying as having a high concentration of Indigenous residents. Although it can be accepted that it was brought to their attention by St Andrew's in October 2016, there is evidence to suggest that Mr Howden had some awareness of this issue in 2015.

201 As previously explained, Mr Hoey gave evidence that around late 2015, he had a conversation with Mr Atwal and Mr Howden where concerns were raised about a number of sales in certain

Indigenous areas and the use of the Refer a Friend program. His unchallenged evidence was that he was not given any formal warning at that meeting. Despite the fact that he was purportedly given a "2nd formal warning" dated 31 July 2015, Mr Hoey's evidence was that he did not receive or sign a document on 31 July 2015 and nor did he attend any meeting with Mr Shah in July 2015. In February 2017, Mr Hoey signed a Final Formal Warning letter, which was also signed by Mr Shah, in respect to "excessive use" of the Refer a Friend program (although, the document was dated 5 October 2015). Around the same time, Ms Dudbridge also signed a Formal Warning letter, dated 5 October 2015 and signed by Mr Shah, for her "excessive use" of Refer a Friend. ASIC claims that these formal warnings which Mr Hoey and Ms Dudbridge were asked to sign in February 2017 were backdated to 2015. Mr Hoey's evidence was that Mr Shah was not his manager in October 2015, as he reported to Mr Atwal at that time. It was in June 2017, after the spike in sales became known to St Andrew's and ASIC, that Mr Hoey and Ms Dudbridge were terminated for their conduct. I note that Mr Shah in his s 19 examination (under privilege) accepted that the documents were backdated. He said that there was no formal warning given in October 2015, it was just an "informal discussion", and that Mr Howden insisted formal warnings be given in 2017 to Mr Hoey and Ms Dudbridge for the 2015 conduct as the documents appeared to be missing from the file. I do not accept the Defendants' submission that this evidence of the warnings is irrelevant.

202 I will return to this topic when considering the Refer a Friend program and the alleged s 912A contraventions.

203 Suffice to note at this stage that I accept the unchallenged evidence of Mr Hoey as to the circumstances of his termination, which includes when he was first spoken to in late 2015 about concerns regarding sales to Indigenous persons and his use of Refer a Friend. I note also the Refer a Friend program was running at the same time as some of the Incentives, and was part of the context in which the Incentives were offered.

204 I accept that Mr Howden and Select had awareness of the issue in 2015. Despite that, Mr Hoey was promoted and was offered further sales incentives. I note also that Mr Howden personally wrote to Mr Hoey on 10 July 2016, providing him with a raise in salary for "consistent performance". That is, although in 2017 it was considered that Mr Hoey's and Ms Dudbridge's conduct was sufficiently serious to warrant termination, Select and Mr Howden did not do so in 2015.

205 I note also that despite the warnings being given, there is no mention of the warnings in the Compliance Reports from around this time (as might have been expected).

206 The submissions in respect to the significance of the QA program must be considered in that light. Further incentive schemes were also provided in that context.

Whether the Incentives are conflicted remuneration, and if so, whether there were contraventions of the conflicted remuneration provisions

207 This enquiry necessarily directs attention to the relevant provisions. I note at the outset that as all the incentive programs were conducted prior to 1 January 2018, the amendments to the conflicted remuneration provisions regarding life risk insurance products do not apply. The relevant provisions were those effective from 1 July 2012.

Legal principles and consideration

208 Section 963A of the Corporations Act defines conflicted remuneration in the following terms:

> **963A *Conflicted remuneration***
>
> *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:
>
> (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
>
> (b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

209 Relevant for present purposes is sub-section (b), as it is that provision which is relied on by ASIC in advancing its case.

210 Section 963J provides as follows:

> **963J Employer must not give employees conflicted remuneration**
>
> An employer of a financial services licensee, or a representative of a financial services licensee, must not give the licensee or representative conflicted remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of the employer.
>
> Note: This section is a civil penalty provision (see section 1317E).

211 Section 963L provides a presumption that certain volume-based benefits are conflicted remuneration, unless the contrary is proved. It is ASIC's case that this presumption applies to each of the Incentives. Section 963L is in the following 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:

(a) a benefit access to which, or the value of which, is wholly or partly dependent on the total value of financial products of a particular class, or particular classes:

(i) recommended by a financial services licensee, or a representative of a financial services licensee, to retail clients, or a class of retail clients; or

(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;

(b) a benefit access to which, or the value of which, is wholly or partly dependent on the number of financial products of a particular class, or particular classes:

(i) recommended by a financial services licensee, or a representative of a financial services licensee, to retail clients, or a class of retail clients; or

(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.

212 Whether the Incentives are volume-based, such as to enliven the discretion, is a question of fact.

213 ASIC submitted, and it was not suggested otherwise, that the key elements of conflicted remuneration are:

(1) a benefit, whether monetary or non-monetary;

(2) that is given to a licensee or a representative of a licensee;

(3) where the licensee or representative provides financial product advice;

(4) the advice is provided to persons as retail clients; and

(5) the benefit is a volume based benefit and the presumption in s 963L applies; or

(6) because of the nature of the benefit or the circumstances in which it is given, the benefit meets the criteria in s 963A(a) or (b).

214 I note that since this matter was heard, in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2022] FCA 515 (reasons provided in respect to penalty proceedings) Beach J observed at [91] that the definition of conflicted remuneration had not yet to be considered. That said, Beach J at [94] described the elements to be established consistently with the approach referred to above.

215 There are two other aspects to conflicted remuneration that are necessary to address.

216 *First,* as is apparent from the terms of s 963A(b), the definition of conflicted remuneration involves considering whether the benefit, in the circumstances in which it is given, could influence the financial product advice. Financial product advice is defined in the Corporations Act in s 766B(1), which is recited above at [0].

217 As noted above, it was ultimately accepted by the Corporate Defendants that the relevant insurance products sold by it, including Let's Insure Funeral Cover and options (a product which had been disputed until during the hearing); Let's Insure Accident Cover and options; Essentials Life Cover; Easy Life Insurance and options and/or Easy Life Cover; Let's Insure Life Cover; and FlexiSure Life Cover and options were each a financial product for the purposes of the Corporations Act.

218 As previously observed at [0]-[0], what constitutes financial product advice was recently considered in *Westpac Securities – Full Court* by Allsop CJ relevantly at [16]-[22]. And see to the same effect, Jagot J at [216]-[218] and O'Bryan J at [326]-[339].

219 This issue of financial product advice became a focus of submissions on these alleged contraventions, as the Corporate Defendants introduced a concept of "mis-selling" and submitted that "influencing the advice" in the conflicted remuneration provisions means "giving something that is other than in accordance with the advice that you would ordinarily be giving". This was in the context where it was submitted that the Incentives "incentivised them to sell and to sell more, to do their job, but it did not incentivise them to mis-sell". As an aside, I note that this submission appears to take no account of statements such as that of Mr Howden, accepting, in his s 19 examination and before the Royal Commission, that the Incentives inappropriately motivated staff and drove wrong behaviours, nor does it take account of Select admitting to the Royal Commission that the Incentives were of a nature and magnitude that "led representatives into failing to follow the practices required of them". That is so, even if, as contended for by the Defendants, the submission to the Royal Commission was said to relate to relate to Mr Hoey and Ms Dudbridge. Their conduct did not account for all the spike in sales during the relevant periods. As previously observed, the remaining 46 percent of the sales identified in that spike were made by 51 other Sales Agents.

220 ASIC took issue with the Corporate Defendants' characterisation of the provision, and the introduction of the term "mis-sell".

221 It is not entirely clear what the Corporate Defendants mean by the term "mis-sell". I note that the Corporate Defendants argued that "mis-selling" is relevant because the incentives protected against the risk that Sales Agents would "cut corners" because points were deducted for QA fails, and as salary was commission-based, if there was mis-selling, then the commission would be removed. The problem with that analysis is that factually, as described above, the purported effect of those features as implemented was limited. Moreover, the issue is whether the Incentives could reasonably be expected to influence the financial product advice given by the participating Sales Agents.

222 The use of the term "mis-sell", attempts to put a gloss on the language of the provision which does not accord with the text of the provision. The usage attempts, it seems, to limit the provision's application. The use of the term, in the context of the Corporate Defendants' submission, does not sit with the breadth of the general concept of the provision of financial product advice, as defined in the Corporations Act and as applied and explained in such cases as *Westpac Securities – Full Court*. It is important to focus on the text of the provision, and not a gloss on it, which, in this case, is apt to mislead.

223 The starting point for ascertaining the meaning of a statutory provision is the text of the statute having regard to its context and purpose: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14], citing *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 (*Project Blue Sky*) at [69]-[71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 at [47]; *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; (2020) 381 ALR 601 at [14].

224 The question of whether that aspect of the contravention has been satisfied must be answered by what is required by the provision, which is by reference to the text and not by reference to any gloss the Corporate Defendants attempt to place on it.

225 I am satisfied that the Sales Agents provided financial product advice to the retail customers within the definition of s 766B(1) as explained by the authorities referred to above.

226 The Corporate Defendants' contention to the contrary fails to grapple with the evidence of the role of the Sales Agents and the manner in which they are trained to (and did) undertake their

work. For example, the Corporate Defendants' submission that the Sales Agent's role was to follow the sales script, advertise the particular insurance product in general terms and sell the product, and therefore could not be capable of influencing a customer, cannot be accepted. The submission is artificial. Sales Agents are trained in sales techniques designed to increase their persuasiveness, including techniques for closing and for handling objections. As ASIC submitted, by reference to a training presentation, Sales Agents were told that "simply reading out the features and benefits off the script…will not capture the customers attention". They were told that if they aligned their product presentation to benefits and impulse factors "their power to persuade will greatly increase". ASIC correctly submitted that the training was designed to encourage and persuade a customer to purchase the policy during the sales call.

227 *Second,* the Corporate Defendants submitted that the Incentives were rewards for past performance. The benefits, being the Cruise, the Vespa, the Las Vegas Trip and the Hawaii Trip were each given at a point when the relevant Incentive had passed. At the point when each was given, it could not be said that there would be a reasonable expectation that the benefit would influence future performance. It was said, therefore, that these rewards cannot constitute conflicted remuneration because they could not have influenced the Sales Agents' future conduct at all. In developing that submission the Corporate Defendants focussed on s 963A, in particular, on when the benefit was "given". That is, they said, the provision only operates prospectively from that point.

228 ASIC took issue with that submission, and contended that such a reading of the provision would result in an absurdity. It submitted that the Corporate Defendants' interpretation places a temporal limitation on the term "given", a term not so limited when the provision is read in its context. Particular reliance was placed on s 963L, the deeming provision, which is recited above. It was submitted that the volume-based presumption, which is about targets and rewards, is entirely inconsistent with the Corporate Defendants' submission. ASIC also referred to the Revised Explanatory Memorandum to the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012* (Cth) (Revised Explanatory Memorandum) relevant to these provisions, and in particular [2.19], [2.20], [2.33], [2.45] and [2.51], which contemplate that a reward may be provided after the sales target has been met (which was said by ASIC to be the basis of the volume-based presumption):

> 2.19 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.

Example 1.1

One licensee (the product provider) provides a white label equity trading platform to another licensee (the promoter), who labels the facility as their own and markets the facility to their clients. The promoter only provides general advice to clients in the form of independent market reports and analysis and has strong internal controls to prevent 'churning'. The client is charged a product neutral percentage-based fee on all transactions which is collected by the product provider. The product provider passes a proportion of that fee to the promoter. The proportion of the fee that is passed on to the promoter will be presumed to be conflicted under section 963L because the fee is volume-based. However, as the scope for influence in this case is remote, the product provider and promoter are likely to be able to establish that the payment is not conflicted remuneration.

2.20 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.

…

> 2.33 …Services such as training and technical support provided by a licensee to its representatives could not generally be said to 'influence financial product advice' unless, for example, they were provided as a 'reward' for meeting sales targets.
>
> …
>
> 2.45 Although the exemption does not extend to IT software and support benefits provided by licensees and authorised representatives, such benefits would not generally be provided in circumstances where they could reasonably be expected to influence advice. However, IT software and support benefits provided by licensees will be prohibited if they could reasonably be expected to influence advice, for example, where the benefit is provided as a reward for product sales.
>
> …
>
> *Treatment of benefits from employers to employees*
>
> 2.51 A monetary or non-monetary benefit given to a licensee or representative by the employer of the licensee or representative is not necessarily conflicted remuneration. If the payment of the benefit is remuneration for work carried out (for example, an employee's salary), then this will not be conflicted remuneration so long as it is not within the definition in section 963A. While this allows the payment of salaries to employee advisers, it means that any proportion of that employee's salary that could reasonably be expected to influence advice is conflicted remuneration. An important consideration in these circumstances would be the extent to which any volume-based proportion of a salary package is presumed to be conflicted remuneration by virtue of section 963L and whether the recipient could prove that it could not reasonably be expected to influence advice.

229 ASIC referred to *Australian Securities and Investments Commission v Forex Capital Trading Pty Ltd* [2021] FCA 570, which related, in part, to contraventions of s 963F for the licensee failing to ensure its representatives did not accept conflicted remuneration and s 963J for giving account managers conflicted remuneration for work carried out by the account manager as an employee. ASIC referred to the conflicted remuneration in that case, which was described by Middleton J at [22]:

> Through its employee remuneration scheme and use of key performance indicators, Forex CT rewarded its employees for, among other things, the size of clients' net deposits and trading volume. There were different arrangements for different types of employees but, generally speaking, the scheme provided an incentive to representatives to encourage clients to deposit funds and to recommend trades or trading strategies that were not necessarily in the client's best interests…

230 And at [49]:

> The conflict between the interests of the client and those of the account manager arises principally because of Forex CT's remuneration and bonus arrangements, which I have referred to at [22] above. It was Forex CT's policy to pay bonuses to account managers calculated by reference to:

(a) the amount of net deposits in the account manager's 'trading book';

(b) the number of individual clients who have placed at least one trade per business day; and

(c) from 1 December 2017, the number of unique clients with a deposit amount greater than $1,000 at the end of the month.

231 This case was said to provide another example of the reward and the benefit coming after the target had been reached, as in this provision.

232 ASIC's submission on this topic must be accepted.

233 As noted above, in construing the meaning of a provision, it is necessary to consider its text having regard to its context and purpose.

234 Section 963L is directed to "benefits", access to which is obtained in particular circumstances. Although volume-based incentives are not the only form of conflicted remuneration, the fact of the creation of a presumption for that form of conduct necessarily reflects that volume-based sales generating a benefit falls within the conduct. That is, a benefit to which access is given partly or wholly on the basis of the number of financial products recommended or acquired, is presumed to be conflicted remuneration: s 963L(b). The conduct must necessarily occur before the benefit is accessed. Section 963A must necessarily be construed against the context of the presumption. Section 963A must bear a construction where, in the context of the presumption operating, the defendant who then bears the onus must prove that the benefit is not conflicted remuneration (within the meaning of s 963A(a) or (b)).

235 I note that this construction is also consistent with the purpose of the provisions as explained in the Revised Explanatory Memorandum.

236 The Corporate Defendants' submission did not address or take account of the purpose of s 963A or the context in which it appears. Their submission did not refer to s 963L and, therefore, did not grapple with its consequences and effect. The practical effect of their submission was that s 963A captures only the circumstance where a person has already been given a benefit, and where that benefit is given to attempt to influence the person's future performance. The Corporate Defendants' construction, which considers s 963A in isolation, would lead to an absurd result, when the provision is necessarily considered in the context of the legislative scheme directed to conflicted remuneration (in Div 4 of the Corporations Act). Their construction is inconsistent with the proper application and plain text of s 963L. Moreover, the Corporate Defendants' emphasis on the word "given" ignores the context in which that term

appears in s 963A. It is the nature of the benefit *or* circumstances in which it is given that is what could reasonably be expected to influence the advice or choice of product recommended.

237 In that context, the issue is whether, in respect to each of the benefits provided under the four incentives, ASIC has established that they are conflicted remuneration.

Corporate Defendants

238 Returning to what is necessary to establish these claims. I am satisfied that each of the Incentives provided a non-monetary benefit; that each of the identified recipients of the benefits were representatives of Select (as admitted by the Corporate Defendants) such as to be a licensee or representative of a licensee; that the Sales Agents provided financial product advice; and that they did so to retail clients. The Corporate Defendants admitted that the benefits received in each instance were partly dependent on the number of products acquired by retail clients to whom the Sales Agents provided advice. I find that the presumption in s 963L applies, such that the benefits meet the criteria in s 963A(b), that is, that the benefits "could reasonably be expected to influence the financial product advice given".

239 The Corporate Defendants have not displaced the s 963L presumption.

240 I note for completeness that during the hearing the Defendants withdrew their reliance on s 963C(1)(c)(i), stating that they would not be submitting the exception to conflicted remuneration in relation to training and education applied in this case.

241 In any event, the Incentives, in the circumstances, could reasonably be expected to influence the financial product advice given.

242 I am satisfied that Select committed each of the alleged contraventions of s 963E. Select did not take reasonable steps to ensure the Sales Agents, as representatives of Select, did not accept the Incentives, and given the findings above, I am satisfied that Select contravened s 963F.

243 The Sales Agents involved in respect to each of the Incentives (with the exception of Mr Banks in relation to the Cruise Incentive) were employed by BlueInc Services and I am satisfied that the contraventions of s 963J are established against BlueInc Services.

Accessorial liability of Mr Howden

244 Mr Howden is alleged to have aided, abetted, counselled or procured the contraventions, or alternatively, induced, or been knowingly concerned in and party to, each of the contraventions by Select and BlueInc Services of ss 963E, 963F and 963J. ASIC relied on accessorial liability

in s 79 of the Corporations Act. Such concepts are well understood and for present purposes it is sufficient to observe that establishing such liability requires an accessory to have knowledge of the essential facts or circumstances that constitute the contravention: *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661. It is not necessary to prove knowledge of the law, or knowledge that a particular fact situation attracts legal consequences: *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 at [48]; *Gore v Australian Securities and Investments Commission* [2017] FCAFC 13; (2017) 249 FCR 167 at [15]; *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17 at [133]. With that kind of knowledge the accessory must aid, abet, counsel or procure, or have induced the contravention or been knowingly involved in it.

245 In the case of Select's contraventions, as apparent from the discussion above, the essential facts which constitute the contraventions of s 963E are: that the Incentives offered benefits which were respectively the Cruise, the Vespa, the Las Vegas Trip and the Hawaii Trip; that the Incentives were open to Sales Agents; that Sales Agents were representatives of Select's AFSL; that Sales Agents engaged in conduct which, on the application of legal principles, constituted the provision of financial product advice; that Sales Agents engaged in that conduct in respect of persons who, on the application of legal principles, were retail clients (namely, individuals who are not sophisticated investors); that qualifying criteria for the benefits offered by each of the Incentives were linked to the volume of sales made by Sales Agents; and Sales Agents received the benefits.

246 The same essential facts constitute the contraventions of s 963F by Select, with the addition of Select not taking reasonable steps to ensure its representatives did not accept the benefits.

247 In the case of BlueInc Services, the same essential facts for Select's contravention of s 963E apply, with the addition of BlueInc Services being the employer entity that gave the benefits to the Sales Agents.

248 I am satisfied that Mr Howden had knowledge of these facts, and was involved or participated in them such as to satisfy s 79. In summary, Mr Howden knew of, and approved, the conduct of each of the Cruise Incentive, Vespa Incentive, Las Vegas Incentive and Hawaii Incentive as sales incentive programs, including the benefits offered by those Incentives. Mr Howden had a central and active role in the operation of the Incentives.

249 As Select's sole director, Mr Howden engaged in the planning and promotion of the Incentives. He, inter alia, had conversations with Sales Agents who told him about incentives run by competitors, and determined that the Call Centre also needed to have incentives; ultimately approved all of the Incentives; approved the Cruise Incentive and its budget; conceived the idea of the Vespa Incentive; approved the Vespa Incentive, including its budget, and arranged for the purchase of the Vespa; knew from Select's Compliance Report for May 2015 that the Sales Agents in the final round of the Vespa Incentive may have needed more frequent quality checking; presented the keys to the Vespa to Mr Hoey; approved the Las Vegas Incentive, including its budget, and before the arrangements were finalised was provided with the quote for the Venetian and Palazzo Resort, where the Sales Agents ultimately stayed; approved the Hawaii Incentive, including its budget; determined its qualifying criteria; announced the Hawaii Incentive while accompanied by Polynesian dancers; was copied into emails between Kieran Howden (his daughter) and the recipients of the Hawaii Trip about the details of that trip; made decisions about logistics, such as the visa application process; wrote a message to staff wishing good luck to those "vying for a ticket to Hawaii"; went on the Hawaii Trip; and walked the floor of the Call Centre at least daily interacting with staff and would, therefore, have seen promotional posters for the Incentives and the Vespa displayed in the Call Centre.

250 Based on the same evidence, Mr Howden also had knowledge of, and participated in, the failure of Select to take reasonable steps (or indeed, any steps) to ensure its representatives did not accept the benefits. Mr Howden had knowledge of, and participated in, the essential facts of Select's contraventions of ss 963E and 963F of the Corporations Act, and was involved in those contraventions within the meaning of s 79 of the Corporations Act.

251 Finally, Mr Howden had knowledge of, and participated in, BlueInc Services giving each of the benefits to Sales Agents. Mr Howden knew that BlueInc Services essentially paid for everything within the BlueInc Group. As sole director of BlueInc Services, Mr Howden had knowledge of and was responsible for its financial affairs, and the payments for each of the Incentives were recorded in BlueInc Services' general ledgers. It follows that Mr Howden had knowledge of, and participated in, the essential facts of BlueInc Services' contraventions of s 963J of the Corporations Act, and that he was involved in those contraventions within the meaning of s 79 of the Corporations Act.

Consumer Contraventions

252 As explained above, the second group of claims are the Consumer Contraventions which relate to 14 identified consumers. In relation to each Consumer, there are alleged contraventions in respect to the sales calls, and in respect to eight Consumers, there are also contraventions alleged in relation to retention calls, where the Consumer tried to cancel their policy.

253 The alleged contraventions include making false and/or misleading representations contrary to s 12DB(1) of the ASIC Act (or misleading and deceptive statements contrary to s 12DA(1) of the ASIC Act), unconscionable conduct, contrary to s 12CB(1) of the ASIC Act, and coercion and undue harassment, contrary to s 12DJ(1) of the ASIC Act.

254 Before considering the evidence and specific claims, it is appropriate to refer to the legal principles relevant to establishing these claims.

Legal principles

False or misleading representations and misleading or deceptive conduct: ss 12DB(1) and 12DA(1)

255 Section 12DB(1) of the ASIC Act prohibits any person from making false or misleading representations concerning one of the matters identified in sub-paragraphs (a) to (j) of sub-section (1). The representations alleged by ASIC are:

(1) s 12DB(1)(a), being false or misleading representations that services are of a particular standard, quality, value or grade;

(2) s 12DB(1)(g), being false or misleading representations with respect to the price of services; and

(3) s 12DB(1)(i), being a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

256 The representations must be in connection with the supply or possible supply of financial services, or the promotion by any means of the supply or use of such services. Section 12DB(1) is a civil penalty provision: s 12GBA(1) (as that section applied at the relevant time).

257 Section 12DA of the ASIC Act prohibits any person from engaging in "conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive". Section 12DA is not a civil penalty provision but will sound in declaratory and other relief: s 12GBA(1).

258 Section 12DB(1) of the ASIC Act is the statutory analogue of s 29 of the Australian Consumer Law (ACL) (see sch 2 of the CCA), save that s 29 is concerned with the supply of goods or services rather than the supply of financial services. Section 12DA of the ASIC Act is the statutory analogue of s 18 of the ACL, save that it is concerned with conduct "in relation to financial services".

259 Sections 12DA and 12DB require the conduct to have been in trade or commerce, which is a fact admitted by the Corporate Defendants.

260 ASIC alleges that the Sales Agents and Retention Agents made a number of express and implied representations to the Consumers in breach of ss 12DA and 12DB.

261 A representation "is a statement, made by a representor to a representee and relating by way of affirmation, denial, description or otherwise to a matter of fact. The statement may be oral or in writing, or arise by implication from words or conduct": *Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 5)* [2012] FCA 908 at [78]. Representations are examined in context, having regard to the circumstances in which they are made: *JWR Productions Australia Pty Ltd v Duncan-Watt (No 2)* [2020] FCA 236; (2020) 377 ALR 467 at [503].

262 In relation to implied representations, those are based upon words used, but also silence and/or the failure to disclose certain matters, having regard to the whole circumstances in which the representations were made. In *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595 (*Birubi Art*) at [78]-[79], Perry J identified some of the principles that the courts had adopted in construing implied representations, which included that implied representations can be false or misleading, even if the express words used were literally true, when those words "conveyed to others something more than the literal meaning which the words spelled out", citing *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* [1978] HCA 11; (1978) 140 CLR 216 at 227 per Stephen J. Ascertaining whether something more than a statement's literal meaning has been conveyed, is a question of fact, and involves a consideration of the surrounding circumstances: *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202 and *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12; (2000) 202 CLR 45 at [100]. Half-truths, where the insufficiency of information permits a reasonably open but erroneous conclusion to be drawn, can also be misleading: *Australian Competition and Consumer*

Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 634; (2014) 317 ALR 73 (*Coles Supermarkets*) at [46] per Allsop CJ.

263 It is a question of fact for the court to determine whether representations were in fact made in the terms alleged, having regard to what was said and done against the background of all relevant surrounding circumstances: *Australian Competition and Consumer Commission v ACM Group Ltd (No 2)* [2018] FCA 1115 (*ACM18 (No 2)*) at [175]; *Birubi Art* at [79].

264 A representation is false if it is contrary to fact. A representation is misleading or deceptive if it induces, or is capable of inducing, error. In *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; (2019) 140 ACSR 561, O'Bryan J observed at [98]:

> The applicable principles concerning the statutory prohibition of misleading or deceptive conduct (and closely related prohibitions) in the Australian Consumer Law, the Corporations Act and the ASIC Act are well known. The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter): *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (*Puxu*) at 198 per Gibbs CJ; *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (*Taco Bell*) at 200; *Campomar* at [98]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 (*TPG Internet*) at [39] per French CJ, Crennan, Bell and Keane JJ; Campbell at [25] per French CJ. A number of subsidiary principles, directed to the central question, have been developed:
>
> (a) First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: see *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 (*Global Sportsman*) at 87; *No one (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569 at [60] per Nettle JA (Warren CJ and Cavanaugh AJA agreeing at [33]).
>
> (b) Second, it is not necessary to prove an intention to mislead or deceive: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228 per Stephen J (with whom Barwick CJ and Jacobs J agreed) and at 234 per Murphy J; *Puxu* at 197 per Gibbs CJ.
>
> (c) Third, it is unnecessary to prove that the conduct in question actually deceived or misled anyone: *Puxu* at 198 per Gibbs CJ. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself: see *Taco Bell* at 202 per Deane and Fitzgerald JJ.
>
> (d) Fourth, it is not sufficient if the conduct merely causes confusion: *Puxu* at 198 per Gibbs CJ and 209-210 per Mason J; *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Campomar* at [106].

265 The question of whether representations are false, misleading or deceptive is a question of fact, determined objectively: *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 at [25] per French CJ.

Statutory unconscionability: s 12CB(1)

266 Section 12CB(1) proscribes conduct in connection with the supply or possible supply of financial services to a person "that is, in all the circumstances, unconscionable". It is a civil penalty provision: s 12GBA(1).

267 The focus of statutory unconscionability in s 12CB(1) of the ASIC Act (and its analogue in s 21 of the ACL) is on the conduct of the wrongdoer in all the circumstances. The question is whether "conduct in connection with the supply of financial services … objectively answers the description of being against conscience": *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; (2019) 267 CLR 1 (*Kobelt*) at [14] per Kiefel CJ and Bell J.

268 The factors in s 12CC of the ASIC Act should be considered and weighed as a whole, with the court taking care that one or two matters are not the focus at the expense of the others and all the circumstances: *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; (2016) 249 FCR 421 (*Kojic*) at [72] per Besanko J, citing *Paciocco v Australian and New Zealand Banking Group Ltd* [2016] HCA 28; (2016) 258 CLR 525 (*Paciocco – High Court*) at [293]-[294] per Keane J.

269 Section 12CC is in the following terms:

> **12CC Matters the court may have regard to for the purposes of section 12CB**
>
> (1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the supplier) has contravened section 12CB in connection with the supply or possible supply of financial services to a person (the service recipient), the court may have regard to:
>
> (a) the relative strengths of the bargaining positions of the supplier and the service recipient; and
>
> (b) whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
>
> (c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services; and

(e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the service recipient was consistent with the supplier's conduct in similar transactions between the supplier and other like service recipients; and

(g) if the supplier is a corporation—the requirements of any applicable industry code (see subsection (3)); and

(h) the requirements of any other industry code (see subsection (3)), if the service recipient acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the service recipient:

(i) any intended conduct of the supplier that might affect the interests of the service recipient; and

(ii) any risks to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient); and

(j) if there is a contract between the supplier and the service recipient for the supply of the financial services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the service recipient in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the service recipient engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services; and

(l) the extent to which the supplier and the service recipient acted in good faith.

(2) Without limiting the matters to which the court may have regard for

the purpose of determining whether a person (the acquirer) has contravened section 12CB in connection with the acquisition or possible acquisition of financial services from a person (the supplier), the court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the financial services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the financial services; and

(e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent financial services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and

(g) the requirements of any applicable industry code (see subsection (3)); and

(h) the requirements of any other industry code (see subsection (3)), if the supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the supplier:

(i) any intended conduct of the acquirer that might affect the interests of the supplier; and

(ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and

(j) if there is a contract between the acquirer and the supplier for the acquisition of the financial services:

(i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the acquirer and the supplier in

complying with the terms and conditions of the contract; and

(iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the financial services; and

(l) the extent to which the acquirer and the supplier acted in good faith.

(3) In this section:

applicable industry code, in relation to a corporation, has the same meaning as it has in subsection 51ACA(1) of the *Competition and Consumer Act 2010*.

industry code has the same meaning as it has in subsection 51ACA(1) of the *Competition and Consumer Act 2010*.

270 ASIC contended that the factors in s 12CC of particular relevance in this case are subparagraphs (a), (b), (c), (d), (i) and (l)

271 In *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; (2018) 266 FCR 631 (*Unique*), the Full Court applied *Paciocco – High Court* and *Kojic* at [104] and observed:

> The notion of unconscionability is a fact-specific and context-driven application of relevant values by reference to the concept of conscience … It is an assessment of human conduct.

272 And later at [155]:

> To behave unconscionably should be seen, as part of its essential conception, as serious, often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism. None of these terms is definitional. The *Shorter Oxford Dictionary on Historical Principles* (1973) gives various definitions including "having no conscience, irreconcilable with what is right or reasonable". The *Macquarie Dictionary* (1985) gives the definition "unreasonably excessive; not in accordance with what is just or reasonable". (The search for an easy aphorism to substitute for the words chosen by Parliament (unconscionable conduct) should not, however, be encouraged: see *Paciocco* at 266 [262]). These are descriptions and expressions of the kinds of behaviour that, viewed in all the circumstances, may lead to an articulated evaluation (and criticism) of unconscionability. It is a serious conclusion to be drawn about the conduct of a businessperson or enterprise. It is a conclusion that does the subject of the evaluation no credit. This is because he, she or it has, in a human sense, acted against conscience. The level of seriousness and the gravity of the matters alleged will depend on the circumstances.

273 That passage was cited with approval in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; (2021) 388 ALR 577 (*Quantum*) at [88]. At [92] the Court further observed:

> The expression of the matter by Gageler J in *Kobelt* 267 CLR at 40 [92] …may be seen to be similar to the expression of the matter by the Full Court in *Unique* 266 FCR at 667 [155]... We would respectfully venture to suggest that the strength of the qualifying or descriptive language ("so far outside", "warrant condemnation", "offensive to the conscience") should be seen as indicative of the quality of the departure from right commercial behaviour, explicated and articulated case by case over time, rather than be taken as definitional of some measurable departure from conscionable business conduct. Perhaps little is to be gained by quibbling over adjectives, adverbs and verbs to express the notion, as long as it is recognised that unconscionable conduct is not limited to the worst kind of unconscionable conduct. There may be more and less serious examples. That will reflect in penalty. The task is an evaluation of the impugned conduct to assess whether it is to be characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience and so be characterised as unconscionable.

274 The inclusion of inequality of bargaining power in the s 12CC circumstances "can be seen to be a recognition that in commerce there may arise circumstances of asymmetry of power; such asymmetries are sometimes ruthlessly exploited in a manner that may offend the commercial conscience.": *Paciocco v Australian and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 236 FCR 199 (*Paciocco – Full Court*) at [286] per Allsop CJ.

275 In *Quantum*, the Full Court concluded that in contrast to unconscionability at general law (as reflected in s 20 of the ACL and s 12CA of the ASIC Act), it is not necessary to establish that the innocent party laboured under a pre-existing special disadvantage that was taken advantage of by the wrongdoing party, or under some type of pre-existing vulnerability, disability or disadvantage more generally. The exploitation of a pre-existing vulnerability, disability or disadvantage (of any kind) is not a necessary feature of statutory unconscionability (although it will often be a feature).

276 ASIC has pleaded that all of the Consumers were in a weaker bargaining position vis-à-vis Select, and that 12 of the Consumers (being Kathy Marika, David Mirrawana, Jennifer Yalumul, Dawnetta Yeatman, Josephine Shadforth, Georgina Gaykamangu, Geraldine Campbell, Edmund Nundhirribala, Irshad Hussain, Freddie Lewis, Cynthia Mirniyowan and Deepak Shrestha) were vulnerable.

277 In relation to that aspect, ASIC submitted that the key issue is whether there is a condition that affects the ability of a party to protect his or her own interests, referring, inter alia, to

Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447 (*Amadio*) where Mason J at 462 described the notion of special disadvantage as:

> …the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.

278 The precise nature of the vulnerability or special disadvantage need not be in fact known by the wrongdoer: see *Amadio* per Mason J at 467 and Deane J at 474. I return to consider *Amadio*, in more detail, below.

279 Since the hearing of this matter, the High Court in *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6; (2022) 96 ALJR 271, considered the equitable claim of unconscionable conduct. In doing so, the High Court addressed *Amadio*. The plurality (Kiefel CJ, Keane and Gleeson JJ) at [40] relevantly observed (footnotes omitted):

> In this field of discourse, "special disadvantage" means something that "seriously affects the ability of the innocent party to make a judgment as to his [or her] own best interests". While the factors relevant to an assessment of special disadvantage have not been exhaustively listed, Fullagar J in *Blomley v Ryan* considered that special disadvantage may be inferred from "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary". No particular factor is decisive, and it is usually a combination of circumstances that establishes an entitlement to equitable relief.

280 It is also alleged by ASIC that Select and its agents did not act in good faith in their dealings with each of the Consumers. In *Paciocco – Full Court* at [288], Allsop CJ observed that inherent in the notion of good faith is:

> …an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties…

281 Further, what constitutes the standard of fair dealing or reasonableness that will amount to the normative standard of "good faith" in any given case will depend on the contract or relationship: *Paciocco – Full Court* at [290]; and see the discussion by Bromwich J in *Australian Competition and Consumer Commission v Ultra Tune Australia Pty Ltd* [2019] FCA 12 at [353]-[361].

Coercion: s 12DJ(1)

282 Section 12DJ(1) is in the following terms:

12DJ Harassment and coercion

(1) A person contravenes this subsection if:

(a) the person uses physical force or undue harassment or coercion; and

(b) the person uses such force, harassment or coercion in connection with the supply or possible supply of financial services to a consumer, or the payment for financial services by a consumer.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) Strict liability applies to paragraph (1)(b).

Note: For strict liability, see section 6.1 of the Criminal Code.

283 It is a civil penalty provision: s 12GBA(1). I note that s 12DJ is the statutory analogue of s 50 of the ACL.

284 In *Australian Competition and Consumer Commission v McCaskey* [2000] FCA 1037; (2000) 104 FCR 8 (*McCaskey*), French J at [50] said of coercion (in the context of s 60 of the former *Trade Practices Act 1974* (Cth)):

> The word "coercion" is defined in the *Shorter Oxford English Dictionary* thus:
>
> "1. The action of coercing; constraint, restraint, compulsion.
>
> 2. Government by force; the employment of force to suppress political disaffection and disorder.
>
> 3. Physical pressure; compression.
>
> 4. Coercitive power or jurisdiction."
>
> The verb "coerce" is defined as:
>
> "1. To constrain or restrain by force, or by authority resting on force.
>
> 2. To subject to restraint in the matter of (rare) 1780.
>
> 3. To effect by compulsion."

285 In *Australian Competition and Consumer Commission v Maritime Union of Australia* [2001] FCA 1549; (2001) 114 FCR 472 (*Maritime Union*), Hill J said at [61] that coercion "carries with it the connotation of force or compulsion or threats of force or compulsion negating choice or freedom to act", citing *Hodges v Webb* [1920] 2 Ch 70 at 86, where Peterson J said that "'coercion' involves something in the nature of the negation of choice". As Hill J observed at [61]:

> A person may be coerced by another to do something or refrain from doing something, that is to say the former is constrained or restrained from doing something or made to do something by force or threat of force or other compulsion.

286 And see *ACM18 (No 2)*, where Griffiths J observed at [266] that coercion "connotes some negation of choice or freedom to act. Whether or not particular conduct constitutes coercion also depends on an overall impression or evaluative judgment". See also *Australian Competition and Consumer Commission v Accounts Control Management Services Pty Ltd* [2012] FCA 1164 (*ACM12*) at [16]-[17]. It was observed in *ACM12* by Perram J at [17], that whether any particular conversation is revealed to be coercive "will not depend on a line-by-line analysis but, rather, on the overall impression". I note for completeness that in approaching this issue I do not consider that 'undue' qualifies coercion which is consistent with recent authority: see, eg, *ACM18 (No 2)* at [184]. The parties did not approach the issue otherwise.

287 The parties diverge as to the scope of the concept of coercion. Given the nature of that dispute, it is best illustrated and addressed by reference to the manner in which ASIC pleads its case in this regard. As such, I return to this topic at [0]-[0] below.

Undue harassment: s 12DJ(1)

288 As noted above, this is the same provision as that relating to coercion. It has been said that undue harassment may be less serious than coercion: *Maritime Union* at [60]; *ACM18 (No 2)* at [266]. The "word 'harassment' means in the present context persistent disturbance or torment": *Maritime Union* at [60]. In *ACM18 (No 2)* at [180] Griffiths J also endorsed the statement from French J in *McCaskey* at [47] that harassment includes conduct which "tends to intimidate, embarrass, ridicule, shame or otherwise distress the person to whom the conduct is targeted". As to what is required for the harassment to be "undue", in *Maritime Union* at [60], Hill J observed that "frequent, unwelcome approaches" will amount to undue harassment, where "the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust". The reasonableness of the conduct will be relevant to whether what is harassment is undue harassment. And at [62]:

> The word 'undue', when used in relation to 'harassment', ensures that conduct which amounts to harassment will only amount to a contravention of the section where what is done goes beyond the normal limits which, in the circumstances, society would regard as acceptable or reasonable and not excessive or disproportionate.

289 In *ACM12*, Perram J noted at [14] that "the content of the word "undue" will vary with the circumstances".

290 Whether any particular conversation is revealed to be unduly harassing will depend not on a line-by-line analysis, but on the overall impression: *ACM18 (No 2)* at [178]-[184].

291 That said, the Corporate Defendants submitted that the facts in this case are different from those in *ACM18 (No 2)* most obviously for two reasons. *First*, the many letters sent by ACM to CT, one of the debtors in that case, contained threats of legal action for non-payment whereas the Retention Agents' letters were said to be polite and professional. The letters at most said that as attempts at payment were unsuccessful, "we will unfortunately have to cancel your Policy due to non-payment of your premium". *Second*, it was contended that ACM was simply trying to extract money from CT and there was no potential benefit to CT by the correspondence. By contrast, the Retention Agents were following up on an active policy that had outstanding payments due, and which would eventually be cancelled if they were not made. And although ASIC alleges that none of the Consumers wanted the policy, when letters were automatically generated or Retention Agents made calls to Consumers, these circumstances could not have been apparent to them. Although there may be some merit in the first point, the second point is more problematic. The conduct of the Retention Agents must be considered in the context in which it occurred. The submission pays no attention to the evidence that some Consumers expressly said they wanted to cancel their policy. It is difficult to see in some calls what is said to be a potential benefit in the communications as they developed. That said, each call must be considered, and the issue is not to be resolved simply by a consideration of conduct in a case factually different from this.

292 ASIC also referred to *Australian Competition and Consumer Commission v Panthera* [2020] FCA 340; (2020) 143 ACSR 486 which was said to be instructive in this factual context. That case involved debt collection activities, and ASIC points to the fact that Panthera were found to have engaged in undue harassment by, inter alia, repeatedly and intrusively contacting individual consumers; making false or misleading statements to the consumers; continuing to pursue individuals after they had disputed liability for the debts including where Panthera knew that the individuals were not liable for the debt; and causing inconvenience and stress to the consumers over weeks, months and years, and creating a risk that they would pay money that was not owed to Panthera.

Consideration

293 As the Defendants correctly submitted, these proceedings are not representative, but relate to 14 individual customers, and as such, the particular calls must be considered and assessed by reference to the individual claims. Each of the 14 cases is distinct and must be considered

separately, and ASIC bears the burden of establishing each claim. This is not a case of systemic unconscionability.

294 Nonetheless, there are a number of similarities between the calls and in relation to the submissions advanced by ASIC and the Defendants. It is appropriate, therefore, to make some observations at the outset.

295 *First*, most of the Consumer Contraventions are in issue.

296 During closing submissions, for the first time, the Corporate Defendants admitted that their sales conduct in relation to Mr Mirrawana, Ms Marika, Ms Gaykamangu and Ms Mirniyowan, was unconscionable. I note that prior to the closing submissions the Defendants had not sought to defend the conduct in relation to Mr Mirrawana and Ms Marika, but submitted, nonetheless, that the conduct had to be established. Their position in respect to Ms Gaykamangu and Ms Mirniyowan had been to deny the conduct. Although no amendment was made to the pleading to reflect the changed position, there is no suggestion that the Court cannot proceed on the basis of acceptance of the oral admission. On that basis, it is unnecessary to decide those four claims, although there may be a dispute as to the factual basis of the claims for the purposes of imposing penalty. That said, in respect to each of those Consumers, there are other claims made apart from unconscionability which require findings. Those findings will necessarily inform the basis of the unconscionability claims. This reflects the limited nature of the admissions made. In that context, a number of submissions made by the Corporate Defendants in respect to the pleading of those unconscionability cases, do not appear to advance their position.

297 The Corporate Defendants also accepted that, on the balance of probabilities, the following express representations were made and were false and/or misleading within s 12DB(1) of the ASIC Act:

(1) the representation pleaded at [189] to [191] of the FASOC in relation to Mr Tapera, being that Select represented he could only be sent policy information regarding FlexiSure Life Cover once the insurance policy had commenced and/or once he had provided his payment details;

(2) the representation pleaded at [296] to [297] of the FASOC in relation to Ms Yeatman, being that the minimum level of cover for FlexiSure Life Cover was $35,000 (when in fact the minimum level of cover was only $15,000); and

(3) the representations pleaded at [711] to [712] of the FASOC in relation to Ms Mirniyowan and Mr Wurrawilya that they told the Sales Agent they were "really happy" with the quote provided, when in fact neither Ms Mirniyowan nor Mr Wurrawilya had stated that they were "really happy" to the Sales Agent.

298 These are also very limited admissions as contraventions of ss 12DA(1) and/or 12DB(1) are alleged to have been made in respect to 13 of the Consumers, with these admissions relating only to part of the allegations made in respect to Mr Tapera, Ms Yeatman and Ms Mirniyowan.

299 In addition, ASIC contends, in respect to some claims, that admissions have been made by the Corporate Defendants, and others in respect to statements made in the Royal Commission or in s 19 examinations. In that context, the Corporate Defendants' submission that, as a general proposition, statements by Mr Howden and others in s 19 examinations and elsewhere, (for example that a particular telephone call is a "bad call"), cannot amount to an admission in respect to the call because what is said is general, not related to the pleadings and therefore not relevant, cannot be accepted. Similarly, the submission that the statements were merely commentary and opinions, and therefore unhelpful, as a general proposition, also cannot be accepted. An admission is "a previous representation that is made by a person who is or becomes a party to a proceeding…and adverse to the person's interest in the outcome of the proceeding": Evidence Act, dict. Statements made by people with the authority to make them, which are adverse to the interests of the Corporate Defendants or Mr Howden, are capable of being an admission.

300 For example, as I will return to below, the Defendants' dealings with Ms Marika was a case study at the Royal Commission, and it is submitted by ASIC that Mr Howden made a number of significant admissions in relation to this matter in his evidence before the Royal Commission. Although not admissible against him: *Royal Commissions Act 1902* (Cth), s 6DD, they are admissible against the Corporate Defendants as admissions pursuant to Pt 3.4 of the Evidence Act. Mr Howden was also examined pursuant to s 19, and again it is contended admissions were made, admissible against the Corporate Defendants (although there are some over which he did not claim privilege). Suffice to say at this stage, that the admissions are broader than the concept of a "bad call" and include such topics as the adequacy of the Sales Agent's explanation on certain subjects, and whether aspects of a call were misleading. Although these statements relate to the call with Ms Marika, there is a commonality about aspects of the calls. These admissions may, depending on the circumstances, apply similarly to

other calls. It is appropriate also to recall, that in the case of statements by Mr Howden, he was the Responsible Manager under Select's AFSL. The Corporate Defendants' submissions, as to what can, or more importantly, what cannot, be drawn from the calls, must also be considered in this context. That said, what, if any, weight is to be placed on any admissions will depend on the statement made, and the issue to be decided. These are addressed in more detail below. Suffice to say at this stage that (as a general proposition) in the instances where admissions are alleged by ASIC, even if I were not satisfied those statements are properly characterised as admissions, the evidence itself is sufficient in any event to establish the relevant contraventions.

301 *Second*, although ASIC made very detailed submissions as to each of the telephone calls the subject of the Consumer Contraventions, illustrating its submission by reference to their content, the Defendants did not address in oral closing submission any of the specific telephone calls. In written submissions, very little attention was directed to the content of the specific calls. That is, although the Defendants made general submissions challenging ASIC's submissions, they often did not do so by submitting, by reference to the calls, that the aspects ASIC identified did not have the meaning or effect contended.

302 Rather, the Defendants, when making their oral submissions, focused on the pleadings in respect to the Consumers. This is a topic I have addressed above. Nonetheless, it is appropriate to recall that it is necessary to read the pleading as a whole and in context. More particularly for present purposes, the Defendants' approach, which considered each pleaded factor of vulnerability (including such issues as whether the Consumer was in a weaker bargaining position as well as the personal circumstances of the Consumers) separately, in isolation from others, cannot be accepted. For example, each matter considered in isolation does not have to establish vulnerability or a weaker bargaining position, but rather the combination of characteristics (such as indigeneity, age, remote location and lack of English language skills) can have that effect. The Defendants' approach is contrary to the legislation and the authorities.

303 The Corporate Defendants criticised the approach of ASIC in addressing the individual calls, submitting that it diverted attention from the calls themselves, and is apt to mislead when the calls speak for themselves. It was submitted that they did not intend to take that approach, as the Court needs to assess the calls by listening to them by reference to the pleadings.

304 By failing to address the content of the calls, and specifically, what can be concluded from the audio recordings thereof, the Defendants' submission that the focus of the assessment should be on the pleadings, absent that analysis, carries with it an air of artificiality. The submissions

were often at a level of generality, devoid of the context of the calls in which the statements were made, which rendered them unrealistic.

305 To take just one example at the outset, to illustrate. As a general proposition relevant to each of the Consumers, the Corporate Defendants submitted at [237] and [239]:

> [237] The Sales Agents were selling standard insurance products on standard terms. There was nothing unique about the product that gave the Sales Agent any particular bargaining strength. The Consumers had the capacity to obtain the same product from a competitor. Equally, they were free to simply not buy the product or hang up the phone. There was no pre-existing obligation on the Consumers to speak with the Sales Agents, and the Sales Agents did nothing to foster any such sense of obligation.
>
> …
>
> [239] …They could hang up the phone without being concerned about having wasted the Sales Agents' time and without any embarrassment about the repercussions.

306 More particularly, in relation to 11 of the Consumers, the Defendants made a specific submission in relation to unconscionability and coercion (and in respect to the inequality of bargaining position or vulnerability). To take two examples. In relation to Ms Marika, it was submitted that:

> In circumstances where a customer has no obligation to purchase what is a standard product, ignoring or refusing a customer's request or query may be poor sales practice. It may be rude. Similarly, not providing a range of options might make the product less attractive to a potential consumer. But these are inherently unlikely to be coercion. The customer has a simple way to deal with such conduct. He or she can hang up the phone or refuse to purchase the product.

307 In relation to Ms Yalumul:

> The suggestion that Ms Yalumul was in a weaker bargaining position than Select is incorrect (see paragraphs 235 to 241 above). Ms Ghobadi was selling a standard product on standard terms. [She] did not have any hold over Ms Yalumul. There was nothing preventing her from simply hanging up the phone or refusing to purchase the product.

308 Submissions of a similar ilk were made in respect to other Consumers (except with respect to the four claims of unconscionability, being Ms Marika, Mr Mirrawana, Ms Gaykamangu and Ms Mirniyowan, which were eventually admitted in so far as the sales conduct was impugned). Although the factor is a relevant consideration in any assessment of the calls, the proposition was repeatedly made in isolation of the circumstances of the calls. What, if any, weight it has must necessarily depend on the circumstances of the call (as reflected by the fact it did not carry weight in the admission in relation to the four unconscionability claims).

309 *Third*, contrary to the Defendants' submission, ASIC has not approached this case by reasoning on a stereotype basis. ASIC does not suggest that merely being Indigenous creates vulnerability. Rather, it contended that indigeneity, in combination with other factors, such as a limited grasp of English, advanced age and residing in a remote community, together make certain Consumers vulnerable. It was submitted that this approach was similar to that in the recent case of *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2021] FCA 502; (2021) 392 ALR 614, where Telstra was found (on its admission) to have engaged in unconscionable conduct towards 108 Indigenous consumers. In that case, the Court's declarations reflected that the consumer's vulnerability lay in being Indigenous combined with English language difficulties, limited reading, writing and financial skills and being unemployed or having limited income. In this case, the Consumers have each provided evidence, which is unchallenged, as to their individual circumstances, and it is the inferences to be drawn from the evidence which forms the basis of these claims. It may be accepted that care must be taken not to assume that because a person is vulnerable the decision was made by the person because of that vulnerability: see for example, *Kobelt* at [110]. However, this case is customer-specific, addressing what occurred in each instance, as evidenced by the recordings of these telephone calls: see for example, *Unique* at [115], [165]; *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982 at [772(6)]; *Australian Competition and Consumer Commission v Keshow* [2005] FCA 558 at [78], [84], [87].

310 ASIC relies on the combination of characteristics as being 'red flags' to the Sales or Retention Agent that a customer may be vulnerable.

311 As ASIC submitted, the Corporate Defendants' compliance training manuals cite indigeneity as a 'red flag'. For example, the Select AFSL Compliance Training Manual (v.2.0), dated 26 February 2015, provided under the heading "What is Unconscionable Conduct":

> The best example of unconscionable conduct for our purposes is selling insurance products to customers who:
>
> - Might be intellectually challenged
> - Indigenous people
> - Cannot speak English
> - Are under the influence of drugs or alcohol.

312 Indeed, that manual also imposed an additional requirement where the customer is Indigenous:

> It is a current business requirement that all sales to indigenous people are followed up with a call a week or so later, to ensure they have received the welcome pack, can afford the premium selected and [sic] happy with their purchase decision.

313 That the Corporate Defendants use indigeneity as a 'red flag' for vulnerability is also apparent in Mr Howden's statement to the Royal Commission, where he relevantly said:

> Following ASIC's review of the sale of funeral policies (Report 454) Select introduced an enhanced verification procedure (as described in Annexure RH-11 (SAF.0003.0001,0276)) to ensure extra care and diligence is exercised when dealing with potentially vulnerable customers (including Aboriginal and Torres Strait Islander Australians).

314 This 'red flag' approach also reflects the approach of the Financial Services Council, in its Life Insurance Code of Practice (Code) where it states at [7.1]:

> We recognise that some groups may have unique needs, such as older persons, consumers with a disability, people from non-English speaking backgrounds and Indigenous people, when accessing insurance, making an inquiry, claiming on their insurance, making a Complaint and communicating with us. Where we identify that a customer requires additional support, we will take reasonable measures to ensure that we provide additional support.

315 I note the Defendants take issue with ASIC's reliance on the Code as it commenced on 1 October 2016 and there was a transition period until 30 June 2017 to be bound by the Code, by which time all the sales calls except that to Mr Shrestha had occurred. I note also that a number of retention calls occurred in late 2017 (for example, in respect to Ms Yalumul, some calls occurred in August 2017). It was also complained that this was not pleaded. Leaving aside the issue of whether the Code was binding, it plainly reflects, consistent with Select's training, that certain characteristics in a person are red flags for vulnerability in this sales environment. It also undermines the Defendants' submission that identifying Indigenous people in some way involves stereotype reasoning.

316 That said, as illustrated above, Select's compliance manuals and Mr Howden's statement to the Royal Commission reflect that Sales and Retention Agents were trained and required to be alert to such characteristics of vulnerability, including lack of capacity in English and indigeneity. Any attempt by the Corporate Defendants to minimise any significance or relevance of the training to this aspect of the claims on the basis that the training is at a general level and, therefore, does not assist in establishing that the Agent knew, or should have known, of any vulnerability, cannot be accepted. I note the submission is rather a two-edged sword for the Corporate Defendants in that they, and more particularly, Mr Howden, as the Responsible

Manager under Select's AFSL, had an obligation to ensure that any financial advice was given efficiently, honestly and fairly.

317 This approach by ASIC is consistent with the evidence of Dr Eades, who spoke of markers or flags in the conversations, which should have alerted the Sales and Retention Agents to the vulnerable position of various Consumers. As Dr Eades explained, the opinions she expressed were not just based on her expertise and knowledge but on "the many, many red flags that appear in those conversations" she considered, the subject of the Consumer Contraventions.

318 The reference to characteristics in ASIC's pleadings, in particular indigeneity as a 'red flag' for vulnerability, does not invoke any stereotype reasoning process when considered in light of the manner in which this case was presented. Rather, as explained above, the Consumer's evidence is relied on as to their individual circumstances. ASIC's case is customer-specific, addressing what occurred, as evidenced by the recording of the telephone calls. The 'red flags', as the Corporate Defendants' training documents reflect, put the Sales and Retention Agents on notice of possible issues. Each call then must be assessed having regard to its contents, given the evidence.

319 *Fourth*, aligned with what ASIC asserts, in relation to the 12 vulnerable Consumers, the relevant Sales and Retention Agents had knowledge of the particular characteristics and circumstances of those Consumers, or ought to have known of the same, such as to raise in the mind of any reasonable person a very real question as to the Consumer's ability to make a judgment as to what was in their own best interests. ASIC contends that the particular combination of characteristics of each relevant Consumer made them vulnerable, in the sense of their inability to make a judgment as to what was in their best interests in the circumstances of the telephone calls.

320 In all cases where ASIC alleged that the relevant Sales Agents and Retention Agents had knowledge of a Consumer's vulnerability, the case is put on the basis that the Agents had actual knowledge, or alternatively, ought to have known of the matter. In that context, the Agents did not make genuine or reasonable attempts to ensure that the Consumers understood what had been discussed during the call and what was being sold to them, and those Agents could not have been reasonably satisfied that the Consumers did understand. It was submitted that if there is a distinction between special disadvantage (as in the equitable doctrine of unconscionability) and pre-existing vulnerability, disability or disadvantage more generally, and the Court is not satisfied that 12 of the 14 Consumers were at a special disadvantage, it may still find (though

it is not necessary) that they were vulnerable and that the Corporate Defendants took advantage of that; or, in the alternative, that the Consumers were in a far weaker bargaining position than the Corporate Defendants. I note the FASOC pleads that the relevant Consumers were either vulnerable and/or in a weaker bargaining position, or that they were in a weaker bargaining position. I approach the resolution of the claims on that basis. That said, the terms vulnerability and special disadvantage, in ASIC's submissions, appeared to be used interchangeably. It is to be recalled that although vulnerability is pleaded, as resolved in *Quantum*, it is not a necessary criteria to establish for statutory unconscionability.

321 As noted above at [0], ASIC refers to *Amadio*, and relies on the analysis therein as to the Defendants' level of knowledge of the vulnerability. In summary, *Amadio* involved two elderly parents who did not speak good English and who were in effect tricked by their son to sign a guarantee for him. The Court concluded that the bank manager knew enough to know that these elderly parents did not understand the transaction, being the guarantee that they were signing. Accordingly, the bank's behaviour was held to be unconscionable and the guarantee was set aside. Mason J at 466-467 said the following:

> In deciding whether the bank took unconscientious advantage of the position of disadvantage in which the respondents were placed, we must ask, first, what knowledge did the bank have of the respondents' situation?
>
> Mr. Virgo was aware that the respondents were Italians, that they were of advanced years and that they did not have a good command of English. He knew that Vincenzo had procured their agreement to sign the mortgage guarantee. He had no reason to think that they had received advice and guidance from anyone but their son. In cross-examination he conceded that he believed that Vincenzo had acted in the "role of adviser/explainer" in relation to the transaction and referred to him as acting "in his capacity as dominant member of the family". Mr. Virgo also knew that, in the light of the then financial condition of the company, it was vital to Vincenzo to secure his parents' signature to the mortgage guarantee so that the company could continue in business. It must have been obvious to Mr. Virgo, as to anyone else having knowledge of the facts, that the transaction was improvident from the viewpoint of the respondents. In these circumstances it is inconceivable that the possibility did not occur to Mr. Virgo that the respondents' entry into the transaction was due to their inability to make a judgment as to what was in their best interests, owing to their reliance on their son, whose interests would inevitably incline him to urge them to sign the instrument put forward by the bank.
>
> Indeed, the inquiry by Mr. Amadio senior as to the duration of the arrangement should have alerted Mr. Virgo to the likelihood that Vincenzo had not adequately or accurately explained the intended transaction to them, let alone the possible or probable consequences which attended it.
>
> Whether it be correct or incorrect to attribute to Mr. Virgo knowledge of this possibility, the facts as known to him were such as to raise in the mind of any reasonable person a very real question as to the respondents' ability to make a judgment as to what was in their own best interests.

322 And similarly, Deane J said at 476-477 (footnotes omitted):

> It is apparent that Mr. and Mrs. Amadio, viewed together, were the weaker party to the transaction between themselves and the bank. Their weakness may be likened to that of the defendant in *Blomley v. Ryan* of whom McTiernan J. said:
>
> > "His weakness was of the kind spoken of by Lord Hardwicke" [in *Earl of Chesterfield v. Janssen* (60)] "in defining the fraud characterised as taking surreptitious advantage of the weakness, ignorance or necessity of another. The essence of such weakness is that the party is unable to judge for himself."
>
> That weakness constituted a special disability of Mr. and Mrs. Amadio in their dealing with the bank of the type necessary to enliven the equitable principles relating to relief against unconscionable dealing. Put more precisely, the result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for their signature and, most importantly, their lack of knowledge and understanding of the contents of the document was that, to adapt the words of Fullagar J. quoted above, they lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the bank.

323 Deane J then at 477 posed the question:

> The next question is whether the special disability of Mr. and Mrs. Amadio was sufficiently evident to the bank to make it prima facie unfair or "unconscientious" of the bank to procure their execution of the document of guarantee and mortgage in the circumstances in which that execution was procured.

324 His Honour observed at 478:

> Mr. Virgo simply closed his eyes to the vulnerability of Mr. and Mrs. Amadio and the disability which adversely affected them.

325 And at 479:

> Mr. and Mrs. Amadio's disability and the inequality between themselves and the bank must be held to have been evident to the bank and, in the circumstances, it was prima facie unfair and "unconscientious" of the bank to proceed to procure their signature on the guarantee/mortgage.

326 And see: *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133; (2005) 146 FCR 292 at [21]; *Thorne v Kennedy* [2017] HCA 49; (2017) 263 CLR 85 at [77].

327 ASIC submitted that where knowledge is pleaded, from the pleaded characteristics and circumstances of the Consumers, an inference was available, or the reasonable person in the position of the Agent would have deduced, that the Consumers were vulnerable. That is, the Consumers could not have looked after their own interests or alternatively were in a weaker bargaining position.

328 The Corporate Defendants took issue with ASIC's reliance on *Amadio*, contending, inter alia, that it had not pleaded that the characteristics relied on affected the Consumer's ability to make a judgment as to what was in their best interests. However, in this context, that is inherent in the concept of vulnerability.

329 The artificiality of the Corporate Defendants' submission, which resulted from their failure to grapple with the content and audio of the telephone calls, was particularly acute in the repeated submissions (particularly in writing) that the Sales and Retention Agents did not, or could not, know of any of the characteristics or vulnerabilities of the Consumers at the time of the calls.

330 The Defendants contended that it is not the pleaded personal characteristics that primarily made the Consumers vulnerable, or a combination of those factors. It was submitted that the Consumers' vulnerability cannot be attributed to such simple and identifiable features as the fact they are Aboriginal or their age or address but rather, it was the result of complex underlying factors, most of which were not apparent from the calls and, therefore, unknown to the relevant Agent. Leaving aside this issue, which is addressed below, the Defendants' submission as to the individual characteristics takes the pleading out of context. The submission ignores the very compliance training provided to Agents. The submission is also general in nature and does not address the content of the calls.

331 In that context, it was submitted that ASIC had not pleaded that the Agents had knowledge of the sociolinguistic concept of gratuitous concurrence. The characteristic of gratuitous concurrence is pleaded in respect to Mr Mirrawana, Ms Gaykamangu, Ms Campbell, Mr Nundhirribala, Ms Mirniyowan and Ms Yalumul. The evidence of gratuitous concurrence is said by ASIC to be relevant because it shows that where relevant Consumers appeared to assent to propositions, they did not in fact do so. It provides an explanation for an assent, even though the Consumer did not agree or consent. It rebuts any suggestion that the relevant Consumers agreed with what occurred. ASIC submitted that significant for the coercion claims is that the free will of the innocent party was overborne. In establishing that aspect, it relies on this evidence of gratuitous concurrence to submit that no weight can be placed on the fact that a particular Consumer has said "yes". Although the Agent may not have been aware of the sociolinguistic concept of gratuitous concurrence, a consideration of the content and audio of the calls reflects on whether the Agent knew, or ought to have known, that the Consumers were vulnerable and/or in a weaker bargaining position. And, as explained below, suffice to say at this stage, in some calls, regardless of the Agent's knowledge of the concept of gratuitous

concurrence, any reasonable person would know that the Consumer did not understand what had been discussed and in that context some affirmative responses were not a reflection of an agreement to what was being offered to them.

332 As discussed above, the Sales and Retention Agents only needed to have been on notice as to indicators, or "red flags", pointing to the possibility or likelihood that a person did not understand what was being discussed. In that context, ASIC contended in respect of each Consumer, that there were such red flags sufficient to indicate to Sales and Retention Agents that they needed to do more to be genuinely or reasonably satisfied that the Consumers understood the nature of the policies they were purchasing, or the fact that they were purchasing anything at all.

333 Moreover, in that context, in so far as the Defendants contended that given the pleading, unless a Sales or Retention Agent was aware of all the identified pleaded factors, they could not be aware of any vulnerability, that submission cannot be accepted. It is not borne out on a proper reading of the pleading.

334 In so far as the Corporate Defendants tendered documents to support the submission that many of their Agents were from overseas, which was said to support the inference that someone from overseas would not be aware of such matters as an Aboriginal accent, or name, the submission does not advance the Corporate Defendants' case very far. Of course, it is for ASIC to establish its case, but the mere fact of an Agent having been a traveller from overseas tells the Court little, if anything, about an Agent's awareness of such matters. The flaw in the Corporate Defendants' submission is illustrated by Mr Hoey (an Irish traveller), who gave evidence. He recognised the names, accent and location of a number of the Consumers as being Aboriginal. His evidence on that topic was not challenged.

335 The Defendants also contended that there was no evidence that some of the Consumers have a distinctly Aboriginal name or accent, and that the allegations involved stereotyping (which I have addressed elsewhere). Moreover, ASIC identified by reference to the calls what it said reflected, for example, an accent. The Defendants did not address or respond to those submissions by reference to the calls, but instead suggested that they generally ought not to be accepted. As noted in the preceding paragraph, Mr Hoey recognised such features. It was not suggested that I could not recognise other accents, for example, the obviously Irish accent of Mr Hoey. Some of the Agents had an obviously English or British accent (for example, Ms Ghobadi, as did Mr Moore). These are matters of general experience. I do not accept the

submission that it was necessary to call specific evidence on these topics. As a general proposition, I accept ASIC's submissions as to the names and accent. That said, where these matters are alleged, they are not alleged in isolation, and are typically alleged with other matters (such as locations) and must be considered in the context of the evidence relevant to the alleged contravention. Moreover, this is also in a context where, as explained above, the Sales and Retention Agents were trained and required to be alert to such characteristics of vulnerability, including indigeneity, and where there is a specific policy in place to address that circumstance.

336 *Fifth*, the best evidence for determining whether the Sales or Retention Agent had actual knowledge (or ought to have had such knowledge) of the Consumer's relevant characteristics and circumstances and the impact of them, is the recording of those calls and the transcripts thereof. Each relevant call must be considered in light of the claims.

337 That said, as ASIC submitted, there are some common features of these calls. The Sales and Retention Agents are pushy and persistent. The recordings often involved a person speaking at a very fast speed and using complex language. The speed with which the sales calls were conducted, in a number of cases, resulted in decisions to purchase insurance products being made in as little as 20 minutes (the average time of the sales calls was between about 20 and 35 minutes). Only a short time into the call the Sales Agent plays the Consumer a pre-recorded PDS, which is only required to be played before a policy is purchased. That is, within a short time, the Sales Agent is of the view that a policy will be purchased. The Agents ask leading questions in the calls designed to elicit affirmative responses. Policy amounts were put to the Consumers without any questions as to their need or appropriateness. The Agents gave no opportunity to the Consumers to ask questions or reflect on what was occurring. In a number of cases, the Consumer barely speaks, except to provide the details elicited (for example banking details for direct debit). In some cases where questions were asked they were not answered. The Sales Agents just continued or pushed forward through the call, to sign the Consumer up to a policy. There were no reasonable attempts made to ensure the Consumers understood what was occurring. Often, the Sales Agents used the approach of endorsing or reinforcing the appropriateness of what was occurring (that is the sale of the insurance to them) by referring to the Consumers' relatives, who they said had referred them for this policy. These features also were common in the retention calls, with the Retention Agents pushing ahead to achieve their agenda, regardless of what was being said by the Consumers.

338 *Sixth*, as referred to above, each sales call involved a PDS being provided to the Consumer as there is a legal obligation to do so before a Consumer acquires a financial product.

339 In respect to each of the Consumers, there was no written PDS provided to them to explain the terms and conditions before they agreed to purchase the policy. Rather, the PDS was provided during the calls by way of an oral product disclosure usually in the form of a short pre-recorded message. The PDS was spoken quickly and used complex terminology. The Consumers' consent to have the PDS given to them in that way was not first obtained, and that is an integer of the coercion and unconscionable conduct claims.

340 As a result of correspondence with ASIC as to the Corporate Defendants' obligation to provide the PDS, the Corporate Defendants provided legal advice, received by them, which they said underpinned their practice.

341 The advice was sought, on 11 July 2013, in the following terms:

> Could you please spend an hour or so to investigate and hopefully advise us how outbound unsolicited calls can be made to potential customers using an over the phone voice recording of the PDS?
>
> The three to five day time lag and large volumes of printed material we're mailing out could both be potentially eliminated if we could complete the sale in the one call.

342 The advice was received, on 15 July 2013, and relevantly included:

> Accordingly, if the person agrees that you can provide the PDS over the telephone and if you are satisfied on reasonable grounds that they have received the statement, you can do it.

343 That is, according to the advice (and without commenting on the correctness or otherwise of the advice), two conditions must be satisfied if the PDS is to be given in this manner. *First*, the Consumer agrees to receive the PDS via telephone. The consumer's consent is needed before this form of PDS can be utilised. *Second*, the caller is satisfied on reasonable grounds that the consumer has "received the statement". The reference to the consumer having "received the statement", read in context, must be taken to mean that the consumer understands the statement. The Corporate Defendants were concerned about ensuring that the procedure they wished to adopt was legally acceptable. This is because there is a legal requirement in s 1012C of the Corporations Act to provide the statement to the consumer before a sale is made or finalised. Indeed, Select told ASIC (in a letter dated 8 December 2015) that it took steps to ensure it was compliant with its legal obligations, amongst which included providing the PDS orally over the telephone, before the customer became bound to acquire the insurance. It was also stated in the

letter that the PDS comprised the product information explained by the Sales Agent to the customer, as well as a pre-recorded component that covered certain additional requirements (such as the name and contact details of the product issuer, an indication of the nature of the information contained in the PDS relating to the product and an option of receiving, orally, any information required to be included in the PDS) so long as this alternative way of giving the PDS (including as a pre-recorded message) is agreed to by the customer.

344 A common feature of these calls is that consent was not sought from any of these Consumers before the PDS was played. Nor are the Consumers actually asked if they understood the PDS, after it had been played. I note that despite the advice received by the Defendants, the script approved by Mr Howden for use by the Sales Agents does not contain anything about obtaining consent. I note also that although Consumers were asked whether they had received the PDS, the issue is whether they have understood the statement.

345 To give just one example. The Corporate Defendants submitted in relation to Mr Mirrawana the following:

> In relation to obtaining Mr Mirrawana's express consent to playing the pre-recorded PDS, before playing the PDS Mr Hoey said he would play the product disclosure statement and asked Mr Mirrawana to "listen to this recording". Mr Mirrawana responded "Right, right". After the recording was played Mr Hoey asked Mr Mirrawana to confirm that he "heard, received that message okay". Mr Mirrawana responded "Yeah"

346 The submission appears to contend that Mr Mirrawana consented to this approach. The submission takes this passage out of the context of the call, and considers it in a vacuum. As previously stated, that approach is of little assistance. In any event, as explained in more detail below, in the context of the call in which these statements were made, a proper consideration of what was said does not reflect that consent was sought or that any attempt was made to ascertain whether the PDS was understood. Mr Mirrawana was simply told this was happening. Any response is, at best, an acknowledgement of that statement. Similarly, phrasing the statement after playing the call as having heard and received the message, is not asking the correct question if the Sales Agent was concerned to ensure that the Consumer understood the PDS. Any response to that, in the context of this call, could not reasonably be contended to reflect that the Consumer understood the PDS. No Sales Agent could reasonably have understood it to have that effect. The same submission is made by the Corporate Defendants in respect to each Consumer, and having considered each of the calls, the same conclusion arises in respect to each of them. Therefore, each of these calls have that feature, bearing in mind the

importance and purpose of the PDS. What effect that has in establishing the claims made, depends on the individual calls.

347 *Seventh*, in respect to 13 of the Consumers there are allegations of false and/or misleading statements and misleading or deceptive conduct having been made in the sales calls. Again, although it is necessary to consider each separately given what was said during each of the calls, there is commonality about some of the statements. For example, in a number of calls it is alleged such statements related to the exclusions to the policy, that ADC, AIC and HEC were part of the standard policy when they were optional extras, and who would receive the benefits.

348 In respect to whether the alleged false and/or misleading statements have been established, the Defendants' submissions as to the interpretation of the calls often brought with it an artificiality to what occurred which could not be maintained on listening to the calls. To take just one example. In relation to Mr Mirrawana, it was submitted that Mr Hoey indicated that he was quoting for the "top level of cover" and that he could work down from there in terms of affordability, and that Mr Mirrawana assented to this approach. However, a consideration of the conversation reflects that realistically, that was not so. Rather, Mr Hoey simply quoted that fee and signed up Mr Mirrawana accordingly. No other options were put to Mr Mirrawana. It was not suggested that a lower amount of cover could be obtained and no questions were asked by the Sales Agent as to whether Mr Mirrawana wanted cover or about the level of cover. The Defendants' submissions often involved nuances which were unlikely to have been picked up even by consumers who were not vulnerable and/or in a weaker bargaining position.

349 *Eighth*, in respect to each of the unconscionability claims for the sales calls, the Corporate Defendants submitted for each Consumer that:

> [The Customer] was not targeted. There is no evidence that the conduct of the Sales Agents towards him [or her] deviated in any way from their standard approach. There is no evidence that he could not have acquired the same product from a different provider, on the same terms.

350 This submission was no doubt directed to some of the considerations in s 12CC. It was the culmination of earlier submissions made on such topics as, inter alia, vulnerability and bargaining position. However, a submission that the Sales Agent did not deviate from his or her standard approach, considered in a vacuum of the detail of the calls, does not assist. Moreover, while the submission that there is no evidence that the Consumer could not have acquired the same product elsewhere may be correct, it fails to grapple with the content of the calls. For example, in most cases the calls were cold calls, with the Consumer not looking for

insurance, and in some instances making it plain they did not want insurance. In some cases, the Consumer expressly stated that they wished to put off making a decision until they had written documentation. In some cases the Consumer already had insurance. The individual circumstances of the calls affect the relevance and/or weight that may be attached to such a consideration.

351 *Ninth*, as noted above at [0], there is a dispute between the parties as to the breadth of the concept of coercion. The submission is best addressed by reference to the manner in which the case is presented. In respect to all but one of the Consumers (being Irshad Hussain), an allegation of coercion is made in addition to unconscionability in respect to the sales calls. The cases in respect to each Consumer, although pleaded to relate to the particular conduct, have similarities, such that, using Ms Marika as an illustration provides insight as to the manner in which is it said coercion is established in respect to each Consumer.

352 ASIC contends that it can be established that Ms Marika was coerced by the following features (FASOC [545]-[546]):

(1) her personal characteristics, including her age, difficulty speaking and understanding English (including due to deafness in her right ear) and that she resided in Sydney and a rural area of New South Wales, but had previously resided in a remote area of the Northern Territory, which ASIC submitted combined to limit her assertiveness and ability to push back;

(2) her personal circumstances, including that that she had limited financial means, that she was employed (but ceased working in late 2015), may have been receiving Centrelink payments, was financially supporting at least four of her children and grandchildren and could not afford $60.06 in fortnightly premiums;

(3) prior to being signed up to the policies, Ms Marika had informed both Sales Agents (Luke Zanotto and Mr Hudson) that she already had funeral insurance through her work;

(4) the Sales Agents ignored and/or spoke over Ms Marika's statements that she already had funeral insurance;

(5) Mr Zanotto ignored and/or spoke over her statements that she was happy with her existing funeral insurance policy and did not want to change insurances;

(6) Mr Hudson ignored her request that she be afforded the opportunity to speak with her existing funeral insurance provider;

(7) Mr Hudson made some false and/or misleading representations;

(8) Mr Hudson did not make any genuine attempt to offer Ms Marika alternate levels of cover, including insurance for fewer members of her family or herself only;

(9) Mr Hudson sought to upsell HEC, ADC and AIC without disclosing that they were optional extras;

(10) Mr Hudson played a pre-recorded PDS without first obtaining Mr Marika's express and/or informed agreement to receive the PDS in this way;

(11) Mr Hudson failed to make a genuine, or alternatively, reasonable, attempt to confirm that Ms Marika understood everything discussed during the 9 September 2015 telephone call;

(12) at the conclusion of the 9 September 2015 telephone call, Ms Marika did not understand that she had been signed up to optional AIC and ADC; that she had been signed up to Let's Insure Funeral Cover, with optional AIC and ADC for herself, her three children and her five grandchildren; that she had been signed up to two separate policies; and/or the nature of the Let's Insure Funeral Cover, with optional AIC and ADC, that she had been signed up to;

(13) Mr Hudson spoke quickly, rushed her through the telephone call and used words that she did not understand; and

(14) Mr Hudson signed Ms Marika up to the policies during the same call, rather than giving her an opportunity to reflect.

353 ASIC submitted that the aggressive manner in which Mr Hudson conducted the call, together with the personal characteristics and circumstances of Ms Marika, had the effect that Mr Hudson had an unfair advantage during the call. By emphasising the amounts of money that would be paid under the policy and by failing to explain the key features of the policy, including their significant exclusions, Mr Hudson "pushed" or "compelled" Ms Marika to sign up for the policy. It was submitted that in circumstances in which Ms Marika did not understand the policies she had been signed up to, and did not understand the consequences of her purchase, it is clear that her will was overborne, in that she had not given meaningful or informed consent. Mr Howden (while claiming privilege), agreed during the s 19 examination that this had occurred. He agreed that, in the way Mr Hudson had conducted himself, he denied Ms Marika "free choice" as to whether to enter into the policies. That, it was submitted, amounts to coercion. That Mr Hudson was uninterested in Ms Marika's consent, ASIC submitted, was

illustrated by the fact that he started taking details of other people to be insured under her policies only 10 minutes into a 35 minute call and before he had explored the costs of the policies or options with her.

354 ASIC submitted that in circumstances in which Ms Marika did not understand the policies she had been signed up to, and did not understand the consequences of her purchase, it is clear that her will was overborne, in that she had not given meaningful or informed consent.

355 ASIC submitted that coercion is a relational concept; the alleged wrongdoers' conduct must be assessed in light of the characteristics of the innocent party. It submitted that the characteristics of the innocent party are relevant to both inquiries, whether the technique was an illegitimate one and whether the innocent party's free will was overborne.

356 The Corporate Defendants submitted that whether Ms Marika's will was overborne, in that she did not give meaningful or informed consent, is not the correct focus of the inquiry, which is whether there is a necessary element of "compulsion or serious threat". The Corporate Defendants took issue with the characterisation of the Sales Agent's conduct. For example, it was submitted, inter alia, that making false and misleading statements does not establish coercion, and nor does the fact Ms Marika purportedly did not given informed consent to receive the pre-recorded PDS, or that Mr Hudson did not do enough to establish that Ms Marika understood what was discussed during the call. It was submitted the conduct is far removed from that discussed in the authorities as to what amounts to coercion.

357 The parties diverge as to the scope of the concept of coercion in two respects. *First*, ASIC contended that it is not just threats, or intimidation, or threats of physical violence, but rather that coercive activity can be construed more broadly to encompass any form of illegitimate pressure. *Second*, in assessing whether coercion has been established, the Court should not only examine the actions of the wrongdoing party, but should also consider the effect of the conduct on the mind of the person subject to the conduct. The Corporate Defendants generally dispute both propositions. Indeed, their submissions which address the coercion claims in respect to the Consumers proceed on the basis of a narrower view of the concept than that contended for by ASIC.

358 ASIC referred to *ACM18 (No 2)* which was said to provide a useful analogy in support of its submission. Given the issues that arise as between the parties as to the scope of the concept of coercion, it is appropriate to consider this case in some detail. In *ACM18 (No 2)*, the company

was found to have engaged in coercion in the circumstances, which were described at [19]-[22] as follows:

> [19] As at 3 September 2014, JR was employed part-time as a secretary, was a single mother of three children, received Centrelink benefits and could not afford to pay the JR Debt to ACM. ACM was aware of each of these matters from that date because JR provided that information to ACM's representative, Mr Rolf Francisco during a telephone call on 3 September 2014.
>
> [20] On 3 September 2014, Mr Francisco telephoned JR while she was in a carpark with her daughter. This phone call was in connection with the Telstra services which gave rise to the JR Debt and/or in connection with the possible supply of a payment plan and/or financial accommodation by ACM by way of an extension of time to pay off the JR Debt fully. Mr Francisco advised JR that ACM had commenced preparing the documents that would be used for legal action against JR, that ACM management was planning for a summons to be drawn, issued and served upon JR soon so that ACM could recover the debt in full, and that if a default was listed on her credit file, JR would not be able to obtain credit for the next five to seven years. Mr Francisco said words to the effect of "And I know with three kids, credit is very important to you, right?"
>
> [21] The terms of the representations which the applicants claim were made by Mr Francisco (and therefore ACM) to JR are as follows:
>
> (a) that ACM had commenced preparing the documents that would be used for potential legal action against her, when it had not;
>
> (b) that ACM was planning for a summons to be drawn, issued and served upon JR soon to recover the debt in full, when it was not planning to do so and/or did not have reasonable grounds for so stating; and
>
> (c) that if a default was listed upon JR's credit file, JR would not be able to obtain credit for the next five to seven years, when ACM did not have reasonable grounds for so stating.
>
> The applicants contend that these representations were not true and/or that ACM did not have reasonable grounds for making them.
>
> [22] JR was stunned, felt threatened and was greatly concerned by the matters said by Mr Francisco. She felt flustered and railroaded into agreeing to payment on the basis that if she did not, service of a summons was imminent. JR offered to pay ACM $1000 in an attempt to stop the threatened court proceedings. This amount represented the total of her pay and Centrelink benefits for a fortnight and, if JR made this payment, she knew she would not have enough to cover rent for that fortnight. She provided her debit card number to Mr Francisco, but ultimately this payment was not made following suspension of the debt as a result of a complaint to the Telecommunications Industry Ombudsman (TIO).

359 Griffiths J concluded at [267]-[272]:

> [267] For the following reasons, I find that the three representations do amount to coercion. First, the representations were made in the context of a conversation during which Mr Francisco became aware that JR was employed only part-time, was a single mother of three children, received Centrelink benefits and had made an offer to pay off the debt as a rate of $20 per week. He was also

aware that JR had made a complaint to the TIO. Despite these matters, Mr Francisco asserted that ACM's management "is really demanding for full payment before full recovery action ensues". He made this statement notwithstanding that, as Mr Clarke acknowledged, he should have accepted the $20 offer having regard to JR's circumstances.

[268] Secondly, I find that Mr Francisco sought to obtain an unfair advantage in his discussions with JR by stating that ACM's management was imminently planning to have a summons drawn and served against JR so that the debt could be recovered in full (as opposed to a payment plan as offered by JR). Mr Francisco sought to soften up JR by then saying that he wanted to resolve the issue with her before those legal steps were taken and then, after ascertaining that she was on Centrelink and had three children, he assured her that he was on her side and was her "advocate so that I could represent you with management".

[269] Thirdly, notwithstanding that Mr Francisco knew that no summons was being drafted and that, at best, a Legal Checklist had been prepared, he told JR that he would go to his manager's office and see what he could do "so we can put a cease order on this account and stop further recovery action".

[270] Fourthly, after speaking with Mr Clarke while JR was on hold, Mr Francisco told JR that the documents were already being prepared for use in the potential legal action against her, a statement which was false and untrue for the reasons set out above. He also claimed that his management was asking for half the full amount. This statement was also untrue having regard to Mr Clarke's evidence of his conversation with Mr Francisco which makes clear that it was Mr Francisco who mentioned that amount, not Mr Clarke.

[271] Fifthly, it was at this stage of the conversation that Mr Francisco set out the three reasons why JR should pay $1,500, one of which reiterated that it would "hold off all potential legal action against you".

[272] Sixthly, I accept that as a result of what she was told by Mr Francisco, JR felt stunned and physically sick and said that she felt "pinned to the wall". I also accept her evidence that she felt flustered, anxious and "rail-roaded" into agreeing to pay a substantial amount to avoid legal proceedings. I accept JR's evidence which is to the effect that she felt that she had no choice but to comply with the demand for an up-front payment of $1,500 or face legal proceedings. In those circumstances, she offered to pay $1,000 within days and then a further $500 the following week when she received her Centrelink payments. Mr Francisco's representations, when viewed in context, constituted coercion within the meaning of s 50(1)(b) of the ACL.

360 It was said by ASIC that relevantly those circumstance were: (1) the individual being pursued was in a position of vulnerability: at [19]-[20]; (2) that individual being "stunned", "railroaded into agreeing" and placed in a position where they had no choice: at [22]; (3) being emotionally blackmailed or made to feel afraid of the consequences for one's family members of not complying: at [20]; (4) attempting to obtain an unfair advantage by "soften[ing] up" the person, in particular by assuring them that the caller would advocate for them: at [268]; and (5) making untrue claims to the person to threaten or persuade them: at [267].

361 The Corporate Defendants took issue with ASIC's reliance on *ACM18 (No 2)* and contended that the coercive conduct in that case was of such a different kind to the allegations in the instant case that it does not assist ASIC.

362 In so far as the Corporate Defendants submitted that coercion requires that there be threatening conduct or intimidation, that submission cannot be accepted. There is nothing in the terms of s 12DJ(1) which confines that concept in the manner contended for. As illustrated by the authorities referred to above, coercion is not limited to those concepts. As explained above, in *Maritime Union*, Hill J said at [61] that coercion "carries with it the connotation of force or compulsion or threats of force or compulsion negating choice or freedom to act". *ACM18 (No 2)* provides a good illustration. The concept of coercion imports some form of compulsion, whether by threat, force or otherwise*: Australian Competition and Consumer Commission v Safety Compliance Pty Ltd* [2015] FCA 211 (*Safety Compliance*) at [147]. The issue is what is encompassed in the concept of "otherwise", there referred to. That is, the element of compulsion is the necessary ingredient for a coercion claim, but compulsion can be brought about by conduct other than by threat or force.

363 As to the second point, to determine whether coercion has been established, one must look at both the actions of the alleged wrongdoing party and the effect those actions had on the innocent party. The same action (e.g. a threat to do harm) may have a different impact depending on the complexion of the party to whom that action is directed, and the context in which the action is taken. ASIC's submission that the key question is whether the free action or free choice of the consumer has been negated, can be seen as nothing more than a recognition that coercion includes actions undertaken involving negation of choice or freedom to act: see for example, *Maritime Union* at [61]; *Safety Compliance* at [147]. However, that does not turn the assessment of whether there has been coercion into a purely subjective inquiry (noting that ASIC did not contend that it is purely subjective). Nor can it distract from the concept underpinning coercion, that of compulsion. That is, the negation of free choice must be brought about in that context. That said, as explained below, ASIC's submission on the individual claims does, at times, suffer from the vice that the Corporate Defendants complained of, (namely, they have the tendency to focus only on the subjective inquiry). The question of negation of choice or freedom to act cannot be considered in a vacuum and must be tethered to the concept of compulsion. I will return to this below when I address ASIC's submission that the issue is whether the Consumer has given meaningful or informed consent, equating the absence of that with negation of choice. However, before doing so it is helpful to consider,

inter alia, the basis of ASIC's submission and its reliance on *ACM18 (No 2)* as an analogous case.

364 To the extent that the Corporate Defendants submitted that the sole focus should be "whether the wrongdoer's actions were capable, objectively, of constituting coercion, rather than whether the innocent party actually had their will overborne", that submission is too narrow. Again, *ACM18 (No 2)* provides a good illustration, where in upholding the coercion claim, Griffiths J plainly had regard to the effects of the pressure brought to bear on the debtors, including their subjective feeling of negation of choice: *ACM18 (No 2)* at [272]. In *McCaskey* at [51], French J referred to "the manner or circumstances of a demand or communication, including the language used, the time and place at which it is made and the person to whom it is communicated". This reflects that the characteristics of the consumer, and the effect on them, in the circumstances in which the communication was made, are relevant to the assessment of whether the conduct undertaken amounted to coercion. That said, the question of the effect of the conduct on the consumer is only one of a number of relevant considerations. It does not change the nature of the inquiry. As the analysis in *ACM18 (No 2)* reflects, attention must be directed on the conduct of the person making the representations, in the circumstances and in the context in which that conduct occurred. As apparent from [272] of *ACM18 (No 2)* (recited above), Griffiths J concluded, having considered the six points raised, that the representations, considered in context, constituted coercion.

365 ASIC, in support of its submission as to the scope of coercion, sought to draw an analogy between coercion and duress, noting that duress has moved beyond the idea of a physical threat or act and, for example, there is now a well-recognised category of economic duress. It was submitted that there is an analogy between duress and coercion in that some illegitimate act has negated the free will of the consumer and, in considering that issue, it is necessary to understand how the consumer felt in the context of the transaction. ASIC contended that it can involve some other "illegitimate means of persuasion". To put it another way, it was said that duress, like coercion, can occur in a number of ways (and is not confined to a physical threat). If that is the extent of the reliance on the analogy, so much may be accepted. However, it is unnecessary to consider that submission in any more detail as it was used to support the conclusions already contended for by ASIC, relying on *ACM18 (No 2)*, amongst others. As will be apparent from the below paragraphs, those conclusions do not rely on ASIC's submission that there is an analogy with the concept of duress. That said, it is appropriate to make four brief observations on this topic. *First*, care must necessarily be taken with reliance on any

analogy as this application involves the statutory concept of coercion in the ASIC Act, not the common law notion of duress in the context of contracts. As illustrated in *Quantum*, attention must be directed to the statute. The term coercion is used, where this is one of a number of provisions in a suite of provisions which address or provide for a statutory norm of corporate behavior. As the Defendants submitted, the analogy is not precise. *Second*, following on from that, duress in the law of contract is focused on whether it is unconscionable for a party who issued the threat (or undertook the impugned conduct) to take benefit from the contract: Seddon N, *Cheshire and Fifoot Law of Contract* (11th ed, Lexis Nexis Butterworths, 2017) at [13.5]. Its effect is to relieve the innocent party of being bound to the contract. That is different from the purpose of s 12DJ. *Third,* in that context, care must also be taken of the authorities relied on by ASIC, for example: *Barton v Armstrong* [1976] AC 104, *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 and *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 (*Cockerill*). Moreover, the passages referred to must be read in their proper context. It is one thing to suggest that they illustrate that the courts recognised, in respect to duress, acts of pressure encompassing a broader concept than a physical threat. It is another thing to rely on them to change the approach to coercion in its statutory form. I take from ASIC's oral submission that it relied on them for the first point, referred to above at [0], only. In so far as ASIC relies on the passage highlighted in its written submissions from *Cockerill* which goes further than that, it was not elaborated on in oral submissions. No such approach is referred to by ASIC as having been applied in the statutory context of coercion. *Finally,* it must be remembered that the statutory concept has been interpreted to involve compulsion. That concept of itself requires there be some conduct, which is capable of compelling a person or applying pressure to act in a particular way.

366 As ASIC correctly submitted, by reference to *ACM18 (No 2)*, coercion can be established by a combination of circumstances. The assessment of whether or not particular conduct is coercive will depend on an overall impression or evaluative judgment, considered in light of the surrounding circumstances. Those surrounding circumstances, as illustrated by *ACM18 (No 2)*, include the personal circumstances of the person said to be coerced. By the same token, the Corporate Defendants' submission that the conduct in *ACM18 (No 2)* was different to that alleged in this case, can also be accepted. However, that does not detract from the nature of the circumstances in *ACM18 (No 2)* which were considered to be relevant in assessing the coercion claim. What this highlights is that each case will turn on its own facts. The Corporate

Defendants' submission that this conduct is far removed from that discussed in the authorities as to what amounts to coercion, must be considered in that context. It is not simply a question of comparing the facts in one case with another.

367 For example, relevantly, *ACM18 (No 2)* involved debt collecting, and the types of considerations which may inform whether conduct was coercive in that particular context would likely be different in a sales context. It may be that conduct which could be characterised as a threat or intimidation (amounting to coercion) is more likely to arise in circumstances where a person is trying to extract payment of a debt. One may be less likely to threaten someone when making a sale, as opposed to extracting a debt. However, as discussed above, the authorities recognise that compulsion can occur in circumstances absent a threat or intimidation. Although debt collecting might be the more typical circumstance referred to in the authorities, s 12DJ prohibits the use of coercion in the supply or possible supply of financial services to a consumer. That obviously encompasses a very wide range of circumstances. A person could, depending on the circumstances, be railroaded or pressured into signing up for a financial product by a variety of different illegitimate means. Coercion can take many forms, and is not as confined as the Corporate Defendants suggest.

368 Moreover, debt collecting occurs in a particular context. For example, as Perram J observed in *ACM12* at [14], "[b]y definition, the class of person who find that they have fallen into the hands of a debt collection agency are likely to be those who, for whatever reason, have not met their legal obligations. The necessary context is one, therefore, in which the law of contract and the ordinary usages of lending have failed to secure compliance by the debtor with his or her obligation to repay. It is not to be expected in such cases that the debt collector must proceed as if at a prayer meeting".

369 This is to be contrasted to the sales calls, where in most, although not all instances, the calls were unsolicited and unexpected. In respect to one Consumer (being Ms Yalumul), there is also an allegation of coercion in respect to the retention conduct. Again, that will involve a consideration of the particular circumstances. But what is clear is that the retention conduct is not necessarily about the collection of outstanding money but heavily focused on retention of the policies. That also places it in a different circumstance to those cases which considered debt collecting.

370 All that said, it is appropriate to return to ASIC's submission referred to above at [0], that *ACM18 (No 2),* provides a useful analogy with this case. The circumstances relied on as

summarised in [0], must be viewed in context. For example, the untrue claims relied on in *ACM18 (No 2)* are qualitatively different from those, for example, pleaded in respect to Ms Marika. That is, false statements of imminent legal action against the Consumer who owed a debt, or statements that management is demanding full payment, as in *ACM18 (No 2)*, are different to false and/or misleading statements, for example, as to exclusions to the policy, or that certain features were part of the standard cover, without informing Ms Marika that they were optional extras. The former, by their nature puts pressure on the Consumer who owes a debt. It is conduct which attempted to remove a consumer's freedom to act. The latter do not, of themselves, carry that connotation. Similarly, the submission that in *ACM18 (No 2)* the consumers were "stunned", "railroaded into agreeing" and placed in a position where they had no choice, must also be considered in context. That is, those feelings were brought about in the face of false statements of imminent legal action being launched against them. Again, this illustrates that it is not as simple as comparing cases. Moreover, it highlights that considerations relevant in one case cannot simply be taken at a level of generality (and out of context) as being illustrative of coercion in another factual circumstance. The Agents may have employed objectionable conduct but it does not necessarily follow that the Consumer was coerced within the meaning of that concept in s 12DJ.

371 In that context, it can readily be seen that unlike in *ACM18 (No 2)*, where the Australian Competition and Consumer Commission identified three representations in the conversation which were, in the circumstances, said to be coercive, in this case the pleadings in respect to each relevant Consumer (Ms Marika's being typical of that in respect to the other Consumers), involve many integers and appear to cover a broader range of conduct. I have referred above to issues that may arise in respect to the false and/or misleading statements. Accepting that the circumstances are not to be considered in isolation, there are integers which identify some acts which, when considered by themselves (and absent the circumstances of these Consumers), may be seen as unexceptional in a sales call context, for example, making the sale in the one call. ASIC has also relied on omissions to act as integers of coercion. As a general observation, it is difficult to see how the failure of a Sales Agent to do something, for example, to take reasonable steps to confirm that the Consumer understood, could be seen to be designed to put pressure on the Consumer, or be an attempt to remove their freedom to act. That is not to suggest it might not be a relevant circumstance in which to assess the impact or effect of other conduct which took place in a coercion allegation, or be relevant to a breach of other provisions (for example, unconscionable conduct).

372 ASIC submitted that there is a myriad of ways in which compulsion can occur including "through trickery, unfair pressure and the use of unfair advantages, just as occurred in [*ACM18 (No 2)*]". That submission extracts the concept of unfair advantage from the reasoning in *ACM18 (No 2)* and the context in which it was used. There is no reference in the reasoning to trickery or unfair pressure, but these concepts appear to be relied on by ASIC as describing the reasoning in *ACM18 (No 2)*. In *ACM18 (No 2)* at [268], it was observed that the agent "sought to obtain an unfair advantage in his discussions" by making the false statements he did which related to the existence of imminent legal proceedings being instituted. It cannot be extrapolated from that whereby, if an unfair advantage is obtained, that necessarily amounts to coercion in s 12DJ. The submission seeks to elevate those concepts without grounding them in the notion of compulsion. ASIC also contended that coercion is concerned with the bringing of illegitimate pressure. Attaching additional labels or descriptors to conduct does not assist in determining whether coercion has been established. It may be accepted that it can be established by different forms of conduct, but at its heart is the necessity for compulsion. The conduct undertaken must have the element of compelling a person to act or refrain from taking action.

373 As illustrated by *ACM18 (No 2)* at [272] recited above at [0], Griffiths J took into account the effect of the conduct on JR. He accepted her evidence that the effect of the identified conduct on her was that she believed she felt she had no choice but to comply with the demand for an up-front payment or face legal proceedings, and she acted accordingly. This evidence was not of a general nature or that she felt pressure generally but related to the effect of that conduct on her. She made a decision to act as she did because of the conduct. She was compelled or had no choice other than to act as she did. That is to be contrasted with the general nature of some of the evidence of the Consumers in this case.

374 Pausing there. Returning to ASIC's submission made in relation to most of the Consumers, that because the Consumer did not understand what they had purchased, their will was overborne in that they did not give "meaningful or informed consent" and, therefore, coercion has been established. In doing so, ASIC frequently reframed the issue under s 12DJ(1) by posing the question as whether the Consumer had given meaningful or informed consent, which had the tendency of focusing the inquiry on the subjective view of the consumer, and working backwards from that. Although, if established, it may be a fact relevant to assessing whether coercion is established, an approach which focuses only on the subjective position of the consumer, as explained above, is inconsistent with authority. ASIC cites no authority for its

reliance on the phrase "meaningful or informed consent" in this context, and it appears to be an extrapolation from the concept of negation of choice. It is not the approach adopted in *ACM18 (No 2)*, which was said to be a useful analogy. I note that the words meaningful and informed, although they appeared to be used interchangeably, have different meanings. The former would go to the genuineness of the consent, the latter, is directed to the knowledge on which the consent is based. The submission, at a general level, fails to direct attention to the concept underpinning coercion. As the authorities recited above demonstrate, coercion involves the negation of choice or freedom to act; that the consumer has been compelled by the conduct of the alleged wrongdoing party to do something or refrain from doing something (in this case, sign up to a policy). Inherent in that description of coercion is the notion that the consumer has not willingly consented to sign up to the policy because they have been forced or otherwise pressured to do so by the conduct of the alleged wrongdoing party (as a consumer's will has been overborne). It can be seen that negation of choice in this context is not necessarily the same as the failure to give meaningful or informed consent.

375 So much is illustrated in this case by the reliance on integers such as some of the false and/or misleading representations (given their nature), as explained above, or playing the PDS in the circumstances in which it was played. It is not suggested that the false and/or misleading representations (for example, a failure to explain the exclusions or that certain features are optional) compelled or pressured a consumer to purchase a policy. Rather, where that is pleaded ASIC typically submitted the false and/or misleading representations "clearly deprived [the consumer] of free choice and an ability to give informed consent". As a general proposition, a consumer may have misunderstood, not fully understood, or not been told the full details of the product being purchased, but that fact, by itself, is not the focus of this aspect of s 12DJ(1), which is directed to whether it has been established that the conduct is coercion in the manner described above. Similarly, the fact that a false and/or misleading representation has been made per se, is not the focus of the inquiry. Bearing in mind this is only one provision in a suite of provisions directed to providing statutory norms or standards of corporate behavior. Such conduct in itself may be deprecated, and may breach other standards (as illustrated by the conclusions in respect to the Consumers in this case). That is not to suggest that these matters may not be relevant in assessing whether coercion is established, but whether that is so must depend on the content of the representation and the context and circumstances in which it was made bearing in mind what must be established given the nature of coercion.

376 ASIC's submissions advanced on these claims which focus on the concept of establishing a lack of meaningful or informed consent, in effect, do not simply address the type of conduct which ASIC alleges may be a form of compulsion, but have the tendency to change the focus of the concept of coercion within the meaning of s 12DJ(1), as explained in the authorities. Failing to give meaningful or informed consent in the manner relied on does not, as ASIC contends, necessarily establish coercion in and of itself. There must be attention to the acts of the alleged wrongdoing party. There must be some form of compulsion in the conduct undertaken, which involves a negation of choice or freedom to act. As previously explained, whether coercion is established will depend on an assessment of the alleged conduct the subject of the claim, in the circumstances in which it occurred. It is timely to recall that whether any particular conversation is coercive will not depend on a line by line analysis of the call, but rather an overall impression: *ACM12* at [17].

377 Before leaving this topic, it is appropriate to make an observation about the Corporate Defendants' repeated submission that the conduct does not have "the necessary element of compulsion or serious threat". The reference to "serious threat" appears to be taken from *Safety Compliance* at [262]-[263]:

> [262] Having said that, I am not satisfied that Safety Compliance's Conduct and the despatch of the debt recovery letters can, in all of the circumstances, properly be described as coercive. The Conduct can properly be described as misleading, and actions in relation to debt recovery letters as an inept attempt at intimidation involving false representations of affiliation with debt recovery and reporting agencies. However, I do not accept that the necessary element of compulsion or serious threat is present even though the tenor of the phone calls and debt recovery letters was deliberately intimidating.
>
> [263] As pointed out by French J in *ACCC v McCaskey* at [51], quite apart from content, "the manner or circumstances of a demand or communication, including the language used, the time and place at which it is made and the person to whom it is communicated" are relevant in determining whether a communication goes beyond legitimate purposes, such as drawing attention to the existence of an obligation and the consequences for non-compliance.

378 From this passage, the Defendants submit that the material question is whether the alleged wrongdoer breached the requisite normative standard because its conduct had "the necessary element of compulsion or serious threat". Prior to this passage, Farrell J recited the relevant principles from *McCaskey* and *Maritime Union,* in the manner recited in this judgment at [0]-[0], observing at [147], that coercion "generally imports some form of compulsion, whether by threat of force or otherwise". Nothing in *Safety Compliance* is inconsistent with the conclusion referred to above at [0]. Moreover, in so far as the Defendants pick up the phrase "serious

threat", that does not appear in any other authority, as is clear from a consideration of *McCaskey, Maritime Union, ACM12* and *ACM18 (No 2).* I doubt her Honour intended to alter the description of what amounts to coercion. Properly read, it may be that by referring to "serious threat", her Honour was simply intending to draw a distinction between innocent threats which are pursued legitimately and threats which, depending on the circumstances, would amount to coercion. For example, as her Honour notes at [261], merely threatening to institute action for the repayment of a debt, without more, is not of itself coercive. This is supported by the references which immediately follow in [263] of *Safety Compliance,* where her Honour seeks to explain the approach in assessing whether conduct "goes beyond legitimate purposes" by referring to French J in *McCaskey* at [51]. In any event, it cannot be extrapolated from the passage recited immediately above, in the context in which it appears, that where there is a threat relied on to establish a coercion claim that it must be a serious threat. That said, the seriousness or otherwise of the threat or other conduct would, depending on the factual context, be relevant to assessing whether a claim had been established.

379 *Safety Compliance* simply illustrates that each case turns on its own facts. The facts in that case are removed from the claims made here. To provide one example. An obvious distinction, is that in respect to a number of the claims it is alleged that the Consumer was vulnerable or at least in a weaker bargaining position, which is a relevant consideration: see *McCaskey* at [51]; *ACM18 (No 2)* at [276]. In *Safety Compliance,* the consumers were, relevantly, small business owners and managers. It was not contended that those consumers were in a weaker bargaining position or were otherwise vulnerable.

380 Before leaving *Safety Compliance,* it is appropriate to address ASIC's submission that based on [265] of the reasons, pivotal to Farrell J's finding that no coercion occurred was that:

> …there was no pressure to complete the purchase through demand for immediate payment. Had there been a demand for immediate payment to complete the purchase, then the degree of intimidation inherent in a representation which leads a small business owner or manager to believe they are dealing with a government agency in a position to punish non-compliance by fines is likely to have tipped the balance into coercion of the purchase. I do not consider that an apt characterisation in this case.

381 From that ASIC submitted that in contrast to *Safety Compliance,* where customers were allowed a cooling-off period and time to think, there was no opportunity afforded to Consumers in this case with the payment details and direct debit authorities demanded on the call with payment then taken automatically from the Consumers. Again, this illustrates that each case necessarily turns on its facts. It does not follow that taking the debit details in the call

necessarily amounts to coercion. Importantly, the significance placed in *Safety Compliance* on this factor is its effect on the degree of intimidation inherent in the representation (said to be coercive) that had been placed on the business owners. The nature of the representation was the significant factor. Moreover, the nature of the erroneous representation relied on was directed to compelling the customer to purchase the product.

382 Apart from a general submission that the cases where findings of coercion have been made differ markedly from the instant case, both in terms of the type and gravity of the relevant conduct, the Defendants' statement that the conduct did not have "the necessary element of compulsion or serious threat" is the only submission advanced in respect to the individual claims.

383 *Tenth*, in respect to eight Consumers (Ms Marika, Mr Mirrawana, Ms Yalumul, Ms Yeatman, Ms Shadforth, Mr Hussain, Mr Lewis and Ms Mirniyowan), there are also allegations in respect to retention calls, with the claims including undue harassment, coercion and unconscionability. Again, each claim and call must be considered separately to determine whether the claim has been established. However, there is a commonality in some of the Defendants' submissions in relation to the retention calls.

384 For example, the Defendants contend that the requirement to cancel the policy in writing, which is referred to by the Retention Agents in the various retention calls, cannot be an integer of undue harassment because it was a contractual obligation on the part of the Consumers. The Corporate Defendants contended that such a requirement was contained in the PDS for the relevant products during the relevant period, citing as examples, the Essentials Life Cover PDS dated 2 January 2018, Let's Insure Funeral Cover PDS dated 25 February 2014 and Let's Insure Funeral Cover PDS dated 13 February 2016. It was submitted that the PDS was St Andrew's document. St Andrew's had responsibility for, and final approval of, the PDS. The Corporate Defendants did not have authority over the PDS's. The requirement that policies can only be cancelled in writing, it was said, was a requirement imposed by St Andrew's. BlueInc Services was bound to follow this requirement. It was submitted that the fact that, in "special circumstances" the Retention Manager had discretion to accept an over the phone cancellation request when the customer was unable to send the request in writing, illustrates that this was the exception, not the rule. There can be no question that Retention Agents were told to, and expected to, follow the rule that policies had to be cancelled in writing. The Defendants submitted that it was at least an arguable interpretation of the documentation that the policy

must be cancelled in writing. This requirement was also said to reflect widespread industry practice.

385 I accept ASIC's submission, that at its highest, those documents only provide a manner in which a policy may be cancelled, rather than a mandatory method. The submission as to the obligation to follow the PDS which says a policy can be cancelled at any time in writing providing 30 days-notice is only based on s 19 examinations of Mr Howden and Mr Jalba (neither of whom were called by the Defendants). This is in a context where Mr Howden also accepted (in a letter to ASIC from Select, dated 4 June 2019, in answer to a s 912C Notice) that there was a discretion to accept a cancellation "over the phone", although he describes it as applying in "special circumstances". Mr Howden noted that the discretion was not recorded in any documents (which would include the PDS), yet it existed. It follows, that whatever is in the documents, it was not a mandatory requirement. It can be inferred that the requirement that the cancellation be in writing, if it existed, was not rigidly applied. Moreover, whatever may appear in the St Andrew's PDS, such a condition of requiring cancellation in writing does not appear in the Distribution Agreements between Select and St Andrew's. None was pointed to by the Defendants. Rather, the Distribution Agreements provide that a policy can be cancelled in accordance with the *Insurance Contracts Act 1984* (Cth) or at the 'request' of the customer which appears to be much broader than is suggested by the Defendants.

386 However, leaving that issue to one side, there are some flaws in the Defendants' reasoning. The submission considers the issue of cancellation in isolation from the circumstances.

387 For example, some of the Consumers were signed up for the policy in one phone call. No documentation was provided to the Consumers before being signed up, and no signature was required. From the one call they are committed to an ongoing financial obligation. It is rather ironic in those circumstances that cancellation of that policy could only be done in writing. Moreover, given that circumstance, the Defendants had no record of the Consumers' signature such as to compare any written cancellation.

388 Although the Corporate Defendants rely on the written PDS, the Consumers were not given a copy of any documentation until after they had signed up to the policy. The short form PDS which the Sales Agents used in each of the sales calls (at Mr Howden's instigation) did not contain any reference to a requirement to cancel in writing. There was no other reference in any of these sales calls to such a requirement. It follows that when the Consumers were signed up for the policy, if there was such a requirement, they had not been told it was a condition.

389 Moreover, as accepted by the Corporate Defendants, there was a discretion to accept a cancellation over the telephone, although it was suggested this would only apply in special circumstances. An example given by Mr Howden of a special circumstance, referred to in his letter to ASIC, dated 4 June 2019, was where a customer had no access to a post office. In some of the calls (see for example [0]-[0], [0]-[0], [0]-[0] below), where the Consumers stated that they could not write (presumably because some had poor literacy skills), it is difficult to understand why such a discretion would not be exercised. Moreover, ASIC's case in the retention claims relies on a number of other circumstances including, in some instances, the Consumer expressly stating they did not want the policy and could not pay the premiums (and having failed to pay premiums, sometimes repeatedly). In closing, the Defendants' submission that because a person could not write does not mean they could not have asked someone else to write for them, and it is a simple requirement, is to advance a submission in isolation from the content of the calls. The Defendants' submission that "[w]riting makes things clear, and that's why in many written contracts, something that's required to be done is required to be done in writing", is rather incongruous given the financial consequences of signing up to a policy over the telephone (without, in many cases, the Consumer having first seen any of the underlying policy documentation). To submit that the requirement "is not a particularly onus requirement" also fails to take account of the circumstances. The consequence on occasions of the continued insistence of the need for the policy to be cancelled in writing, is that despite Consumers wishing to cancel their policy because they were unable to pay the premiums, they continued to have those premiums charged, and on occasions the premiums even increased (see for example [0]).

390 I note also in this context, that the Corporate Defendants had a discretion to cancel a policy if the premiums were a month in arrears. For example, in the PDS given to Ms Marika after she had been signed up to a policy, it stated that under the heading, "When cover ends", that the policy would end in certain circumstances including "the date we cancel your policy due to non-payment of premiums". The PDS expressly provides "[w]e can cancel your Policy when it is due and remains unpaid for more than one month". In that context, and where the Consumer expressly stated that they could not pay the premium, it is difficult to understand the insistence on cancelling the policy in writing, given that in many cases it resulted in the Consumer continuing (against their wishes) to accrue debt to the Corporate Defendants. Indeed, that is what eventually occurred in relation to the policies held by Ms Yalumul, Ms Yeatman, Ms

Shadforth, Ms Gaykamangu, Ms Campbell, Mr Lewis, and Ms Mirniyowan, although for most it was only after many unsuccessful attempts to cancel their policy and further debts accruing.

391 It is in that light that the Corporate Defendants' submission, that requiring the policy to be cancelled in writing was in accordance with industry standards, must be considered.

392 Whether, in any given call, the statement that a policy can only be cancelled in writing was made in order to prevent or forestall cancellation and otherwise to make it harder for the Consumers to cancel their policies, must be considered in the above context. Whether it was being used as a road block, as contended for by ASIC, turns on the content of the particular call.

393 It was also submitted by the Corporate Defendants, in respect to the retention conduct, that it was reasonable for Retention Agents to assume a Consumer would wish to maintain coverage for a policy, especially where payments had already been made, and that the Retention Agents' conduct during the calls is to be assessed in that context.

394 This submission is at such a level of generality so as to be of little assistance. As explained below, in respect to some of the calls, the Consumers made it abundantly clear that they sought to cancel the policy and/or did not have the financial means to pay the premiums. In respect to some, for example, Mr Mirrawana, his representative made it plain that he did not know what he had entered into. From a consideration of the content (and by reference to the audio) of at least some of the calls, that the Consumer did not want the insurance policy and their inability to comply with a requirement to cancel the policy in writing, would have been, or ought to have been, readily apparent to the Retention Agents. In some calls, it was not reasonable for the Retention Agents to assume that a Consumer would wish to maintain coverage for a policy, and if that was so at the outset of a call, they ought to have been quickly dissuaded from that assumption. In many instances, there were a large number of calls by Retention Agents to a Consumer, and although it might not have been by the same Agent, they were all on behalf of the Corporate Defendants, and their actions are attributed to them.

395 The same can be said of the Corporate Defendants' submission that:

> There is nothing anti-consumer about Retention Agents offering or attempting to persuade a Consumer to continue a policy with a lowered premium and benefit rather than cancel it, particularly if the reason the Consumer gave for wanting to cancel the policy was that they couldn't afford the current premiums. It certainly does not constitute undue harassment to make such an offer in a polite and professional way, even on repeated occasions…

396 Such conduct must be considered in the context in which it occurred, and not in a vacuum.

397 Moreover, the performance of Retention Agents was measured at the time against key performance indicators, which included their ability to collect premium payments and achieve a retention rate of over 50 percent. Any submission that what was done was necessarily motivated by the best interests of the Consumers is to be considered in that context.

398 Again, attention must be focussed on the individual calls.

The Consumers

399 The degree to which the content of a call is recorded in these reasons varies in respect to each of the Consumers. Some of the transcripts are lengthy and unnecessary to repeat. It is appropriate to recall that the recordings of the calls make apparent in some instances a meaning, effect or consequence of conduct of the Sales or Retention Agent that is not necessarily apparent from a consideration of the transcript alone.

Kathy Marika

400 In respect to Ms Marika, ASIC pleads in respect to sales calls that five false and/or misleading representations were made in contravention of s 12DB(1) (FASOC [532]-[544]), there was coercion in respect to the sale of the two polices in contravention of s 12DJ(1) (FASOC [545]-[546]), the sales conduct was unconscionable contrary to s 12CB(1) (FASOC [547]-[552]), and in respect to the retention call, there was undue harassment contrary to s 12DJ(1) (FASOC [553]-[554]), and unconscionable conduct contrary to s 12CB(1) (FASOC [555]-[560]). As noted above, the Defendants admit only that the sales conduct is unconscionable.

401 It was agreed that on 9 September 2015, Ms Marika was sold two separate Let's Insure Funeral Cover policies, each with optional ADC and AIC, by Sales Agent, Mr Hudson. During the call, Mr Hudson signed up Ms Marika, as the policy owner, to:

(1) one policy, in the amount of $12,000, with optional AIC and ADC to the value of $25,000 and optional ADC to the value of $25,000 for each of herself, and her three children, Lance Ngurruwuthun, Meryl Ngurruwuthun and Vicki Ngurruwuthun, as the lives insured, with a policy acceptance date of 9 September 2015, a stepped fortnightly premium commencing at $46.29 and the nominated beneficiary being Lance Ngurruwuthun; and

(2) one policy, in the amount of $12,000, with optional AIC to the value of $25,000 and optional ADC to the value of $25,000 for each of her five grandchildren Nolene Marika, Shakira Marika, Danielle Whyman, Patricia Whyman and Stephanie Whyman, as the lives insured (aged 20, 12, 7, 5 and 4 years old), with a policy acceptance date of 9 September 2015, a fortnightly stepped premium commencing at $13.77 and no nominated beneficiary.

402 Mr Hudson took Ms Marika's bank account details for the purposes of premiums being automatically charged on a fortnightly basis.

403 Ms Marika failed to pay numerous fortnightly stepped premiums and sought on a number of occasions to cancel her policies, which were not ultimately cancelled until 9 December 2016. From the time that Ms Marika was signed up until the time of cancellation, she paid $1955.29 in premiums. She subsequently received a refund of $1,909.

404 ASIC pleaded that Ms Marika was around 58-59 years old in the period of August 2015 to December 2016. She is an Aboriginal woman who, for most of her life, had resided in a remote community in Arnhem Land in the North Territory (in or around Nhulunbuy). In August 2015 to December 2016 she had resided in Sydney and a rural area of NSW. She had difficulties speaking and understanding English, and difficulties understanding people speaking English as she suffered deafness in her right ear. It was contended that the combination of those factors make her a vulnerable consumer, or in a weaker bargaining position.

405 The personal characteristics, including that she was in a position of vulnerability or at least a weaker bargaining position, were established by the evidence of Ms Marika and the agreed facts.

406 It was agreed that the conduct of Sales Agents, Mr Zanotto, Mr Hudson and Mr Hoey towards Ms Marika was taken to have been engaged in by Select by reason of s 12GH(2)(a) of the ASIC Act. Further, it was agreed that the conduct of Mr Zanotto, Mr Hudson, Mr Hoey, Beccy Ledsham, Sanna Khan and Retention Agent, Rachel Ward (all BlueInc Services employees), is taken to have been engaged in by BlueInc Services pursuant to s 12GH(2)(a).

Evidence of Ms Marika

407 ASIC relied on the affidavit of Ms Marika sworn on 7 June 2019.

408 Ms Marika is a Yolngu woman, who was born in the Yirrakala community in North East Arnhem Land. Until moving to Newcastle in 1996, Ms Marika lived in various communities in Arnhem Land, including Bremer Island. Ms Marika speaks five Aboriginal languages and can understand some others used in Arnhem Land. She first learned English when she attended school.

409 Ms Marika completed schooling up to the Year 10 level. She has held various roles including as a teacher's assistant at a primary school in Yirrakala and in conservation in Darwin where she assisted in the preparation of a book on Aboriginal bush tools and bush-tucker. Ms Marika has also worked as a trainee nurse at Yirrakala Medical Centre. From 2000 to 2003, after moving to Newcastle in 1996, she worked at the National Aboriginal Islander Skills Development Association (NAISDA) Dance College. Since 2003, Ms Marika was employed by the Bangarra Dance Theatre (Bangarra) until her retirement at the end of 2015 due to a lumbar spine injury. In 2006, Ms Marika moved to Condobolin, NSW, and in 2017, she moved to Orange.

410 Ms Marika has four children, five grandchildren and one great-grandchild. Ms Marika has cared for one of her granddaughters since 2006, as well as her granddaughter's son. She occasionally cares for her other 16 year old granddaughter.

411 Ms Marika received Newstart from Centrelink from 2016-2018 and now receives a disability pension. Whilst working at Bangarra, Ms Marika was paid about $1,000 per week before tax, and she was renting a house in Newtown, Sydney. After expenses, including rent, electricity and phone bills, Ms Marika would have about $300-400 leftover each week, however, she also sent money to her boys and to her granddaughter.

412 Ms Marika has experienced hearing difficulties in her right ear since before 2015. In 2015, she was waiting to receive a hearing aid. In 2015 and 2016, Ms Marika says that she "sometimes could not hear people" and she "would just nod yes or agree" even when she did not properly understand what was being said. She has also had difficulty understanding people because when she speaks in English, she would need to translate the English in her mind into Yolngu Matha.

413 While working for Bangarra, Ms Marika said that she had insurance with Media Super and that money was there when she retired in 2015, or early 2016. She understands "insurance to be money that you get paid when you retire".

414 In her affidavit, Ms Marika described the details of eleven telephone calls with Let's Insure. Often the callers had an accent and spoke quickly. It was difficult for Ms Marika to understand them, particularly given her language barriers.

415 During the sales call, on 9 September 2015, Mr Hudson signed up Ms Marika to two separate Let's Insure Funeral Cover policies. Ms Marika did not know that she had two insurance policies with Let's Insure until 16 April 2019, when she was told this by Nathan Boyle (from ASIC).

416 Ms Marika recalled that the caller spoke about the benefits and the money that her family would receive under the policy, including if you were injured. This made her think that it was a "good idea" to take up the insurance given that her son had been in a car accident in 1994 and injured his leg but did not receive any assistance. She remembered wondering "where the money was going to come from". The caller asked about her children and their age. She did not understand why she was being asked this information. Ms Marika gave him this information because she wanted to "tell the truth" and because she was thinking about the money that her children would get if anything "went wrong". The caller took her bank details, and she did not understand why he asked for them. Ms Marika believed at the time that "he was putting money in my bank account. I thought that they already had the $12,000 that the caller talked about there to give me and I thought that they would put that money in my bank account in case [she], [her] children or [her] grandchildren passed away". The caller also talked about "different dollar amounts" which she found confusing.

417 Although she did not understand why she was being called, she recalled that the caller "kept getting nicer and nicer" throughout the call and that he appeared to be helping her out.

418 Ms Marika accepted that when the caller told her the cost was $30 per week, she understood that this meant that money would be taken from her bank account. She recalled that the caller told her that a "premium" would be taken out at 8am. She did not understand what a PDS, "premium", "stepped premium" or "set premium option" is. If she had known what a premium was, she would have asked for it to have been taken out in the afternoon because she usually was paid on Tuesday at 4pm.

419 Ms Marika stated:

> I am not a whitefella and able to listen to the whole conversation in English. I need to interpret for myself, so the longer the call goes on for, the harder it is for me to understand, and sometimes I get tired.

420 By the end of the call, Ms Marika knew she had funeral insurance. She thought this meant a payment would be made to her son for funeral costs if she passed away and that she would receive a payment if anybody else she looked after passed away.

421 Ms Marika sought assistance from Legal Aid to cancel her policy. Kate Hehir, from Legal Aid, assisted Ms Marika to cancel her Let's Insure policies.

Sales conduct

422 On 24 August 2015 there was a call, with the caller identifying herself as being from "[indistinct] Advisors" stating she was conducting a survey. Ms Marika informed the caller that she already had funeral insurance. The caller asked permission to have someone call Ms Marika back.

423 On 25 August 2015, a second call occurred with Mr Zanotto, telephoning Ms Marika. Again, Ms Marika informed him she already had insurance. The call ended as follows:

> LZ: So, Kathy, we deal with insurance for customers like yourself actually every day. I'd say about 80 per cent of my day I deal with switching InsuranceLine customers over to us because we are able to save them money, okay? And, I mean, Kathy, I'm sure, obviously, you're like most people I speak with - no-one really wants to be spending more money on their insurance than they really have to, hey? So you're –
>
> KM: Yes, but I can't –
>
> LZ: Yeah?
>
> KM: But I can't do it again, you know. I can't have two life lines.
>
> LZ: Yeah, so that's what we're doing. So that's obviously what I'm telling you. We can actually help you cancel that policy. Instead of having that one, you'll just have this one, obviously, the one that is obviously cheaper, you know what I mean?
>
> KM: I'm happy with the other one.
>
> LZ: Yeah, but surely you'd be happier if you were saving yourself a bit of money and getting more cover?
>
> KM: No. No, no.

424 Despite that, between 26 August 2015 and 3 September 2015, Sales Agents attempted to call Mr Marika four times.

425 On 9 September 2015, Mr Hudson called Ms Marika, and despite the fact that she also informed him that she already had funeral insurance through her work, he signed her up to two Let's Insure policies. It is this call which is the subject of ASIC's claims.

426 To the fact Ms Marika said she had a policy, Mr Hudson said variously:

> You've only got it through your work have you?
>
> …..
>
> Well the good news is, look, we speak to loads of people that got it through their work, look, but what they tell me is they got an expiry date on theirs and you can't actually cover the whole family, okay?
>
> ……
>
> Now with us, look, like I said before, look, you can have your one at work, no worries, okay, because they sort that one out for you anyway. Now, for you and your family, you can choose just to cover yourself but most people cover everyone, okay?

427 In her affidavit, Ms Marika said that the Sales Agent did not listen to her saying 'no' (as she did not need new insurance), and that he talked quickly and over the top of her, never giving her a moment to pause to listen and talk. Her evidence was that "he basically left [her] speechless and [she] could only say 'yes' or 'no'".

428 Ms Marika asked if she could talk, and said:

> KM: I would have to - I will have to ring Bangarra and ask them about that, too, you know, make sure they've still got it. If not, your number come up and I'll give you a call.
>
> SH: No worries. With that one, you can keep that one for yourself, okay? And you can get - you can actually have two at the same time, and that's what most people tend to do. Because with their one at work, it only covers them and they say it expires when you stop working, which means your family don't get the money. So I'll just tell you about ours and you can tell me if you want this one as well, okay?
>
> KM: Okay.
>
> SH: No worries. Now, Kathy, calls are recorded just for your security and can only provide general advice. More importantly, how's your week been? You had a good week?
>
> KM: Yeah, week, I've been back and forth to the hospital because I'm diabetic.
>
> SH: Oh, yeah.
>
> KM: And I had migraine on Thursday last week and I had to --
>
> SH: Oh, that's not good.
>
> KM: -- go to hospital.
>
> SH: And you got some help, yeah? No worries. Well, hopefully you don't get another one of them, hey?
>
> KM: Yeah, other than that, you know, it was mowing yesterday and, yeah.
>
> SH: Yeah, so apart from that, all good, hey?

KM: All good, yeah.

SH: Oh, good, good, good. It's always good to hear. Now, what we got for you, look, we have the funeral cover. We go all the way up to $16,000, okay? Now, the reason why people take one out with us as well as the one they have at work is because we're priced up to 50 per cent less and, as you can imagine, you don't really want to be spending too much, do you?

KM: No.

429 Pausing there. Elsewhere, Ms Marika also refers to not earning enough money. The response "mmm" is a frequent one in the conversation.

430 There was then a brief discussion about Ms Marika's financial means:

SH: No, you've got better things to be spending your money on, hey?

KM: I tell you what, I tell that in a minute because I haven't been going to work, because I had to come and do this house - you know, for the inspection and everything.

SH: Yeah.

KM: But so I haven't been doing as much money at all.

SH: Yeah.

KM: From work.

SH: Yeah, exactly. So you definitely don't want to be paying too much, hey? No worries. Now, Kathy, what else we've got for you, look, we also have the accidental death cover. Now this is for each of the family members as well. So that's going to be $32,000 each there as well, okay? So that means --

KM: Where's all the money coming from?

431 The question asked by her as to where the money was coming from was not answered.

432 Mr Hudson continued to outline the policy using the following type of descriptions:

Now, if you were to suffer one of those eight injuries and needed the ambulance, you know you could because you've got $32,000 each there, okay?

…

Yeah, so to help your family out, we actually give them $800 every single month, okay? And that can be for up to 20 whole months, so nearly two years, just to help out with all those bills, okay?

…

…during the first 12 months you're covered for accidental death, and then following that you're covered for everything, okay? And you're also covered for your serious injuries straight away as well, all right?

…

…it will never expire, so you know your family will get the money.

433 As to the exclusions to the insurance policies, Mr Hudson advised Ms Marika:

> …with your serious injury cover, there are some common exclusions such as participating in criminal activity, but, you know, I take it, Kathy, you don't take the kids and grandkids and rob banks on a weekend?"

434 The pre-recorded PDS was played, with a male speaker speaking very quickly and using terms such as "product disclosure statement", "financial services", "ombudsman", "premium" and "inflation". He did not seek or obtain her consent to receive the PDS over the phone prior to playing it. Rather, what was put was:

> SH: Yeah, is that fine? Perfect. Now, what I'll do for you, Kathy, so we can get you all covered, I just need to play you a recording. It's only 60 seconds long, so you make sure you listen to this. You'll come straight back to me and we'll get you and all the kids sorted, okay?
>
> …
>
> SH: There we go. Hello, Kathy?
>
> KM: Yes.
>
> SH: Yeah, you're back to me now. Would you just confirm that you received and heard that message?
>
> KM: I confirm, yeah.
>
> SH: Yeah, perfect. Now, I just need - for the recording, I just need a clear "yes" that you did receive and hear that message?
>
> KM: Okay.
>
> SH: I just need a clear "yes".
>
> KM: Sorry?
>
> SH: I just need a clear "yes" that you did.
>
> KM: Yes.

435 In addition, Mr Hudson took bank account details from Ms Marika for the purposes of arranging a direct debit facility to automatically charge premiums for both policies on a fortnightly basis.

436 The following day, on 10 September 2015, Ms Marika called Mr Hudson to provide the dates of birth of her grandchildren. During that call, Mr Hudson asked for the phone numbers of Ms Marika's friends and family and she was told she would receive Coles and Myer vouchers if she gave their numbers to him:

> SH: I ring up, like, your family and friends and say, "Well, you, Kathy, Kathy's just got the funeral cover all right for her and her whole family and he just said to ring you to explain it to you to help you out as well." Obviously they go,

"Yeah," then they get their family covered so they're all safe. And then because they've done that, you get some vouchers.

KM: Oh.

SH: Okay.

KM: I might have to have a look at my phone book.

SH: Yeah, if you want to have a look through your phone book, look, I'll just take down everybody's name and number. I can ring them all today. And you never know, if you've got, like, of them, you get $600.

437 Ms Marika did not know why the caller wanted these numbers. She recalled receiving at least one $20 Myer card.

438 Some observations can be made about the sales calls.

439 As noted above, Ms Marika described that Mr Hudson "talked quickly and over me and never gave a pause for me to listen and talk. He basically left me speechless and I could only say 'yes' or 'no'" and "kept talking to me about the benefits that I would get under the insurance and the money for the family". That is an apt description. The recording of the call reflects that Mr Hudson had a thick Cockney accent and, at times, spoke very quickly. He rushed through the conversation. He repeatedly spoke over Ms Marika. He did not answer any questions or address any issues and did not appear to be taking account of what she said. As ASIC contended, he spoke with an authoritative tone. There were repeated references to how much she would be paid. Mr Hudson used leading questions or propositions to advance the call. As is apparent from the passages of the call recited above, at times it is obvious that Ms Marika appears confused (for example, when Mr Hudson asked Ms Marika for authority for the insurer to direct debit the premium payments, she stated, "Yes, hopefully I'll be treated, you know, with respect"). There was no genuine attempt to ascertain what she needed, but rather, when Ms Marika said she already had insurance and wanted to check with her work, he dismissed what she requested. Indeed, the conversation began with the proposition that Ms Marika did not want or need the policy, which was simply dismissed. Mr Hudson just pushed ahead to sign her up to policies for all her family, including young grandchildren. Before Ms Marika had agreed to anything, he asked for and elicited all the family details and banking details. He started to take details of those to be insured only about 10 minutes into a 35-minute call. He proceeds as if it was a fait accompli.

440 Moreover, the PDS was not explained, nor its significance (and the person was speaking very quickly). Mr Hudson did not even inform her it was a PDS, but rather that a recording would

be played. Mr Hudson played the PDS without first obtaining her consent or informed agreement to receiving the PDS in the form it was provided. No mention was made of the optional nature of HEC, ADC and AIC, or that it raised the premium. Nor were the exclusions properly explained. When exclusions were referred to by Mr Hudson, there was a reference to criminal activity, said in a joking manner, as if the exclusion was not important or something she needed to concern herself about. There was no genuine attempt to ensure any policy was affordable. Nor was there a genuine attempt to ensure that Ms Marika understood what she was agreeing to. The two occasions where Mr Hudson elicited from Ms Marika a positive response as to whether she understood what was occurring, considered in context, could not have been taken as genuine or reasonable attempts to do so.

441 It is plain from the circumstances of the sales call including the information provided therein, that Mr Hudson had knowledge that Ms Marika was an Aboriginal woman. He admitted as much in his s 19 examination. He also had, or ought to have had from the conversation, knowledge of her age, that she resided (and had resided) in rural and remote areas (for example, she confirmed she had opened her Westpac Bank account in Nhulunbuy), and that she had difficulties hearing out of one ear (she had told him so in the call). It was also readily apparent from the call that Ms Marika had difficulty understanding what was occurring, and appeared at times to be confused. She had difficulty understanding English. It would also have been readily apparent from the content of the call that Ms Marika had limited financial resources. She did not appear to understand the products. From that, the obvious inference is that Mr Hudson was aware (or at least should have been) that Ms Marika did not have a great deal of financial understanding or literacy.

442 It was known, or ought to have been known, by Mr Hudson that Ms Marika was a vulnerable customer, or at least in a weaker bargaining position than Select.

Admissions

443 As noted above, this call was a case study for the Royal Commission, with Mr Howden giving evidence. He also was involved in a s 19 examination. Statements made by him in each forum are capable of amounting to admissions. Whilst in respect to a number of matters Mr Howden's statements are not admissible against him (noting that the admissions were made under privilege), they are admissible against the Corporate Defendants.

444 In his oral evidence before the Royal Commission, Mr Howden admitted that this sales call on 9 September 2015 by Mr Hudson was: "an appalling call, and there's was no way other than

[sic] to explain that. It was terrible" and that "[t]he whole call was terrible, I accept that. It failed. I can't defend that call". Mr Howden also told the Royal Commission, inter alia, that there were "a number of very serious defects in the processes used by the Select representative" in the call and accepted that "there were multiple occasions in this call in which Ms Marika appeared confused". He agreed that Ms Marika "had been paying for a policy that she did not need, that she did not want, and that she did not understand". He stated that:

> there are sufficient signals during the call that suggest that she may not have fully understood the product she was purchasing and the consequences of the purchase. I also formed the view that these signals should have been obvious to the Select representative at the time.

445 Mr Howden similarly stated during his s 19 examination that the 9 September 2015 call "was a terrible call. I don't make any bones about it" and that it was an "atrocious call". Later on in the examination, he said while claiming privilege that "there's nothing redeeming about this call". Under privilege, he said that it was unconscionable to sell the policies to Ms Marika in the circumstances in which they were sold to her; that Mr Hudson was not acting in good faith; that he used unfair sales tactics in his dealings with Ms Marika and he "did everything that we didn't want an agent to do". In the way Mr Hudson conducted himself, he denied Ms Marika "free choice" as to whether to enter the policies.

446 Mr Howden also said about particular aspects of the 9 September 2015 call where he did not claim privilege: that Ms Marika appeared confused on multiple occasions during the call; Mr Hudson "should've given her more time to think about the call" and "shouldn't have tried to abuse the refer a friend program" and that it was inappropriate of Mr Hudson to say to Ms Marika that most people tend to have two funeral insurance policies.

447 Under claim of privilege and, therefore, only admissible against the Corporate Defendants, Mr Hudson said about particular aspects of the call, inter alia, the following:

(1) Mr Hudson should have informed Ms Marika that the ADC was an optional form of cover (which he did not);

(2) it was "quite misleading to fail to identify that the [ADC] was an optional extra" and that "in any case where a sales agent failed to identify that [ADC] travelling with funeral cover was an optional extra, that would be misleading";

(3) Mr Hudson's description of what was covered and the exclusions to the policies was "inadequate because he didn't highlight the accidental nature" and that it is "an optional rider". The statement "you'll all get… $32,000 each" was quite misleading;

(4) Mr Hudson's description of the exclusions to the policies was not "an adequate statement of the exclusions to that policy"; and

(5) Mr Hudson did not take sufficient steps to clarify to Ms Marika the additional rider benefits and the exclusions to the cover she was sold.

448 It is appropriate to recall that Mr Howden was the Responsible Manager under Select's AFSL, and as such held certain obligations.

449 Although what Mr Howden said is plainly reflected on any reasonable consideration of the call, the admissions are not necessary to establishing the claims.

450 The observations made above at [0]-[0] as to the call, are made from the call itself without reliance on the admissions made.

451 As will be recalled, in relation to this call, the Defendants ultimately accepted that the conduct of Mr Hudson resulted in unconscionability in relation to his dealing with Ms Marika. However, the submissions that the Corporate Defendants now advance as to the false and/or misleading representations, are in stark contrast to some of the admissions made above.

452 I note also that a number of the features of this conduct which Mr Howden denounces, also feature in other consumer calls the subject of the claims.

453 Turning to the remaining claims.

False and/or misleading representations

454 In respect to the claims of false and/or misleading statements having been made in that call, five are pleaded. The first three of which are claims also made in respect to other Consumer's calls. I have already made some observations above about the nature of the Corporate Defendants' submission in respect to the interpretation of calls. Suffice to say they have a level or subtlety or nuance as to an understanding of the call, and what would have been taken from it by the recipient, which is plainly not borne out by the content of the call.

455 *First*, ASIC alleged that it was represented by Mr Hudson that there were no exclusions to the ADC and AIC to the Let's Insure Funeral Cover, save for criminal activity. It is submitted by ASIC that is the natural inference from the circumstances of the call where positive statements as to criminal activity were made and the Sales Agent failed to mention matters which are exclusions. In particular, Mr Hudson made the statement recited above at [0]. Mr Hudson otherwise did not refer to any exclusions to the Let's Insure Funeral Cover, ADC or AIC. Nor

did he inform Ms Marika of the definitions of "accident" or "accidental death" for the purpose of the ADC and AIC, which strictly limited the circumstances in which benefits were payable. This was in a context where Mr Hudson repeatedly said that if an event occurred, Ms Marika's family would receive payment.

456 The Defendants made the submission that ASIC must establish that Mr Hudson made the "startlingly broad representation that there was only a single instance when the policy would not apply" and in that context such a representation cannot be implied. This submission again illustrates an artificiality of the Defendants' case, which divorces the allegation from the circumstances of the telephone call. It imputes a level of sophistication in the listener, which given the circumstances, cannot be. Given the position of Ms Marika, and the circumstances in which the representation was made, it was reasonably open to conclude from it that the limited exclusion was confined in the manner Mr Hudson said.

457 Although Mr Howden admitted this statement was inadequate, the Corporate Defendants submit the claim is not established and contend, inter alia, that Mr Hudson referred to "some exclusions", an example of which was criminal activity, and stated that the insurance coverage was "subject to the terms, conditions and exclusions outlined in the product disclosure statement". As noted above, the reference to criminal activity was in a joking manner, such as to create the impression that the exclusions were not a matter which she need concern herself with. The statement that it was subject to the terms, conditions and exclusions outlined in the PDS was, in the scheme of this call, no more than a passing reference. In that context referred to above, given the manner in which the PDS was played, the speed of its content, Mr Hudson's lack of explanation of it, together with the fact that Ms Marika did not have the written PDS when Mr Hudson signed her up to two policies, reflects that this statement would not impact on Ms Marika's understanding.

458 I am satisfied that the representation was impliedly made.

459 There are significantly more exclusions to the AIC than criminal activity, including, inter alia, if the injury occurred, directly or indirectly, as a result of natural causes, illness, an intentionally self-inflicted injury or attempted suicide, consumption of intoxicating liquor (including having a blood alcohol content over the prescribed legal limit), or drugs (unless under the direction of a medical practitioner but not in connection with treatment for substance abuse, drug addiction or dependence). Moreover, AIC only applied in respect of eight serious injuries (such as

blindness, paralysis and major head trauma, loss of speech, coma, major burns, loss of hearing and loss of use of limbs).

460 I am satisfied the representation made as to the exclusion is false and/or misleading. I am satisfied that the representation made concerns the exclusion of a right, being a right to recovery under a policy, and the existence or effect of a condition, in that recovery under the policy is conditional on the insured not falling into any of the exclusions, which brings the representation within s 12DB(1)(i). Accordingly, there is a contravention of s 12DB(1)(i).

461 *Second,* ASIC alleged that representations were made by Mr Hudson that the benefits under the proposed ADC and AIC would be paid to each family member in the event of the death or injury of an insured person (the 'all family members benefit' representation). ASIC relies on express representations, for example, "we have the accidental death cover. Now this is for each of the family members as well. So that's going to be $32,000 each there as well". I do not accept the Corporate Defendants' submission that the representations were ambiguous. The repeated nature of the reference to "each" receiving a benefit in the circumstances of this call gives rise to the inference that the representation being made was that each member of the family was to receive the benefit. The evidence establishes they were not. I am satisfied the representations are established and that they are false and/or misleading. They conveyed that the policy pay-out was far more valuable than was in fact the case, and fall within s 12DB(1)(a). There is a contravention of s 12DB(1)(a).

462 *Third,* ASIC contended that Mr Hudson represented that the ADC, AIC and HEC were not optional extras and/or were a standard component of the insurance policy (the 'standard cover' representation). Mr Hudson did not say that ADC, AIC and HEC were optional, but rather, gave the impression that they were part of the standard policy, when they were not. Nowhere in the call was there anything said which would lead Ms Marika to suppose they were optional, and that additional premiums need be paid for them. I accept ASIC's submission that when Mr Hudson described the policies he represented that the ADC and AIC were "two extra benefits" of the Let's Insure Funeral Cover. I am satisfied that the representation was impliedly made.

463 As noted above, while claiming privilege, Mr Howden admitted in his s 19 examination that a failure by a Sales Agent to identify that ADC was an optional extra to Let's Insure Funeral Cover would be "misleading", and inadequate. That is no more than a reflection of what is obvious from the call. The representation is false and/or misleading.

464 The representation concerned the existence of Ms Marika's right to not to take out the optional extras when she was signed up to the Let's Insure Funeral Cover and, accordingly, was a representation concerning the existence of a right within s 12DB(1)(i). There is a contravention of s 12DB(1)(i).

465 *Fourth,* ASIC claimed that Mr Hudson made a representation that Select offered HEC as a gift and/or "just to help out". ASIC advanced its case in alternative ways: either it is an express representation that HEC was offered to "just help out" or it was implied that it was a gift. The statement relied on to establish this representation is:

> Yeah, so to help your family out, we actually give them $800 every single month, okay? And that can be for up to 20 whole months, so nearly two years, just to help out with all those bills, okay?

466 ASIC contended that there is nothing in the surrounding context of the telephone call that served to qualify or correct this representation. The Corporate Defendants submitted that when considered in its proper context, the representation contended for was not made. I accept ASIC's submission that the representation is at least implied. The use of the phrase "to help your family out", in the context in which it used, at least implied that this was an additional gift that was being provided for no cost. The statement made, in the circumstances, is false and/or misleading.

467 The representation concerns the price of the policy premium and falls within and is a contravention of s 12DB(1)(g).

468 *Fifth*, ASIC alleged that it was represented by Mr Hudson that the insurance premiums remained the same throughout the duration of the policies (the 'flat premium' representation). ASIC contended this representation was implied in the circumstances given some express statements and silence or omissions. Mr Hudson said that "It's going to be $60.06 cents [sic] a fortnight, okay? So it's going to be 11 cents cheaper for you. No worries. And that'll be split up over your two policies". That statement was not qualified in any way, to suggest that the amount would rise over time. It may be accepted, as contended by the Defendants, that the PDS played included that "if you select a stepped premium option, premiums generally increase as you get older and due to inflation protection increases". Even leaving aside the difficulties with the PDS, nowhere did Mr Hudson refer to this as a stepped policy option, or explain what that entailed.

469 However, the premiums were in fact stepped, and would increase over the life of the policies. I am satisfied that this representation was made and that it is false and/or misleading. It was a representation with respect to the price of services within s 12DB(1)(g). There is a contravention of s 12DB(1)(g).

470 In summary, I am satisfied that there are five contraventions of s 12DB(1).

Unconscionability (Sales conduct)

471 As explained above, the Corporate Defendants admit this contravention of s 12CB(1) and it is unnecessary to consider it further.

Coercion (Sales conduct)

472 ASIC's case in respect to coercion is outlined above at [0]-[0] and there is no need to repeat that here.

473 Suffice to recall that whether conduct is coercive is not to be considered on a line by line analysis but rather the overall impression: *ACM12* at [17].

474 The integers of the conduct said to establish coercion are factually established. It, however, does not follow that coercion has been established.

475 It is necessary to address some of the specific submissions made. For example, part of ASIC's case is an assertion that as Ms Marika did not understand what she had signed up for (although she understood that it was an insurance policy), that was said to be a clear indication that her will was overborne. As explained above, as a general proposition, that a consumer does not understand the details of what has been purchased does not necessarily mean that the consumer's free will has been overborne such as to establish coercion within s 12DJ. Nor, as explained above, does the fact that an Agent may have made false and/or misleading statements in relation to the product being sold. Moreover, it is difficult to see how the integer that the PDS was played without Ms Marika's consent, is capable of being coercive or any form of illegitimate pressure. If conduct, by its nature, is incapable of being associated with exerting pressure, that the conduct may be improper is insufficient. To put it another way, simply because conduct may be improper or illegitimate does not mean it necessarily falls within the concept of coercion.

476 That said, there are some features pleaded in respect to Ms Marika's case which do not exist in respect to some other cases. For example, Ms Marika already had a policy and clearly said she

was happy with that and that she was deprived of an opportunity to speak to her existing provider. As a result, other integers, for example, that she was signed up in the same call rather than giving her an opportunity to reflect, and speaking quickly, over the top of her, and rushing through the call, carry a different complexion than they might otherwise have. Moreover, it is important to recall that it can be a combination of circumstances which give rise to the conclusion that the conduct was coercive. Integers, considered in isolation, may bear a different colour when a call is assessed overall.

477 The call is described above at [0]-[0]. The tactics used by Mr Hudson were designed to overbear her free will. Given Ms Marika's personal characteristics and circumstances, that she already had a policy through her work which she said she was happy with, where Mr Hudson ignored her statements and requests to be given an opportunity to speak to her existing provider, but rather rushed her through the call (including making a number of false and misleading statements about the policy), and where Mr Hudson talked quickly, paid no attention to her statements and spoke in an authoritative tone, the conduct was illegitimate. The conduct was directed to, and did, pressure Ms Marika. The tactics used to sign Ms Marika up for a policy in those circumstances, and in the face of her repeated objections and requests for time to consider, demonstrate that Ms Marika was coerced into signing up to the policy. That Ms Marika in her affidavit said that at the end of the call she knew she had signed up to funeral insurance, does not alter or detract from that. In the particular circumstances, Mr Hudson's conduct cannot simply be regarded as an acceptable sales technique. There was undue pressure exerted on Ms Marika to sign up. She was railroaded to that result. I accept ASIC's submission that Mr Hudson was uninterested in Ms Marika's consent is clearly illustrated by the fact that he started taking details of other people to be insured under her policies only 10 minutes into a 35 minute call and before he had explored costs of the policies or options with her.

478 In the circumstances, coercion is established within s 12DJ(1).

Retention conduct

479 On 16 September 2015, a week after Ms Marika signed up to the policies, she telephoned Select to cancel the policies as she could not afford them. She spoke to Mr Hoey, who introduced himself as being from Let's Insure, and told him "I'm going to cancel my policy now, please" and gave him the policy number. Mr Hoey informed Ms Marika that someone from customer service would call her back.

480 By the end of this call, Ms Marika believed that she had cancelled her insurance. Her evidence was that she called Let's Insure to cancel her insurance because she had been to the bank and asked them for a copy of her bank statement and realised it was costing too much money.

481 Later that day, Ms Ledsham returned Ms Marika's call. Again, Ms Marika informed the Retention Agent: "Yeah, I'm cancelled it out because I'm not getting enough money to be able to pay for the insurance". Despite the request and the basis for it, Ms Ledsham offered Ms Marika a month's free coverage. At this point, Ms Marika realised that her insurance had not yet been cancelled.

482 Ms Marika was then the subject of numerous letters, text messages and telephone calls from Let's Insure regarding unsuccessful premium payments. Between 21 January 2016 and 5 May 2016, Retention Agents called Ms Marika 13 times regarding unsuccessful premium payments. Ms Marika informed them, inter alia, she was "short on finance", and she would need to go to Centrelink. The policy was not cancelled. Rather, despite the premium arrears, by letters dated 11 August 2016 on Let's Insure letterhead Select notified Ms Marika that each of her two policies would be automatically renewed, that her benefits would increase by 5% and that her premiums would be increased to $50.53 per fortnight and $14.42 per fortnight, respectively. Legal Aid intervened on Ms Marika's behalf and outlined to Select a series of legal issues and complaints in respect of Let's Insure's conduct, and on or about 9 December 2016, Ms Marika's policies were cancelled and she obtained a refund of $1,909.

483 ASIC submitted that the repayment of premiums should be treated as an admission of misconduct on the Corporate Defendants' part.

Undue harassment (Retention conduct)

484 ASIC contends that Select unduly harassed Ms Marika by continuing to seek payment of her insurance premiums in circumstances where: Ms Marika sought to cancel her Let's Insure Funeral Cover policies because she already held funeral insurance, of which she had informed Select on three separate occasions; where Ms Marika sought to cancel her policies because she was not working, and did not have enough money to pay the premiums; and Select automatically increased her premiums without previously informing her that the premiums on her policies were stepped and thus subject to increases over the duration of the policies.

485 At the outset it is significant that Ms Marika first said to the Corporate Defendants that she wished to cancel her policy one week after the sales call (that she already had a policy and did

not have enough money to pay for the premiums), yet it took over 15 months, during which such statements were repeatedly made, and a lawyer intervened on her behalf to have the policy cancelled. By that time, Ms Marika had paid nearly $2,000 in premiums.

486 Despite the ability of Select to cancel the policy for non-payment, and informing Ms Marika of that, Select chose not to do so. For example, between 21 January 2016 and 5 May 2016 there were 13 calls by Retention Agents about non-payment of premiums, and although it was noted in correspondence following up the call of 21 January 2016 that Select may cancel the policy for the missed payment, it did not do so.

487 This amounted, in the circumstances, to harassment of Ms Marika, which is properly characterised as undue, owing to the frequency, nature and content of the communications which had the effect of tiring out or exhausting Ms Marika in a context where the Retention Agents had deliberately ignored Ms Marika's repeated statements that she could not afford the policies, having said one week after taking the policy that she wished to cancel it.

488 In the circumstances, undue harassment has been established within s 12DJ(1).

Unconscionability (Retention conduct)

489 As noted above, the Corporate Defendants accepted that the sales call is unconscionable.

490 The circumstances of the retention calls being made include the circumstances of Ms Marika signing up to the policy. The Corporate Defendants repeatedly submitted that the Retention Agents could not know the matters in which the policy was signed. However, whether the individual Retention Agent knew the circumstances of the sales call cannot obviate the relevance of the circumstances, as required to be considered in the application of s 12CB(1). It was Select (through its Sales Agents) who signed Ms Marika up to the policy, and Select (through its Retention Agents) who are making these retention calls.

491 For the reasons previously discussed at [0]-[0] above, Ms Marika was in a position of vulnerability or at least in a weaker bargaining position vis-à-vis Select. It is also apparent from the calls (their content and tenor), that the Retention Agents knew, or at the least, ought to have known this fact. Ms Marika spoke with an Aboriginal accent, and her children who were listed on the policies had typically Aboriginal names. Her age and remote location were also referred to in calls. The content and circumstances of the calls makes it apparent that Ms Marika was having some difficulties understanding parts of what was occurring, and difficulties with her finances.

492 A consideration of the retention conduct reflects that the Retention Agents took advantage of Ms Marika's vulnerable or disadvantaged position.

493 From one week after the sale of the policy, Ms Marika repeatedly told the Retention Agents that the policies were not affordable. She had also sought to cancel her policies because she already held funeral insurance, which she had told Select on three separate occasions. Ms Marika sought to cancel her policies because she was not working, and did not have enough money to pay the premiums. There are repeated references to waiting for Centrelink. Ms Marika had thought she had cancelled the policy in her first call. The Retention Agents did not provide Ms Marika with any assistance to enable her to cancel the policy. Instead of doing as she requested, the Retention Agents persisted in keeping the policy going, in circumstances where it was evident Ms Marika did not want it and could not then and unlikely moving forward, be able to pay for it. By engaging in this conduct, the policy continued, and the premiums became due, and indeed, increased over time. As referred to above, between 21 January 2016 and 5 May 2016 there were 13 calls from Retention Agents as to unpaid premiums. There were also letters and SMS's. As noted in Select's correspondence, unpaid premiums can lead to the policy lapsing, but this was also not done by Select. In these calls, where it was readily apparent Ms Marika could not afford the policy, the Retention Agents did raise the possibility of cancelling the policy (particularly in circumstances where there had been repeated requests to do so), but provided no proper assistance in doing so (given the circumstances).

494 This also occurred in a context where it was made clear in the sales call that she already had insurance through her work and that she was short of money.

495 I note that Ms Khan was participating in the Las Vegas Incentive at the time of her call. This is an integer of unconscionability, and may explain her conduct at the time.

496 Applying the principles explained above, the task of considering whether conduct is unconscionable within s 12CB(1), is an evaluation of the impugned conduct to assess whether it is to be characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience and so be characterised as unconscionable.

497 I am satisfied that the persistence with which the Retention Agents sought to retain Ms Marika as a customer and to seek further payments from her was, in the circumstances, unconscionable. It follows that there is a contravention of s 12CB(1).

David Mirrawana

498 In respect to Mr Mirrawana, ASIC pleads in respect to sales calls that four false and/or misleading representations were made in contravention of s 12DB(1) (FASOC [108]-[118]), coercion in contravention of s 12DJ(1) (FASOC [119]-[120]), unconscionability contrary to s 12CB(1) (FASOC [121]-[127]), and in respect to the retention call, undue harassment contrary to s 12DJ(1) (FASOC [128]-[129]). As noted above, the Corporate Defendants admit only that the sales call is unconscionable.

499 ASIC pleaded that Mr Mirrawana is an Aboriginal man around 68 years of age who resided in the remote community of Maningrida in Arnhem Land, Northern Territory. He had difficulties speaking, reading and writing in English. He had difficulties understanding English and he had a socio-cultural tendency towards gratuitous concurrence. It was contended that the combination of those factors make him a vulnerable consumer or alternatively, in a weaker bargaining position. It was not suggested that the Sales or Retention Agents knew that Mr Mirrawana had a socio-cultural tendency towards gratuitous concurrence, but contended that they could not have reasonably thought he understood what was going on.

500 The personal characteristics pleaded by ASIC are established by the evidence and the agreed facts. That Mr Mirrawana had a socio-cultural tendency towards gratuitous concurrence is also established by the evidence of Dr Eades. I accept that evidence.

501 It was agreed that on 23 March 2015, Mr Mirrawana was sold Let's Insure Funeral Cover to the value of $16,000 as well as optional HEC to the value of $4,800 and ADC and AIC each to the value of $32,000, over the telephone by Sales Agent, Mr Hoey, at a fortnightly stepped premium of $66.63. There were no nominated beneficiaries to the policy. During the sales call, Mr Hoey took Mr Mirrawana's bank details for the purposes of automatically deducting premiums on a fortnightly basis. At the time of the telephone call, Mr Hoey was participating in the Cruise Incentive and the Vespa Incentive.

502 About a week later, by letter dated 2 April 2015, Mr Mirrawana requested that his insurance policy be cancelled immediately and that any fortnightly premiums that had been paid be refunded. On or about 8 April 2015, Mr Mirrawana's insurance policy was cancelled and he

was refunded the premium that he had paid. From the time that Mr Mirrawana was signed up to the policy until the time it was cancelled, Mr Mirrawana paid $66.63 in premiums.

503 It was further agreed that the conduct of Mr Hoey was taken to have been engaged in by Select by reason of s 12GH(2)(a). It was also agreed that the conduct of Mr Hoey, Harriet Morton-Fishwick and Michele Harkins (all BlueInc Services employees) was taken to have been engaged in by BlueInc Services pursuant to s 12GH(2)(a).

Evidence of Mr Mirrawana and Ms Armstrong

504 ASIC relied on the affidavits of Mr Mirrawana sworn on 7 May 2019 and Deborah Armstrong affirmed on 7 May 2019.

505 This evidence, inter alia, establishes the pleaded personal circumstances of Mr Mirrawana, and the circumstances in which the sales call was made to him.

506 Mr Mirrawana was around 68 years of age in the period of March to April 2015. He is a Yolngu and Burrara man from the Anburarra clan. He came to live in Maningrida when he was about 12 years old, around the time that the Mission there was first established. Maningrida is an Aboriginal community in the Northern Territory with a population of around three or four thousand. Mr Mirrawana started school when he was 12 years old and completed his schooling in Maningrida. He has also spent time in his homeland and in the Aboriginal communities in the APY lands. He learned to speak English at school and left school at the age of 16.

507 Mr Mirrawana has worked in his community teaching language and culture and is a Djungay, which means he is a senior law man. His last paid job was at Bawinanga Aboriginal Corporation (BAC) as a Community Development Program Supervisor. He stopped working at BAC in 2016. Mr Mirrawana is also the Community Minister of the Maningrida Uniting Church, a position he has held since 2007. Mr Mirrawana currently receives a Centrelink pension, but he was not receiving any money from Centrelink around 2015. Whilst working at BAC, he earned about $900 a fortnight. He used this money to pay for living expenses and any leftover money he shared with his family, which he said is customary in Aboriginal families.

508 Mr Mirrawana's first language is Burarra, which is the language he speaks at home. He speaks three Burarra dialects, as well as Yolngu Matha and other Arnhem Land languages and languages spoken in the Central Desert. He can speak and understand these languages better than English, which is at least his ninth language. Mr Mirrawana has difficulty understanding English when it is spoken too fast or when people say words that are too hard. He can read

basic English, and used to teach simple English in a community class, but finds it difficult to understand "hard" words.

509 Mr Mirrawana said that he does not understand what "insurance" means and he does not think that he has ever had insurance. In his affidavit, Mr Mirrawana said:

> [24] I remember that when I used to work at BAC, someone talked about if you pay insurance, they will help you for your car fixing.
>
> [25] I don't know what funeral insurance is.
>
> [25] When someone dies in Maningrida the family pays for most of the funeral. Some money for the funeral is paid by Northern Territory Land Council and Maningrida Progress Association and the family pays the rest. A funeral can cost thousands of dollars.

510 Mr Mirrawana received assistance from Ms Armstrong to cancel his Let's Insure policies. Ms Armstrong is the manager at BAC Money Management Services, an organisation which provides financial counselling and financial capability services to persons in Maningrida and the surrounding homelands. In her experience, the majority of the organisation's clients (all of whom are Aboriginal) have very poor financial literacy skills.

511 Mr Mirrawana has been Ms Armstrong's client since 21 May 2013. She has helped Mr Mirrawana in the past with his bank statements, tax and bank card issues. In her role as Mr Mirrawana's financial worker, Ms Armstrong assisted him with superannuation, applying for a Centrelink aged pension, taxation, and some other matters. Ms Armstrong's observations were that Mr Mirrawana has a functional level of English language skills for a person living in Maningrida. He can read and write in English to a very limited extent and has poor literacy and numeracy skills.

512 Ms Armstrong assisted Mr Mirrawana to understand and cancel his Let's Insure insurance policy in April 2015. Ms Armstrong recalled that Mr Mirrawana came to see her and that he showed her a letter, dated 23 March 2015, which was addressed to him from Let's Insure. Mr Mirrawana told her that a stranger, who he thought was from the government, had telephoned him and told him they would give him money.

513 Ms Armstrong and an Aboriginal financial capability worker from her team assisted Mr Mirrawana to understand the policy documents. Ms Armstrong explained to Mr Mirrawana that he would only receive money from the insurance if he died. After hearing this, Mr Mirrawana said that the insurance was not good for him. Mr Mirrawana did not know that money would need to be deducted from his bank account to be eligible for the insurance.

Ms Armstrong logged into Mr Mirrawana's bank account using the office computer and showed him that money had already been deducted. Mr Mirrawana stated that he did not want money to be taken from his account to pay for the Let's Insure policy. Ms Armstrong said that she knew, from her experience working with Mr Mirrawana in 2015, that he was financially stressed, had no savings, and would usually use all of his pay before the next pay day, even though he was working for BAC.

514 On 1 April 2015, Ms Armstrong called Let's Insure twice on Mr Mirrawana's behalf to cancel his policy. Ms Armstrong also wrote a letter, dated 2 April 2015, addressed to Let's Insure from Mr Mirrawana, to cancel his policy. Mr Mirrawana signed the letter and Ms Armstrong faxed it to Let's Insure.

Sales conduct

515 As noted above, Mr Mirrawana was telephoned by Mr Hoey on 23 March 2015 for the purposes of marketing Let's Insure Funeral Cover. He was surprised to receive this call.

516 At the time, Mr Mirrawana was concerned about a cyclone that was likely to hit Maningrida. He said it was hard to understand what the caller said to him because he spoke very quickly and Mr Mirrawana was "more worried about saving [his] life with the cyclone coming than talking to the man on the phone".

517 It is appropriate to consider the content of this call.

518 Mr Hoey introduced himself to Mr Mirrawana and asked how he was, to which Mr Mirrawana replied:

> Yeah um, sorry, I'm between good and bad. There's a cyclone coming across on my way in Maningrida…

519 Thereafter, Mr Hoey proceeded to explain his reasons for calling and referred to having spoken with, inter alia, Elizabeth Gungaguru, from the Galawinku area, who Mr Mirrawana said is a family relation:

> PH: Well, David, I'll just tell you quickly why I'm calling you. It's only a very quick phone call. Um, David, the reason I'm calling you is, David, we're helping a lot of people in the Galawinku area, Maningrida - - -
>
> DM: Yeah, yeah, yeah.
>
> PH: David, what we do, we already spoke to one of your friends um, Elizabeth. You know Elizabeth [Gungaguru] in Galawinku and, David, what we do we're helping friends and families out for funeral which is like a sorry day or a sorry ceremony which means if someone in your family passes away we pay you

and your family that money to help you out, David. Do you know what I mean?

DM: Ah…

PH: So, David, we already spoke to Elizabeth, Elizabeth [Gungaguru] and a couple of people in that area. Now, David, you and your family, we understand you do not have any cover in place. Is that correct?

DM: [indistinct] I'm misunderstanding. I mean, I'm just a, um, ah, yeah, the maybe too fast for me but maybe speak slowly.

520 Although Mr Hoey initially slowed down, he then picked up his pace and continued to speak quickly for the remainder of the call.

521 I note that throughout the sales call, as is apparent from the extracts recited above and below, there were repeated references to persons from the Galawinku community, including Alfred Gondara (a family member of Mr Mirrawana) and Karen Gondara. Such references included the following:

PH: And, David, lastly, we also pay your family $800 every month for 20 months and that just helps you all out. So, David, I've already spoken to, you know Alfred Gondara and Karen Gondara, you know the Gondaras in Galawinku?

DM: Yeah, yeah, yeah. yeah. Yeah, yeah, yeah.

PH: David, we've already spoken to them. We've got their family all covered…

522 Pausing there. Mr Mirrawana's details were obtained by Mr Hoey through the Refer a Friend program. It is apparent from the transcript of Mr Hoey's call to Mr Gondara and Ms Gungaguru, who he had spoken to earlier that day on 23 March 2015, that he was aware that they were Indigenous, that they lived in a remote community, and it can be readily inferred that he was aware that Mr Mirrawana, whose details he elicited in that call, was also Indigenous.

523 Mr Hoey then obtained some personal details from Mr Mirrawana for the purposes of preparing a quote, and asked questions about whether he was currently working, as Mr Hoey was apparently concerned about the affordability of the policy:

PH: Okay. Because I want to make sure it's affordable because I spoke with Alfred Gondara and they work too. I mean do you, do you earn much each week or each fortnight, do you earn much income every fortnight, David?

DM: Yes, yes, yes.

PH: Because I want to make sure this is affordable. Do you earn like 1,000, 2,000 a fortnight or - - -

DM: [indistinct] okay.

PH: Okay. Well, David, what I'll do to make sure it's affordable what I'm going to do, I'll give you a quote for the top level of cover and you can always work

your way down in terms of affordability, David. Okay. So, David, if we get you on the same - - -

DM: Yeah, yeah.

PH: - - - the same level of cover as Alfred Gondara and Karen and them, if we get you covered for 16,000 which means, David, if you pass away we'll pay your family $16,000 in one lump sum.

DM: Oh, right. Yeah.

524 Mr Mirrawana said that when the caller discussed the 'affordability' of the insurance policy, he thought that this meant that he would receive money. What Mr Hoey said to Mr Mirrawana was not clear because he spoke too quickly and in a "different tongue".

525 Shortly after, Mr Hoey explained that the fortnightly premium was $66.63, to which Mr Mirrawana responded "Yeah, yeah". Mr Mirrawana explained in his affidavit that he "thought that [Mr Hoey] was going to give me that money…the man on the phone did not say this is money you pay. I thought [Mr Hoey] said he would cover me. I thought [Mr Hoey] meant he will pay for me. I was not sure why [Mr Hoey] was going to pay me money".

526 Mr Hoey then referred to the policy exclusions, and the following exchange occurred:

PH: And, David, I do need to point out for the first 12 months from acceptance date - - -

DM: Yeah.

PH: - - - the funeral benefit will only pay for an accidental death and after 12 months [indistinct] necessary and, David, with the injury benefit we give you there are some exclusions such as professional sports or, David, I can safely assume you're not like a professional athlete or a kickboxer or anything, no?

DM: No, I'm not a kickboxer or I'm not, I'm not a boxer, I'm not um [indistinct] player or whatever.

PH: No worries. [indistinct]

DM: [indistinct] too old I think.

PH: No problem.

527 Mr Mirrawana's evidence was that he does not understand the word "exclusions".

528 Mr Hoey noted that a welcome pack would be sent to Mr Mirrawana and proceeded to play him a recording of the PDS:

PH: …before I post this up to you, before I post this up to you in Maningrida, David, what I've got to do for legal purposes is play a very small recording which is called the product disclosure statement. David, it only takes about 60 seconds. It gives you a quick rundown on the company and who we are. So, David, we're nearly done but don't go anywhere, just stay on the line, listen to

this recording and, David, I'll be right back and we'll get you looked after then, David, okay.

DM: Right, right.

PH: No problem. Okay. Stay, stay on the line, stay, stay on the line, David, and I'll be right back. Okay.

529 I note that the PDS consisted of a recording of a male speaker speaking very quickly and using complex terminology, including terms such as "product disclosure statement", "financial services", "ombudsman", "premium" and "inflation".

530 Mr Mirrawana could not recall hearing the PDS at the time, although the transcript and recording shows that this was played during the telephone call. Mr Mirrawana later listened to the recording of the PDS, and said that he can understood some of the words, but does not know what they mean.

531 After the PDS was played, the following exchange occurred:

PH: Okay. Excellent. So, David, you're back to myself now [indistinct] so I'll just confirm you heard, received that message okay?

DM: Yeah.

PH: Beautiful. Okay. So, David, I'm going to post this up to you. Now, whereabouts, and I've already spoken to Alfred Gondara and Karen Gondara and they're in Galawinku. David, are you the same address, are you Galawinku as well?

DM: No, I'm in Maningrida.

532 Shortly after, Mr Hoey summarised the quoted coverage:

PH: Before, yeah, and before I get your homeland and your home line number and all that there, David, what I'll do, I'll do a recap. So, David, we'll get you covered today for $16,000 to your family, $32,000 for accidental death, $32,000 injury cover, $800 every month for six months. Now, David, that money is going to come out fortnightly $66.63 and, David, like I did with Alfred Gondara and Karen Gondara they do the payments fortnightly.

DM: Yeah.

533 Mr Mirrawana's evidence is that he did not understand that $66.63 would be deducted from his bank account.

534 After taking Mr Mirrawana's bank details and some other information, Mr Hoey asked Mr Mirrawana to confirm his understanding of their conversation:

PH: Okay, cool. So, David, you'll receive your policy documents by post, together with your policy documentation, um, I'm sure you will, just keep that safe. It's for your future reference. And, David, lastly, just so if I can confirm, you're

happy and understood everything we've discussed today?

DM: Sorry?

PH: Yep. Sorry, David, I'm just looking here, so your address I need to confirm, that postal, so if I post that there to [redacted], you'll receive that okay, is that correct?

DM: Yep, yep.

PH: Beautiful. So, David, congratulations, you've got yourself covered. Again, David, I just want to confirm, you're happy and understood everything [we] discussed today. Is that correct?

DM: No worries.

PH: No worries. Is that a clear yes?

DM: All clear.

PH: All clear, beautiful, okay. Um - - -

DM: I got all that clear, yeah.

535 Mr Mirrawana recalled that when he said everything was "all clear" that he was "just copying what [Mr Hoey] said back to him". He was "sick and tired" of the caller asking so many questions and felt like the caller was "forcing him to say yes".

536 In his affidavit evidence, Mr Mirrawana said:

> I did not understand what the man on the phone was saying to me. I could not pick up all the words because he spoke too fast. I was happy because I thought he was going to give me money. I thought good things must be coming and happening to me. I only heard the bit he was saying about the money. I did not hear the bit about the death.
>
> He didn't stop to let me ask a question. I felt like he jumped down my throat. He did not explain himself. He just kept saying new stories, new things. He wasn't explaining to me the reason for his call and didn't give me time to understand. In my culture, we listen before we talk. I was thinking about the cyclone and I was just saying yes without listening to what he was saying. I did not know what I was saying yes to.

537 Mr Mirrawana further explained why he felt the need to say "yes" throughout the sales call:

> When I was young I was under the white man and he was my boss. I had to say yes to him. If I said no to a white man they would take me away or hit me. Whatever the white man told me to do, I just did it. Whatever I got asked to do I felt like I had to say yes or things will go the wrong way and be bad for me. My family taught me never to say no to a white man to save your skin. If a white man calls me today I still feel a bit scared to say no.

538 A number of matters are apparent on listening to the recording of the call, some of which might not be so clear from reading the transcript. At times Mr Mirrawana's speech was slow and confused. His answers at times were non-responsive. His tone and intonation also inform the meaning to be given to his responses. This was a cold call, which Mr Mirrawana did not expect.

539 As noted above, that Mr Mirrawana is Indigenous was evident. Mr Hoey was informed of his age and was aware of where he lived. Mr Hoey repeatedly referred to Mr Mirrawana's Aboriginal friends and "people in the Galawinku [sic] area, Maningrida" as a means of engaging with him. It was also being used by Mr Hoey as an implied social endorsement of what was occurring. He said he was familiar with the area where Mr Mirrawana lived, and used familiar language during the call, describing a funeral as a "sorry day" or "sorry ceremony". There was a cyclone approaching, yet, although Mr Hoey acknowledged that fact, he proceeded nonetheless. Mr Mirrawana said he misunderstood, but the conversation proceeded. Despite Mr Mirrawana asking him to slow down, to "maybe speak slowly", there is no apparent attempt by Mr Hoey to do so. It may be accepted that at times Mr Mirrawana said "yeah", or acknowledged that he understood, but the context in which that was said could not be taken as genuine agreement, but rather reflected a statement moving the conversation along. This is confirmed by Mr Mirrawana's evidence which, as noted above, included that he felt he was forced into saying "yes". Mr Hoey's tone could be described as pushy. Mr Hoey spoke with a strong Irish accent, and contrary to the Corporate Defendants' submission, spoke very quickly. There was no consent sought for the PDS to be played orally, and no genuine attempt to elicit whether it was understood. The pre-recorded PDS was played at a stage when it was considered that the policy had been sold, which was at about eight minutes into this call. The PDS involved a person speaking very quickly, with the use of some complex terms. Mr Mirrawana was not asked whether he wanted a policy, but rather, the conversation proceeded on the basis that Mr Hoey assumed he did and had sold a policy to him. Mr Hoey obtained Mr Mirrawana's banking details to allow for direct debit and he was signed up for a policy effective immediately, which was the top level of cover. No alternative levels of cover were offered, and the optional extras were included without it being disclosed that they were optional. The last question which was purportedly to confirm that he understood what was happening initially elicited a non-responsive answer. It is apparent from the call, that Mr Mirrawana did not understand what was being sold to him, or that he was being signed up to anything during the call. Any responses at that stage, could not reasonably have been interpreted by Mr Hoey as genuine. He had made no genuine or reasonable attempt to ascertain whether Mr Mirrawana understood what he was being told. It is readily apparent from the call that Mr Mirrawana was vulnerable or at least in a weaker bargaining position and so much would have been obvious to Mr Hoey.

540 ASIC submitted that Mr Mirrawana was completely railroaded by Mr Hoey into taking out the insurance and providing payment details. So much can be accepted.

Unconscionability (Sales conduct)

541 As noted above, the Corporate Defendants now accept that the sales call by Mr Hoey is unconscionable.

542 That, however, leaves the remaining claims.

False and/or misleading representations

543 In respect to the claims of false and/or misleading statements having been made in that call, four are pleaded. There is a similarity between these representations and those alleged in respect to Ms Marika, although each call must be separately assessed. The observations made about the nature of the Corporate Defendants' submission in respect to Ms Marika's claim, are equally apt in respect to these claims.

544 *First*, ASIC alleged that it was represented that there were no exclusions to the Let's Insure Funeral Cover, ADC and AIC, save for limited sporting based exclusions to the AIC. ASIC submitted that this was established by the following:

(1) Mr Hoey repeatedly said that if an event occurred, Mr Mirrawana's family would receive payment;

(2) Mr Hoey stated "with the injury benefit we give you there are some exclusions such as professional sports or, David, I can safely assume you're not like a professional athlete or a kickboxer or anything, no?"; and

(3) Mr Hoey otherwise did not refer to any exclusions to the Let's Insure Funeral Cover, ADC or AIC or inform Mr Mirrawana of the definitions of "accident" or "accidental death" for the purpose of the ADC and AIC.

545 Although later during the call Mr Hoey said that coverage was "subject to the terms, conditions and exclusions outlined in the product disclosure statement", ASIC submitted that the written PDS was not made available to him at the time of the call, and it was not explained what that was or when he would receive it. Given Mr Hoey said to him he would explain how "everything works" and he only mentioned the professional sports exclusions, his statement was false and/or misleading. There were other very significant exclusions to the ADC and AIC.

546 The Corporate Defendants also made the submission, as they did in respect to similar claims, that ASIC "must establish that Mr Hoey made the startlingly broad representation that there was only a single instance when the policy would not apply" and in that context such a

representation cannot be implied. For the reasons given above at [0], that cannot be accepted. Given the position of Mr Mirrawana, and the circumstances in which the representation was made, it was reasonably open to conclude from it that the limited exclusion was confined to what was stated by Mr Hoey.

547 The representation is false and/or misleading. I am satisfied the representation was made, that it concerns the exclusion of a right, being a right to recovery under a policy, and the existence or effect of a condition, in that recovery under the policy was conditional on the insured not falling into any of the exclusions, which brings the representation within s 12DB(1)(i). Accordingly, there is a contravention of s 12DB(1)(i).

548 *Second*, ASIC alleged that Mr Hoey made the all family members benefit representation. This was said to arise from Mr Hoey's representation near the beginning of the call that "if anything happens to you or any of your family we'll pay … $16,000 each, per person". I do not accept the Corporate Defendants' contention that the statement, when considered in isolation, is ambiguous. It may be accepted that later in the telephone call, Mr Hoey stated that they would pay the family "$16,000 in one lump sum", and referred only to a payment of "$16,000 to your family". That said, the incorrect statement was never corrected. In the circumstances of this call, the original statement was capable of conveying that the policy was more valuable than it actually was. It follows that the representation is false and/or misleading and that it falls within and is a contravention of s 12DB(1)(a).

549 *Third*, ASIC alleged that Mr Hoey made the standard cover representation. That is, that ADC, AIC and HEC were part and parcel of the standard Let's Insure Funeral Cover. This representation was said to arise, inter alia, from the following statements:

> …if it's accidental death, God forbid, but if it is accidental death we will triple the benefits. We'll pay your family up to $48,000…
>
> …it also covers you for injuries which means if you or any of your family are to suffer a serious injury such as blindness, paralysis, loss of speech, a coma, burns [indistinct] loss of use of limbs we will pay you and your family up to $32,000 while you're still alive…
>
> …we also pay your family $800 every month for 20 months and that just helps you all out…
>
> …accidental death we'll pay them $32,000. Accidental serious injury $32,000 and, David, we'll also pay your family $800 every month for six months just to help you and the kids out…
>
> …we'll get you covered today for $16,000 to your family, $32,000 for accidental death, $32,000 injury cover, $800 every month for six months. Now, David, that money is

going to come out fortnightly $66.63…

550 ASIC submitted that at no point during the call did Mr Hoey explain to Mr Mirrawana that he could elect not to add ADC, AIC or HEC to the Let's Insure Funeral Cover, nor that he had the option of choosing only Let's Insure Funeral Cover. I accept ASIC's submissions. Mr Hoey never explained to Mr Mirrawana what the premium would be for the Let's Insure Funeral Cover alone, nor that he had the option of choosing only the Let's Insure Funeral Cover (see for example, that the conduct should not be assessed in isolation: *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592 at [109]). Contrary to the Defendants' contention, in the particular circumstances, and considering the conduct in its context, the reference by Mr Hoey to "top level cover" did not clarify that ADC, AIC and HEC were optional extras that Mr Mirrawana could elect not to add to the Let's Insure Funeral Cover. I am satisfied that it was implied that this was standard cover, that ADC, AIC and HEC were part and parcel of the standard Let's Insure Funeral Cover.

551 I am satisfied that the representation is false and/or misleading. I am also satisfied that this representation concerns the existence of Mr Mirrawana's right to not take out the optional extras when he was signed up to the Let's Insure Funeral Cover and, therefore, is a representation concerning the existence of a right within s 12DB(1)(i).

552 It follows that there is a contravention of s 12DB(1)(i).

553 *Fourth*, ASIC contended that Mr Hoey made the flat premium representation. This is based on the positive statement, "we'll get you covered today for $16,000 to your family, $32,000 for accidental death, $32,000 injury cover, $800 every month for six months. Now, David, that money is going to come out fortnightly $66.63", and on the circumstances in which the statement was made. The premium for this policy was in fact stepped, and would increase over the life of the policy. It may be accepted, as the Corporate Defendants contend, that the recorded PDS that was played to Mr Mirrawana noted that stepped premium options generally increase over time and due to inflation, although that does not assist. Mr Hoey had not explained that the stepped premium option had been selected for him nor give him a choice to select the stepped option. In any event, as is evident from the call, the PDS was not explained to him, with the only explanation being "a very small recording which is called the product disclosure statement… it gives you a quick rundown on the company and who we are". I am satisfied that the representation was made and that it is false and/or misleading. This is a representation that falls within and is a contravention of s 12DB(1)(g).

Coercion (Sales conduct)

554 ASIC contends that taking into account the personal characteristics and circumstances of Mr Mirrawana (giving rise to his vulnerability and/or weaker bargaining position) and the conduct of Mr Hoey, Select coerced him into signing up to Let's Insure Funeral Cover with optional ADC, AIC and HEC and/or into providing his direct debit payment details over the telephone in contravention of s 12DJ(1) of the ASIC Act.

555 Given the controversy in this case as to the breadth of the concept of coercion it is appropriate to detail the integers on which ASIC placed particular reliance:

(1) Mr Mirrawana's personal characteristics which it said combined to limit his ability to push back;

(2) Mr Hoey telephoned him without prior notice;

(3) Mr Hoey did not slow down his speech despite being asked to;

(4) Mr Hoey referred repeatedly to helping his family, implicitly inviting Mr Mirrawana to trust him as a person known to his community;

(5) Mr Hoey made the false and/or misleading representations to Mr Mirrawana;

(6) Mr Hoey only quoted for the top level of cover, and did not offer Mr Mirrawana alternative levels of cover;

(7) Mr Hoey upsold optional HEC, ADC and AIC without disclosing that they were optional extras;

(8) Mr Hoey played a pre-recorded PDS without first obtaining Mr Mirrawana's express and/or informed agreement to receive the PDS in this way;

(9) Mr Hoey did not make a genuine, or alternatively reasonable, attempt to confirm that Mr Mirrawana understood everything discussed during the telephone call;

(10) at the end of the call Mr Mirrawana did not understand he had been signed up to Let's Insurance Funeral Cover with optional extras or any insurance policy at all;

(11) Mr Hoey rushed Mr Mirrawana through the telephone call; and

(12) Mr Hoey signed up Mr Mirrawana to the insurance policy during the same telephone call rather than giving him the opportunity to reflect.

556 I note that a number of the integers overlap, for example, the false and/or misleading statements are referred to as an integer, as is the underlying fact. In any event, I accept that those matters have been established, although, as explained above, that does not necessarily amount to

coercion. As explained above, some of these integers are not directed to applying pressure or compelling Mr Mirrawana to sign up for the policy, for example, the false and/or misleading statements and the playing of the PDS without consent. They are not matters designed to have that effect. Although the conduct of the Sales Agent resulted in Mr Mirrawana feeling that he had no choice but to say yes to him, it is apparent it was not those types of integers that could fall within that description.

557 It is unnecessary to repeat all the features of this call, which are described above.

558 As explained above, the description that Mr Mirrawana was, in effect, railroaded to purchase the policy is accurate. The Sales Agent repeatedly employed the use of the names of persons Mr Mirrawana knew, together with the suggestion that he helped them and others in Mr Mirrawana's community, and suggested that he was going to help Mr Mirrawana in the same manner, as a means of placing pressure on him to proceed. The Sales Agent raised the names of family members at different stages during the call, to keep that pressure up including in a context that he was going to provide the same amount of cover for him as he had for them. This was in a context where it was evident that Mr Mirrawana had an inability to push back. Mr Mirrawana was not asked whether he wanted a policy, but rather, the conversation proceeded on the basis that Mr Hoey would sell Mr Mirrawana a policy. The whole call proceeded from the outset from the Sales Agent's perspective as if it were a 'done deal'. This was all in a context where there was no genuine question asked as to whether he wanted such insurance, whether if he did this was an amount he wanted, or whether he understood what was occurring. Rather, from the outset it was clear that Mr Mirrawana did not understand and that, inter alia, the Sales Agent was talking too quickly. The call was rushed (with the Sales Agent speaking in a strong Irish accent), and took place when Mr Mirrawana made known that he was facing an impending cyclone. Far from delaying what was occurring because of that, the Sales Agent used it as an opportunity to further rush the call. The tactics employed were designed to compel Mr Mirrawana to agree even though he did not understand what was occurring. He was pushy. Because of the tactics used, Mr Mirrawana was unable to stop what was occurring. The one thing Mr Mirrawana did ask, that the Sales Agent speak slowly, was ignored. As explained above, the conduct of the Sales Agent resulted in Mr Mirrawana feeling that he had no choice but to say yes to him. As explained above, his references to "yes" or "yeah" could not have been taken as genuine agreement. That is apparent from the call, and is not dependent on (though is supported by) the evidence of Dr Eades. In the circumstances of this case, his choice

was negated. I am satisfied that the call amounted to coercion and that there is a contravention of s 12DJ(1).

Undue harassment (Retention conduct)

559 As is apparent from the evidence referred to above, shortly after being sold the insurance policy, Mr Mirrawana sought assistance from Ms Armstrong from the BAC in understanding correspondence he had received from Select. After the Policy Schedule was translated for Mr Mirrawana, he indicated to Ms Armstrong that:

(1) he had understood that he was going to get some money;

(2) he did not know money would be deducted from his bank account;

(3) he did not want money deducted from his account;

(4) he could not afford the insurance policy; and

(5) the insurance policy he had been signed up to would not be good for him.

560 On 1 April 2015, Ms Armstrong telephoned Retention Agent, Ms Morton-Fishwick. Ms Armstrong explained that Mr Mirrawana wished to cancel the policy because he was not aware at the time that he was signed up to an insurance policy and could not understand the Sales Agent he had spoken to. Ms Morton-Fishwick advised Ms Armstrong that she would transfer the call to 'cancellations', placed her on hold for a number of minutes and then advised her that there was no one to take her call and that someone would call her back. Later that day, Ms Armstrong received a call from Retention Agent, Ms Harkins. Ms Armstrong again explained that Ms Mirrawana wished to cancel the policy because he did not want it, was not aware at the time that he was signed up to an insurance policy, could not understand the Sales Agent he had spoken with, and was frightened by the call as he thought it was a government person on the telephone. Ms Harkins advised that it was not possible to cancel the policy over the telephone, and that Mr Mirrawana was required to cancel the policy by sending a letter signed by him to Let's Insure.

561 It is to be noted that at this time Select, BlueInc Services and IMS had no record of Mr Mirrawana's signature as he had been signed up to the policy on the telephone. As is apparent from the sales call, he was not advised that the policy could only be cancelled in writing.

562 ASIC contends that Select unduly harassed Mr Mirrawana by not permitting him to cancel the policy during the telephone calls on 1 April 2015 and/or by requiring him to provide Select with

a written document bearing his signature before permitting him to cancel the policy, in circumstances where:

(1) he sought to cancel the insurance policy during the 30 day cooling off period;

(2) he had been signed up to the insurance policy during the 23 March 2015 telephone call without any dealings in writing;

(3) no statement was made during the telephone call or in the pre-recorded PDS played during that call that an insurance policy could only be cancelled, during or outside of the 30 day cooling off period, in writing; and

(4) none of Select, BlueInc Services or IMS possessed a copy of his signature.

563 It was submitted the requirement to cancel in writing was unreasonable in circumstances where Mr Mirrawana had been signed up to the policy over the telephone and where Ms Armstrong had explained to two Retention Agents that Mr Mirrawana: (1) had not wanted the policy and did not understand what he had signed up for; (2) was not literate, could not write the letter himself, and would require her to write the letter for him; and (3) had not signed anything to purchase the policy and Select, BlueInc Services and IMS did not have his signature on the file. It was contended in those circumstances Select unduly harassed Mr Mirrawana.

564 I do not accept the Corporate Defendants' submission that what was done was not inherently unreasonable and was in line with St Andrew's policy. The issue of whether cancellation was required to be made in writing is addressed above. In the circumstances of this call and the context in which the policy was sold, the hurdles put in place to hinder Mr Mirrawana's ability to cancel his policy are self-evident. It was also self-evident that Mr Mirrawana was not simply a customer who had changed his mind, but one who never understood what was occurring.

565 That said, this all occurred on one day (being 1 April 2015). Mr Mirrawana was fortunate to have assistance. In the circumstances, while one might question the reasonableness of the Retention Agents' conduct in the calls, I am not satisfied that it amounted to undue harassment.

Jennifer Yalumul

566 In respect to Ms Yalumul, ASIC pleads in respect to sales calls that two false and/or misleading representations were made in contravention of s 12DB(1) (FASOC [244]-[249]), coercion in contravention of s 12DJ(1) (FASOC [250]-[251]), unconscionability contrary to s 12CB(1) (FASOC [252]-[257]), and in respect to the retention calls, coercion contrary to s 12DJ(1) (FASOC [258]-[259]), and unconscionability contrary to s 12CB(1) (FASOC [260]-[266]).

567 On 29 May 2015, Ms Yalumul was sold FlexiSure Life Cover together with optional AC over the telephone by Sales Agent, Leila Ghobadi. Ms Yalumul failed to pay numerous fortnightly premiums and sought on numerous occasions to cancel the policy. From the time that Ms Yalumul was signed up to the policy until the time the policy lapsed on 29 August 2017, Ms Yalumul paid $1,268.22 in premiums.

568 ASIC pleaded that Ms Yalumul was an Aboriginal woman who in the period of May 2015 to August 2017, was around 43-45 years of age, resided in a remote area of the Northern Territory, spoke limited English and had difficulties understanding English and had a socio-cultural tendency towards gratuitous concurrence. It was contended that Ms Yalumul was in a position of vulnerability and/or in a weaker bargaining position viz-a-viz Select.

569 The personal characteristics pleaded by ASIC are established by the evidence and the agreed facts. That Ms Yalumul has a socio-cultural tendency towards gratuitous concurrence is established by Dr Eade's evidence. I accept Dr Eade's evidence.

570 It was agreed that on 29 May 2015, Ms Ghobadi signed Ms Yalumul up to FlexiSure Life Cover to the value of $150,000, together with optional AC to the value of $100,000, with a policy acceptance date of 29 May 2015 and a fortnightly premium commencing at $20.87, with the nominated beneficiary being her nephew. Ms Ghobadi took Ms Yalumul's bank account details for the purposes of premiums being automatically charged on a fortnightly basis. From 1 February 2016 to 28 August 2017, Retention Agents placed 46 telephone calls in relation to dishonoured payments, sent nine text messages and sent nine letters to Ms Yalumul regarding unpaid premiums. In May 2016 and May 2017, Ms Yalumul was notified that her policy would be automatically renewed and her premiums be increased by 5% respectively. On 9 August 2017, during a telephone call between John Moore and Ms Yalumul at around 11:35am, Ms Yalumul reduced her FlexiSure Life Cover to a value of $75,000 and optional AC to a value of $75,000 with a premium of $13.88 per fortnight. At the time of the 9 August 2017 call, Mr Moore was participating in the Hawaii Incentive. By letter dated 29 August 2017, Ms Yalumul was notified that her policy had lapsed.

571 It was further agreed that the conduct of Ms Ghobadi is taken to have been engaged in by Select pursuant to s 12GH(2)(a). In addition, at the relevant time Ms Ghobadi was contracted by IMS from a labour hire provider and her conduct is, therefore, taken to have been engaged in by IMS by reason of s 12GH(2)(a). Further, it was agreed that the conduct of Retention Agents,

Carl Chesters, Celia Joyce and Mr Moore (all BlueInc Services employees) is taken to have been engaged in by BlueInc Services by reason of s 12GH(2)(a).

572 There is an issue as to whether Ms Boland, Ms Burridge and Ms Prosser were contracted by BlueInc Services or IMS such that their conduct, in relation to Ms Yalumul, can be attributed to one, or both, of those entities. The Corporate Defendants in their Amended Defence admitted that they were employed by BlueInc Services. Ms Burridge and Ms Prosser were each engaged as Retention Agents through Keegan Adams Recruitment Pty Ltd (Keegan Adams). BlueInc Services and IMS made regular payments to Keegan Adams for retention services in May 2017, during which Ms Burridge made a telephone call to Ms Yalumul; and BlueInc Services made regular payments to Keegan Adams for retention services in August 2017, during which Ms Prosser made a telephone call to Ms Yalumul. Both Ms Burridge and Ms Prosser signed confidentiality agreements with BlueInc Services, in which BlueInc Services described itself as "the Employer". Ms Burridge was subject to Select's QA monitoring. Ms Boland was engaged as a Retention Agent through the Citrus Group. During the period in which Ms Boland made a telephone call to Ms Yalumul, BlueInc Services made payments to Citrus Group. Ms Boland also signed a confidentiality agreement with BlueInc Services in which it described itself as "the Employer". I am satisfied that each was engaged by BlueInc Services. Their conduct is taken to have been engaged in by BlueInc Services pursuant to s 12GH(2)(a).

573 I have addressed the issue of attribution generally above and it is unnecessary to repeat.

Evidence of Ms Yalumul

574 ASIC relied on the affidavit of Ms Yalumul affirmed on 4 May 2019.

575 Ms Yalumul is a Yolngu woman who has lived in Milingimbi, an Aboriginal community in East Arnhem Land, Northern Territory, for her entire life. She completed school up to Year 12, which was taught in both English and Djambarrpuyngu.

576 Ms Yalumul is employed as a supervisor at the Traditional Credit Union (TCU) in Milingimbi, where she has worked for nine years. The TCU is a bank for Yolngu people. Her role involves assisting customers to open bank accounts and with administrative matters. Ms Yalumul's first language is Djambarrpuyngu, which she speaks at home and at work. English is her third language. She has some trouble understanding English, particularly if the person is speaking too fast or with a foreign accent. Ms Yalumul has a better understanding of English now than she did in 2015, as now that she is working in the supervisor role she usually speaks to the TCU

Head Office in English. Ms Yalumul cannot recall when she became supervisor but before then she did not speak English very often. In 2015, Ms Yalumul was employed as the bank teller at the TCU. She was paid $500 per fortnight which she would usually spend before her next pay date. She has her own bank account and does not share money with her family.

577 Ms Yalumul said she does not understand what insurance or life cover means.

Sales conduct

578 During the sales call on 29 May 2015, Ms Yalumul was told that she had completed a survey and an expression of interest for FlexiSure Life Cover and that she was being called in relation to a free quote. Ms Yalumul's evidence was that this call was unexpected.

579 Ms Ghobadi outlined the policy and took Ms Yalumul's details. The following exchange then took place:

> JY: Um, can I ask a question?
>
> LG: Yeah, of course.
>
> JY: Yeah, what's this for?
>
> LG: So, this is life insurance. So if you were to pass away –
>
> JY: Oh, yeah. (indistinct)
>
> LG: There'd be money left behind for your family.
>
> JY: Yeah, yeah.
>
> JY: Yeah, yeah.
>
> LG: So, I have a quote here for $150,000 of life insurance --
>
> JY: How much
>
> LG: 150,000.
>
> JY: Yeah.
>
> LG: Yep?
>
> JY: What's that for?

580 Without taking any further steps to ensure Ms Yalumul understood, Ms Ghobadi gave her a quote for FlexiSure Life Cover to the value of $150,000, together with $100,000 optional AC, which she said was "only $20.87 a fortnight, so around $10 a week". She then said the following:

> So the quote I have is 150,000 of life insurance, um, and that pays out to you directly if you're terminally ill. That goes to you when you get to 85 and also pays out if you

were to, um – yeah, pass away.

On top of that, we have $100,000 of accidental death and injury cover. So if you were to pass away in an accident, let's say – god forbid – you were to get run over in a car accident and you were to pass away like that, then $250,000 pays out. So that's a quarter of a million pays out for your family. And, again, if you were accidentally seriously injured, you receive $100,000. So if you were in an accident that caused you to be paralysed, caused you to be blind, lose your hearing, lose your sight, um, speech, anything like that, you get $100,000, just to help you out adjust your lifestyle and see you through.

581 Ms Yalumul said that it was difficult to understand what she was being told on the phone because the caller used "big words" and she did not know what they meant. She does not know what 'accidental death' means. She said that she only understood "the bits about money". I note that Ms Ghobadi spoke quickly and with a British accent.

582 Ms Ghobadi then asked Ms Yalumul whether she thought $10 a week was affordable. It is apparent that Ms Yalumul paused. When she was asked again whether $10 a week "sounds good" Ms Yalumul responded "What's that?".

583 The exchange which immediately followed the passage above, began with Ms Ghobadi asking whether she had smoked in the last 12 months, and with the response of "no", Ms Ghobadi continued:

LG: Wonderful. Good to hear. Nice and healthy. Um, so, for $150,000 of life insurance and $100,000 of accidental death and injury cover, it's only $20.87 a fortnight, so around $10 a week.

JY: Mmm.

LG: How does that sound? Is that something that you think is affordable?

JY: (Indistinct).

LG: Sorry, can you say that again?

JY: Yes.

LG: Yes, so $10 a week, do you think that sounds good? Something that you can afford?

JY: What's that?

LG: $10 a week, $20.87 a fortnight, do you think that is affordable?

JY: Um, 20. $20 a week – a fortnight?

LG: Yeah, so $10 a week.

JY: Yeah.

LG: Yeah, sounds good?

JY: Yep

584 Ms Yalumul relevantly explained:

> I didn't know that the lady on the phone was trying to sell me something for $20.87 a fortnight. I thought that they were going to give me money. I thought what she was saying to me was the truth because she was a white person. When she was talking about the big amounts of money, I remember I was thinking I didn't believe her sometimes and I wanted some proof.

585 After noting Ms Yalumul's beneficiary, Ms Ghobadi spoke to Ms Yalumul about the exclusions to the AC:

> LG: Okay, perfect. So I've got Jacinto here as your beneficiary, so if anything happens to you, then he receives all of that money there, Jennifer. So the quote – you receive $150,000 if you are terminally ill. When you get to 85 you receive $150,000. And, um, if you were to pass away from a natural cause, then Jacinto receives 150,000. If you were to pass away in an accident, then Jacinto receives $250,000. And if you were seriously injured, then you receive $100,000 as well. I do need to point out at this stage, there are some exclusions for the accident cover, such as intentional or self-inflicted injury as well as participating in professional sports. And those are all listed in our product disclosure statement. So you're not a professional rugby player or kickboxer or anything like that?
>
> JY: No.

586 Ms Yalumul's evidence is that she does not understand what the term 'exclusions' means.

587 Ms Ghobadi informed Ms Yalumul that she would play her a "very short recording" to give her "a bit more information about our company and run through a few more terms and conditions". Ms Ghobadi then played Ms Yalumul the pre-recorded PDS of a male speaker speaking very quickly and using complex terminology. After playing the pre-recorded PDS, Ms Ghobadi asked "I know it is a lot of information, but please can I confirm you received and heard that message?" to which Ms Yalumul responded "Mmm. Yeah".

588 When Ms Yalumul later listened to the recording of the PDS, in May 2019, she said that she did not understand because he spoke too quickly and used "big words". She does not know what the words "essential features", "PDS", "Financial Services Guide", "general advice" and "acquire the product" mean.

589 Shortly thereafter, the following exchange occurred:

> LG: And what we're looking at there is $20.87 a fortnight. So around $10 a week.. So what we can do for you – obviously the good news is that we can get that set up for you today. That means you're going to be covered for the $250,000 of life insurance in full, obviously subject to our terms and conditions and exclusions outlined in the product disclosure statement. Would you like for me to get that started for you now, there, Jennifer?

JY: Yep

590 Ms Yalumul in her affidavit said that "When [she] said "yep", [she] was just saying it to keep going on with the call. [She] didn't know that [she] agreed to buy something. [She] didn't know what they were talking about at that time".

591 Ms Yalumul said that she never, at any time, knew that she had bought anything from FlexiSure or that FlexiSure or St Andrew's were taking money from her bank account.

False and/or misleading representations

592 There are two representations alleged.

593 *First*, an implied representation that there were no exclusions to the optional AC to the FlexiSure Life Cover policy other than intentional or self-inflicted injury and participating in professional sports. As with the previous Consumers, ASIC contended this is established by the Sales Agent repeatedly stating that if an event occurred there would be a monetary pay out, that the Sales Agent stated "there are some exclusions for the accident cover, such as intentional or self-inflicted injury as well as participating in professional sports", and that she otherwise did not refer to any exclusions to the AC, and did not inform her of the definitions of "accident" or "accidental death" for the purpose of the optional AC. Although, as the Corporate Defendants contended, the Sales Agent referred to the full range of exclusions to the AC by stating "And those [exclusions] are all listed in our product disclosure statement" and "That means you're going to be covered … in full, obviously subject to our terms and conditions outlined in the product disclosure statement", she did not explain to Ms Yalumul what a PDS was or its significance to the policy. Moreover, the reference to "those", in the context, creates the impression that it is only those exclusions which were specifically identified by Ms Ghobadi that are listed in the PDS. Further, the pre-recorded PDS did not refer to exclusions and the written PDS was not provided to Ms Yalumul until after the policy had been purchased. In the circumstances, the reference to the PDS would not have qualified the preceding statements.

594 Given what was said, and what was not said by the Sales Agent, the impression that a person in the position of Ms Yalumul would have been left with is that the exclusions were limited to what had been identified, namely intentional or self-inflicted injuries and engaging in professional sports. That is false and/or misleading as there are a number of specific exclusions, including that the cover is limited to eight identified "Accidental Serious Injuries".

595 This representation falls within and is a contravention of s 12DB(1)(i).

596 *Second*, the standard cover representation, namely, that the optional AC was not an optional extra and/or was a standard component of the insurance policy. The manner in which the optional AC was referred to by the Sales Agent implied that it was part of the standard cover. At no stage did the Sales Agent explain that AC was an optional extra, or that she could opt not to take that aspect of the policy. This representation is false and/or misleading and, therefore, falls within and is a contravention of s 12DB(1)(i).

Unconscionability (Sales conduct)

597 ASIC contends that Ms Yalumul was in a position of vulnerability and/or was in a weaker bargaining position vis-a-vis Select. The personal characteristics alleged, that she is an Aboriginal woman, at the relevant time around 43-45 years old, resided in a remote area in Arnhem Land, spoke limited English and had difficulties understanding English, are established by the evidence.

598 ASIC also contended that Ms Yalumul exhibited the socio-cultural tendency toward gratuitous tendency, although ASIC does not suggest the Sales Agent was aware of this concept.

599 It is apparent from the sales call that these characteristics (apart from gratuitous concurrence) were either known to the Sales Agent, or ought to have been. That she was vulnerable or at the least in a weaker bargaining position was known or ought to have been known by the Sales Agent.

600 It is apparent from even the small portion of the call recited above that Ms Yalumul did not understand what the Sales Agent was talking about. The recording reveals that at no stage did the Sales Agent ask Ms Yalumul whether she wanted a life insurance policy, or to buy the policy, or how she wished to pay for it, but rather used such leading language as "[w]ould you like for me to get that started for you now there, Jennifer?" and "So, how do you want to set it up, Jennifer?" The Sales Agent never asked Ms Yalumul what her needs were in terms of taking out a life insurance policy. She was not asked if she wanted to purchase a FlexiSure Life Cover policy with optional AC. The Sales Agent did not refer to the option of obtaining a lower level of cover on any of the policies or quote for a lower level of cover, but rather she nominated the amount and proceeded to sign up Ms Yalumul. The conversation was very dense in content provided by the Sales Agent. The Sales Agent spoke very quickly in a high-pitched voice with a British accent, used complex words and phrases, and frequently spoke at length without

pausing. Ms Yalumul barely spoke and her responses, which were minimal, frequently consisted of "mmm", "yeah" and "yep". Her responses were in a soft, barely audible voice and often after long pauses. It was evident that Ms Yalumul was confused. The Sales Agent was not interested in Ms Yalumul's wishes, but rather in the sale regardless. Irrespective of the Sales Agent's lack of awareness of the concept of gratuitous concurrence, Ms Yalumul's assents could not reasonably, in the circumstances of this call, be taken for genuine agreement. The Sales Agent took no steps, or at least no reasonable steps, to ensure that Ms Yalumul understood the content of the call.

601 By just over eight minutes into the call, the Sales Agent proceeded on the basis that Ms Yalumul was signing up to the policy and took down the details of Ms Yalumul's nephew as her beneficiary. The Sales Agent used false and/or misleading statements as to aspects of the policy, on matters of significance.

602 The Sales Agent was aware of Ms Yalumul's personal characteristics. Her name, date of birth, address and other information provided, together with her accent (noting also that it can be heard on the call that Ms Yalumul was speaking in an Aboriginal language), would have made her age, background and indigeneity apparent to the Sales Agent. The content of the call made it apparent she was having difficulty understanding English including from the lack of understanding as to what was occurring. At the very least, the Sales Agent should have been aware that Ms Yalumul could not understand. There were very obvious red flags or alerts, which were ignored. Rather, she took advantage of the obvious vulnerabilities to make the sale.

603 The Sales Agent never made any genuine or reasonable attempt to ensure that Ms Yalumul understood what was occurring, or wanted the policy she was sold.

604 I am satisfied the sales conduct is unconscionable and is a contravention of s 12CB(1).

Coercion (Sales conduct)

605 As ASIC alleges, the personal characteristics of Ms Yalumul already described above, combine to limit her assertiveness and her ability to push back.

606 Each of the underlying features relied on by ASIC in respect to this aspect of the claim can be accepted and are to be deprecated. That is:

(1) Ms Yalumul was rushed through the call;

(2) the Sales Agent used many words Ms Yalumul did not understand;

(3) the Sales Agent made two false and/or misleading statements;

(4) she was only quoted one price, and she was not asked her consent to the recorded PDS being played;

(5) there was no genuine or reasonable attempt to ascertain whether Ms Yalumul understood what was discussed during the call; and

(6) the Sales Agent signed her up during the same call rather than giving her an opportunity to reflect.

607 Ms Yalumul's evidence is that she did not understand what had been purchased. I note, however, that the false and/or misleading statements were not of a type such that they would, in and of themselves, impose pressure to purchase the policy. I note also that failing to obtain Ms Yalumul's consent in relation to the PDS would not of itself compel anyone to act. That said, it is not suggested by ASIC that these integers of themselves are the reason for not understanding what had been purchased.

608 The issue is whether that conduct, in all the circumstances, coerced her into signing up for the policy. ASIC's case primarily is based on the subjective evidence that Ms Yalumul did not understand the policy and, therefore, did not make an informed choice. This topic as a general proposition is addressed above at [0]-[0]. Suffice to say, in any event, the subjective case, by itself, is not enough. The features of this call may be deprecated, and as found above, constitute unconscionability. However, that the Sales Agent engaged in the conduct, and took unfair advantage of Ms Yalumul and her vulnerability, does not necessarily mean the conduct amounts to coercion within s 12DJ. ASIC has not established that the integers relied on, in the circumstances of this call, compelled or forced Ms Yalumul to sign up to the policy and/or provide her direct debit details during the telephone call.

609 In the circumstances of this call, I am not satisfied that it has been established that the sales conduct amounts to coercion with the meaning of s 12DJ(1).

Retention conduct

610 As noted above, between 1 February 2016 and 28 August 2017, Retention Agents placed 46 telephone calls, sent nine text messages and nine letters to Ms Yalumul regarding unpaid premiums.

611 On 3 February 2016, Ms Yalumul spoke with a person who introduced herself as "Rachel at Let's Insure". During the call, Ms Yalumul was asked about a dishonoured premium payment. The following exchange occurred:

R: So, yeah, I can see here - well, I need to let you know this call's recorded and I can only provide general advice. So there's an outstanding balance of $20.87. Was there any reason we couldn't get that collected?

JY: What's that?

R: There was an outstanding balance of $20.87.

JY: Where's that?

R: It's for your life cover.

JY: My --

R: Flexisure. Your life cover?

JY: $20?

R: - yeah, $20.87.

JY: What's that?

R: It's your life cover. Your life insurance.

JY: Life insurance?

R: Yeah.

JY: Yeah, and also –

R: When can I get that collected from you?

JY: What's that?

R: When can we get it collected from you?

JY: Now you gonna --

R: What's that, sorry?

JY: What's that for?

R: It's for your life insurance. It's Flexisure.

JY: Yeah. I already cancelled that.

R: Yeah. But we need to collect your outstanding balance. That's - that's why we would have given you a missed call.

JY: Mmm. Okay.

612 Ms Yalumul said in her affidavit that she did not understand what the caller was talking about. She could not recall why she said that she had already cancelled her insurance.

613 Between 4 February 2016 and 28 August 2017, Ms Yalumul made numerous attempts to cancel the policy via telephone.

614 On 4 February 2016, Ms Yalumul called Select and spoke with Retention Agent, Mr Chesters. During that call, she asked four times for her insurance to be cancelled. Despite that, throughout the call, Mr Chesters continued to ask Ms Yalumul questions about why she was cancelling her insurance and whether she was happy with her cover. When asked why she wanted to cancel her policy, Ms Yalumul repeatedly gave responses such as "What's that?" and "What is the life insurance?" Ms Yalumul agreed to keep the insurance in place but, she said, this was only because she was confused and the caller kept asking her questions.

615 Mr Chesters' notes of the 4 February 2016 call recorded that:

> Customer asked to cancel. I think she was unsure of what she was covered for, I went through the cover with her and offered to resend policy documents. Customer was happy to keep in place.

616 By letter on 2 May 2016, Ms Yalumul was notified that her policy would be automatically renewed and that her premiums would increase by 5%. On 1 May 2017, Ms Yalumul was notified that her policy would be automatically renewed and that her premiums would increase by a further 5%.

617 On 16 May 2017, Ms Yalumul called Select and spoke with Retention Agent, Katrina Tatnell. Ms Yalumul stated that she wanted to cancel her policy and, shortly thereafter, was transferred to Retention Agent, Samantha Burridge. During the call with Ms Burridge, Ms Yalumul repeatedly asked for her policy to be cancelled. In response, Ms Burridge offered Ms Yalumul lower levels of cover for a reduced premium. For example:

> JY: I can cancel - I can cancel my - all my - all that - what that? What do you call that?
>
> SB: Do you want to cancel down your policy?
>
> JY: Yeah.
>
> SB: Yeah? Okay. That's all right. As I said, I did just want to obviously give you - give you some other options rather than having to cancel it down. It would mean that you are left - left uncovered completely, but like I said, I could still obviously pay the outstanding amount for you and - and, you know, reduce your premiums down to that $8.61 a fortnight going from the 19th. Do you - do you not think that - is that not affordable for you, Jennifer? Like, does that not sound like something you'd want to do today?
>
> JY: No. What's that?
>
> SB: Sorry. Sorry, I couldn't hear that. I said is that something that sounds like you'd

like to do that today?

JY: No.

SB: Rather than getting it cancelled down completely, we could just reduce it down.

JY: Yes. Cancel all my policies.

SB: Okay. So but what that - what that means is obviously you are left uncovered completely, which is just something we do look to - to prevent here. Because if, you know, the worst were to happen and you were to pass away, them there would be - would be nothing in --

JY: Yeah (indistinct) that, but no money to pay.

SB: Yeah, but that's - that's why I'm saying what we could do is just reduce it down to that $8.61 a fortnight and you'd still have $50,000 left for Jacinto there if you've got the - if you were to pass away, and you'd still have $50,000 of accident cover on there as well. So I thought that would mean if you were to pass away as the result of an accident, you still have that $100,000 to go to Jacinto there. And like I said, that would be at - only at that $8.61 a fortnight. So - I mean, you know, quite - quite a high level of cover there for a lot cheaper premiums than what you are paying now, and it does mean that you do still have those benefits in place for if something were to happen to you. Because like I said, you have paid, you know, into this policy quite a lot, so it would - it would be a shame to just see that go to waste just because of an affordability thing. Like I said, I do speak to a lot of customers that are in a similar situation. Those with financial - different situations, and so what we could do is just have a flexible policy. Rather than shutting it down, we could just change it slightly to make it cheaper - cheaper for you. I mean, is that $8.61, is that - do you want to do that today, Jennifer?

JY: No.

SB: No? Okay, not to worry. So you just want to get that cancelled down completely, then? Is that correct?

JY: Yeah.

618 Despite that, Ms Burridge insisted that Ms Yalumul needed to write a letter to FlexiSure to cancel her policy:

SB: Yeah. Okay. Well, in terms of getting that shut down completely what we do just require is something in writing because we need a signature to get it completely shut down. So if you pop us something in the post, what we can do is get that completely shut down when we receive that signature for you - from you. So it just doesn't need to be anything much, it just needs to be a quick note just stating your intention to cancel there. And then we can get that shut down for you. But your next collection is on the 19th, but what I can do - if you don't think you can get us a letter in by then, what I can do is push that out till the next payment, just to give you time to get that letter in to us. And - because your policy will remain in force until we do receive that. Okay?

…

SB: Yeah. Write a letter. Just state your intention to cancel. So just saying on that

> letter, you know, "I want to cancel this policy." And as long as there's a signature on there. So as long as your signature's on there, then we can get that shut down for you.

619 In her affidavit, Ms Yalumul said that she did not write a letter as she needed help to do this and there was no one who could help.

620 Ms Burridge's notes of the retention call recorded:

> …customer looking to cancel, cancelling all other policies as well, affordability, offered to reduce cover to 100/50 for 14.04 still unaffordable, reduce to 50/50 for 8.61, just needing to cancel, advised of cancellation process, push next payment to give time to end letter but will email dishonors to try take o/s [outstanding balance] as customer called in to pay o/s.

621 On 2 August 2017, Ms Yalumul called Select and spoke with Retention Agent, Abby Boland. Ms Yalumul again expressed her desire to "pay this off" and cancel the policy. In her affidavit, Ms Yalumul explained that she did not know what she was paying for but she was "sick and tired of them ringing" and she just "wanted to get it over and done with". Ms Boland indicated that she was not able to cancel the policy herself and that the matter would be passed on to the policy manager who would call her back. She was never called back.

622 Ms Yalumul's evidence is that the repeated phone calls were upsetting and she wanted them to stop. She thought that she had cancelled her policy when she said this during the telephone calls.

623 Ms Yalumul had two further calls on 9 August 2017 with Retention Agents, Abi Prosser and John Moore. Again, Ms Yalumul stated that she wanted to cancel her policy.

624 Despite this, Ms Yalumul reduced her FlexiSure Life Cover to $75,000 and optional AC to $75,000 with a premium of $13.88:

> JM: Okay, cool. So what I can offer you, Jennifer, is I can still keep you covered with us, so you don't lose the money you've already paid us.
>
> JY: Mmm.
>
> JM: And I can change the cover to $75,000-worth of life cover and $75,000-worth of accidental death cover for $13.88 a fortnight, okay? And what I can do is make sure you don't have to pay any money into the policy up until the 25th of August, okay?
>
> JY: Mmm.
>
> JM: Okay? Now, that - at that point it'll be the new price of $13.88, okay?
>
> JY: Okay.

625 Ms Yalumul said that she did not understand this and that she had wanted to cancel her policy. She said "Okay" because she felt like "he was forcing me to do that. He kept saying it. They were forcing me to pay them". I note that Mr Moore was speaking quickly during this call and that he had an Irish accent.

626 On 28 August 2017, Ms Yalumul called Select and spoke with Retention Agent, Celia Joyce, about cancelling her policy. Ms Joyce said that they would let the policy lapse.

627 On 29 August 2017, Ms Yalumul was notified by letter that her policy had lapsed. In total, Ms Yalumul paid $1,268.22 in premiums.

Unconscionability (Retention conduct)

628 The retention conduct reflects that the relevant Retention Agents knew, or at the very least ought to have known, the personal characteristics of Ms Yalumul.

629 Ms Yalumul made repeated attempts to cancel her policy. The Retention Agents took advantage of Ms Yalumul's vulnerability and/or weaker bargaining position to maintain the policy when she had made it clear that she wanted to cancel it.

630 As noted above, between 1 February 2016 and 28 August 2017, Retention Agents placed 46 telephone calls and sent nine text messages and nine letters to her regarding dishonoured payments. From one month after Ms Yalumul signed up for the policy, not understanding that she had, she repeatedly attempted to cancel the policy. She was provided no reasonable assistance to do so. Rather the attempts were ignored, or required Ms Yalumul to do so in writing or in effect refused the request, with the Retention Agents pushing ahead to have her maintain the policy. The Corporate Defendants' submission that the characterisation of the Retention Agents' conduct in the calls as ignoring her requests is not correct, cannot be accepted. In one call alone on 16 May 2017, Ms Yalumul stated on at least 13 occasions that she wanted to cancel her policy, that she could not afford the policy, and/or that she could not afford and did not want a lower level of cover. Instead of doing as requested (in a circumstance where the system notes had recorded that there had been previous such requests), the Retention Agent instead repeatedly offered her lower levels of cover for a reduced premium. At the end of that call, Ms Yalumul was informed that she would need to cancel her policy in writing, by sending a letter to Select.

631 It was not until 28 August 2017, when Ms Yalumul again said she wanted to cancel the policy, that the Retention Agent said that the Corporate Defendants would let the policy lapse.

632 The submission that the Retention Agents' conduct was in some way motivated by the interests of Ms Yalumul in keeping the policy going at a lower premium, is addressed above. The conduct in this case is beyond anything which could properly be described in that manner. The Retention Agents ignored her wishes and, as illustrated by the call with Mr Moore on 9 August 2017, ignored her statement that she did not want a lower premium policy. Before the passage recited at [0] above, Ms Yalumul was asked by Mr Moore whether, if he could make the policy cheaper, she would be "happy to keep it active". Ms Yalumul answered "no". The Retention Agent then persisted regardless. He immediately put her on hold to see what he could do for her, and came back with an offer of a policy for $13.88, leading to the passage recited above. She had said she did not want a lower premium and it could not have been reasonably been considered to have been her wish or in her interest to maintain the policy. This was in circumstances in which Ms Yalumul had missed numerous premium payments, and had called Select on five occasions to cancel her policy, of which the Retention Agent was aware. Having persisted, and offering a lower premium, Mr Moore did not make any genuine or reasonable attempt to ascertain whether Ms Yalumul wished to take that option, or still wished to cancel her policy. I note that Mr Moore was at the time participating in the Hawaii Incentive, and retention of Ms Yalumul's policy would count towards that.

633 ASIC contended that Mr Chesters, Ms Burridge and Mr Moore in the circumstances did not act in good faith in their dealings with Ms Yalumul. Their conduct described above could be described in that manner, given the circumstances known to them, or what ought to have been known. That said, putting a label on the conduct does not alter the assessment of the conduct.

634 I note that ASIC alleges that Mr Chesters was participating in the Las Vegas Incentive at the time of the 4 February 2016 call, which is referred to above at [0]-[0]. His involvement in the Incentive could only be as a Wild Card, of which there were two positions for persons in "non-sales departments based on work ethic and commitment to the company". ASIC can only put it as highly as he is not excluded from the Incentive. Regardless, in the circumstances, whether he was a participant does not affect my conclusion. Rather, it may explain why he behaved as he did.

635 I am satisfied that the Retention Agents' conduct in the circumstances, in failing to permit Ms Yalumul to cancel her policy, is unconscionable and is a contravention of s 12CB(1).

Coercion (Retention conduct)

636 It is unnecessary to repeat the retention conduct. It is readily apparent that Ms Yalumul wanted, over an extended period of time, to cancel her policy, and no genuine or reasonable steps were taken to assist her to do that. Rather, that request was entirely ignored. Rather than being permitted to do so, she was repeatedly offered bases to accommodate the lack of payment or to provide lower payment. In addition, this is in a context where hurdles to cancel the policy were placed in her way.

637 It may be accepted that in the circumstances, from Ms Yalumul's perspective, she wished to cancel her policy. She made that clear. However, as previously explained, the issue is not to be considered solely subjectively. It is necessary to consider the integers of the conduct said to amount to coercion. It is alleged that in light of her personal characteristics and circumstances, the instances of unpaid or late premium payments and her repeated requests to cancel the policy, she was coerced into not cancelling her policy by the Retention Agent's following conduct:

(1) ignoring Ms Yalumul's requests to cancel her insurance;

(2) failing to make a genuine, or alternatively reasonable, attempt to inform Ms Yalumul of the process required to cancel her policy;

(3) failing to make a genuine, or alternatively reasonable, attempt to confirm that Ms Yalumul wished to continue her FlexiSure Life Cover with optional AC when she requested cancellation in the instances pleaded;

(4) refusing and/or failing to cancel Ms Yalumul's FlexiSure Life Cover with optional AC when she requested cancellation; and

(5) requiring Ms Yalumul to cancel the policy in writing.

638 However, as previously explained, the issue is not to be considered solely subjectively. The coercion is alleged to be being coerced into not cancelling the policy. It may be accepted that a person can be coerced into being restrained from doing something. Nonetheless, although the conduct had the effect that the policy was not cancelled, it does not necessary follow that Ms Yalumul was coerced into not cancelling the policy. At one stage she understood she had cancelled the policy.

639 Again, the conduct is unconscionable, but I am not satisfied it amounts to coercion within the meaning in s 12DJ(1).

Zondani Mtawale

640 In respect to Mr Mtawale, ASIC contends that two false and/or misleading representations were made in contravention of s 12DB(1) (FASOC [149]-[153]), coercion contrary to s 12DJ(1) (FASOC [154]-[155]) and unconscionability contrary to s 12CB(1) (FASOC [156]-[161]).

641 The personal characteristics pleaded are that he was a man from Zambia who in April 2015 was around 51 years of age, resided in Queensland, had resided in Australia for about 3 years and spoke English as his third language.

642 The personal characteristics of Mr Mtawale pleaded by ASIC are established by the evidence and the agreed facts.

643 ASIC does not plead that Mr Mtawale was vulnerable, although it contends that he was in a weaker bargaining position. Unlike other Consumers, it is not contended he has issues with the English language or did not understand the concept of life insurance. Indeed, it is accepted that he was looking to obtain life insurance. Two Sales Agents were involved in the sales call, Emma Hunt and Mr Thompson, with the telephone being handed to Mr Thompson, when Mr Mtawale was appearing to raise issues with the process. At the time of the sales call, both Ms Hunt and Mr Thompson were participating in the Cruise Incentive.

644 It was agreed that on 14 April 2015, Sales Agent, Mr Thompson, signed up Mr Mtawale to Let's Insure Funeral Cover to the value of $12,000 with optional ADC to the value of $32,000 and AIC to the value of $30,000 for himself, his wife and two daughters, and HEC to the value of $9,600 for himself and $8,000 for his wife. The cover was by way of a stepped monthly premium commencing at $93.82 and a policy acceptance date of 14 April 2015. During the sales call, Mr Thompson took Mr Mtawale's bank account details for the purposes of automatically deducting monthly premiums. On or about 5 April 2018, Mr Mtawale requested in writing that his policy be cancelled. His policy was cancelled on or about 10 April 2018. In total, he paid $3,765.48 in premiums.

645 It was further agreed that the conduct of Ms Hunt and Mr Thompson is taken to have been engaged in by Select by reason of s 12GH(2)(a). Mr Thompson's conduct is also taken to have been engaged in by BlueInc Services (as he was a BlueInc Services employee) and Ms Hunt's conduct is taken to have been engaged in by IMS (as she was contracted by IMS from a labour hire provider at the relevant time) pursuant to s 12GH(2)(a).

Evidence of Mr Mtawale

646 ASIC relied on the affidavit of Mr Mtawale affirmed on 17 May 2019.

647 Mr Mtawale was around 51 years of age in 2015. He is from Zambia, Africa. His first language is Tumbuka, and he also speaks Bemba, a common language in the Copper Belt province in Zambia. English is Mr Mtawale's third language, which he studied throughout primary and secondary school in Zambia. After finishing schooling, Mr Mtawale studied in England, where he completed a Bachelor of Engineering. After completing his study, Mr Mtawale returned to Zambia.

648 Mr Mtawale has a wife and two children. He has lived in Australia since April 2012. Mr Mtawale came to Australia on a skilled worker visa. He became a permanent resident in 2013 and an Australian citizen in 2017.

649 Mr Mtawale lives with his family in Mt Isa, working at Mt Isa Mines. He is currently a Senior Continuous Improvement Engineer. In 2015, he was working as a Senior Backfill Engineer. At that time, his income was roughly $140,000.

650 Prior to signing up for Let's Insure funeral insurance in 2015, Mr Mtawale did not have any funeral insurance, although he did have health and car insurance, as well as income protection insurance via his superannuation. Mr Mtawale started looking for funeral insurance around July 2014. He wanted funeral insurance to provide security for his family.

Sales conduct

651 On 14 April 2015, Ms Hunt and Mr Thompson telephoned Mr Mtawale for the purpose of marketing Let's Insure Funeral Cover. Mr Mtawale understood that she was trying to sell him insurance.

652 Earlier that day, a person who identified herself as 'Amy' from 'A+ Advisers' called Mr Mtawale and said she was doing a "very quick survey" and worked in partnership with "Cover Sydney". She offered for a consultant to call him back later that evening about funeral insurance. Mr Mtawale said a number of times that he would like to receive written information prior to the call, explaining "I cannot have a sensible question just listening to him".

653 Mr Mtawale recalled that during the sales call, the caller spoke quickly and had an accent which he could not recognise.

654 During the sales call, Mr Mtawale asked numerous times that he be sent the policy information so that he could review it and discuss the policy with his wife. However, he felt that the caller was trying to sign him up "straightaway". For example, Mr Mtawale asked the following:

> Is it possible to send me, um, an email so I can have a look at that and then, um, I'll get back to you...
>
> Yeah, but send me that. Also send me the, um, what do you call that, um, the one that gives all the information...
>
> But is it possible to send the information, um, to my email? … Yeah. Actually, send it to my email and then I'll discuss it with, um, Nachizya, all right...

655 Mr Mtawale's evidence was that the caller was not listening to him and that he believed that he would not be provided with any further information unless he signed up to the policy.

656 Mr Mtawale said that he became agitated as he had asked the caller to send him the information but felt that she was "bulldozing" him and was more concerned with registering a sale. He said that he was not expecting to be signed up to a policy at the time and was expecting the information to be sent to him first.

657 After the fourth time that Mr Mtawale had asked for the policy documentation to be sent to him, Ms Hunt handed the call to her more experienced colleague, Mr Thompson. This occurred approximately 18 minutes into the sales call. Mr Mtawale said that Mr Thompson had a strong accent and was not very clear.

658 When Mr Thompson took over the call he spoke very loudly, and as ASIC contended so loudly that the sound of his voice distorts the recording. He spoke assertively, very quickly and with an accent. He was pushy, and proceeded on the basis that the Consumer would be signed up to the policy.

659 Mr Thompson played Mr Mtawale a short recording of the PDS. Mr Mtawale said that he did not expect to hear the PDS over the phone as he had asked for it to be provided to him in writing. Mr Mtawale said that he was familiar with what a PDS is, but that the recording was too fast and he could not really understand it. Mr Mtawale's evidence was that he did not understand the full extent of the exclusions as he was unable to properly hear the PDS and the only exclusion he was told about during the sales call related to professional sports.

660 After the PDS recording was played, Mr Thompson said that a welcome pack would be sent to Mr Mtawale within three to five working days. Shortly thereafter, the following exchange occurred:

HT: Okay, cool. So it's a guaranteed acceptance cover for yourself, so what happens is, Zondani, great I can start the policy for you today, and the good news, the whole family will be covered immediately after the telephone call, subject to those terms, conditions and exclusions outlined in the product disclosure statement. Zondani, just to confirm that I am right, and you're happy for me to do that for you now?

ZM Well, like I said to your counterpart, I said that email me the product disclosure statement.

HT: Hmm.

ZM: I'll look at that and then I'll get back to you.

HT: Hmm, hmm. So the policy, it's probably because, I'm sure you'd agree, Zondani, it's not whether you've taken out a policy - this is what everyone is saying to us at least - it's not whether you've taken out a policy, it's the level of cover that you've actually taken out. So, Zondani, we completely understand that you'll obviously have to speak to your wife and just not ask her if she wants it, just to show you, show her basically the value for money that you're actually receiving there. Now, Zondani, if she wanted to increase it to any level of cover she wanted it, or decrease it, the policy is always controlled by yourself, because like, I, I'm going to go out on the assumption, Zondani, that, I mean, $43 a fortnight, you can't really go wrong, can you

661 At this point, Mr Mtawale felt that the caller was being very forceful by insisting that Mr Mtawale had the policy. There was then some discussion about the fortnightly premiums and whether they could be deducted monthly to align with Mr Mtawale's pay date. The following exchange occurred thereafter:

HT: So, great, once again I can start the policy for you today and the good news is the whole family will be covered immediately after the telephone call, subject to the terms, conditions and exclusions outlined in the product disclosure statement. Zondani, should we do that for you now? Yeah?

…

HT: Shall we start that for you now then, yeah?

ZM: Can we start tomorrow?

HT: No, no, the cover, the cover starts today but you don't pay until two days, because obviously you're not getting paid till tomorrow, we'll do the day after, the, no worries at all, just for you.

ZM: No, I'm saying that, can we do the sign-up tomorrow, because I need to talk to my wife.

HT Oh, yeah, but as I said, look, what we'll do is we'll get your documents emailed to you, so by about 10, 11 o'clock AM tomorrow, you'll have all your full policy documentation through on the email, no worries. Then, Zondani, if your wife decides she wants more, you call me back, no worries, and I can change that for you at any point. Because you never know what's going to happen. Accidents can happen at any time, can't they, Zondani?

662 Mr Mtawale explained in his affidavit that:

> I was more agitated at this point as I had repeated that I wanted to talk to my wife before making a decision. I felt like the caller was being commanding especially when I asked if l could start tomorrow and he said no. The way he was speaking made me feel like I had no choice.
>
> I felt like he was putting pressure on me and that he was trying to guilt me into taking out the policy by suggesting I take cover immediately in case something happened to me at work.

663 Mr Thompson ignored Mr Mtawale's requests and then proceeded to take his bank details. Mr Mtawale asked whether he could make the payments online himself, but this question was dismissed by Mr Thompson who insisted, despite Mr Mtawale's concerns, that Mr Mtawale provide his bank details over the phone due to data security concerns.

664 At the end of the call, Mr Mtawale knew that he had signed up to funeral insurance for each member of his family and accidental death and expenses cover for himself and his wife. He was not sure if he wanted the additional cover, but believed that he could change his mind after the call.

665 After the telephone call, Mr Mtawale was sent copies of the Policy Schedule, FSG and a PDS, enclosed in a letter dated 14 April 2015.

666 Amongst other things, there are two particular features evident in this call.

667 *First*, on at least six occasions during the call Mr Mtawale made clear requests that he be sent the PDS and other information so he could consider it and talk to his wife about it, to decide whether to take up the policy. In each instance Mr Mtawale was either ignored or brushed off. While he asked if it was possible to send him the information and the Sales Agents said it was, they proceeded with the conversation and sales pitch with the intent to sign him up during the call, regardless of his request. When Mr Thompson wanted his agreement to start immediately, Mr Mtawale repeatedly raised that he wanted to consider it.

668 It is plain from the transcript and audio that the Sales Agent paid no heed to what Mr Mtawale wanted, which were obviously reasonable requests. Mr Mtawale was not given any opportunity to reflect upon whether to purchase the policy. Despite his repeated requests to be sent the policy documents, neither Ms Hunt nor Mr Thompson sent Mr Mtawale the policy information, including the PDS, prior to concluding the sale.

669 *Second*, Mr Mtawale was reluctant to provide his bank details over the phone, and questioned whether he could pay online. Again, Mr Thompson was not interested in his concerns, brushing

them aside, telling him that it was because of security concerns. He persisted in obtaining the bank details on the call, telling Mr Mtawale that this is how it works.

670 I do not accept the Corporate Defendants' submission that Mr Thompson did not refuse or ignore Mr Mtawale's requests. They submitted that:

> Mr Thompson was trying to sell a standard product over the phone. Mr Mtawale was not under any obligation to purchase that product. If Mr Thompson ignored or refused Mr Mtawale's requests in the sales call, Mr Mtawale was free to hang up the phone at any stage.
>
> In circumstances where a customer has no obligation to purchase what is a standard product, ignoring or refusing a customer's request or query may be poor sales practice. It may be rude. But it is inherently unlikely to be against conscience. The customer has a simple way to deal with such conduct. He or she can hang up the phone or refuse to purchase the product. In this instance, Mr Mtawale made a decision to purchase the policy.

671 I do not accept the submission.

672 This submission, that the failure to hang up the call or that a Consumer could have refused to purchase the product, which is made repeatedly by the Corporate Defendants, is no more than the ends justifies the means. If the Sales Agents signed up the Consumer, the call could not have been unconscionable. The logic does not follow.

673 This sales call was reviewed by the Corporate Defendants' compliance staff as part of "the remediation program" and was rated as a fail. The review concluded that:

> Customer wants policy docs send [sic] out to discuss with his wife first, 4 partner objections – Pressure sale and selling on application
>
> ….
>
> Customer understood what they were taken out but hesitant to agree to the policy on the spot as he wants to speak to his wife, has made over 3 partner objections, hugo [Mr Thompson] comes on to handle the objection using amendments, the customer did like the cover however it feels like he was pressured on the spot to take it out.

674 ASIC submitted that this acknowledgement that Mr Mtawale was "pressured on the spot" to take the insurance, is an admission of misconduct by the Corporate Defendants.

675 Although the Corporate Defendants now appear to suggest there was no pressure and that Mr Thompson was just doing his job as a sales person, that submission does not sit with its own acceptance that the call was flawed because of the pressure put on.

676 Regardless, the pressure is evident from the call. Mr Thompson would have been well aware of what he was doing. Not surprisingly in the circumstances, Mr Mtawale's evidence was that he felt pressured.

677 As noted above, Mr Mtawale requested in writing that his policy be cancelled which ultimately occurred on 10 April 2018. Mr Mtawale did not receive any refund of the premiums he paid.

False and/or misleading representations

678 There are two such statements alleged.

679 *First*, ASIC allege that the Sales Agents represented that there were no exclusions to the Let's Insure Funeral Cover, ADC and AIC, save for limited sporting based exclusions to the AIC. This is an implied representation to be inferred from positive statements as well as failures to mention matters in all the circumstances of the call.

680 The Corporate Defendants relied on their submissions in respect to Ms Marika and submitted that the representation cannot be implied. They submitted that Ms Hunt indicated that coverage was not at large and that it responded to particular events.

681 The telephone call included the following by Ms Hunt:

> EH: Oh, lovely. Now, our last benefit is an accidental serious injuries cover. Now, we pay you up to another $32,000 if you were to get in an accident and suffer from something like blindness, paralysis, loss of speech, a loss of use of limbs, or in a coma, we will happily pay you $32,000. Now, there are just a few exclusions for this benefit. Now this includes say, participating in professional sports. Now, can I confirm, Zondani, you're not a professional kickboxer?
>
> ZM: No, no.
>
> EH: All good. We can make that joke with everybody. But you'll happily be covered with that benefit. Now, you can choose cover just for yourself, but we'll happily put any family members you like on the policy.

682 During the exchange Ms Hunt giggled. During the call Ms Hunt had delineated between Let's Insure Funeral Cover, the HEC, ADC and AIC, and as the recited passage reflects, she only referred to exclusions in relation to AIC. This was the only occasion during the sales call she referred to exclusions.

683 When Mr Thompson took over the call the references to exclusions were as follows:

> So it's a guaranteed acceptance cover for yourself, so what happens is, Zondani, great I can start the policy for you today, and the good news, the whole family will be covered immediately after the telephone call, subject to those terms, conditions and exclusions outlined in the product disclosure statement.

> …the good news is, you're going to be covered immediately after hanging up the telephone and so will the family of course, subject to those terms, conditions and exclusions outlined in that product disclosure statement…
>
> So, great, once again I can start the policy for you today and the good news is the whole family will be covered immediately after the telephone call, subject to the terms, conditions and exclusions outlined in the product disclosure statement.

684 The Corporate Defendants submitted that because Mr Thompson stated that coverage was subject to the terms and conditions outlined in the PDS, that this refutes the implication of the representation contended for by ASIC. However, the available PDS was not provided to Mr Mtawale at the time, despite his request. The short form PDS does not refer to exclusions.

685 Other than those statements, neither Ms Hunt nor Mr Thompson refer to any exclusions to the Let's Insure Funeral Cover, ADC or AIC. Nor were the definitions of accidental death or accident explained, which as previously noted limit the circumstances in which a benefit is paid.

686 In addition, during the call there were repeated express references, in an unqualified manner, that Mr Mtawale would be paid benefits. In suggesting that benefits would be paid, it was implied that there were no exclusions.

687 I am satisfied that the representation was capable of inducing error. The inference open to be drawn from the joking reference to professional sports, with the example of kickboxing being used, is that the exclusions are limited. I am satisfied that in the context of the call, it was represented that if there were other exclusions, they were not matters to be concerned about. The full extent of the exclusions are significant and would not have been known as a result of this call.

688 Indeed, Mr Mtawale only had a very limited understanding of exclusions, as deposed to in his affidavit. He concluded from the call that the only exclusion related to professional sports.

689 I am satisfied that the representation is established, it is false and/or misleading and it falls within and is a contravention of s 12DB(1)(i).

690 *Second,* ASIC alleged that the Sales Agents made the all family members benefit representation.

691 ASIC relies on the following statements of Mr Thompson:

(1) in respect of Let's Insure Funeral Cover, "everyone on [sic] the family gets $12,000 guaranteed for the funeral on [sic] anything else, straightaway $12,000 per person each";

(2) in respect of ADC, "if anyone dies or there's an accident, no worries, what we do [sic] we give an extra $32,000 per person, so that's $44,000 each"; and

(3) in respect of the AIC, a payout would be made for "common accidental serious injuries" and "$30,000 will be paid out to each person whilst alive".

692 ASIC submitted that each of those statements was misleading, and nothing else in the call qualified them.

693 ASIC submitted that these express statements were false and/or misleading because in fact the Let's Insure Funeral Cover, AIC and ADC only paid the benefit per insured who was injured or who died, and not per policy beneficiary. Mr Mtawale only had one beneficiary to the policy, his wife.

694 The Corporate Defendants submitted that if considered in isolation these statements may be misleading, however, when considered in context, it is clear that Mr Thompson's statements did not convey the meaning contended for by ASIC. They submitted that the references to the payments being made per "person" could only have been interpreted as payments made per insured, not per beneficiary. This was said to have been made clear by Ms Hunt and was correctly understood by Mr Mtawale.

695 It may be accepted, as the Corporate Defendants contend, that the above statements relied on were preceded by an exchange in which the Sales Agent advised "Now if something were to happen to you we would give Nachizya [his wife] that cover, that payout of money okay". These statements are in a context where there had been obvious confusion on this topic, with this Agent handing the telephone to a more experienced Agent as she had been unable to answer a question as to the number of beneficiaries that could be named on the policy.

696 Each of the representations relied on are clear, with the emphasis placed on each person getting the benefit. Contrary to the Corporate Defendants' contention, there is no ambiguity in the representations. The statements were not later qualified. The statements are inaccurate, and were capable of inducing error.

697 The representations relate to the value of the policy, and fall within s 12DB(1)(a). Therefore, there is a contravention of s 12BD(1)(a).

Unconscionability

698 ASIC contended that the conduct towards Mr Mtawale was, in all the circumstances, unconscionable, particularly noting his weaker bargaining position, that Ms Hunt and Mr Thompson repeatedly ignored Mr Mtawale's requests, their failure to advise him of the significant policy exclusions and that the premium was stepped, and that they did not act in good faith. It was also submitted that it was relevant that Mr Thompson and Ms Hunt were participating in the Cruise Incentive and Vespa Incentive at this time.

699 The Corporate Defendants submitted that the conduct was not unconscionable. Mr Mtawale was not in a weaker bargaining position viz-a-viz Select. It was submitted that the matters relied on by ASIC mischaracterise the evidence and that in any event, if made out, they are insufficient to make the conduct "offensive to conscience".

700 As noted above, the personal characteristics pleaded are that he was around 51 years of age, resided in Queensland, has resided in Australia for about 3 years and that English was his third language. Although each of those characteristics were made known to Ms Hunt during the sales call, the significance of the fact that Mr Mtawale lived in Healy, Queensland is unclear, nor for that matter, that he was about 51 years old.

701 It was known to the Sales Agents that Mr Mtawale was from Zambia, and that he had only lived in Australia a short time. The Sales Agents should have been aware that English is not his first language. Although Mr Mtawale asked questions and made repeated requests, they were easily and repeatedly brushed aside by the Sales Agents. That the Agents could easily brush aside any requests or concerns would have been obvious to the Sales Agents, or at least should have been.

702 The Sales Agents ignored, or refused to address, Mr Mtawale's repeated requests to be emailed the policy information, including the PDS, so that he could read it and get back to them prior to the conclusion of the sale. They deflected each of his requests and pressed on with seeking the details they needed in order to complete the sale. They ignored and/or refused his request that he be afforded time to discuss the policy with his wife, prior to the conclusion of the sale. The PDS was played orally, without his consent. That PDS in any event did not cover significant matters. Exclusions were not referred to, and what little was said about that by the

Sales Agents was false and/or misleading. By being denied the opportunity to read the PDS as he wished, he was in a lesser bargaining position than Select. Mr Thompson ignored his request to provide banking details online as opposed to over the telephone. They denied Mr Mtawale an opportunity to reflect before purchasing the policy. The short form PDS was played in a context where he was interested in the conditions such that he had made repeated requests to be provided with the information in writing before he made a decision. This is also in a context when a false and/or misleading representation was made as to the limited exclusions to the policy. The Sales Agents did not pay any regard to his interests. The call reflects in that context they were not acting in good faith.

703 They mounted pressure on him to sign up during the call which built up throughout. This pressure was exerted in response to reasonable requests made by Mr Mtawale. When such requests were made the Sales Agents did not permit that as an option. How that was done, and the tone or manner in which it was achieved, with the Agents speaking assertively, forcefully and in respect to Mr Thompson, also loudly, impact on what was said and the effect on the recipient. They were reasonable requests. Although it may be accepted that an Agent is a salesperson, and in trying to make a sale a salesperson may attempt to overcome any resistance by a prospective purchaser, what occurred here was over and above such conduct. It is properly characterised as unfair pressure. The relative strengths in the bargaining positions was evident in the call, and would have been obvious to the Sales Agents. The impression created in the call by the Sales Agents was that the only thing (or at least proper thing) to do was to sign up to the policy then.

704 I do not accept, given the way in which this call developed, the Corporate Defendants' submission that the fact that Mr Mtawale decided to purchase the product notwithstanding his previously expressed concerns, meant that Mr Thompson could have reasonably concluded that Mr Mtawale had overcome his initial concerns during the course of the conversation.

705 I note also that both Mr Thompson and Ms Hunt were eligible to participate in the Vespa Incentive, as it was an agreed fact that the Vespa Incentive qualifying period was between 9 February 2015 to 30 June 2015, and that it was open to Sales Agents who sold Let's Insure Funeral Cover. Although this is denied by the Corporate Defendants, its documents in relation to the Vespa Incentive do not indicate criteria for participation which precluded either Mr Thompson or Ms Hunt, nor do the Vespa Incentive promotional materials, which refer to an "all sales agents event". The Cruise Incentive was also operating during this period, and it was

agreed that Mr Thompson and Ms Hunt participated in this incentive. The fact of the incentive schemes operating does not render the call unconscionable, but rather tends to provide an explanation for the conduct undertaken. As a consequence, even if I had not been satisfied that they participated in the Vespa Incentive, nonetheless, I would be satisfied that the call was unconscionable (noting that in any event it was at least agreed that they participated in the Cruise Incentive).

706 I am satisfied that the call is unconscionable contrary to s 12CB(1).

Coercion

707 ASIC submitted that this was a very strong case of coercion in that Mr Mtawale was denied free choice and was railroaded into signing up to the policy. That Mr Mtawale was coerced to sign up for the policy and/or provide his direct debit details was said to be established in light of his personal characteristics, weaker bargaining position and the combined effect of the false and/or misleading statements, that the Sales Agents made no reasonable attempts to offer alternative levels of cover, they played the pre-recorded PDS without obtaining his consent, they repeatedly ignored his requests to be emailed the policy information including the PDS and to speak to his wife prior to the conclusion of the sale and they ignored or refused his request to be able to provide the direct debit details online as opposed to over the telephone, but rather continued to exert pressure on him to agree to the sale.

708 The pressure exerted on Mr Mtawale by the Sales Agents was, in ASIC's submission, unreasonable.

709 The Corporate Defendants' only submission, as in relation to the other coercion claims, was that the conduct of Ms Hunt and Mr Thompson lacks the necessary element of compulsion or serious threat.

710 I accept that the underlying factual basis of the integers exists, the issue is whether they establish coercion. As with the coercion claims already discussed, a number of the integers such as the false and/or misleading statements and the PDS being played without consent could not be seen as directed to applying pressure on the Consumer to sign up to the policy in and of themselves. The conduct of particular concern is the unfair pressure applied by the Agents not following Mr Mtawale's repeated requests to be given time to consider the matter, to be provided with the PDS before signing up and to discuss whether to purchase the policy with his wife. The pressure as described above was unfair and was designed to compel Mr Mtawale

into signing up. It was designed to take away his choice or his freedom to act. Mr Mtawale repeatedly expressed reservations during the call. Mr Mtawale said he felt pressured, bulldozed into signing up on the spot. The content of the call reflects that.

711 On the other hand, it can be accepted that Mr Mtawale knew that he was being signed up for Let's Insure cover for each member of his family, as well as accidental cover for himself and his wife. Although he was in a lesser bargaining position, he was not a vulnerable consumer. His evidence was that he thought at the time he could change his mind after the call. This tends against the conclusion that he was compelled to act. He did not change his mind, but rather chose to keep the policy for three years before deciding to cancel it as he had purchased life insurance.

712 The pressure applied might be described, inter alia, as unfair. However, having assessed the call I am not satisfied that his freewill was overborne such that he provided his banking details and signed up then within the concept in s 12DJ(1).

713 I am not satisfied that the Corporate Defendants coerced Mr Mtawale into purchasing the policy at that time.

Teubiti Tapera

714 In respect to Mr Tapera, ASIC pleads in respect to sales calls that Select made one false and/or misleading representation in contravention of s 12DB(1) (FASOC [189]–[191]), coercion in contravention of s 12DJ(1) (FASOC [192]–[193]) and unconscionability contrary to s 12CB(1) (FASOC [194]–[199]).

715 On 7 May 2015, Mr Tapera was signed up to FlexiSure Life Cover for himself and his wife, Emery Tapera, to the value of $50,000, with a policy acceptance date of 7 May 2015, a monthly premium commencing at $213.86 and no nominated beneficiaries. On or about 26 May 2015, Mr Tapera's policy was cancelled before any premiums had been charged.

716 ASIC pleaded that Mr Tapera was an I-Kiribati man from Kiribati who, in the period of May 2015 was around 65 years old, resided in a remote area, in Croker Island in the Northern Territory, and spoke basic English as a third language. It was not contended that Mr Tapera was a vulnerable consumer, but that he was in a weaker bargaining position than Select.

717 The personal characteristics of Mr Tapera pleaded by ASIC are established by the evidence and the agreed facts.

718 It was agreed that on 6 May 2015, Sales Agent, Bethany Gregory, called Ms Tapera for the purposes of marketing FlexiSure Life Cover, and then spoke with Mr Tapera. On 7 May 2015, Sales Agent, Arnold Luichareonkit called Mr Tapera and during that call, signed up Mr Tapera to the policy described above. Mr Luichareonkit took Mr Tapera's bank account details for the purposes of premiums being charged to that credit card on a monthly basis. At the time of signing up to the policy, Mr Tapera already had a funeral insurance policy that covered himself and Ms Tapera. By letter dated 14 May 2015, Mr Tapera requested that his FlexiSure Life Cover be cancelled. The policy was cancelled on or about 26 May 2015, before any premiums had been paid. Mr Tapera passed away on 18 August 2019.

719 It was further agreed that the conduct of Ms Gregory and Mr Luichareonkit was taken to have been engaged in by Select by reason of s 12GH(2)(a) of the ASIC Act. Mr Luichareonkit was also an employee of BlueInc Services at the relevant time and, therefore, his conduct is taken to have been engaged in by BlueInc Services pursuant to s 12GH(2)(a). Further, Ms Gregory was contracted by IMS from a labour hire provider at the time and her conduct is taken to have been engaged in by IMS by reason of s 12GH(2)(a).

Evidence of Mr Tapera

720 ASIC relied on the affidavit of Mr Tapera affirmed on 24 April 2019.

721 As noted above, Mr Tapera was 65 years old in the period of May 2015. He was from Kirabati, an island in the Pacific Ocean. He moved to the Solomon Islands when he was 13 years old. Mr Tapera attended school in the Solomon Islands until the age of 18. Thereafter, he studied theology in Papua New Guinea and in 1990 he came to West Arnhem Land, Northern Territory.

722 Since 1995, Mr Tapera worked as a Minister at the Minjilang Uniting Church, which has mainly an Aboriginal congregation. Minjilang is a remote Aboriginal community on Croker Island. He was married with eight children and had two grandchildren. Mr Tapera held roles as a gardener for the West Arnhem Land Council and as a late night patroller. He received a Centrelink pension since 2015. In 2015, Mr Tapera was supporting his son and grandchild who lived with him in Minjilang. He also sent money to his family in the Solomon Islands from time to time.

723 Mr Tapera's first language was I-Kirabati, although he also spoke Solomon Islands Pidgin and simple English. English was Mr Tapera's third language. He found it difficult to understand accents or when people spoke quickly. Although Mr Tapera could read and write in English,

he used a dictionary to understand technical words. In 2015, Mr Tapera's English was not as good as it was at the time his affidavit was affirmed in 2019.

724 At the time Mr Tapera was signed up to Flexisure Life Cover, in 2015, Mr Tapera had funeral insurance for himself and his wife, but he could not remember with which company.

Sales conduct

725 There are two sales calls; on 6 May 2015 with Ms Gregory and on 7 May 2015 with Mr Luichareonkit.

726 It is necessary to consider the content of each of the sales calls.

727 Ms Gregory, at the beginning of the sales call on 6 May 2015, indicated that she was calling to provide Mr Tapera with a "free quote" or "comparison" (noting that he had existing funeral cover). She asked Mr Tapera how much he paid for his cover, to which he responded "I think [I] pay a month or pay a fortnight, something, somewhere in the hundred, hundred-plus dollar". Ms Gregory then speculated that people are "generally insured for around $15,000 each" and encouraged him to switch his funeral cover to life insurance.

728 Shortly after, Ms Gregory proceeded to provide Mr Tapera with a quote and asked him whether there was an amount for which he would like to be covered. After not receiving any response, she suggested coverage of $50,000 each with a fortnightly premium of $98.71. She asked whether that was affordable and Ms Tapera said that he had to "talk" to the "funeral plan first so that I find out what – what's the real" and he could "maybe…shift over to life insurance". Rather than acknowledging this request, Ms Gregory pushed ahead with the sales spiel. She insisted that Mr Tapera was better off taking up life insurance because he would be "getting quite a significant extra amount there for a little bit less". There appears to be no proper basis for Ms Gregory to make that assertion. She then stated that:

> No matter what, [Teubiti], that money definitely comes back to you there as well. And you can also put some aside for, you know, any other payments that you might need as well. So then generally it's a bit more beneficial to switch over to the life insurance there because of the –those living benefits. Like, for example, [Teubiti], you've also got worldwide cover…

729 In response, Mr Tapera asked whether there was any possibility if he decided to change insurance, whether his funeral plan will automatically transfer to life insurance. Ms Gregory responded that:

> It doesn't transfer over but we can assist you with – if you did want to cancel your

funeral cover.

730 And then says: "So it's almost like transferring". And then again says:

> Usually the way people do it is they cancel their cover and they usually just sign up with us and we can assist.

731 Pausing there, it is entirely unclear how it is "almost like transferring".

732 Ms Gregory then played a "1-minute recording" of the PDS. The PDS was played without asking for Mr Tapera's consent or whether he understood what had been played. Mr Tapera said that the PDS was played quickly and without enough time for him to understand what had been said. That is an inference readily drawn from the content of the call.

733 After playing the PDS, Ms Gregory proceeded to suggest that Mr Tapera sign up to the policy. Mr Tapera repeatedly said he wanted to consider the matter:

> BG: Now, what I can do for you today, [Teubiti], is I can actually start the policy for you today. And that means as soon as the phone goes down, you guys will actually be covered immediately for that $100,000 worth of cover. Obviously, you know, subject to our terms and conditions and exclusions outlined in that product disclosure statement, but, yeah, no. [Teubiti], would you like me to get that started for you now and have the paperwork sent out for you?
>
> TT: Um, I think you can send me first the papers.
>
> BG: Yeah.
>
> TT: And as I said, I have to – I'm going to talk to that funeral plan.
>
> BG: Yep.
>
> TT: And I want to really find out what they – yeah, yeah, I think your policy seems to be, um, working according to what I – I think it's good.
>
> BG Yeah, yeah, well, in that situation --
>
> TT: So, but --
>
> BG: -- [Teubiti], what I can do --
>
> TT: Yeah.
>
> BG: -- I can start the policy for you up today for both of you, but without requiring any payment. So it just means that you guys get the next two weeks free sort of a thing…

734 It is plain from that passage that Mr Tapera did not want to be involved straight away but wanted to make an inquiry about the existing cover he already had. That does not deter Ms Gregory who ignored those requests and persisted with her sales spiel and went straight into when the payments would come out of his bank account before he had agreed to the policy. Ms Gregory continued to pressure Mr Tapera into doing what she wanted.

735 Mr Tapera declined the offer and insisted that he "read the papers first". At that point, Ms Gregory indicated that a "little information pack" would be sent to him by post in three to five business days and that she would call back "on the Friday", which was two days later (being 8 May 2015).

736 Throughout the sales call, Mr Tapera repeatedly said he would like to see the paperwork first and speak to someone about the funeral insurance he had. There is also evident confusion by Mr Tapera at times. On numerous occasions, he asked "What's that?"

737 Mr Luichareonkit called the very next day (being 7 May 2015), at a time that Mr Tapera could not have received the documents he was promised.

738 From the outset the call proceeded in this manner:

> AL: Now, again, for yourself and also covering your wife as well, so, you know, it's like both of you are leaving –leaving a legacy for your kids, basically, don't you agree? So, basically, $50,000 worth of life cover for yourself and $50,000 worth of life cover for your wife, Emery, okay? And altogether you'd only really be looking at a fortnightly premium of $98.71. So you're getting basically more better value for money. We can increase – we've increased your cover, which means the good 1 news is we could save you money, okay? So at $50,000, you could still take care of your funeral, but, again, also, Emery, if you were to pass away, it pays out to your family, okay? If you were to be diagnosed terminally ill as well, within 12 months of being diagnosed terminally ill you can claim on that 100 per cent of the lump sum for yourself and also – happier note – again, if you to live up to 85, 100 per cent of that benefit paid to yourself, okay?
>
> TT: Yeah.
>
> AL: There you go. Fantastic. So, again, um, just to recap on everything – after that, rather, so the good news is, to provide you with some documentation, like our privacy statements and everything, you'll receive an email from us, [Teubiti], straight after this call, plus a hard copy in the post some time later next week, okay? And that means we could get you covered in the meantime, subject to terms and conditions and exclusions outlined in the product disclosure statement. Okay, Mr [Tapera]?
>
> TT: What's that?
>
> AL: Oh, well, basically, what I'm saying is, are you happy for me to start the cover for you now so we can get the paperwork sent out for you to read?
>
> TT: Yeah.
>
> AL: Yeah?
>
> TT: Yeah, I want papers to read it first.
>
> AL: Yes, absolutely. Well, basically, like I said before, we do start the cover today, but when people say they want to read it first, we do not take any payment from you today, okay? Providing you with a bit of service there. Make sense,

Mr [Tapera], yeah?

TT: Yeah, yeah.

AL: Good, good. Fantastic. So, again, like me to get this started for you so you can have the paperwork, yes?

TT: Yeah.

AL: Fantastic. No worries. So, like I said, we do not require any payment from you today. You are the one that gets to choose your day of preference, like, if you want to – first payment to come out on a payday or if you just want it to come out on another day that works for you, like within the next fortnight so between now and the 21st of May. Would you like to put it as far back as the 21st of May, or do you want to put it on another day?

TT: Yeah, yeah, I think – I need the paper first to read them properly.

AL: That's exactly what we're providing you with. So you can have a read of everything well before first payment. Okay?

TT: Yeah.

AL: Yep? Fantastic. So would you like to put it back as far as May 21st?

TT: Um, May 21st (indistinct).

AL: Okay, okay, fantastic. Now, and after you've had a read through everything, Mr [Tapera], all you can do is, um, if you're – you know, have any concerns and you think you can't, you know, pay on the 21st of May, all you have to do is call us up and you can actually move that date a little further down into the future, okay?

TT: Yeah, yeah.

AL: So you'll be able to have a lot of flexibility, hence the name, Mr [Tapera]. Fantastic.

TT: Yeah.

AL: Now, as I said, we don't take any payment from you today, but we do set this up via direct debit or Visa or MasterCard. So we don't take any payment today; we just note it down for you today for your security as well as safety as well, just to make sure that we're speaking to the Mr [Tapera].

TT: Yeah.

AL: So, do you have a direct debit or Visa/MasterCard? What do you prefer?

TT: Huh? What's that?

AL: Do you have a direct debit or Visa or MasterCard to have everything sent out to you, sir? Did you understand exactly what I said just then?

TT: Yeah.

AL: Yes?

TT: Yeah. After – yeah, when I read the paper first and --

AL: Yes.

TT: -- then, yeah.

AL: Basically --

TT: I will concern my --

AL: I understand.

TT: -- where my money goes to, you know?

739 In his affidavit, Mr Tapera explained that he believed that the policy would not start until after he had read the paperwork. Mr Tapera's policy was cancelled on 26 May 2015.

Admission

740 At the outset it is appropriate to refer to the QA assessment undertaken by Select in relation to the call on 7 May 2015. It is telling for three reasons. *First,* it assessed the call as a 'fail'. *Second,* despite that, it passed certain aspects of the call which, a consideration of the call reflects, could not properly have been considered appropriate in the circumstances. This reflects on the quality of this process, and as previously mentioned, the quality of the call appears to be assessed against the script provided to the Sales Agents to use in the calls. *Third,* despite that, the assessment concludes with the following notation:

> Customer was confused when asked if he had cover in place already – sold on application as the customer thought he was receiving documents to check. Customer did not know they were starting the policy as the agent sold the policy under the illusion the customer was only receiving documents – was prompted for answers. There were pauses throughout the call, and the customer seemed to be confused by a lot of things.

741 That description is apt.

742 Mr Luichareonkit made no inquiry about whether Mr Tapera had received the documents, but just talked at and over Mr Tapera. From the outset Mr Tapera asked or said "what?" or "what's that?" in response to what was being said. Mr Tapera's evidence is that the Sales Agent was speaking quickly and it was difficult to keep up with the language. That is obvious from the content of the call. Despite that, Mr Luichareonkit proceeded on, talking about features of the policy. When Mr Luichareonkit attempted to sign him up to a policy he did not listen or, it appears, care for the concerns raised by Mr Tapera. Early in the call, he made the claim that Mr Tapera was "getting basically more [sic] better value for money", a claim for which he could have no proper basis, except a desire to sign up Mr Tapera.

743 The QA assessment is capable of being treated as an admission. That said, as noted above, the description is borne out by the content of the call. This admission of the obvious, is to be

contrasted to the submission of the Corporate Defendants which included relevantly the submissions outlined below at [0], [0] and [0] which contend matters to the contrary.

False and/or misleading representations

744 One false and/or misleading representation is alleged, that Mr Tapera could only be sent policy information regarding FlexiSure Life Cover once the insurance policy had commenced and/or he had provided his payment details. The Corporate Defendants admit that allegation. That false and/or misleading statement forms part of the integers of the coercion and unconscionability claims and I will return to the topic in that context.

745 Although ASIC had alleged in its FASOC that another false and/or misleading statement was made by Ms Gregory, this allegation was withdrawn at the hearing.

Unconscionability

746 ASIC alleges, and I accept, that Mr Tapera was in a weaker bargaining position than Select and the tenor of the calls would have made that readily apparent to the Sales Agents. It would have been apparent to both Sales Agents that Mr Tapera was confused at times. This, with the language used, would have alerted the Sales Agents to some difficulty of Mr Tapera in understanding what was being said.

747 Although the Sales Agents would not necessarily have known that Mr Tapera was on a pension, it would have been obvious given what they did know, that he was not flush with funds and would not be able, or want, to pay for policies in addition to his funeral cover.

748 In that context, as explained above, the Sales Agents spoke quickly, rushed him through the call, overcame objections he made, and ignored the obvious confusion by Mr Tapera. The Sales Agents made a false and/or misleading statement, on a matter of significance. The Sales Agents ignored Mr Tapera's requests, made on five occasions, that he be sent the policy information and/or afforded the opportunity to discuss the FlexiSure Life Cover with his existing funeral plan provider.

749 More particularly, Mr Luichareonkit bulldozed his way through the call of 7 May 2015 and any objections Mr Tapera had. His tone and manner was forceful. Mr Luichareonkit spoke quickly and did not pause throughout the conversation. I do not accept the Corporate Defendants' submission that Mr Luichareonkit did not rush him through the call, or did not speak quickly. Mr Luichareonkit (and Ms Gregory) did not ask Mr Tapera what his needs were

in terms of taking out a life insurance policy or if he wanted a life insurance policy. ASIC correctly describes that he bombarded Mr Tapera with features. He did not inform him of any exclusions. He signed him up to a policy involving over $200 a month payment when he knew Mr Tapera already had a funeral insurance policy on foot, which he was paying for, and where he wanted to address that policy and get advice from his existing provider before signing up to anything. He took his financial details on a false basis, having told Mr Tapera that he need to do that before he could send him the policy documents. Mr Luichareonkit did not make clear to Mr Tapera he was signing him up to a policy. He did all this knowing that Mr Tapera wanted to read and consider the material first. He did not make any genuine or reasonable attempt to ascertain that Mr Tapera understood what had been discussed.

750 The Corporate Defendants submitted that:

> Although Mr Tapera initially wanted the documents sent out to him before signing up to the policy, he appeared to be eventually convinced to provide his payment details after Mr Luichareonkit explained to Mr Tapera that he would not be charged until 21 May (two-weeks from the time of the call), so that he could read all the documents "well before the first payment". Mr Luichareonkit could have reasonably concluded that Mr Tapera had overcome his initially stated concerns during the course of the conversation…
>
> Mr Tapera's concern was that money was not taken from his bank account until he was sent the policy papers. This concern was accommodated…

751 I do not accept that submission. It is not borne out by a proper consideration of the call. Indeed, the submission omits reference to the false and/or misleading statement made by Mr Luichareonkit that it was necessary to obtain Mr Tapera's bank details before the paperwork could be sent to him. Mr Tapera's concern was that he get the policy documents before any decision was made to sign up to the policy. That did not occur.

752 In that regard, as noted above, Mr Luichareonkit's statement that the written policy information documents could not be sent to Mr Tapera until the Sales Agent had his payment details is, as discussed above, plainly false and/or misleading.

753 The Corporate Defendants submitted that those:

> …comments were made in the context of him emphasizing that no money would be taken out of Mr Tapera's account until he had read the papers so there was no disadvantage in providing those details. Although it is accepted that, viewed objectively, Mr Luichareonkit did convey the meaning that policy information could only be sent out once Mr Tapera had provided those payment details, this was not a deliberate misrepresentation. It was an inadvertent misrepresentation caused by Mr Luichareonkit's eagerness to stress an advantage of the service provided.

754 Again, I do not accept the submission as to the Sales Agent's motive. He plainly wished to sign Mr Tapera up to the policy in the telephone call. This telephone call had taken place in a context where Ms Gregory had spoken to Mr Tapera the day before, and where there was eventual agreement that the documents he requested would be sent, but that it would take 3-5 days for them to arrive. It was only after that time, when Mr Tapera had had time to consider that (and his existing policy), was the further call from Select to be made. Mr Luichareonkit did not show any concern for Mr Tapera. He did not wait for the documents to be sent, but telephoned the next day to make the sale. Once Mr Tapera was signed up, which occurred in that call, he remained signed up to the policy until he cancelled. It was to the Corporate Defendants' advantage to sign him up in that call.

755 The description of acting in bad faith, which is alleged by ASIC, applies particularly to Mr Luichareonkit. The manner in which the call occurred is described above and is unnecessary to repeat. The call was not conducted with any concern for Mr Tapera, with an approach taken, including using a false and/or misleading statement to obtain his banking details, to sign up Mr Tapera to a policy in circumstances where he was aware (or at least should have been) that Mr Tapera was confused at times, had made it clear that he wanted to see the policy documents first, and where he did not seek or obtain his consent to sign up to a policy and knowing he already had funeral insurance.

756 The Corporate Defendants submitted:

> Some may not approve of Mr Luichareonkit's persistence in encouraging Mr Tapera to purchase the policy despite his initial reluctance. But such conduct was not unconscionable. Encouraging potential customers to overcome their initial doubts about a product is a very ordinary sales technique. Nothing about Mr Luichareonkit's application of that technique was offensive to conscience.

757 I do not accept that submission. It fails to grapple with the context in which the call took place, and the content of the call.

758 I note that ASIC alleges Mr Luichareonkit was participating in the Cruise and Vespa Incentives, as an integer of unconscionability. It is difficult to see how that effects the call being unconscionable. That said, it may well explain his conduct in conducting the call as he did.

759 I am satisfied that ASIC has established the sales conduct is unconscionable.

Coercion

760 Given his personal circumstances and his obvious weaker bargaining position, ASIC pleads that the conduct engaged in by the two Sales Agents, namely speaking too quickly, rushing him through conversations, making the false and/or misleading statement, playing the pre-recorded PDS without his consent and ignoring and/or refusing Mr Tapera's requests on five occasions that he be sent the policy information and/or afforded the opportunity to discuss the FlexiSure cover with his existing provider, coerced him into signing up to the policy and/or providing his credit card details over the telephone.

761 The existence of the integers relied on can be accepted.

762 In that context, I note ASIC submitted that:

> One may well ask how a 65 year old man, who was not employed and survived on a disability pension and supported his wife, son, grandson and extended family in the Solomon Islands, would willingly agree to a policy that saw him pay $213.86 per month in premiums. This itself is strong evidence that entry into the policy was not a product of his free will.

763 That submission can be accepted.

764 Moreover, the Corporate Defendants admit the false and/or misleading statement, which in this case was directed to getting Mr Tapera to sign up for the policy and provide his bank details on a false premise. As previously observed, playing the pre-recorded PDS without his consent was not conduct (even when considered in combination with other conduct) directed at pressuring or compelling Mr Tapera to act. However, in a context where Mr Tapera had a funeral policy in place, ignoring the repeated requests by him that he be provided with the policy information for review in advance, and the manner of the telephone call as described above, in effect railroaded Mr Tapera. Mr Luichareonkit's conduct including his tone during the conversation, was forceful. It was rushed. It was designed to deprive him of his wish to obtain the policy documents in advance of signing and the opportunity to speak to his existing provider. So much is evidenced, inter alia, by the false and/or misleading statement which was made. That conduct was designed to put pressure on him to provide his bank details and to agree to the sale.

765 Although the first sales call concluded on the basis that the material he requested would be sent to him to consider in advance of Select telephoning again, a call was made the very next day. At that time, Mr Luichareonkit must have been aware of the circumstances in which the previous call concluded. Given the timing and content of his return call, it can be inferred that

he considered Mr Tapera's wishes were not something with which he would concern himself. The conduct in that call is to be considered in that light. To the contrary, an objective assessment of the call reflects the intention was to pressure Mr Tapera to sign up to a policy regardless. A consideration of the content of the call reflects that this is not simply a sales technique. He was deprived of his ability to make a free choice because of the conduct of the call.

766 Again, the Corporate Defendants did not address the detail of the call but rather, as with other claims, simply contended it did not amount to the 'compulsion or serious threat' necessary to satisfy coercion.

767 In the circumstances, I am satisfied that Mr Tapera was coerced into the purchase. Accordingly, there is a contravention of s 12DJ(1).

Dawnetta Yeatman

768 In respect to Ms Yeatman, it is contended that Select (via its Sales and Retention Agents) contravened s 12DB(1) by making two types of representations that were each false and/or misleading (FASOC [296]-[300]); contravened s 12DJ(1) during the sales call by coercing Ms Yeatman into signing up to FlexiSure Life Cover and/or providing her direct debit details over the telephone (FASOC [301]-[302]); contravened s 12CB(1) during the sales call to Ms Yeatman by engaging in unconscionable conduct (FASOC [303]-[308]); and contravened s 12DJ(1) by unduly harassing Ms Yeatman by continuing to contact her to seek payment of her premiums during retention calls (FASOC [309]-[310]).

769 ASIC pleaded that Ms Yeatman is an Aboriginal woman who, in the period of June to October 2015, was around 46 years of age, resided in a remote area of Queensland and had completed secondary education to Year 10. It was contended that Ms Yeatman was in a position of vulnerability and/or in a weaker bargaining position viz-a-viz Select.

770 The personal characteristics pleaded by ASIC are established by the evidence and the agreed facts.

771 It was agreed that on 17 June 2015, Sales Agent, Jimmy Haddad, signed Ms Yeatman up to FlexiSure Life Cover to the value of $35,000 with a policy acceptance date of 17 June 2015, a fortnightly premium commencing at $12.47 and no nominated beneficiaries. Mr Haddad took Ms Yeatman's bank details for the purposes of premiums being automatically deducted on a fortnightly basis. From the time that Ms Yeatman signed up to the policy until the policy lapsed

on 8 October 2015, Ms Yeatman paid $49.88 in premiums. She subsequently received a full refund plus interest.

772 It was further agreed that the conduct of Mr Haddad is taken to have been engaged in by Select by reason of s 12GH(2)(a). Mr Haddad's conduct is also taken to have been engaged in by IMS per s 12GH(2)(a), because at the relevant time he was contracted by IMS from a labour hire provider. It was also agreed that under s 12GH(2)(a) the conduct of Ms Clynes and the Retention Agents referred to at FASOC at [288]-[292] (with the exception of Tom Stotesbury and Rachel Ward) is taken to have been engaged in by BlueInc Services, as each were employees of BlueInc Services. The parties did not address the position of Ms Ward or Mr Stotesbury in this respect.

Evidence of Ms Yeatman

773 ASIC relied on the affidavit of Ms Yeatman affirmed on 31 May 2019. The affidavit was admitted, subject to some minor objections.

774 Ms Yeatman was around 46 years old in the period of June to October 2015. She is an Eastern Yalanji Aboriginal woman, who was born in Cairns and raised in Yarrabah, an Aboriginal community in Queensland. Ms Yeatman completed school up to Year 10. English is her first language.

775 In 2003, Ms Yeatman moved to Cherbourg, Queensland, where she lived with her partner for 10 years. In Cherbourg, Ms Yeatman worked for the Community Development Employment Program (CDEP), and she also held roles in rehabilitation, day care and at the children's shelter. Ms Yeatman split from her partner in 2012, although they remained close until his death in November 2015. Ms Yeatman never married and has no children.

776 Ms Yeatman has chronic diseases including type 2 diabetes, kidney issues, asthma and has had half of her lung removed. She was placed in an induced coma in 2016. Ms Yeatman receives a disability pension, and in 2015 her income was around $800-900 per fortnight.

777 Ms Yeatman said she had a few insurance policies before 2015, mainly because she is a "sick woman on a disability pension" and she wanted to look after her sister if anything happened to her, but she did not know much about insurance back then.

Sales conduct

778 At the beginning of the sales call on 17 June 2015, Ms Yeatman told Mr Haddad that she already had funeral and life insurance.

779 It is evident from the call, that at times Ms Yeatman was not following what was occurring. There were pauses, and non-responses. She spoke softly and slowly. Ms Yeatman spoke with an Aboriginal accent. She said "what", "pardon?", "um" and similar responses to questions on a number of occasions.

780 In her affidavit, Ms Yeatman stated that the caller spoke quickly and at times she did not understand what he was saying. This is reflected by the recording of the call.

781 The call included:

> DY: Can you just send me out a package there and I'll make my own mind up?
>
> JH: Yeah, yeah. I guess what we'll do there, we'll leave the beneficiary form with you. I'll send you out a welcome pack there, [Dawnetta], and that itself in your own time, whether or not you want to leave it for your sister or not, you can fill that out in your own time.

782 Ms Yeatman explained that she wanted the caller to send her the information so that she could make up her own mind but she felt as if the caller was trying to sign her up on the spot.

783 Mr Haddad went straight into the PDS. Mr Haddad said the recording of the PDS was "a bit quick". It is evident that there was no consent asked to receive the PDS in this way, nor was there any attempt to ascertain whether she understood. The "yeah" she gave in respect to the question as to whether she had heard and received the message, leaving aside that it is the wrong question to ask, given the manner in which it was said, appears to reflect a lack of understanding of what was occurring. It was said in an unsure manner. This response and in that manner is repeated on other occasions during the call. That was, or at the very least should have been, readily apparent to Mr Haddad. I note also that Ms Yeatman's evidence is that she did not know what a PDS was.

784 Shortly thereafter, the following exchange occurred:

> DY: What's – what I want to do is, um, is just send me out a pack. I'd then understand it better. And I want to make up my own mind whether it suits.
>
> JH: Yeah, no. --
>
> DY: (Indistinct) or not, see?
>
> JH: Yeah.

DY: That's all I'm asking.

JH: Yeah, yeah, definitely. Well, I guess in that case there, [Dawnetta], we do understand that you've got a policy in place. So that's more than understandable. I guess what I'm trying to offer you there is giving you a chance to see whether or not you want to use this cover, replace it with your existing cover, okay? And I guess at the same time see whether or not you want to save some money there. I guess most importantly there, [Dawnetta], we can be saving you that $50 a month there. Okay.

DY: Yeah.

JH: Okay, but I guess this is a decision that you have to make there yourself. Okay? Now part of our process is through that process, okay, we don't require any payments off you now, okay? So what I can do there is defer the day of your preference. But the good news there itself is that we can get the policy started for you now. So, I guess, meaning as soon as you put the phone down there, [Dawnetta], okay, you're going to have the cover in place subject to the terms, conditions, exclusions outlined in the product disclosure statement there, okay?

Now, on my end, what I'll be doing is organising your policy documents to be sent out to you via email. So once you put the phone down, you should have the email within the next half an hour. Plus a hard copy in the post, which you should receive in the next three to five business days, okay? And this is also going to include the PDS, which contains details of our privacy statement and how we deal with your personal information required under the privacy legislation. Now, [Dawnetta], you're obviously going to be happy to read those privacy statements all yourself?

785 Mr Haddad went straight into obtaining Ms Yeatman's payment details.

786 Pausing there. Mr Haddad repeatedly stated throughout the call that Ms Yeatman would be making a saving of $50 per month and that would occur by signing with them. It was also said that they were providing an additional $20,000 of cover. However, as discussed further below, there is no reasonable basis in the call or elsewhere for those figures. Mr Haddad simply stated the propositions and then repeatedly used them, particularly the $50 saving, as leverage during the call. This was used as a sales tactic, with 11 such statements made during the call. The $20,000 statement was only made three times during the call.

787 Then as follows:

DY: It'll be – it'll be totally up to me whether I go with you guys or not, hey?

JH: Yeah. So this is – yeah, this is a decision that you're going to make in your own type. Now, I guess if you can receive the documents, you want to make changes, you can do so, but I guess that itself we're providing you the opportunity to save that $50 a month there, okay? Now, I guess if you want to make changes in the future, you can give us a call back and let us know if you want to make any changes, whether you want to increase it I guess really depends on what you want to do thereafter. But it's a decision that you make in your own time. But this ensures - obviously it allows you to sit down, ensure

that you are happy with our cover most importantly there, [Dawnetta].

788 At the end of the call, Ms Yeatman was signed up to the policy. The policy was for $35,000, which Mr Haddad said was the minimum amount of cover provided. It had no beneficiary. Contrary to what Mr Haddad said, it was not a situation of the decision being Ms Yeatman's after she saw the documentation. Ms Yeatman would then have to cancel. Noting also that the conversation about her decision, from Mr Haddad's perspective, is plainly put on the basis as to whether there was enough cover.

789 There was a follow up call, on 24 June 2015. This does not assist. It was brief, and confirmed that she received the material sent, and that she could increase or decrease the cover. I note there is no suggestion that she could cancel her policy. If this was a follow up call in accordance with the policy because Ms Yeatman is Indigenous, the nature of the call was such that it achieved no purpose. It made no attempt to ensure that Ms Yeatman understood what occurred or that she wanted the insurance signed up for. It was perfunctory.

Admission

790 As previously explained, after St Andrew's had notified Select of a spike in sales to Indigenous communities, Select embarked upon a process of reviewing the relevant calls to people within the nominated post codes and made some refunds.

791 As a result, Ms Yeatman was sent an email dated 26 February 2019. It was in the following terms:

> Dear Dawnetta,
>
> **You are entitled to a refund**
>
> We think you have paid for life insurance you may not have wanted, and we are going to fully refund your premiums plus interest at 6% pa.
>
> We are referring to FlexiSure Life Cover insurance policy you bought from FlexiSure on 17 June 2015.
>
> According to our records, your Policy is no longer in force as it was cancelled by us due to non-payment of premiums on 08 October 2015.
>
> **Why you're entitled to a refund on your Flexisure Insure policy**
>
> You no longer have your FlexiSure policy, but we think that when purchasing it our representative did not take appropriate action to ensure that you were able to make an informed decision. Therefore, we have decided to refund all premiums you have paid for this policy.
>
> **…..**

792 The conclusion in the letter is capable of being an admission by Select as to the quality of the sales call and conduct involved therein. It may be accepted that it is not directed to a particular claim or nature of a claim, for example, unconscionability. That said, it does involve an admission of a lack of appropriate action to ensure Ms Yeatman was able to make an informed decision, which is in stark contrast to the submissions now advanced, including, that Mr Haddad made a genuine and reasonable attempt to confirm that Ms Yeatman understood everything that had been discussed during the call.

False and/or misleading representations

793 The Corporate Defendants admitted that the statement by Mr Haddad to Ms Yeatman that $35,000 was the minimum amount of cover offered (and which she was signed up for), is false and/or misleading.

794 The second set of representations made to Ms Yeatman were that, with FlexiSure Life Cover, compared to her existing insurance, Ms Yeatman would save $50 per month and have additional coverage of $20,000.

795 These representations are said to include the following passages;

> I'm going to start you off with our minimum – 35,000, okay? So what this is going to do is its going to give you an additional $20,000 worth of cover as opposed to your 15,000 that you have… So I guess based on this level of cover there, [Dawnetta], what we can actually do there for you is provide you an additional $20,000-plus worth of cover and save you just under $50 a month, okay….
>
> …all we're trying to do there is … save you some money, and $50 a month, okay, is a considerable amount of money… not only that, we're going to provide you with an additional amount of cover. So I guess you can be paying less for more…
>
> So I guess the real question there is being that we can save you that $50 a month…
>
> …so I guess if you're on the pension, that $50 a month can stay to yourself rather than, I guess, being that we can provide you the higher level of cover for less, what we can do, um , we can leave it at the 35,000, give you that additional coverage, okay, but save you some money…
>
> …the figures are quite obvious, being that you can save just under $50 a month, okay…
>
> …we're providing you the opportunity to save that $50 a month there, okay…
>
> [Dawnetta], I guess the $50 that you're saving each month on the premiums, that could be your spending money… instead of paying $70, you're only paying $27, and you're actually getting $20,000 more cover…

796 The information on which the representations are based is said by the Corporate Defendants to have come from the call itself. However, the information provided is this:

JH: Now, right, [Dawnetta], do you currently have any life or funeral cover in place at the moment?

DY: Yes, I do.

JH: You do, okay. Fantastic. How much are you currently covered for at the moment, there?

DY: One is for 365. The other one is – oh goodness, I can't tell you what the other one is (indistinct).

JH: All right. No that's fine. And how much are you paying for the 365 a month?

DY: Um. (Indistinct) Sorry. (Indistinct) oh, shit. I think its $60-something, and the other one is 70.

JH: The other's one's 70. And is the other one more like a funeral cover there itself or –

DY: Yes.

JH: Yeah, so your cover's around 10 to 15,000, would that be the case?

DY: What?

JH: Would you be covered for around 10 to 15,000 with the $70 one?

DY: [Something like that].

797 The information as to her existing policies was scant, and as relayed, vague at best. He did not know the terms of those policies. In that context, the positive future representations that Ms Yeatman would be benefitted by $50 per month savings and higher coverage of $20,000, were misleading. Mr Haddad had no reasonable grounds for making the representations. As a consequence of s 12BB(1) of the ASIC Act, those representations are taken to be misleading.

798 As noted above, such representations were made 11 times during the call. It follows, as ASIC contended, that s 12DB(1) is contravened each and every time Mr Haddad made the statements about saving $50 per month and providing $20,000 more in benefits.

Unconscionability (Sales conduct)

799 It is alleged that Ms Yeatman was, because of her personal characteristics, vulnerable, or at least in a weaker bargaining position, with respect to her dealings with Select.

800 The factors or characteristics relied on are established by the evidence. Moreover, such factors would have been known to Mr Haddad, or at the very least, ought to have been. Ms Yeatman was an Aboriginal woman, she spoke with an Aboriginal accent, her age was known, as was the fact of her address being in Queensland. These are apparent from the call. I note the Corporate Defendants contend there was nothing to indicate that the address was remote.

Although remoteness was not discussed, given the name of the address, in the circumstances, it could be inferred. It is plainly not a major centre. It would also have been apparent, or ought to have been, from the content and manner in which Ms Yeatman spoke, that she was having difficulty at times understanding what was being said. Ms Yeatman also told him she was on a pension. Indeed, Mr Haddad made the point of her saving $50 a month, in the context that she was on a pension. That amount is referred to as a considerable amount of money each month. He said that he recognised that being on a pension meant that "every dollar" counted.

801 ASIC also rely on factors to establish vulnerability which it accepts were not known to the Sales Agent. This primarily related to the fact that she had limited financial means. The uncontested evidence is that, at the time of the sales call on 17 June 2015, Mr Yeatman's only source of income was a disability pension of $800-$900 per fortnight. I note that Ms Yeatman told Mr Haddad that she was "only on a pension at the moment" during the sales call and she could not afford $12.47 per fortnight in premiums in addition to her existing insurance. The other factors relate to her health.

802 I accept that Ms Yeatman was vulnerable, or at the very least, in a weaker bargaining position.

803 Given that, and the content and circumstances of the call (including, inter alia, that Ms Yeatman repeatedly said she wanted to be sent the material first, that she already had insurance and was on a pension) there were no genuine or reasonable inquires made of Ms Yeatman to ensure that she understood what was discussed during the call or what she signed up to.

804 It can readily be inferred from the call, and the manner in which it progressed, that she was not in a position to push back. Mr Haddad kept pushing through, brushing aside her concerns. He took advantage of her position. It would have been obvious to Mr Haddad, that he was able to do so. He ignored her repeated requests to be sent the policy information before deciding to sign up, and that she be given time to consider. In that context, the short form PDS was played without her consent to do so, and there was no attempt to ensure she understood its contents. He did not respond to her questions, and on occasion spoke over her. In his rush through the call, no beneficiary was even nominated. He used false and/or misleading representations, and one repeatedly throughout the call. That was an unfair tactic.

805 The allegation of a lack of good faith is said to be established by the features of the call. For example, ignoring the repeated requests to be sent the policy information before deciding whether to purchase the policy, failing to give her an opportunity to consider the policy as

requested, speaking over Ms Yeatman, rushing her through the telephone call, the false and/or misleading statements, and failing to take genuine and reasonable steps to ascertain that Ms Yeatman understood what was happening.

806 In the circumstances of this call, where Ms Yeatman's confusion was evident, where she wanted to see the policy information before signing up and wanted time to consider, the pressure exerted railroaded her through the call. The suggestion that by starting the policy immediately and deferring the initial payment for three weeks meant that she could make her own mind up, was disingenuous. What that meant was that she had to cancel the policy after she had already signed up (without having seen the policy documents first as requested). The persistence and tactics used, were to achieve the sale regardless of Ms Yeatman's wishes. Whether or not Mr Haddad's false statement to her as to the minimum amount of a policy was likely a mistake is immaterial, the pressure exerted from the repeated misleading statements as to the benefits of this policy was unfair.

807 The Corporate Defendants submitted that the false and/or misleading representation made by Mr Haddad did not appear to have had any influence on her decision to purchase the policy, because she made the decision to purchase the policy because she "just wanted to see what the thing was" and "knew I could cut him down through my bank later". Those quotes come from Ms Yeatman's evidence and it is appropriate to see them in context. The first was in the context of her explaining that she wanted to read the policy documents before signing up, but she "realised he was making me sign up that day and that money would come out". It was, therefore, made in the context of the refusals by the Sales Agent to give her the time requested, to consider the matter before signing up for the policy. She also stated that she did not feel he was listening to her. Relevantly, immediately thereafter is the passage "[i]t made me feel uneasy but I still went ahead with it. I just wanted to see what the thing was". The second quote relied on by the Corporate Defendants was said in this passage "I felt like he just did most of the talking and I was shut out. I felt like he would not listen to what I was saying so ended up just letting him have a run of it. I knew I could cut him down through my bank later".

808 It may be that the false and/or misleading statement did not influence Ms Yeatman, yet those passages relied on illustrate the unfairness in the call. For example, a consumer should not have to sign up for a policy to see the details of the policy because the Sales Agent would not provide them to her in advance, or give her time to consider the issue. Moreover, as a matter of

principle, there is no need to demonstrate that the consumer was misled to make out a claim of unconscionability, as the focus of unconscionability is on the conduct of the alleged wrongdoing party, having regard to the surrounding circumstances (such as the consumer's vulnerability, relative bargaining strengths, etc).

809 In all the circumstances, I am satisfied that the sales call is unconscionable and is contrary to s 12CB(1).

Coercion (Sales conduct)

810 ASIC alleges that Select coerced Ms Yeatman into signing up to FlexiSure Life Cover and/or providing her direct debit payment details over the telephone in light of Ms Yeatman's personal characteristics and circumstances and Mr Haddad engaging in the following conduct:

(1) speaking quickly and talking over Ms Yeatman and not responding to her questions;

(2) rushing her through the conversation; using many words that she did not understand;

(3) making the false and/or misleading representations (as referred to above);

(4) playing a pre-recorded PDS without first obtaining Ms Yeatman's express and/or informed agreement to do so;

(5) ignoring or refusing Ms Yeatman's multiple requests that she be sent the policy information prior to the conclusion of the sale;

(6) ignoring her requests that she be allowed to make up her mind after receiving the policy information;

(7) signing her up to the insurance policy during the same telephone call rather than giving her the opportunity to reflect;

(8) failing to make a genuine, or alternatively reasonable, attempt to confirm that Ms Yeatman understood everything discussed during the call; and

(9) failing to expressly confirm she understood that she was signing up to FlexiSure Life Cover that day.

811 ASIC submitted that Ms Yeatman's lack of understanding at the end of the sales call that she had been signed up to FlexiSure Life Cover or any insurance policy at all, is a clear indication that her free will was overborne. As previously explained, this submission is one repeated throughout the claims, and of which I have made some general observations above at [0]. They are not necessary to repeat.

812 Although the underlying factual assertions in the integers of coercion can be accepted as established, it does not necessarily follow that Ms Yeatman was coerced as understood in s 12DJ(1).

813 As with other claims, some of the integers are not directed towards compelling or pressuring the consumer to purchase the policy, for example, playing the PDS without seeking consent and the false and/or misleading statements. The details or lack thereof of the policy did not compel or put pressure on Ms Yeatman to purchase the policy. It is also difficult to envisage how Mr Haddad's failure to do something falls within the concept of compulsion. However, as explained above, coercion can be established from a combination of circumstances. That said, there must nonetheless be conduct that falls within the description of coercion, some form of compulsion that took away her free will. In practical terms the only conduct that really could be said to fall within that is Mr Haddad's insistent behaviour, in particular, in the face of repeated requests by Ms Yeatman that she wanted the policy documents, and wanted time to consider.

814 However, as is also apparent from the discussion above, Ms Yeatman's evidence is that she was aware at the time of the sales call that this was about a policy and that she could cancel the direct debit at the bank. Ms Yeatman's evidence is that she was aware at the time of the call she could cancel the policy later. This reflects that at the time of the call she made an active decision to sign up anyway knowing that she could just cancel it at a later point which implies some freedom to act. Notwithstanding that the conduct is to be deprecated, this is a relevant matter to consider in assessing whether it has been established the conduct amounted to coercion.

815 Considering the matters relied on to establish this claim, and the evidence, I am not satisfied that it has been established the call amounts to coercion within s 12DJ(1).

Undue harassment (Retention conduct)

816 In or around August or September 2015, Ms Yeatman arranged with her bank to cancel the direct debit facility in respect of the FlexiSure Life Cover payments, which she said she did when the bank manager drew the insurance direct debits to her attention and suggested that she did not need that much insurance and helped her put a stop on them.

817 On 3 September 2015, the first letter was sent by FlexiSure to Ms Yeatman notifying her of a declined payment. The letter noted "Your financial institution informed us your payment was

declined for the following reason: Payment Stopped". The letter also encouraged Ms Yeatman to urgently call a 1300 number to "ensure you and your loved ones keep this valuable protection under the FlexiSure Life Cover". It is apparent from that letter that Select were aware that the direct debit deductions had been stopped.

818 From 7 September 2015 to 7 October 2015, Retention Agents placed 11 telephone calls and sent two letters to Ms Yeatman regarding unsuccessful premium payments.

819 The call of 11 September 2015, with Retention Agent, Laura Clynes, was in the following terms:

> LC: Hi, Dawnetta, its Laura from FlexiSure. How are you today?
>
> DY: I'm all right.
>
> LC: That's good.
>
> DY: What are you ringing me for?
>
> LC: Okay. So I'm ringing you regarding something that you have with us. Could you confirm your –
>
> DY: No, no, no, I cancelled that with my bank and all that.
>
> LC: Sorry?
>
> DY: I stopped everything.
>
> LC: Okay. Well, Dawn, I need to speak to you about it because it is something that you have with us
>
> DY: No. Can you just fuck off and just leave me the fuck alone.

820 That confirmed what Select already knew, that is, she had cancelled the direct debit. It is also plain that she did not want the policy.

821 On 17 September 2015, she received a further letter advising her of a second declined payment.

822 There were also calls on 17 September 2015, 22 September 2015, 6 October 2015 and 7 October 2015, each of which Ms Yeatman hung up when the caller identified themselves from FlexiSure. She had asked the Retention Agents to leave her alone.

823 Ms Yeatman's unchallenged evidence of the effect of these calls upon her is they were "sickening", "getting on [her] nerves" and "invading [her] privacy". Ms Yeatman felt harassed by the contact.

824 By email dated 8 October 2015, Ms Yeatman was notified that her policy had lapsed because of non-payment of premiums.

825 The circumstances surrounding this conduct include the sales call of 17 June 2015, in which Ms Yeatman was signed up despite already having insurance, being on a pension, and having repeatedly said she wished to have the policy documents sent to her so she could consider the matter before she signed up. Select was well aware that Ms Yeatman did not want the policy and had cancelled her direct debit. Despite that, Select continued to contact Ms Yeatman, and had a further premium charged.

826 Although, as the Corporate Defendants submitted, the Retention Agents were seeking premiums owed, after the contact on 11 September 2015, they could have been under no illusion but that Ms Yeatman did not want the policy, and had deliberately cancelled the direct debit. The Corporate Defendants could have cancelled the policy but did not. Rather, Ms Yeatman was charged a further premium. It was in that context that the calls continued.

827 In the circumstances in which this conduct occurred, I am satisfied that it amounts to harassment and it is undue, contrary to s 12DJ(1).

Josephine Shadforth

828 In respect to Ms Shadforth, it is contended that Select (via its Sales and Retention Agents) contravened s 12DB(1) by making four separate representations that were each false and/or misleading (FASOC [355]-[362]); contravened s 12DA(1) by making a representation that was misleading or deceptive, or was likely to mislead or deceive (FASOC [363]-[365]); contravened s 12DJ(1) during the sales call by coercing Ms Shadforth into signing up to Let's Insure Funeral Cover with optional ADC and AIC and/or providing her direct debit payment details over the telephone (FASOC [366]-[367]); contravened s 12CB(1) during the sales call by engaging in unconscionable conduct (FASOC [368]-[374]); contravened s 12DJ(1) during the retention process by unduly harassing Ms Shadforth (FASOC [375]-[376]); and contravened s 12CB(1) during the retention process by engaging in unconscionable conduct (FASOC [377]-[382]).

829 It was agreed that on 26 June 2015, Ms Shadforth was sold Let's Insure Funeral Cover to the value of $16,000 as well as optional ADC and AIC to the value of $32,000 each over the telephone by Sales Agent, Mr Shah, at a fortnightly stepped premium commencing at $28.69, with a policy acceptance date of 26 June 2015 and four nominated beneficiaries. Mr Shah took Ms Shadforth's bank account details for the purposes of automatically deducting fortnightly premiums. At the time of the sales call, Mr Shah was participating in the Cruise Incentive. Her

policy was cancelled on or about 15 October 2015. Ms Shadforth paid $114.76 in premiums. She subsequently received a full refund plus interest.

830 The pleaded personal characteristics of Ms Shadforth are that she is an Aboriginal woman who, in the period June 2015 to October 2015, was around 57 years old, resided in a remote area, in the Beagle Bay Community in Western Australia, had attended secondary school up to Year 9 and had difficulty writing in English and understanding English over the telephone. It was contended that Ms Shadforth was in a position of vulnerability and/or in a weaker bargaining position than Select.

831 Those characteristics are established by Ms Shadforth's evidence and the agreed facts.

832 It was agreed that the conduct of Mr Shah is taken to have been engaged in by Select by reason of s 12GH(2)(a). It was also agreed that pursuant to s 12GH(2)(a) the conduct of the Sales and Retention Agents referred to at FASOC [314]-[353], which includes Mr Shah, Ms Gustafsson, Ms Clynes, Mr Davies and Ms Fisher (but with the exception for Mr Stotesbury) was taken to have been engaged in by BlueInc Services, noting that each were employees of BlueInc Services at the relevant time.

833 ASIC contends that the conduct of Mr Stotesbury towards Ms Shadforth is taken to have been engaged in by IMS by reason of s 12GH(2)(a) of the ASIC Act. The Corporate Defendants admitted in their Amended Defence that he was contracted by IMS to perform functions on behalf of BlueInc Services, but deny his conduct is also taken to have been engaged in by IMS. Mr Stotesbury was subjected to QA monitoring by Select. For the reasons previously given in respect to attribution of the conduct of Retention Agents, Mr Stotesbury's conduct as a Retention Agent may be taken as the conduct of IMS, by whom he was contracted, and the conduct of Select, on whose behalf he dealt with Ms Shadforth.

Evidence of Ms Shadforth

834 ASIC relied on the affidavit of Ms Shadforth affirmed on 16 May 2019.

835 Ms Shadforth was around 57 years old in the period of June to October 2015. She is an Aboriginal woman who was born and grew up in Derby, Western Australia. Ms Shadforth attended school until the age of 16. Ms Shadforth was previously employed as a healthcare worker. She studied a health worker course in Broome and undertook practical training in Beagle and Bidyadanga.

836 Ms Shadforth has four adult children and presently lives in Beagle Bay, Western Australia. Beagle Bay is an Aboriginal community in the Kimberley region. Ms Shadforth's partner of 40 years lives in Broome.

837 Ms Shadforth only speaks English. She finds it difficult sometimes to understand long words or foreign accents or when people speak too quickly. Ms Shadforth can read English but uses a dictionary to understand hard words and sometimes she will ask someone "a bit more educated" for assistance.

838 Ms Shadforth received a disability pension since at least before 2015. She would usually have about $600 per fortnight leftover after paying rent and bills and does not have any savings. Ms Shadforth has had diabetes for around 4 years and has a "bad back" from working as a camp cook.

839 Ms Shadforth's understanding is that people in her community can get assistance from Centrelink with the cost of funerals but Centrelink will not always pay these costs. It can cost "big money when you die" and sometimes as much as $14,000 or $15,000.

840 Since before 2015, Ms Shadforth has had insurance with InsuranceLine Funeral Insurance (InsuranceLine). Her understanding is that "funeral insurance was to help my kids and to bury me and give me a good goodbye". Ms Shadforth did not want to leave her kids without any assistance if she died.

Admission

841 As previously described, after St Andrew's notified Select of a spike in sales to Indigenous communities, Select embarked upon a process of reviewing the relevant calls to people within the nominated post codes and made some refunds.

842 As a result, Ms Shadforth was sent an email dated 25 July 2017. It was in the following terms:

> We're writing to you regarding the Let's Insure Funeral Cover Policy you previously held with us.
>
> According to our records, your Policy is no longer in force as it was lapsed on 16/09/2015.
>
> As part of our ongoing quality assurance program, we identified that the lapsed policy may not have met all of our requirements for new customers. Accordingly, we wish to advise you that we will be providing you with a full refund of the premiums you paid to us plus interest on the payments at the rate of 6% p.a. (to reflect the interest or earnings that the refund amount would have earned if it had remained in your account).
>
> Your premium refund plus interest will be paid into the bank account associated with

> your Let's Insure Policy, and will be processed on 25/07/2017. Please allow for up to five business days for the funds to appear in your account.
>
> ……
>
> Kind regards
>
> **Let's Insure Quality Assurance**

843 This statement is of such a general nature as to be of no relevance in addressing the claims.

Sales conduct

844 On 26 June 2015, Mr Shah telephoned Ms Shadforth for the purposes of marketing Let's Insure Funeral Cover.

845 This was an unsolicited call. From the outset Mr Shah referred to Ms Shadforth's daughter and others (including Kathleen, Keith, Carina, Jeremy, Diane, Ruth, Daniel, Joseph and Audrey Shadforth, as well as Sharon, Toshika, Francine, Anne-Marie and Erica Cox) who he said he had spoken to, who they had signed up and said he had helped, (for example, "we are helping a lot of people out in Beagle bay") as a means to get her to trust him ("it is just to save you money on what you are paying at the moment, just like we did with Sharon"), accept what he said, and put social pressure on her, to do what he said, in signing up. This continued throughout the call. Ms Shadforth's evidence is that these were all persons known to her, including family members such as her sisters, nieces, nephews and grandson. Mr Shah also continually adopts familiar language, such as references to "mob", designed to win Ms Shadforth's trust.

846 It was apparent from the outset of the call that Ms Shadforth already had funeral insurance, although she was not sure with whom, or how much cover it was for.

847 The call proceeded on the assumption by Mr Shah that there would be a sale. For example:

> AS: Yeah. It's him and his grandson on one policy. So with the Let's Insure funeral cover, Josephine, you can choose cover between $4,000 and it goes all the way up to $16,000. So when you pass away, we give your family up to $16,000. Okay? And the reason why people take it out with us, with us it's priced up to 50 per cent cheaper than other plans in the market. Okay?
>
> JS: All right. So that thing will, like, it will carry out from my other old one of them?
>
> AS: Yeah. So we help you cancel that one, okay? And then we take over. That's how it works. Okay, Josephine?
>
> JS: Okay.
>
> AS: So --

JS: So long as you guys can send us letter to tell us how much, how much, how much, you know?

AS: Yeah. Yes. What's going to happen --

JS: (Indistinct) get nothing.

AS: Yeah, yeah. What's going to happen is I'll explain - just listen to me for two minutes, I explain to you how it works, I give you the price, and then if we can save you money, then we'll switch you over. Okay, Josephine?

JS: Yeah.

848 Mr Shah never asked Ms Shadforth if she wanted the policy, but rather proceeded on the basis that it was to occur. I note that in her affidavit, Ms Shadforth stated that she did not understand what Mr Shah was saying at this point and that he was speaking very quickly.

849 ASIC describe Mr Shah as having a "smooth, confident and assuring manner", which is an accurate description. He was also pushy and authoritative. At times he spoke quickly. Ms Shadforth appeared to trust him, joking at times with him, as he was cajoling her along. He brushed aside any concerns that Ms Shadforth had, or questions raised, as reflected in the passage recited above. He told her what was going to happen. Another example being:

AS: If you die before a accident, 32,000, and if you have a serious injury, 32,000. If you die because of natural causes, 16,000. Okay? That will only cost you $28.69 a fortnight under our stepped premium option. So instead of paying 46 a fortnight, you're only going to pay $28.69 a fortnight.

JS: (Indistinct).

AS: You're going to save money, aren't you?

JS: Yeah, but you stop it from the other side. Yeah. Well, you stop it from the other side, that.

AS: Yeah. You're going to save yourself, like, $18 a fortnight, do you know what I mean? So that's a lot of money you'll be saving yourself every single fortnight. It's good - it sounds good to you, doesn't it, Josephine?

JS: That's a packet of smokes, mate.

AS: You've got more smokes. More money for smokes. That's right.

850 This was one of a number of occasions Ms Shadforth raised her other policy and asked about them stopping it. The question was not answered. He did say he was going to help her cancel the policy, and "then we take over. That's how it works". It would have been obvious that Ms Shadforth did not have the ability to be assertive. Pausing there. Mr Shah did, later in the call and only after he signed Ms Shadforth up to a policy, assist her to try and cancel her existing insurance policy and suggested that the customer care team would call to assist as well.

851 Mr Shah took the details of Ms Shadforth's four children (who were nominated as beneficiaries) and then played a pre-recorded PDS. Before doing so, he told Ms Shadforth that an actor named Erik Thompson from the television show 'Packed to the Rafters', and also their brand ambassador, had the same funeral insurance and "recorded a quick message for our customers". Mr Shah played the recording and asked Ms Shadforth whether she received and heard the message, to which she responded "Yes". In her affidavit, Ms Shadforth explained:

> I remember hearing the 'quick message' when I got this call and thinking Eric was a deadly bloke. I liked watching him in Packed to the Rafters. I think that this made me more interested. I did not understand all the words he was saying. I didn't know what the words 'product disclosure statement, 'PDS', 'financial services guide' or 'FSG' meant.
>
> I said 'yes' when I was asked to confirm that I had received and heard Eric's message nice and clear because I did hear it and it was his voice.

852 Following that, Mr Shah proceeded to take Ms Shadforth's payment details.

853 Towards the end of the sales call, Mr Shah asked her whether she was happy with and understood what had been discussed, to which she responded "Yes". Ms Shadforth's evidence was that she said Mr Shah spoke quickly and she "did not think that [she] was signing up to a different insurance mob. [She] thought it was all in one, the same insurance mob".

854 After signing up Ms Shadforth to the policy, Mr Shah transferred the call to Retention Agent, Agnes Gustafsson, from the customer care team who he said would assist her to cancel her InsuranceLine policy. During the transfer, Mr Shah noted that Ms Shadforth was "a little slow" and he was "not sure if she can write properly". Despite that, Ms Gustafsson explained to Ms Shadforth that the easiest way to cancel her policy was to write a simple letter, which Ms Shadforth said she was unable to do: "I don't know how to write letters. God Almighty". Ms Gustafsson then told Ms Shadforth to just write "Cancel this policy" (which she spelled for her) on InsuranceLine documents and mail those to InsuranceLine using prepaid envelopes which would be sent to her by Select. Ms Shadforth wrote those words on the document, with her name, date of birth and InsuranceLine policy number. However, she did not ultimately send the letter to InsuranceLine.

Retention conduct

855 There were various Retention Agents involved with Ms Shadforth, being Ms Gustafsson, Ms Clynes, Devin Davies, Mr Stotesbury and/or Laura Fisher. It is apparent from the various calls, and from admissions made during some of the s 19 examinations, that they were aware of

characteristics which made Ms Shadforth vulnerable. Ms Gustafson was the Retention Agent to whom Mr Shah said "she's [Ms Shadforth] a little slow" and "I'm not sure if she can write properly". Indeed, Ms Shadforth told her directly, that "I don't know how to write a letter…I don't know how to write letters" Moreover, this was in a context where the file note on Select's system made after the sales call was transferred recorded "very limited [E]nglish, described how to write the letter. Think she understood". The fact that Ms Shadforth had some problems understanding, and that as a result an Agent needed to describe how to write a letter to cancel her existing policy, was evident from the content of the calls.

856 It is appropriate to consider the content of the various retention calls. On 17 July 2015, Ms Shadforth received a call from Ms Clynes. Ms Clynes indicated she was calling to assist Ms Shadforth to cancel her InsuranceLine policy. She also suggested that the "easiest method" to do this is to provide a "handwritten letter".

857 The evidence is that Ms Shadforth (it is unclear precisely when) directed her bank to stop making payments in relation to her Let's Insure Funeral Cover. Thereafter, on 17 September 2015, she received two telephone calls, a text message and a letter from Select regarding unsuccessful premium payments. The letter noted that: "Your financial institution informed us your payment was declined for the following reason: Payment Stopped".

858 On 17 September 2015, Ms Shadforth called Select and spoke with Retention Agent, Mr Davies. It is clear from the statements she made during the conversation that Ms Shadforth wished to cancel her Let's Insure policy: "I can't have two funeral things", "I stopped the $28 one. I stopped it the other fortnight" and "I was going to change, but too many hassles, so I'll stay on the other one". Mr Davies said that "one of the girls" in the cancellation team would call her back.

859 The following day, Retention Agent, Mr Stotesbury, called Ms Shadforth. During the call, Ms Shadforth reiterated that she wished to remain with her existing policy and cancel her Let's Insure policy: "I'll stick to the old one", "I was going to cancel it, but too much hassle" and "I'll cancel that one, the $28 one". Again, the Retention Agent indicated numerous times that Ms Shadforth needed to write a letter to cancel her policy. To take the following example (discussed in further detail below):

> TS: You need to write a letter to us if you want to cancel the policy.
>
> JS: Well, you guys send that thing and I can send it back. I'm telling you on the phone. Good enough, isn't it?

TS: No, I'm afraid not, it's not actually good enough. Basically, because it is a financial product, you'll have to send us a letter, the same as you'd have to do with Insurance Line. You need to send us a letter saying that you wish to cancel.

860 In the period between 23 September 2015 and 15 October 2015, Retention Agents called Ms Shadforth three times and sent her two letters regarding unsuccessful premium payments.

861 On 15 October 2015, Ms Shadforth called Select and spoke with Retention Agent, Laura Fisher. Ms Shadforth said "cancel it long time ago, but they're not listening". The following exchange occurred:

LF: …Yeah, so the policy is pending, I can see there, Josephine, so we're just waiting receipt of your cancellation letter. Have you sent us that letter?

JS: I haven't got no address to send it to, I don't know where.

LF: Yeah. I can give you the address now, if you'd like.

JS: Well, I can't (indistinct) because I'm on the phone. I haven't got no pen or anything.

LF: Yeah, so the policy will remain in place, Josephine, there until we receive the cancellation letter. Are you able to get a pen and I can certainly give you the address.

JS: No, I can't, because I'm out in the bush.

LF: Right. Do you have any of our policy documents, because the address is in there, as another option.

JS: I don't know. Kids going through my glove box and everything, I don't know, they lost everything.

LF: Okay. I …

JS: Why (indistinct) this cancellation thing?

LF: Yeah, we do need it in writing. As it is a financial product, Josephine, we do need something in writing to get that cancelled. It is stated in our product disclosure statement. So I can see, like I said, the status of the policy is pending, so we're just awaiting receipt of that letter.

862 Ms Fisher then agreed to call back the following day to provide Ms Shadforth with the address so that she could write a letter to cancel her policy.

863 Ms Shadforth's evidence was that:

I had been trying to cancel this funeral insurance lots of times. By this time I was getting sick of their calls and I was wild. They kept ringing me. They rang me when I was in the bush at a meeting. They were getting on my nerves because I could not cancel over the phone. I did not understand why I could not cancel over the phone. I need help to write a letter, but if they had sent me a letter saying I want to cancel and I could just sign it and send it back it would have been much easier

864 The evidence establishes that Select ultimately did cancel the policy for non-payment of premiums on 15 October 2015. As explained above, this reflects the obvious, that a policy can be cancelled in the absence of a written request of the consumer. Moreover, as referred to above, Select in a response to a s 912C Notice from ASIC stated that it had a discretion to accept cancellations over the telephone in special circumstances where the customer is unable to send the request in writing. Not being able to write, one might think, must satisfy that criteria.

865 Ms Shadforth subsequently received a refund plus interest of $13.56.

False and/or misleading representations

866 There are four alleged false and misleading statements.

867 *First*, ASIC alleged that Mr Shah represented that there were no exclusions to the Let's Insure Funeral Cover, ADC and AIC save for participating in professional sports. For the reasons previously given, which apply similarly to this call given its content, the representation is established and there is a contravention of s 12DB(1). The Defendants' submissions, for the same reasons as given previously, cannot be accepted. The submissions are devoid of a consideration of the content of this call, and are entirely artificial given the context in which the statements were made.

868 *Second,* ASIC alleged that Mr Shah made the standard cover representation. For the reasons previously given, which apply similarly to a consideration of this call, this representation is also established and there is a contravention of s 12DB(1).

869 *Third*, ASIC alleged that Select (via Mr Stotesbury and Ms Fisher) represented that the policy could only be cancelled in writing because it was a financial product. This relates to two statements made in retention calls, which are set out above at [0] and [0]. In short, on 18 September 2015, Mr Stotesbury represented that that it was "not good enough" for Ms Shadforth to cancel her policy over the phone and that because it is a "financial product, you'll have to send us a letter". That aspect of the retention call is recited above at [0]. Ms Fisher made a similar statement on 15 October 2015, recited above at [0].

870 The question of a requirement to cancel in writing is addressed above at [0]-[0]. It is important to focus on the nature of the alleged false and/or misleading representation, which is that the requirement to cancel in writing arises because the policy was a financial product. It follows that contending that it is in the PDS (even accepting that to be so) does not assist the Corporate Defendants. Nor does the submission that it is standard insurance industry practice. The

Corporate Defendants have not pointed to any legal requirement that cancellation must be done in that manner because it is a financial product. The two representations are established, they are false and/or misleading and fall within s 12DB(1)(i) as they concern the existence or effect of a condition, in that cancellation of the policy was conditional on the cancellation request being made in writing because the policy was a financial product. Accordingly, there is a contravention of s 12DB(1)(i).

Misleading and deceptive conduct

871 ASIC allege that Select (via its Sales Agent, Mr Shah and Retention Agent, Ms Clynes) engaged in conduct which constituted a contravention of s 12DA(1) of the ASIC Act. The alleged misleading or deceptive conduct was its representation that it would "take over" Ms Shadforth's existing insurance policy.

872 There are two passages identified as giving rise to this representation.

873 *First*, the exchange on 26 June 2015 between Mr Shah and Ms Shadforth, which is recited at length above at [0]:

> JS: All right. So that thing will, like, it will carry out from my other old one of them?
>
> AS: Yeah. So we help you cancel that one, okay? And then we take over. That's how it works. Okay, Josephine?
>
> JS: Okay.

874 *Second*, the retention call on 17 July 2015 with Ms Clynes:

> LC: Now, look, we can assist you with the cancellation of the policy with Insurance Line. The most easiest method that people find, Josephine, is just a handwritten letter just saying, "Hi, my name is Josephine Shadforth", put your date of birth.
>
> JS: -- Yeah, yeah, I know. That bloke told me
>
> LC: Yeah, cancel policy, and just sign it, and once you send that in to them, they will send you out confirmation of the cancelled policy and just forward that in to us, Josephine, and we can get everything transferred over from Insurance Line to your new policy, okay?

875 ASIC also relied on the following passage from Ms Shadforth's affidavit:

> I knew that they were going to take out $28.69 from my bank account, but I thought they were going to reduce it from $40 odd dollars to the $28.69. I did not think that I would be paying both $40 something dollars and $28.69.

876 It was said that these representations were misleading or deceptive, or likely to mislead or deceive, because Select did not in fact take over existing insurance policies and instead commenced new policies with customers.

877 ASIC contended that there is an important temporal limit to this representation, being the point in time at which the sale was made. The focus is on what was said to Ms Shadforth to induce her entry into the contract. That is, later calls (which were retention calls made after she had been signed up to the policy) where she was told that she needed to cancel the policy with her other insurer cannot qualify the earlier representation.

878 However, the passage of Ms Shadforth's evidence relied on by ASIC in support of its submission, to the effect that she did not expect to be paying two amounts of premiums, does not advance the claim.

879 The passages from the calls (referred to above), refer to the need to cancel the existing policy, which Ms Shadforth acknowledged is something that she would need to do, and the Defendants offered to assist her with that.

880 Although the Agents did refer to taking over the policy, in the context in which those statements were made, I am not satisfied that it has been established that it is misleading or deceptive conduct.

Unconscionability (Sales conduct)

881 I am satisfied that the personal characteristics and circumstances of Ms Shadforth as pleaded by ASIC are established, and that she was in a position of vulnerability or at least in a weaker bargaining position with respect to her dealings with Select.

882 Mr Shah would have been aware Ms Shadforth was an Aboriginal woman. The contents of the call make that plain. In his s 19 examination, Mr Shah acknowledged as much. He said he would have known this after speaking to Ms Shadforth's relatives who were Aboriginal, and after the statements she made in the call. The call also reflects he was aware of her age, where she lived, and that it was a remote community.

883 The call reflects that Mr Shah was aware of Ms Shadforth's limited capacity to understand English over the telephone (given the content of the call and manner of speech), and that she had difficulties writing in English (as she said to him, "how I write letter? I don't know how to write letter"). After the call, he told a colleague, Ms Gustafsson, that "she's [Ms Shadforth's]

a little slow" and "I'm not sure if she can write properly". Further, in his s 19 examination, Mr Shah acknowledged that he would have known Ms Shadforth had difficulties writing in English.

884 It follows that Mr Shah knew of those particular characteristics, or at the very least should have known.

885 Despite that, there are some circumstances which contributed to Ms Shadforth's vulnerability and/or weaker bargaining position of which Mr Shah would not have been aware. He would not have known that her personal characteristics were that she had grown up in Derby, a remote Aboriginal community in Western Australia; had been living in Beagle Bay for at least the last ten years; and only had limited formal education. Further, Mr Shah would not have known that she had very limited financial means (essentially financial vulnerability), with her sole source of income being a disability pension from Centrelink, which was about $600 a fortnight after rent and some other expenses. It would not have been known that she did not have any savings nor that she was also suffering from diabetes and was taking medication for it. However, even if these additional factors were not known by Mr Shah, they nevertheless reflect on the harsh impact of the conduct on her; a consideration relevant to the unconscionability claim.

886 The Corporate Defendants submitted that whether or not, as ASIC pleads, Mr Shah should have done more by speaking more slowly, giving her further time to reflect on whether she really wanted the policy, giving her prior notice of the call or not referring to the fact that he had helped individuals known to Ms Shadforth (none of which is admitted), is insufficient to establish unconscionability. Mr Shah was a sales person who sold a product to someone who said she wanted it and provided her payment details. Ms Shadforth confirmed that she was happy to sign up to the policy, that she understood everything that was discussed during the call and that she was happy with the service she had been provided. Mr Shah made a genuine and reasonable attempt to confirm that Ms Shadforth understood everything discussed in the sales call. The fact that he failed to do more to protect Ms Shadforth's interests did not make his conduct unconscionable in circumstances where he was not aware of – and had no way of knowing – the depth of her misunderstanding.

887 It was also submitted that Mr Shah could not have known that Ms Shadforth had misunderstood that he was selling a different insurance product to what she already had, in circumstances where he had explained the position on multiple occasions. This is in no way, the Corporate Defendants submitted, to criticise Ms Shadforth but merely to submit that Mr Shah was not

responsible for her misunderstanding and he could not have known of it during the call. Similarly, it was submitted Mr Shah could not have known that Ms Shadforth could not afford the policy – indeed, Mr Shah's aim was to provide Ms Shadforth with a cheaper alternative to her existing policy.

888 This was a cold call. Mr Shah invoked social pressure on Ms Shadforth by repeatedly referring to persons known to her including members of her family. He did this to engender trust in him. Mr Shah referred to at least 15 friends and family who he asserted were all "covered with us", had taken out Let's Insure Funeral Cover, or were "about to" sign up. The manner in which he used that information was designed to create the impression that they had endorsed the product. He also told Ms Shadforth that Select was, "helping a lot of people out in Beagle Bay", with reference also being made to other remote communities. Ms Shadforth appeared trusting in the call, and that was taken advantage of. The tactics he used in the call were unfair.

889 Mr Shah knew, having been told by Ms Shadforth, that she already had a policy. There was no explanation given to her as to how the policy would be cancelled before she was signed up to the Let's Insure policy. Knowing that, and the difficulties she had with English, including writing English, nonetheless, he proceeded on the assumption there would be a sale. As described above, Mr Shah never asked Ms Shadforth if she wanted the policy, but rather proceeded on the basis that she would be signed up. If that occurred without the other policy having been cancelled, the consequence to Ms Shadforth would be that she would have to pay two premiums.

890 Ms Shadforth asked for something in writing, which was ignored with Mr Shah telling her what would be happening, saying "just listen to me for two minutes", and then continuing with his pitch that he could save her money. At times during the call, Mr Shah spoke quickly. The PDS, which was played to her without her consent and without explanation of the content or its significance, was also quickly spoken and used complex language. It was clear at times that Ms Shadforth did not understand what was being said.

891 Mr Shah made the false and/or misleading statements referred to above. Significant exclusions were not referred to, and nor was she told that the ADC and AIC were optional extras.

892 Despite Mr Shah's view at the time that Ms Shadforth was "a little slow", he made no genuine or reasonable attempt to ensure that she understood what was being said, that she wanted the policy and understood its nature, or that she wanted it on these terms. To the contrary, Mr Shah

pushed through with a sale which he had assumed, from the beginning, was to be made. Mr Shah could properly be described as not having acted in good faith in his dealings with Ms Shadforth. I accept ASIC's submission that knowing Ms Shadforth's vulnerability, he took advantage of that and foisted an insurance policy with extras on her. Contrary to the Corporate Defendants' submission that he did not take advantage of her, the contents of the call plainly reflects otherwise. As explained above, far from following Ms Shadforth's request that he send her the information in writing so she can consider it, he persisted with the call and getting her signed up that day. He gave her no opportunity to consider the matter.

893 In that context, I note that the Corporate Defendants submitted that the real significance of the statements made by Mr Shah to Ms Gustafsson showed he was mindful that any difficulties in understanding Ms Shadforth needed to be accommodated in the way the Agents spoke to her. Mr Shah, it was submitted, was trying to alleviate any difficulties of understanding Ms Shadforth had, rather than exploit them. Whatever may have been his intention in passing on his view, that conduct is not reflected in his own dealings with Ms Shadforth.

894 I note also that at the time of this call, Mr Shah was participating in the Cruise Incentive. That of itself does not reflect on the conduct being unconscionable, although it may provide an explanation or motive for the conduct of Mr Shah.

895 I am satisfied that by signing up Ms Shadforth to this policy the conduct is unconscionable and contrary to s 12CB(1).

Coercion (Sales conduct)

896 The conduct engaged in which was said to establish that Ms Shadforth was coerced are that:

(1) she was called without prior notice;

(2) Mr Shah spoke quickly on the telephone and used words that she did not understand;

(3) he applied social pressure by repeatedly referring to the fact that he had sold the same policy to many people she knew;

(4) he made the false and/or misleading representations;

(5) he quoted for the top level of cover and the optional extras, and did not offer alternative levels of cover;

(6) he upsold optional ADC and AIC without disclosing that they were optional extras;

(7) he played a pre-recorded PDS without first obtaining her express and/or informed agreement to receive the PDS in this way; and

(8) he said Select would assist her to cancel her existing policy and signed her up during the one telephone call.

897 It was said these factors deprived Ms Shadforth of making an informed choice and denied her an opportunity to reflect on the position.

898 It is alleged those integers are to be considered in light of Ms Shadforth's personal circumstances. It is submitted this established that illegitimate pressure was placed on Ms Shadforth. The personal circumstances relied on in this context include that at the time of the call Ms Shadforth was on a disability pension, which was her only income, and she already had insurance from another provider and could not afford to pay two premiums. The circumstances were also said to include that at the time of the completion of the call Ms Shadforth did not understand that she had been signed up to Let's Insure Funeral Cover and optional ADC and AIC, the nature of that policy including that it was additional to her current policy and that her premiums would increase over time. It was said that Mr Shah could not have been reasonably satisfied that she did understand.

899 It was submitted that Mr Shah applied pressure on her to cancel her existing insurance policy and he signed her up to the insurance policy during the same telephone call rather than giving her the opportunity to reflect (which it was said meant she was not in a position to exercise free will and judgment). It was also submitted that Mr Shah did not make a genuine, or alternatively reasonable, attempt to confirm that Ms Shadforth understood everything discussed during the telephone call.

900 Although the factual assertions underpinning that conduct may be established, the issue is whether they, in combination, amount to coercion.

901 Again, some of that conduct could not be seen as being directed to or having the effect of compelling or forcing someone to purchase a policy. Even on the way in which ASIC presented its case, it is difficult to see how much of the conduct, even considered in combination, amounts to "illegitimate pressure" being placed on Ms Shadforth. Pressure in the context of coercion is directed to compelling a person to act. The only conduct in the integers which appears to be directed to exerting pressure is Mr Shah's use of name dropping. I note that Ms Shadforth does not say that she felt pressure being exerted on her. Ms Shadforth, inter alia, misunderstood

what was happening. The Sales Agent plainly took unfair advantage of Ms Shadforth's position.

902 However, all that said, in the circumstances and considering the evidence, and the content of the call, I am not satisfied that the conduct amounts to coercion within s 12DJ(1).

Undue harassment (Retention conduct)

903 ASIC contends that Select unduly harassed Ms Shadforth by not permitting her to cancel, or refusing to provide reasonable assistance to Ms Shadforth to cancel her Let's Insure Funeral Cover during the telephone calls, and/or by continuing to seek payment of her premiums in the circumstances described below.

904 ASIC relies on the following circumstances: that Select knew or should have known that Ms Shadforth was paying for two insurance policies at the same time; false and/or misleading representations had been made that a request to cancel the policy had to be in writing because the policy was a financial product; that although some Retention Agents had stated that they would assist Ms Shadforth in cancelling her InsuranceLine policy there was no genuine or reasonable attempt to cancel her policy or assist her to do so; she was not advised by Mr Shah or in the pre-recorded PDS which was played during the sales call that the insurance policy could only be cancelled in writing; and she had attempted or sought assistance to cancel her policy on 17 and 18 September 2015 and 15 October 2015.

905 It was submitted that the approaches made by Retention Agents constituted undue harassment on account of their content, nature and frequency. This was said to be in a context where Mr Shah knew when he signed her up to a policy she already had a policy which they said they would help with cancelling, the Corporate Defendants knew Ms Shadforth was not able to write a letter to cancel her existing policy; Select did not reasonably assist Ms Shadforth in cancelling her existing policy; after Ms Shadforth realised that she was paying for two policies, she stopped the direct debit premium payments and Select was aware of this at least from 17 September 2015 yet nonetheless pursued payment via further telephone calls and letters to her until the policy was finally cancelled by Select, without a request in writing, on 15 October 2015.

906 The Corporate Defendants submitted that the Retention Agents gave Ms Shadforth reasonable assistance to cancel her Insurance Line policy (so Ms Shadforth was not paying for two insurance policies at the same time) and later to cancel her Let's Insure policy. It was submitted

that the fact that the Retention Agents were actively trying to assist Ms Shadforth strongly suggests against the conclusion that they unduly harassed Ms Shadforth.

907 I do not accept that submission. To take just one example, during the call on 18 September 2015, that is after it had been made clear in earlier calls that she wished to cancel the policy and she had stopped the direct debit, Ms Shadforth told the Retention Agent at least four times that she no longer wanted her policy and wished to cancel it. On five occasions she asked for assistance in cancelling her policy, by having Select send her a document to sign, or by providing her the address to which to send a cancellation letter. The Retention Agent did not do so. Rather, the Retention Agent attempted to retain the customer. The Retention Agent stated four times that if she wished to cancel her policy, she needed to "send a letter". He stated that it was "not good enough" to request cancellation over the telephone, and "because it is a financial product, you'll have to send us a letter, the same as you'd have to do with Insurance Line. You need to send us a letter saying that you wish to cancel". Twice he told her to "look in your policy documents" for instructions on how to cancel her policy. There was obviously no genuine or reasonable assistance given. This is in circumstances where the Corporate Defendants had already been told she did not know how to write a letter, and had told Mr Stotesbury that she did not have her policy documents.

908 The calls and letters continued, as the policy had not been cancelled and, therefore, payments fell due. The call on 18 September 2015, as apparent from the summary above, is only one of a number of calls made of a similar ilk.

909 In the circumstances, where Select admit there is a discretion to cancel a policy otherwise than in writing, it was unreasonable in the circumstances to require written cancellation from Ms Shadforth.

910 I am satisfied that it was undue harassment to pursue the payment in circumstances where she wanted to cancel the policy, and, as known to the Corporate Defendants, could not cancel in writing. Accordingly, there is a contravention of s 12DJ(1).

Unconscionability (Retention conduct)

911 As previously explained, Ms Shadforth was in a position of vulnerability, or at the very least in a weaker bargaining position.

912 I am satisfied that the Retention Agents had knowledge of Ms Shadforth's characteristics described above at [0] (save for some factors such as her financial vulnerability described above

at [0]). This included difficulties in understanding English. The content of the calls made that apparent. Moreover, the system notes kept on file for Ms Shadforth after the transferred 26 June 2015 telephone call with Ms Gustafsson record that she had "very limited [E]nglish".

913 The conduct, as described above, did not involve any reasonable or genuine attempts to assist Ms Shadforth to cancel her policy, despite her known vulnerability and inability to cancel the policy in writing. Indeed, as apparent from the call of 18 September 2015, the Retention Agent was still trying to retain her as a customer, and when that was rebuffed, no reasonable assistance was given. The result, as would have been obvious to the Retention Agent, is that there were two premiums for Ms Shadforth to pay.

914 Whatever may be said of the earlier calls as to attempts at assisting Ms Shadforth, at least by those calls from 18 September 2015 there was plainly no reasonable attempt to assist her in cancelling the policy. Notably, although the Defendants submitted that such assistance was given, referring to specific Agents, the submission fails to make any reference to the calls of 18 September 2015 onwards. That said, in circumstances where it was apparent from the outset that Ms Shadforth had difficulties in complying with the request, requiring her to cancel in that manner when there is a discretion to not do so, or where the policy could be allowed to lapse (which would have the same effect), could be characterised as a lack of good faith. On two occasions the Agents made false and/or misleading statements that the requirement to cancel in writing was because it was a financial product. Moreover, this is in a context where Ms Shadforth had already directed her bank to stop making payments in relation to her Let's Insure Funeral Cover. She had said she did not have the money to pay.

915 Despite that, in the call of 18 September 2015, despite the repeated statements that she wished to cancel her policy, Mr Stotesbury was still trying to convince her not to do so, as described above at [0].

916 I am satisfied that in the circumstances, refusing to reasonably assist Ms Shadforth to cancel her policy with the result that premium payments were charged to her despite her requests to cancel the policy, and then pursuing payment in the manner that occurred, is unconscionable and contrary to s 12CB(1).

Georgina Gaykamangu

917 In respect to Ms Gaykamangu, it is contended that Select (via its Sales Agent, Ms Dudbridge) contravened s 12DB(1) by making two separate representations that were each false and/or

misleading (FASOC [409]-[414]); contravened s 12DJ(1) during the sales call by coercing Ms Gaykamangu into signing up to Let's Insure Funeral Cover with optional ADC, AIC and HEC and/or providing her direct debit details over the telephone (FASOC [415]-[416]) and contravened s 12CB(1) during the sales call by engaging in unconscionable conduct (FASOC [417]-[422]).

918 ASIC pleaded that Ms Gaykamangu is an Aboriginal woman who in the period of July 2015 to July 2017 was around 21-23 years old, resided in a remote area in Arnhem Land, had some difficulty understanding English and had a socio-cultural tendency towards gratuitous concurrence. It was contended that she was in a position of vulnerability and/or in a weaker bargaining position viz-a-viz Select.

919 Ms Gaykamangu's personal characteristics as pleaded by ASIC are established by the evidence and the agreed facts. That Ms Gaykamangu has a socio-cultural tendency towards gratuitous concurrence is also established by the evidence of Dr Eades.

920 It was agreed that on 7 July 2015, Ms Dudbridge signed up Ms Gaykamangu to Let's Insure Funeral Cover for herself and her son to the value of $16,000, together with optional ADC to the value of $32,000 and optional AIC to the value of $32,000 each, and optional HEC for Ms Gaykamangu to the value of $10,400 with a policy acceptance date of 7 July 2015, stepped fortnightly premium commencing at $14.76 and no nominated beneficiaries. Ms Dudbridge took Ms Gaykamangu's bank account details for the purposes of automatically deducting fortnightly premiums. In June 2016 and June 2017, Ms Gaykamangu was notified that her policy would be renewed and that her benefits would increase by 5% respectively, with an increase in the fortnightly premium. Ms Gaykamangu paid $755.63 in premiums until her policy lapsed (due to the non-payment of premiums) on 18 July 2017. She subsequently received a full refund plus interest.

921 It was agreed that the conduct of Ms Dudbridge is taken to have been engaged in by Select and BlueInc Services (as she was a BlueInc Services employee) pursuant to s 12GH(2)(a).

Evidence of Ms Gaykamangu

922 ASIC relied on the affidavit of Ms Gaykamangu sworn on 2 May 2019.

923 Ms Gaykamangu was around 21-23 years old in the period of July 2015 to July 2017. She is a Gupapuyngu woman, who was born in Nhulunbuy and grew up in Ramingining. Ramingining is a remote Aboriginal community in East Arnhem Land, Northern Territory.

924 Ms Gaykamangu completed schooling up to Year 11 in Ramingining and then did a further two years of schooling in Darwin at an English speaking school. Thereafter, she came back to Ramingining, where she has lived ever since. Ms Gaykamangu has not worked since she finished school.

925 Ms Gaykamangu is married and has two children. She lives in Ramingining with her husband's family, including his two grandmothers, three uncles and their wives, two brothers and their wives and children.

926 Ms Gaykamangu's first language is Djambarrpuyngu but she also speaks Warlpiri and English. English is her third language. She learned English at school in Ramingining but speaks Djambarrpuyngu at home and in the community. Ms Gaykamangu can read and write in English but has difficulty understanding "big words" and when people speak too quickly.

927 Ms Gaykamangu was not working in 2015 and at the time received payments from Centrelink. She believes she was paid about $400 into her bank account and received about $400 on her basics card every fortnight. Money on her basics card can only be spent on things like groceries and electricity. Ms Gaykamangu's mother used to assist her with Centrelink issues until she moved away in 2012. Ms Gaykamangu's husband is paid a royalty, but she does not know how much he is paid. Ms Gaykamangu does not share her finances with her husband but he helps her pay for things like food and electricity.

928 Ms Gaykamangu's evidence is that she does not know what insurance or funeral insurance means. She understands that when someone in her community passes away, their funeral and other costs are paid for by "ALPA".

Sales conduct

929 On 7 July 2015, Ms Dudbridge telephoned Ms Gaykamangu for the purposes of marketing Let's Insure Funeral Cover. Ms Gaykamangu was not expecting this call.

930 At the outset of the sales call, Ms Dudbridge said that she had spoken with Ms Gaykamangu's cousin, "Gina", who had taken out funeral cover with Let's Insure and "really wanted" Ms Dudbridge to call Ms Gaykamangu. During the call, Ms Dudbridge also at times referred to others who she said had Let's Insure polices, including "Fiona" (Ms Gaykamangu's aunt), as a way of gaining her trust.

931 Ms Dudbridge then gave Ms Gaykamangu an overview of the policy, referring to the large sums of money payable, and said that she would provide her with a free quote:

> RD: Lovely. So with our funeral cover what it means, if you were to pass away, Gina, Georgina, we are going to pay out up to $16,000 to your loved ones okay and we are priced up to 50 per cent less than any other plan in the market. That's why Gina took it out. Now, second to this, we do have household expenses cover. What this means is after your death we will provide each month $800 for up to 20 months after your death, okay.
>
> GG: Ah hmm.
>
> RD: Um, now, Georgina, it's standard industry practice the first 12 months it covers you for accidental death. After those 12 months [indistinct] leading on, Georgina, thirdly, we do have accidental death cover here as well. Now, this is up to another $32,000 in addition to your funeral cover, okay. Last but not least, Georgina, we actually have a living benefit for yourself so you personally will receive up to $32,000 whilst you're still alive. Now, this is if you get seriously injured so if you suffered injuries such as say blindness, paralysis, loss of speech, major head trauma, even a coma, we're going to pay you up to $32,000 straight into your bank account, okay, Georgina?
>
> GG: Yeah.
>
> RD: With the common exclusion taking part in professional sports. Georgina, what I'm going to do for yourself now is provide you with a quote and I'm sure like Gina you'll be very surprised at how affordable we can make it.

932 Ms Gaykamangu, in her evidence, explained that she does not understand what many of the terms used by Ms Dudbridge such as 'funeral cover', 'exclusions', 'household expenses cover' or 'accidental death cover' mean. Nor does she know what 'affordable' means.

933 Ms Dudbridge proceeded with the call on the assumption that Ms Gaykamangu would be signed up to the policy. After taking some personal details, Ms Dudbridge indicated that the premium would cost $11.85 per fortnight and asked whether that was affordable:

> RD: So, Georgina, for you to have the 16,000 funeral cover, anything happens to yourself we will pay your family 16,000. On top of that, Georgina, if you died of an accident we are going to pay out the 32,000 plus the 16, that is $48,000. If you got seriously injured, Georgina, we've got 32,000 straight into your bank account and household expenses of 10,400. Now, for all of that cover that only costs you every fortnight just $11.85 so just under $6 a week. Sounds good doesn't it?
>
> GG: Yeah.
>
> RD: Lovely. And that's affordable for yourself, Georgina, as well?
>
> GG Ah hmm.

934 Ms Dudbridge then took the details of Ms Gaykamangu's children and proceeded on the assumption that cover would be taken out for both of them:

> Okay. Lovely. So just to confirm what we've got for yourself and Zackeus is the 16,000 funeral cover, the accidental death cover or $48,000, the accidental serious injury of 32,000 and household expenses of 10,400. Now, Georgina, the fantastic news is that we don't take any payments today. We set up a day of your choice. Now, Georgina, most customers they like to link it up with a payday so when do you next get paid, Georgina?

935 Thereafter, Ms Dudbridge told Ms Gaykamangu that she would play a "quick recording" (of the PDS). I note that Ms Dudbridge did not explain the purpose of the recording (or even that it was a recording of the PDS), which used complex terminology and was spoken quickly. After the recording had finished, Ms Dudbridge asked whether Ms Gaykamangu had "received and heard Eric's message" to which she said "Um, yes". Ms Gaykamangu's evidence was that she did not understand many of the words used in the recording.

936 Ms Dudbridge then took Ms Gaykamangu's bank details. Ms Dudbridge continued to use ambiguous language about "linking" up premium payments with Ms Gaykamangu's bank details. Ms Gaykamangu's evidence was that she was not aware money would be deducted from her bank account or that she had even purchased anything during the sales call.

937 I note that throughout the sales call Ms Gaykamangu frequently responds with "Yeah" or "Ah hmm" to statements and questions from the Sales Agent. On a number of occasions, when Ms Gaykamangu expressed hesitation, Ms Dudbridge would respond assertively ("Is that a clear yes") with the effect of pressuring her to respond in the affirmative ("Yes"). In her affidavit, Ms Gaykamangu explained that she said "Yeah" at times because she "had no idea" and "did not understand" what was being said. So much is apparent from the sales call, the tone and manner of Ms Gaykamangu's responses, and in particular the final exchange recited below at [0] between Ms Dudbridge and Ms Gaykamangu, where Ms Dudbridge purported to confirm Ms Gaykamangu's understanding of their discussion.

938 Ms Gaykamangu continued to hold and pay for the policy for over two years, during which time her benefits increased by 5% in June 2016 and her premium increased to $15.50 per fortnight. In July 2017, her benefits increased by a further 5% and her premium increased to $16.27 per fortnight. On 18 July 2017, Ms Gaykamangu was notified that her policy had lapsed because of non-payment of premiums. In total, she paid $755.63.

Admissions

939 The Sales Agent involved in this call was Ms Dudbridge, one of the Sales Agents whose employment was terminated for abusing the Refer a Friend program. Mr Howden stated in her

termination letter dated 5 June 2017, after noting that her conduct has accounted for 31% of all sales represented by the 'spike' in sales to Indigenous consumers: "We listened to all the calls you made for these 198 policies and there is no doubt in the Company's mind that you failed to act with the utmost good faith as a Senior Sales Agent to take advantage of people in these Postcodes" and that "Your behaviour and conduct during this period did not meet the Company's compliance and ethical selling standards". An email to Ms Dudbridge sent on behalf of the BlueInc Group dated 16 June 2017 said, "your actions in selling funeral insurance policies to vulnerable individuals in a specific group of postcodes was a breach of the Corporations Act 2001 and also a breach of the Company's compliance and ethical selling standards".

940 As previously explained, there was an investigation into the spike of sales to certain postcodes with large Indigenous communities. In respect to the sale to Ms Gaykamangu, the investigation outcome was that the call was rated as a 'fail', noting:

> The customer only answers in 'yes' and does not talk at all. Customer does not expand on any answers and there are long pauses on the call. The agent prompts the entirety of the call so the customer just agrees and mumbles through the call. Customer shows no desire to actively take out the policy and so I believe that this should be refunded.

941 A refund was provided to Ms Gaykamangu, with the letter dated 15 December 2017 stating:

> We think you have paid for life insurance you may not have wanted and we are going to fully refund your premiums plus interest at 6% p.a.
>
> We are referring to the Let's Insure Funeral Cover insurance policy you bought from Let's Insure on 7/07/2015. According to our records, your Policy is no longer in force as it lapsed on 8/06/2017.
>
> **Why you're entitled to a refund on your Let's Insure policy**
>
> You no longer have your Let's Insure policy, but we think that when purchasing it you were subject to unfair sales practices. This means we think the sales person who sold you the policy may have pressured you into purchasing your policy or misled you into thinking you were purchasing something different.
>
> **So, just to clarify**
>
> We'll give you a full refund of $825.03 which will be paid into the bank account associated with your Let's Insure Policy, and will be processed on 15/12/2017. Please allow for up to five business days for the funds to appear in your account.
>
> …

942 These statements are capable of amounting to admissions. I accept they do not relate to a specific claim made but are a recognition by Select as to the conduct in the call. The conduct was such that a refund was provided. I note that the observations in the QA assessment

accurately reflect the content of the call. Although the claim of unconscionability was ultimately admitted, the claims in respect to false and/or misleading statements remain, as does the coercion claim.

False and/or misleading representations

943 ASIC alleges that Select (via Ms Dudbridge) made two false and/or misleading representations during the sales call in contravention of s 12DB(1).

944 *First*, that there were no exclusions to the Let's Insure Funeral Cover, ADC and AIC, save for participating in professional sports. As with the other similar claims, this is said to be implied, and based on both what was said, and what was not said. For the reasons given in respect to other calls, and in respect to this call, where Ms Dudbridge made positive statements as to the sums that would be paid under the policy, but failed to advise of the full range of exclusions to the ADC and AIC, and where she represented that there were no exclusions to the cover, save for participating in professional sport, the representation is established. For the reasons previously given, the Corporate Defendants' submission that a passing reference in the call to the coverage being "subject to the conditions and exclusions outlined in the product disclosure statement" would not have been reasonably understood in the circumstances as qualifying the statement made.

945 For those reasons, including where relevant the reasons previously given in respect to other Consumers, I am satisfied that the representation is false and/or misleading and that it falls within and is a contravention of s 12DB(1)(i).

946 *Second*, ASIC alleged that Ms Dudbridge made the standard cover representation. At no time during the call did the Sales Agent disclose that ADC, AIC and HEC were optional extras to the Let's Insure Funeral Cover. Of course, by failing to inform the Consumer of this fact, they are deprived of a choice as to whether to purchase that aspect. This representation is established and it is false and/or misleading. It falls within s 12DB(1)(i).

947 Again, this claim is of the same nature as contraventions alleged in respect of other Consumers. I am satisfied, including where relevant for the reasons given in respect of other similar claims, that there is a contravention of s 12DB(1)(i).

Unconscionability

948 As referred to above, the Corporate Defendants ultimately admitted that the sales conduct is unconscionable and contrary to s 12CB(1). In those circumstances it is unnecessary to refer to this further.

Coercion

949 ASIC relies on the following conduct to establish this claim:

(1) telephoning Ms Gaykamangu without prior notice;

(2) referring to individuals known to Ms Gaykamangu and asserting they have policies with Let's Insure;

(3) using words Ms Gaykamangu did not understand;

(4) making the false and/or misleading statements;

(5) quoting only the top level of cover;

(6) upselling coverage for her son without disclosing expressly that it was an optional extra;

(7) playing the recorded PDS without her consent to receive it in this manner;

(8) failing to make a genuine or reasonable attempt to confirm that Ms Gaykamangu understood what was discussed and that she consented to premiums being deducted and pressuring Ms Gaykamangu to sign up in the same call.

950 This conduct was said to be in the context of Ms Gaykamangu's personal characteristics.

951 Those characteristics include that she was a 21 year old Aboriginal woman who resided in a remote community, had difficulty understanding spoken English and understanding and reading complex words in English and who was financially vulnerable (including that she was receiving Centrelink payments and could not afford $14.76 per fortnight in premiums). She also displayed a socio-cultural tendency towards gratuitous concurrence. It was said that these characteristics combined to limit her assertiveness and ability to "push back" and made her "easy prey" for a predatory salesperson. I accept Ms Gaykamangu was vulnerable, or at least in a weaker bargaining position. This limited her ability to be assertive and push back.

952 It may readily be accepted from Ms Gaykamangu's evidence that by the end of the call she did not understand that they would take money out of her bank account, or that she had bought anything (let alone this insurance policy). That is looking at it only from a subjective

perspective. The factual matters underlying the Corporate Defendants' conduct relied on by ASIC can also be accepted. However, that does not necessarily establish this claim.

953 As with other claims, the conduct in making false and/or misleading statements on the topics in this call and the playing of the PDS without consent, did not attempt to remove the Consumer's freedom to act. Nor did conduct such as upselling the policy or failing to obtain her consent before playing the PDS. However, in the circumstances of this call, as described above, the use of the sales tactic whereby the Sales Agent invoked the names of persons known to Ms Gaykamangu (repeatedly and dispersed throughout the call), asserting, inter alia, they have a policy, did have that effect. It was the obvious purpose of the repeated references. In relation to one, her cousin, it was said that she "really wanted" Ms Dudbridge to call Ms Gaykamangu to give her a quote. It was said by the Sales Agent, in that context, "we are priced up to 50 per cent less than any other plan on the market. That's why Gina [her cousin] took it out". This sales tactic of using the names of family and friends during the call in the manner in which the Sales Agent did, was employed to put social pressure on Ms Gaykamangu to sign up to the policy. The repeated raising of names at important junctures during the call was to reinforce that message. In this context also, given the circumstances in which this call took place, exchanges such as that recited below are to be understood:

> RD: I'm so happy that we can get yourself and your son protected today. Now, are you happy that you've understood everything we discussed?
>
> GG: I'm not sure yet.
>
> RD: Oh. So are you happy that you've understood everything we just discussed?
>
> GG: Ah hmm.
>
> RD: Is that a clear yes?
>
> GG: Yes.

954 Far from taking steps to confirm that Ms Gaykamangu understood what was occurring, passages of that nature were designed to remove Ms Gaykamangu's ability to object and, therefore, freedom to act. This approach was invoked in circumstances in which the answers were to that point, and thereafter (with the exception of when she provided the details requested) a single word being "yeah", "mmm" or "yes".

955 I am satisfied in the particular circumstances of the call, the conduct amounts to coercion and is contrary to s 12DJ(1).

Geraldine Campbell

956 In respect to Ms Campbell, it is contended that Select (via its Sales Agent) contravened s 12DJ(1) during the sales call by coercing Ms Campbell into signing up to FlexiSure Life Cover with optional CC and providing her direct debit details over the telephone (FASOC [454]-[455]) and contravened s 12CB(1) during the sales call to Ms Campbell by engaging in unconscionable conduct (FASOC [456]-[461]). ASIC withdrew its allegations that Select made false and/or misleading representations to Ms Campbell.

957 ASIC pleaded that in the period September to November 2015, Ms Campbell was around 33 years old, resided in Alice Springs in the Northern Territory, had suffered multiple head injuries causing some memory loss, had difficulties understanding spoken English and could only read and write in English to a limited degree and had a socio-cultural tendency towards gratuitous concurrence. It was contended that Ms Campbell was in a position of vulnerability and/or in a weaker bargaining position than Select.

958 The personal circumstances of Ms Campbell pleaded by ASIC are established by the evidence and the agreed facts. That Ms Campbell has a socio-cultural tendency towards gratuitous concurrence is established by the evidence of Dr Eades. I accept Dr Eade's evidence.

959 It was agreed that on 2 September 2015, Sales Agent, Newyear Patiole, signed up Ms Campbell to FlexiSure Life Cover to the value of $120,000, together with optional CC to the value of $10,000 for each of her three children, with a policy acceptance date of 2 September 2015, fortnightly premium commencing at $13.72 and no nominated beneficiaries. Ms Patiole took Ms Campbell's bank account details for the purposes of automatically deducting fortnightly premiums. Ms Campbell did not pay any premiums under the policy. On 4 November 2015, she was notified that her policy had lapsed due to non-payment of premiums.

960 It was further agreed that the conduct of Mr Patiole is taken to have been engaged in by Select and BlueInc Services (as he was a BlueInc Services employee at the relevant time) per s 12GH(2)(a).

Evidence of Ms Campbell

961 ASIC relied on the affidavit of Ms Campbell sworn on 29 May 2019.

962 Ms Campbell is an Anmatyere woman who was born in Alice Springs, Northern Territory. She lived in Ti Tree and Laramba in the Central Desert region until the age of 13, when she moved

to Alice Springs to attend Yirara College. Ms Campbell attended school up to Year 11, but did not complete her Year 11 studies.

963 Ms Campbell is unemployed and has not held a job since 1999, when she was a cleaner at an outstation. She has four children, one of whom has a heart condition, and is not married. Ms Campbell presently lives in Kilgariff, Northern Territory, with three of her children, in a Mission Australia housing project.

964 Ms Campbell's first language is Anmatyere and she also speaks Warlpiri and Arrente. English is her third language, which she learned at school and can understand "a little bit". She can understand "normal speaking" but cannot understand more complex words. She can read and write some English.

965 In 2015, Ms Campbell was unemployed and caring for her children through Centrelink family payments. Ms Campbell had no savings and spent all her fortnightly income on rent and other expenses.

966 Ms Campbell has asthma and experienced domestic violence with a former partner around 2010 and 2011, which she said has affected her memory.

967 In 2015, Ms Campbell did not know what 'insurance' meant. She has only ever had insurance with FlexiSure.

Sales conduct

968 The audio recording of the sales call on 2 September 2015 reflects that there were pauses, sometimes lengthy, before answering. Ms Campbell's voice was slow, soft or low. Most answers were monosyllabic, with most answers being "yes", "yeah" or "mmm". There was a young child, who throughout the call at times was crying or otherwise noisy. There was an evident lack of understanding by Ms Campbell from the beginning of the call with her telling the Sales Agent that "I have already done it yesterday", which she repeated at various times during the call, in circumstances which were non-responsive to the questions asked. Ms Campbell at times, was evidently confused. Ms Campbell does not correct the Sales Agent in the call when he refers to her as "Mr Campbell" or "sir", or uses some other male descriptor. In the context of this call, this reflects on the lack of assertiveness by Ms Campbell.

969 The Sales Agent intersperses the call with references to his own children. The Sales Agent put to her that "obviously, like, you know, if something happens to you, you'd like your children

to have some financial support to fall back on, yeah?" This approach was no doubt a sales tactic to elicit a positive response. Only a quote of $120,000 was given, with no questions asked by the Sales Agent as to the appropriateness or suitability of that or Ms Campbell's desire for that amount of coverage. There were no open-ended questions asked in relation to matters of significance, but questions designed to elicit agreement.

970 The PDS which was played, without any explanation of its significance, involved a recording in which the speaker spoke particularly quickly, such that already complex information was even less understandable.

971 Ms Campbell did not ask any questions about the policy or anything that was being put to her. She barely engaged in the conversation.

Unconscionability

972 Ms Campbell was, because of her personal characteristics and circumstances, vulnerable or at least in a weaker bargaining position. I do not accept the Defendants' submission to the contrary. This submission was based primarily on the assertion that the Sales Agent was selling a standard product, they did not have a hold over Ms Campbell and she could have hung up. I have addressed this submission earlier.

973 Of the matters pleaded, it should have been readily apparent from the call that Ms Campbell was an Indigenous woman who lived in Alice Springs and was 33 years old at the time. Given Ms Campbell's answers, and the manner in which she was responding (including being non-responsive), it should have been apparent that she had difficulty understanding what was being put to her. There was obvious misunderstanding or miscommunication in the call. For example, when asked if the amount was affordable, Ms Campbell repeated three times that "I already done it yesterday", then added "gave my account number yesterday". That could not possibly be a reference to filling out a survey, as was suggested by the Sales Agent. The response "yeah" to the Sales Agent asking if her statements related to the survey could not have reasonably been understood to be correct. Despite what was an obvious misunderstanding, the Sales Agent simply proceeded with the sales pitch.

974 Ms Campbell was single, with four children under 15 years old (the youngest being eight months old), including one child with a congenital heart condition. She was unemployed, receiving Centrelink benefits. The Sales Agent knew she was unemployed. The obvious inference is that she has financial constraints. In that context, the Sales Agent unilaterally

nominated an amount for the policy with no discussion as to its suitability. Nor was any reference made to any lesser amount. Although the Sales Agent did ask whether the amount of $15 to $20 a week was affordable, Ms Campbell's responses were non-responsive. He did not return to that question at any stage.

975 There were sufficient red flags in the sales call which, at the very least, should have alerted the Sales Agent that there was an issue as to whether Ms Campbell understood what was being purchased and that she was vulnerable, or at the least in a weaker bargaining position. The Sales Agent took advantage of her position. The sales approach or tactics used, which were generally to ask leading questions, without ensuring that Ms Campbell understood what was occurring or wished to enter the policy, applied pressure on her, such as to be unfair in the circumstances. This is in the context where it was evident that Ms Campbell was caring for a baby who spent some of the call at least, crying. Far from allowing time to attend to her child, or even asking if it was a convenient time to talk, the Sales Agent used Ms Campbell's baby as a way to bond with her by discussing his children. Although as a general concept, such conduct might be considered unexceptional, this was occurring in circumstances where there was an apparent lack of understanding by Ms Campbell of what was being said as illustrated by her responses.

976 It may be accepted that the Sales Agent could not have been aware that Ms Campbell had suffered multiple head injuries causing her memory loss, or that he was aware of the socio-linguistic concept of gratuitous concurrence. That said, it would have been readily apparent, in the context referred to above, that Ms Campbell was not engaging, as she simply in the manner described above, kept repeating "yes", "yeah" or "mmm" in answer to questions. That is, she had the tendency to simply agree with what was being put to her by the Sales Agent. It could not have been genuinely or reasonably thought, for example, that Ms Campbell would have taken in and understood the PDS, let alone in the absence of any explanation, understood what the PDS was.

977 In the manner in which the conversation progressed, despite the red flags, the Sales Agent did not attempt to confirm Ms Campbell understood what was being discussed in the call. Simply asking her, for example, to confirm that she "understood everything that we've discussed today" could not in the circumstances, suffice as a genuine or reasonable attempt to ensure Ms Campbell understood. The red flags called for additional steps to be taken to ensure Ms Campbell understood what was discussed in the call, what she had signed up for and that she

wanted that policy. Moreover, this sale was made in the one call, with no option being given to Ms Campbell to consider whether she did want insurance nor any time to reflect on what was being discussed. The Sales Agent could not, in the circumstances, have been reasonably satisfied that she did understand.

978 The Corporate Defendants' submissions fail to grapple with the contents of this call, and the circumstances of Ms Campbell's positon, which should have been apparent to the Sales Agent. It is no answer to say, as the Corporate Defendants did, that when the Consumer indicated that they wanted to purchase the product in circumstances where they were not forced to do so, the Sales Agent was entitled to assume that the Consumer was making a conscious decision to purchase the product and that they did actually want it. The submission is made entirely devoid of what occurred in this, and other, of the Consumer calls. On the Corporate Defendants' submission, provided that a Consumer says yes to what is occurring, that is sufficient. That approach is simplistic and fails to acknowledge the Sales Agent's responsibilities in carrying out their duties, namely, the responsibilities and legal requirements which the Corporate Defendants' training program, inter alia, is targeted to address. On that submission, the Sales Agent can blithely proceed to make a sale regardless of any issues as to understanding on the part of the Consumer which are evident.

979 I am satisfied that there is a contravention of s 12CB(1).

Coercion

980 ASIC contends that taking into account the personal characteristics and circumstances of Ms Campbell, giving rise to her vulnerability or at least weaker bargaining position, the Sales Agent's conduct coerced Ms Campbell into signing up to FlexiSure Life Cover with optional CC and/or providing her direct debit payment details over the telephone in contravention of s 12DJ(1).

981 ASIC contended Ms Campbell's personal characteristics which have been addressed above, including that she was unemployed, in receipt of Centrelink benefits, had four children between eight months and 15 years old, including a 12 year old with a heart condition and that she could not afford $13.72 per fortnight in premiums, made her "easy prey" for a predatory sales person and limited her ability to "push back". Against that background, the Sales Agent's conduct relied upon in establishing that Ms Campbell was coerced was quoting only for $120,000 of cover and not offering alternative levels, playing a pre-recorded PDS without first obtaining Ms Campbell's express and/or informed agreement to do so, failing to make a genuine or

reasonable attempt to confirm that she understood everything discussed during the telephone call, and signing her up to the insurance policy during the same telephone call rather than giving her the opportunity to reflect. Moreover, she did not understand the nature of the policy she had signed up to. Being deprived of that opportunity and her lack of understanding, it was submitted, meant that she was not in a position to exercise her free will and judgment.

982 Each of the underlying integers of conduct can be accepted to have occurred. Similarly, Ms Campbell's personal circumstances have been established. It can also be accepted that, as she said in her evidence (which was unchallenged), she did not want insurance.

983 However, a consideration of the integers reflect they are not related to conduct which could be described as attempting to remove her freedom to act. As previously explained, looking at the subjective evidence of Ms Campbell is not the only evidence to be considered. The conduct identified could not be described as designed to put pressure on her, or compel her to sign up to the policy. For example, it could not be said that making the false and/or misleading statements, playing the pre-recorded PDS without her consent or not offering lower levels of cover compelled her to sign. Rather the Sales Agent took advantage of her situation to proceed with the sale as described above. This can be contrasted to, for example, the conduct alleged in relation to Ms Gaykamangu where the pressure was exerted on her by the Sales Agent's repeated use of name-dropping at strategic times. The conduct that occurred is to be criticised and is unconscionable. However, it does not follow that it necessarily is coercive within the meaning of s 12DJ(1). As previously explained, simply because a person does not understand the product that is purchased does not necessarily mean that their free will has been negated such that the conduct amounts to coercion within s 12DJ.

984 In the circumstances, I am not satisfied in relation to this call, that it is coercive within s 12DJ(1).

Edmund Nundhirribala

985 In respect to Mr Nundhirribala, ASIC contends that Select (via Sales Agent, Ms Dudbridge) contravened s 12DB(1) by making two separate representations that were each false and/or misleading (FASOC [483]-[488]); contravened s 12DJ(1) during the sales call by coercing Mr Nundhirribala into signing up to Let's Insure Funeral Cover with optional HEC, AIC and ADC and/or providing his direct debit details over the telephone (FASOC [489]-[490]); and contravened s 12CB(1) during the sales call to Mr Nundhirribala by engaging in unconscionable conduct (FASOC [491]-[496]).

986 ASIC pleaded that Mr Nundhirribala is an Aboriginal man who in the period of September 2015 to November 2018 was around 37-40 years old, resided in a remote area of the Northern Territory, had difficulties understanding English and had a socio-cultural tendency to gratuitous concurrence. It was contended that Mr Nundhirribala was in a position of vulnerability and/or in a weaker bargaining position than Select.

987 The personal circumstances of Mr Nundhirribala as pleaded by ASIC are established by the evidence and the agreed facts. That Mr Nundhirribala has a socio-cultural tendency towards gratuitous concurrence is established by the evidence of Dr Eades. I accept Dr Eades' evidence.

988 It was agreed that on 4 September 2015, Ms Dudbridge signed Mr Nundhirribala up to Let's Insure Funeral Cover to the value of $16,000, optional HEC to the value of $9,600 and optional AIC and ADC to the value of $32,000 each, with a policy acceptance date of 4 September 2015, fortnightly stepped premium commencing at $14.47 and no nominated beneficiaries. Ms Dudbridge took Mr Nundhirribala's bank account details for the purposes of automatically deducting fortnightly premiums. In August 2016, August 2017 and August 2018, Mr Nundhirribala's policy was automatically renewed and his benefits increased by 5%, with an increase in the fortnightly premium. Between 4 September 2015 and 1 November 2018, Mr Nundhirribala paid $1,169.18 in premiums. Although he received a refund of $967.19 on 20 December 2017, his policy remains in force.

989 It was further agreed that the conduct of Ms Dudbridge is taken to have been engaged in by Select and BlueInc Services (as she was a BlueInc Services employee) by reason of s 12GH(2)(a).

Evidence of Mr Nundhirribala

990 ASIC relied on the affidavit of Mr Nundhirribala sworn on 29 April 2019.

991 Mr Nundhirribala is a Nunggubuyu man from Numbulwar, a remote Aboriginal community. He attended school until the age of 16. Since 2016, Mr Nundhirribala has worked as a Remote School Attendance Officer at Numbulwar School. Mr Nundhirribala is married with three children. He lives in Numbulwar with his wife, their three children, his son's wife, his daughter's husband and his aunty.

992 Mr Nundhirribala's first language is Nunggubuyu. At home, he speaks Kriol. English is his third language. Mr Nundhirribala can understand spoken and written English but has difficulty with longer words or when people speak quickly.

993 In 2015, Mr Nundhirribala was working as a sports and recreation teacher in Roper Gulf Shire, Numbulwar, for which he earned about $997 each fortnight. After this, Mr Nundhirribala worked at the school as a "HLO" and earned about the same amount per fortnight. Mr Nundhirribala also received Centrelink family payments in 2015.

994 Mr Nundhirribala does not understand what insurance or funeral insurance is – he understands that when a person in his community dies, their funeral is usually organised by the "shop" in Numbulwar.

Sales conduct

995 This was a call where the Sales Agent obtained the Consumer's details through the Refer a Friend program. The reference was from Florence Murunum who is Mr Nundhirribala's niece. A consideration of Ms Dudbridge's call with Ms Murunum plainly put her on notice that Mr Nundhirribala was Indigenous. An Indigenous language is heard in the call and Ms Murunum is from the Numbulwar community, as are those family members she provided the referrals for. Moreover, during the 4 September 2015 sales call, Ms Dudbridge told Mr Nundhirribala that she had spoken to others from Numbulwar.

996 The call to Mr Nundhirribala commenced with Ms Dudbridge saying "Hi, is that Esmond [Edmund] Its Rebecca calling you from Let's Insure" and almost immediately thereafter she said "I was speaking to one of your family members, Florence… Florence took out a funeral insurance with us just because we made it so, so affordable for herself and her family. So she really wanted me to give you a call just to run through it with you and provide you with your very own free quote as well, okay?" Without explaining that she was calling for the purpose of selling Let's Insure Funeral Cover, or asking Mr Nundhirribala whether he was interested in purchasing insurance, Ms Dudbridge gave Mr Nundhirribala a brief overview of the large sums of money payable under the Let's Insure Funeral Cover, ADC, AIC and HEC. At various times during the call, the Sales Agent invoked the names of Ms Nundhirribala's relatives (including Patricia, Cheryl, Ingrid, Rosabelle and his mother, Fay), most of whom she said had taken out insurance cover. The manner in which this was done was to engender trust, and it was used as a means of social endorsement and to put pressure on Mr Nundhirribala to purchase the policy.

997 Ms Dudbridge spoke quickly throughout the sales call. Mr Nundhirribala's responses, with limited exceptions, were simply "yeah". It would have been apparent from the manner in which the answer was repeatedly given that he was not genuinely assenting to statements being made. So much is also reflected in Mr Nundhirribala's evidence: "Each time I said 'yeah', I said it

just to say something because I didn't understand what the caller was saying. I didn't mean that I agreed to anything". Moreover, the questions asked or propositions put by the Sales Agent were generally leading to an affirmative answer. Mr Nundhirribala did not ask any questions or engage in the conversation in respect to the policy. The PDS was played orally, and carried with it the same flaws as previously described. He was never asked his consent to receive the PDS in this manner, the significance of the PDS was not explained, and there was no attempt by the Sales Agent to satisfy herself that he understood it. Not surprisingly in the circumstances, Mr Nundhirribala's evidence was that he does not understand what many of the words used in the PDS mean. Within a short period of time, the Sales Agent was taking his debit details without any questions being asked as to whether he wanted any insurance or the suitability of the amount quoted to him, which was the highest amount. Although having done so, Ms Dudbridge did ask whether the premium sounded affordable, which was initially answered "mmm" before eliciting a "yeah", when the question was repeated. The call proceeded from the outset as if this sale was a given.

998 Mr Nundhirribala's evidence was that he did not understand that he had purchased insurance during the sales call or that money would be taken from his bank account. He "thought the lady was trying to put pressure on [him]" and that she was "forcing [him] to do something, but [he] didn't know what she wanted".

Admissions

999 A number of statements have been made which amount to admissions in respect to the sales conduct in relation to this Consumer.

1000 Ms Dudbridge is the Sales Agent who dealt with Mr Nundhirribala. It is to be recalled that she was the Sales Agent who dealt with Ms Gaykamangu. Her employment was terminated due to her conduct in relation to the use of the Refer a Friend program. As explained above at [0], a review was undertaken in relation to a spike in sales to certain postcodes with a high proportion of Indigenous residents. In an email to Ms Dudbridge from the Defendants' solicitors (referred to above at [0]), which contained her termination letter, Mr Howden stated, inter alia, that Ms Dudbridge failed to "act with the utmost good faith" and took advantage of certain customers. Subsequently, as recited above at [0], an email to Ms Dudbridge sent on behalf of the BlueInc Group dated 16 June 2017 provided that her actions constituted a breach of the Corporations Act and the company's compliance and ethical selling standards.

1001 As a result of the investigation in relation to the spike, the sales call in respect of Mr Nundhirribala was recorded as a 'fail' and it was noted that:

> I do not believe that this is an ethical sale as despite the customer answering all the agents [sic] questions, he did so very slowly and only with yes answers. The customer seems confused at the beginning of the call as to what it is about. When asked for phone numbers for references at the end of the call the customer gives his daughters [sic] phone number despite the agent a minute before stating that she is ringing him back later that day to get her DOB and covering her under his policy. The lack of conversation from the customer is concerning and I therefore believe that this should be refunded.

1002 In a letter dated 19 December 2017, Let's Insure (which is a trading name of Select) sent Mr Nundhirribala a letter which advised:

> We think you have paid for insurance you may not have wanted and we are going to fully refund your premiums plus interest at 6% pa.…
>
> We think that when purchasing your Let's Insure policy you were subject to unfair sales practices. This means the sales person who sold you the policy may have pressured you into purchasing your policy or misled you into thinking you were purchasing something different.…
>
> The agent who sold this funeral insurance policy to you did not provide sufficient product information to allow you to make an informed decision during the telephone call.

1003 For the reasons given previously, including where relevant in relation to Ms Gaykamangu, these statements are capable of amounting to admissions.

1004 The Corporate Defendants' submissions as to the conduct of Ms Dudbridge in relation to this Consumer call, which makes repeated assertions contrary to what are plain admissions, must be considered in this context. For example, submissions that Ms Dudbridge's conduct was "logical and defensible" or that ASIC's claims that her conduct involved "unfair tactics" or was not in good faith are unjustified, are difficult to maintain. As explained below, the submission fails to grapple with the content of the call.

False and/or misleading representations

1005 Two representations are alleged, which relate to the same topics which are the subject of claims made in relation to some other Consumers; the limited exclusion representation and the standard cover representation.

1006 *First*, ASIC alleged that the Sales Agent implied that there were no exclusions to the Let's Insure Funeral Cover, ADC and AIC, save for a professional sports exclusion to the AIC. Having considered the content of this call, I am satisfied that the limited exclusions

representation was made and was false and/or misleading because in fact there were other significant exclusions to the ADC and AIC. I am satisfied that contravention is established and that it falls within and is a contravention of s 12DB(1)(i).

1007 The Corporate Defendants relied on the same types of arguments as referred to above at [0]-[0], in respect to Mr Mirrawana. The same reasoning applies in respect to Mr Nundhirribala.

1008 *Second,* ASIC allege that Ms Dudbridge made the standard cover representation, being that the ADC, AIC and HEC were not optional extras and/or were a standard component of the insurance policy. A consideration of the call reflects that this representation is established. The Corporate Defendants' submission is artificial and pays no regard to the content of the call. The conduct falls within and is a contravention of s 12DB(1)(i).

Unconscionability

1009 Mr Nundhirribala, because of his personal characteristics and circumstances, was vulnerable (or at a special disadvantage, the concepts being used interchangeably) or at least in a weaker bargaining position. I do not accept the Corporate Defendants' submission to the contrary. As with other Consumers the Corporate Defendants' submission was based primarily on the assertion that the Sales Agents were selling a standard product, they did not have a hold over Mr Nundhirribala and he could have hung up. I have addressed this submission earlier.

1010 At the time of the sales call Mr Nundhirribala was a 37 year old Aboriginal man who resided in Numbulwar, a remote Aboriginal community. These matters would have been readily apparent to Ms Dudbridge from the call, and the circumstances in which she had obtained Mr Nundhirribala's contact details. Mr Nundhirribala's unchallenged evidence was that he had difficulties understanding English. Given Mr Nundhirribala's conduct on the call, the slow speech, pauses and the nature of his responses to questions asked and that he did not ask a single question about the policy during the call, it would have been, or at least should have been apparent to Ms Dudbridge, that he had difficulties understanding English, and was having difficulties understanding what was occurring.

1011 At the very least, there were a number of red flags in the call that should have alerted Ms Dudbridge to these characteristics and that Mr Nundhirribala was vulnerable, or at least was in a weaker bargaining position.

1012 The Sales Agent made two false and/or misleading statements about matters of significance. This was in a context where the Sales Agent chose to employ a tactic of using the information

that she had gained through the Refer a Friend program to erroneously imply that a certain family member wanted her to provide a quote and then she repeatedly invoked names of family and friends so as to put pressure on him to sign up to the policy. The PDS was played in the manner previously described such that Mr Nundhirribala was not asked for his consent, and no steps were taken to explain it to him, or to ensure that he understood the content of the recording. She only quoted the top of the range cover. The Sales Agent did not make any genuine or reasonable attempt to confirm that Mr Nundhirribala understood everything that had been discussed in the call. Ms Dudbridge could not in the circumstances have been reasonably satisfied he did.

1013 In all the circumstances Ms Dudbridge did not act in good faith. She took advantage of his position. She employed unfair sales tactics. I note that Mr Howden expressly referred to her lack of good faith when he terminated her employment.

1014 I am satisfied that the conduct is unconscionable and that there is a contravention of s 12CB(1).

Coercion

1015 ASIC contends that taking into account the personal characteristics and circumstances of Mr Nundhirribala giving rise to his vulnerability or at least, weaker bargaining position, the conduct of the Sales Agent coerced him into signing up to Let's Insure Funeral Cover with optional ADC, AIC and HEC and/or providing his direct debit payment details over the telephone in contravention of s 12DJ(1).

1016 In relation to Mr Nundhirribala's personal characteristics and circumstances, ASIC also refers to the fact that he was financially vulnerable including that he could not afford $14.47 per fortnight in premiums and displayed a socio-cultural tendency towards gratuitous concurrence. As a result, it was submitted that his personal characteristics combined to limit his assertiveness and ability to 'push back'. Against that background, the Sales Agent's conduct which is relied on is:

(1) telephoning Mr Nundhirribala without prior notice;

(2) speaking too quickly to him;

(3) referring to individuals known to him and members of his family and in doing so making the following statement, that one of those individuals, Ms Murunum, had taken out funeral insurance with Select, and "really wanted [Ms Dudbridge] to give [Mr

Nundhirribala] a call just to run through it with [him] and provide [him] with [his] very own free quote";

(4) making the false and/or misleading representations;

(5) quoting only for the top level of cover and not offering alternative levels of cover;

(6) playing a pre-recorded PDS without first obtaining his agreement to receive the PDS in this way;

(7) failing to make a genuine, or reasonable, attempt to confirm that Mr Nundhirribala understood everything discussed during the telephone call; and

(8) signing him up to the insurance policy during the same telephone call rather than giving him the opportunity to reflect.

1017 ASIC submitted that, at the end of the call, Mr Nundhirribala did not understand what he had signed up for, or that he even had signed up for insurance at all. As a result, ASIC submitted, Mr Nundhirribala's will was overborne in that he did not give his meaningful and informed consent. Mr Nundhirribala's evidence was that he felt pressured by Ms Dudbridge and that he did not know that he had agreed to sign up to a policy and to have money deducted from his account. This unchallenged evidence, which is referred to above at [0], may be accepted. Again, it is necessary to consider all the circumstances, not simply the state of mind of the Consumer.

1018 A number of the integers relied on, as in other cases, relate to conduct which although it may be accepted as occurring, is not directed to imposing any pressure or compulsion to act. For example, playing the pre-recorded PDS without his consent, making the false and/or misleading statements and only quoting the top level of cover could not be said to have compelled him to purchase a policy (although it explains how a policy of this type and amount was purchased). Those statements were said to deprive him of free choice and his ability to give an informed decision, although Mr Nundhirribala does not give that evidence. As previously explained, this was a Consumer where the underlying submission by ASIC and the evidence of Mr Nundhirribala is that he did not understand what he had signed up for, not that he was deprived of a choice. I have generally addressed that submission above.

1019 The only one of the integers in any dispute was that the call was without prior notice, as Mr Nundhirribala said that his niece had told him "a story about credit or something but I don't remember. She told me that I was going to get a phone call from someone about something like this", referring to the call in question. That is the extent of any purported notice. All other integers are factually established. The only integer that was designed to put pressure on Mr

Nundhirribala was the repeated reference to his family members including the statement that Ms Murunum had taken out funeral insurance with Select, and "really wanted [Ms Dudbridge] to give [Mr Nundhirribala] a call just to run through it with [him] and provide [him] with [his] very own free quote". However, this was not used to the same extent as in some of the other Consumer calls. As described above, although this was an unfair tactic in the circumstances of this call, including his personal characteristics, it did not have the effect of compelling Mr Nundhirribala to sign up to the policy and/or provide his direct debit details. Rather, the recording of the call reflects that Mr Nundhirribala did not engage in the call. ASIC submitted that Ms Dudbridge's "subtle and sneaky tactics" had the consequence that he did not understand the policy he had signed up for. That was the basis on which this claim was really advanced. That Mr Nundhirribala did not understand the policy that he signed up for, in the circumstances of this call, does not mean that he was necessarily coerced within the meaning of s 12DJ(1).

1020 Ms Dudbridge plainly took unfair advantage of Mr Nundhirribala. However, in the circumstances I am not satisfied that it amounts to coercion within s 12DJ(1).

Irshad Hussain

1021 In respect to Irshad Hussain, ASIC contended that Select (via its Sales and Retention Agents) contravened s 12DB(1) on three occasions by making three separate representations that were each false and/or misleading (FASOC [592]-[599]); contravened s 12CB(1) during the sales call by engaging in unconscionable conduct (FASOC [600]-[608]); contravened s 12DJ(1) by unduly harassing Irshad Hussain by not permitting him to cancel his policy over the telephone and requiring instead that he provide a written document bearing his signature to cancel his policy (FASOC at [609]-[610]); and contravened s 12CB(1) during the retention calls by engaging in unconscionable conduct (FASOC [611]-[619]).

1022 ASIC pleaded that Irshad Hussain and Saeed Hussain (Irshad Hussain's cousin) are Pakistani men who, in the period of November 2015 to April 2017, were around 25-27 and 28-30 years old respectively. Irshad Hussain lived in Australia on a visa, after having come to Australia as a refugee. He could not read or write English and had difficulties understanding English as it was not his first language. Saeed Hussain also came to Australia as a refugee in November 2012 and had difficulties understanding English as it was his third language. It was contended that Irshad Hussain was in a position of vulnerability and/or in a weaker bargaining position than Select.

1023 The personal circumstances of Irshad and Saeed Hussain as pleaded by ASIC are established by the evidence and the agreed facts.

1024 It was agreed that on 4 November 2015, Sales Agent, Mr Banks, telephoned Saeed Hussain in the presence of Irshad Hussain for the purpose of marketing Let's Insure life insurance to Irshad Hussain. During the sales call, Mr Banks signed up Irshad Hussain to Let's Insure AC, which comprised ADC to the value of $130,000 and AIC to the value of $130,000, with a policy acceptance date of 4 November 2015, a monthly premium commencing at $23.40 and no nominated beneficiaries. Mr Banks took credit card details from Irshad Hussain via Saeed Hussain for the purposes of automatically deducting monthly premiums. On or around 6 April 2017, Irshad Hussain's policy was cancelled. In total, Irshad Hussain paid $403.65 in premiums. He subsequently received a full refund plus interest of $63.77.

1025 It was further agreed that the conduct of Mr Banks and Jordan Henck, is taken to have been engaged in by Select per s 12GH(2)(a). It was also agreed that the conduct of Mr Banks, Mr Henck, Marina Todorovic and Chloe O'Toole (all BlueInc Services employees at the relevant time), is taken to have been engaged in by BlueInc Services by reason of s 12GH(2)(a).

Evidence of Irshad Hussain and Saeed Hussain

1026 ASIC relied on the affidavits of Irshad Hussain affirmed on 10 April 2019 and Saeed Hussain affirmed on 30 May 2019 (noting that Saeed Hussain's affidavit was admitted subject to some rulings on objections).

1027 Irshad Hussain was born and raised in Pakistan. Irshad Hussain came to Australia as a refugee in April 2013. He is married and has three children, who all live in Pakistan. In 2015, Irshad Hussain was receiving Centrelink payments. He was not working as this was not permitted under his visa. He has sent money to his family in Pakistan since 2015.

1028 Irshad Hussain's first language is Pashto. In 2015, he could not read or write in English and needed the assistance of an interpreter when dealing with Centrelink. His English is better now, however, but he still has some difficulty understanding spoken English and needs assistance on the telephone. He can read some English, but cannot understand the meaning of everything.

1029 In 2015, Irshad Hussain had insurance with Commonwealth Bank which he cancelled. He could not remember what insurance this was, but he had it before signing up to Let's Insure. In 2015, Irshad Hussain understood life insurance was something "for if you were hurt at work, hurt in a fire or were in an accident".

1030 Saeed Husain was born in Pakistan. He attended school in Pakistan and completed a degree in Computer Science. He is married and his wife lives in Pakistan. Saeed Hussain came to Australia as a refugee in November 2012. He has lived in Australia for six years and came to Sydney in January 2013. He has known Irshad Hussain since they were teenagers in Pakistan.

1031 Saeed Hussain's first language is Pashto and his second language is Urdu. He also speaks some English, which he learnt at school, and can read and write in English. He found it difficult to understand spoken English when he came to Australia in 2012, because of people's accents or when they used "big words" or spoke too quickly. When he first came to Australia, he was usually assisted by an interpreter when dealing with things like immigration. His English was worse in 2015 than it is now.

1032 Saeed Hussain's evidence is that Irshad Hussain's English was not very good in 2015. He observed that Irshad Hussain had trouble understanding English and would ask Saeed Hussain to explain things to him in Pashto, or would ask Saeed Hussain to speak for him. He is the "main person" who helps Irshad Hussain to understand English and translate things to him in Pashto.

1033 Around 2014, Saeed Hussain bought insurance with Westpac. He believed that he would be paid money under the insurance policy if he was injured. Saeed Hussain later learned that he would only be paid money under the Westpac insurance if he were to die, so he cancelled the Westpac insurance, but he cannot recall when.

Sales conduct

1034 On 4 November 2015, Saeed Hussain received a call from Mr Banks. During the call, Saeed Hussain stated that he already had life insurance. Saeed Hussain invited Mr Banks to call him back later that day, as he had a friend who might want life insurance.

1035 Mr Banks, who introduced himself as "Jon Stewart", called back later that day. Saeed Hussain told Mr Banks that his friend, Irshad Hussain, wanted insurance. Mr Banks was evidently aware of Irshad Hussain's English language difficulties from the outset of the call. Saeed Hussain told Mr Banks that "he [Irshad Hussain] can't speak English – English properly". Then, after speaking very briefly to Irshad Hussain and providing him with a short overview of the policy, Mr Banks stated "I think he [Irshad Hussain] can't understand me" and continued to deal with Saeed Hussain. Irshad Hussain's evidence was that he asked Saeed Hussain to speak to Mr

Banks as he was speaking quickly and had an accent which made it difficult for him to understand. So much is reflected in the audio recording of the sales call.

1036 After initially stating that Irshad Hussain wanted life insurance, Saeed Hussain explained that Irshad Hussain wanted benefits or something like that for injuries ("broken your bones"). Mr Banks then switched to provide a quote for accident cover and gave some details about the nature of the coverage, exclusions (referring to professional sports as an example) and the premiums that would be payable.

1037 The following exchange then occurred:

> DB: Yeah, that's fine. So is he happy with that one, $23.40 a month, $130,000 of cover?
>
> SH: Yeah.
>
> DB: Okay. Now, obviously is he going to be paying for it or are you paying for it?
>
> SH: No, no, he's paying

1038 There was some discussion about payment dates, and then:

> DB: Well, what I've got to do, okay - are you on loudspeaker, are you?
>
> SH: Sorry?
>
> DB: What I need to do is even though he's paying, that's fine, I'll make you the policy owner just because obviously you understand everything that's going on, okay.

1039 Despite that, Irshad Hussain was made the policy owner.

1040 Mr Banks then proceeded to play the pre-recorded PDS. When asked, Saeed Hussain indicated to Mr Banks that he did not hear the pre-recorded message. It appears from the recording that Saeed Hussain was talking in the background to someone else at this time. Mr Banks played the message again and asked, for a second time, whether Saeed Hussain heard and received the message, to which he said "Yeah". In his affidavit, Saeed Hussain explained that he could not recall whether he put the PDS on loudspeaker and that he did not understand many of the words used in the PDS. Mr Banks did not ask Irshad Hussain whether he had heard and received the message. Indeed, as is reflected in the passage recited below at [0], he was aware that it was unlikely that Irshad Hussain would have understood the PDS in any event. I note that Saeed Hussain's evidence was that he did not explain the recording to Irshad Hussain.

1041 Saeed Hussain and Irshad Hussain were evidently confused about the policy that was being purchased, as they asked questions about life insurance (even though what was being discussed was ADC and AIC). That misunderstanding was not corrected by Mr Banks.

1042 Mr Banks asked Saeed Hussain whether Irshad Hussain was "happy for [him] to get that going for [Irshad Hussain] now" and Saeed Hussain agreed. Mr Banks then took Irshad Hussain's bank details.

1043 Irshad Hussain could not recall whether Saeed Hussain had translated the conversation, but he knew at the end of the call that he had purchased insurance. The recording reveals that Saeed Hussain did not generally translate what had been discussed during the call. Irshad Hussain's evidence though was that Saeed Hussain had told him that the insurance would cover him if he died or was in an accident.

Admissions

1044 The Sales Agent in relation to the sales call was examined pursuant to s 19 of the ASIC Act on 16 April 2019. At that time, he was employed by BlueInc Services as a Sales Manager. In those circumstances, I accept ASIC's submission that he can be taken as speaking on behalf of the Corporate Defendants. In his examination, Mr Banks said (under privilege) in relation to this sales call, "I admit, it's not up to my standards and it wasn't a good call", "[t]his is a poor call where I've had a complete lapse of judgment and it's just not up to my standard, what I normally do", "it's not an acceptable call. I imagine it would go down as maybe an, I don't know, unethical call perhaps, and it would probably warrant a formal warning, definitely", and from a supervisor's perspective, this call "would definitely be a fail". It should be recalled that although these statements were made under privilege, they are admissible against the Corporate Defendants. Mr Banks also acknowledged in his s 19 examination, claiming privilege, that he knew that Irshad Hussain did not speak English well, did not understand him and that there was a language barrier between them on the call or that Saeed Hussain was not translating for Irshad Hussain either simultaneously or in stages during the call. Mr Banks also agreed, under privilege, in seeking direct debit details that it was not acceptable to seek authorisation from Irshad Hussain in circumstances where he knew that he did not speak English well and thought that he did not understand him. The QA review of the sales call found that this call was a 'fail' and that the Sales Agent had not avoided making any misrepresentations. Notwithstanding that conclusion, the QA assessment was notable for what it did not refer to (that is, aspects of the call which were rated as a pass).

1045 Irshad Hussain was provided with a refund of his premiums. On 26 February 2019, Let's Insure emailed him stating "We think you have paid for life insurance you may not have wanted, and we are going to fully refund your premiums plus interest at 6% pa." and "we think that when purchasing it our representative did not take appropriate action to ensure that you were able to make an informed decision".

1046 These statements are capable of amounting to admissions.

1047 The Corporate Defendants' submissions which are now advanced as to Mr Banks' conduct, must be considered in that light. In this context also, the Corporate Defendants' submission which attributes motivations to Mr Banks for various conduct, must be considered in light of the fact he remains employed by a company wholly owned by BlueInc Group, and controlled by Mr Howden, but was not called to give evidence. The circumstances are such that a *Jones v Dunkel* inference can be drawn, as explained above at [0].

False and/or misleading representations (Sales conduct)

1048 There are three false and/or misleading representations pleaded; two relating to the sales call and one to a retention call. The two in relation to the sales call are of the same nature as pleaded in respect to some other Consumers, being the limited exclusions representation and the flat premium representation.

1049 *First*, in respect to the limited exclusion representation, ASIC allege that Mr Banks represented that there were no exclusions to the Let's Insure AC save for professional or motor sport-based activities. I am satisfied this contravention is established in relation to this sales call and that it falls within and is a contravention of s 12DB(1)(i). The Corporate Defendants' submissions, which primarily repeat those made in relation to other Consumers, cannot be accepted, for the reasons previously explained.

1050 *Second*, in respect to the flat premium representation, ASIC alleged that it was represented by Mr Banks that the premiums remained the same throughout the duration of the policy. It was said that this representation was implied and could be discerned from all the circumstances. In particular, ASIC relied on the statement recited above at [0], together with Mr Banks' failure to explain that Irshad Hussain had been signed up to the stepped premium option and that his policy was subject to automatic annual increases.

1051 I am satisfied that the representations made during the call together with the failure to explain this was a stepped premium, establish this contravention. Again, the submissions advanced by

the Corporate Defendants are primarily those made more generally in respect to this representation, and for the reasons previously given, do not lead to a different conclusion. It falls within and is a contravention of s 12DB(1)(g).

1052 I will address the remaining false and/or misleading representation claim in respect to the retention call below, when dealing with the retention claims.

1053 Suffice to say at this stage, I am satisfied of the two contraventions alleged in respect to the sales call.

Unconscionability (Sales conduct)

1054 I am satisfied that by reason of Irshad Hussain's personal characteristics that he was vulnerable, or at least in a weaker bargaining position.

1055 Irshad Hussain's personal circumstances are referred to above at [0]. Each of those matters is established, and each of those matters was known to Mr Banks, the Sales Agent. In particular, during the sales call, Saeed Hussain, informed the Sales Agent of these matters. The conduct of the call thereafter makes it readily apparent that Mr Banks was aware of this. The Corporate Defendants admit that it was reasonably apparent to Mr Banks that Irshad Hussain did not understand English, and that he ought to have known that Irshad Hussain had difficulties understanding English, though it was contended that he did not exploit those difficulties. I do not accept that submission, as by proceeding with the call in the manner he did, reflects otherwise.

1056 ASIC also relied on the fact that Irshad Hussain was on Centrelink payments, with that being his sole source of income and could not work due to his immigration status. The unchallenged evidence establishes those matters. The Corporate Defendants submit that Mr Banks would not know those facts. That may well be correct. This was relied on by ASIC as relevant to the harsh consequences of the conduct relevant to the unconscionability claim.

1057 I note that although Mr Banks stated in the call that he would explain the cover to Saeed Hussain and that Saeed Hussain could then explain it to Irshad Hussain during the call, it is readily apparent from the audio of the call that Saeed Hussain was not translating at stages or simultaneously what Mr Banks was saying during the call and that Irshad Hussain would not have understood their conversation from overhearing it in English. From this, it would have been apparent to Mr Banks that the information he was providing to Saeed Hussain about the policy was likely not reaching Irshad Hussain prior to him being signed up to the policy.

1058 Although Saeed Hussain had better English skills than Irshad Hussain, the unchallenged evidence is that he was also speaking English as a third language, and did not understand the complex terminology used during the call or the nature of the product being sold. The difficulties in relying on Saeed Hussain to translate would, or at least should have been, apparent to Mr Banks.

1059 Despite that, Mr Banks did not take any take steps to confirm that Saeed Hussain was translating what he was saying or, when he was, that he was accurately translating information to Irshad Hussain. Nor did he make any genuine, or reasonable, attempt to confirm that Irshad Hussain understood everything discussed during the telephone call. The question Mr Banks asked at the conclusion of the call was not sufficient, and he could not reasonably have thought otherwise. Plainly by the time of his s 19 examination he acknowledged as much.

1060 Given the above context, the flaws in the manner in which the PDS was played are stark.

1061 Mr Banks did not seek Saeed Hussain's or Irshad Hussain's express or informed consent to receive the PDS in this way, but rather, the following occurred:

> DB: What I just - what I just have to do is play you a product disclosure statement. It's a recording that takes about 60 seconds. I'm listening to it --
>
> SH: Mmm.
>
> DB: -- as well. Will you do me a favour, [Saeed]? Will you put it on loudspeaker just so Irshad hears it as well. I know he might not understand but can you just put it on loudspeaker while I play it?
>
> SH: I put it on loudspeaker?
>
> DB: Yeah. So I'm just going to play you a recording, it's our product disclosure statement, and you'll come back to me in 60 seconds, okay?
>
> SH: Okay, hold the call.
>
> DB: Hold the line, [Saeed].
>
> SH: Hold.
>
> (Recorded message plays)

1062 The purpose, content and significance of the recording was not explained. The recording was of a male speaker speaking very quickly and using complex terms. In the circumstances it could not possibly have been genuinely or reasonably considered that was appropriate. So much was accepted by Mr Banks (under privilege) in his s 19 examination when it was put to him that playing the pre-recorded PDS on loudspeaker for Irshad Hussain to hear was not "an acceptable way to communicate a product disclosure statement". Moreover, Mr Banks accepted (again,

whilst claiming privilege) that there was a "real risk" that Irshad Hussain would not understand the PDS that was played to him. I note also that the PDS played was for funeral insurance rather than Let's Insure AC.

1063 In addition, as explained above, during the sales call Mr Banks made two false and/or misleading statements on matters of significance. Mr Banks also did not correct Saeed Hussain when he repeatedly referred to the policy on offer as "life insurance".

1064 In the above context, and despite all the language difficulties, Irshad Hussain was signed up before the end of the call, with no opportunity to consider his position. He took advantage of Irshad Hussain's position. Contrary to the Defendants' submission, the fact that Irshad Hussain wanted accident cover does not diminish the inappropriateness of the conduct undertaken by the Sales Agent.

1065 In the above circumstances it can be accepted that Mr Banks did not act in good faith towards Irshad Hussain.

1066 In the circumstances, the conduct in the call, by taking the credit card details and signing Irshad Hussain up to a policy, is unconscionable.

1067 I am satisfied that there is a contravention of s 12CB(1).

Retention conduct

1068 After being signed up to Let's Insure AC, Irshad Hussain received a number of letters from Let's Insure, often chasing up premium payments.

1069 The evidence establishes that in about October or November 2016, Irshad Hussain says he burnt his hand and that the medical treatment for his hand cost him about $900. He tried to ring Let's Insure a few times, but they did not call him back and he was unable to leave a message. He said that around this time he told Saeed Hussain to cancel the policy because he "was upset and angry that [he] had insurance and they did not help [him]."

1070 Pausing there. That Irshad Hussain thought that his policy would cover him for this injury revealed his lack of understanding of the policy, and reflects on the sales call, which is explained above. His lack of understanding was known to Select during the retention calls (for example, the call from Ms O'Toole on 11 November 2016). Although Mr Banks did say to Saeed Hussain that the coverage would not apply if, for example, Irshad Hussain were to break his hand, it is relevant (particularly to the unconscionability claim above) that Mr Banks failed

to adequately explain the scope of the coverage. This is in a context where there were no reasonable steps taken to ensure Irshad Hussain did understand what was he was signing up for.

1071 Thereafter, from 24 October 2016 there was a series of telephone calls by Saeed Hussain to Select in an attempt to cancel the policy, and calls between Retention Agents (Mr Henck, Ms O'Toole and Ms Todorovic) and Irshad Hussain (and others who assisted him). It was not until 6 April 2017 that the policy was cancelled and that occurred only after Saeed Hussain wrote a cancellation letter dated 4 April 2017 on Irshad Hussain's behalf for him to sign.

False and/or misleading representations (Retention conduct)

1072 As explained above, the third representation relied on relates to the retention call.

1073 In relation to the retention call, ASIC alleged that Ms O'Toole represented that a request to cancel the policy was required to be in writing by virtue of Let's Insure AC being a financial product. This allegation is similar to claims made in respect to other Consumers.

1074 The following statements made by the Retention Agent during the call on 11 November 2016 are said to establish the representation:

> …if he wants to close the account down, will you inform him that he needs to send us a letter and with a signature on it stating that he wants to cancel his policy and then customer services will close the account for him. It's because this is a financial product, so it requires a signature…
>
> No, he needs to send us a letter saying he doesn't want the policy and we will cancel it for him. It needs to have his signature on there because this is a financial product, he's taken out an agreement. So if you want to tell him to - if he wants to cancel it, he needs to post us a letter with his signature on it saying, "I don't want the policy" and we will close it. Is that okay?

1075 There appears to be no statutory requirement to that effect. Nor have the Corporate Defendants pointed to any such requirement. Rather, the Corporate Defendants' submission is that the Retention Agent appears to have inferred that the reason St Andrew's required policies to be cancelled in writing was that they were financial products. I note that Select did not have any record of Irshad Hussain's signature in any case because he signed up on the telephone.

1076 This representation concerns the existence or effect of a condition, in that cancellation of the policy was conditional on the cancellation request being in writing because Let's Insure AC was a financial product, which brings it within s 12DB(1)(i). Accordingly, there is a contravention of s 12DB(1)(i).

Undue harassment (Retention conduct)

1077 Although what occurred can properly be criticised (as explained below), I am not satisfied that it can properly be described as undue harassment. For example, there are no frequent unwelcome approaches by the Corporate Defendants: cf *Maritime Union* at [60]. Rather, the conduct reflects that the Corporate Defendants effectively placed a hurdle or barrier in the way of Irshad Hussain's attempts to cancel his policy. The conduct, as explained below, is more properly to be characterised as unconscionable.

Unconscionability (Retention conduct)

1078 The personal characteristics of Irshad Hussain would have been known to Retention Agents, Mr Henck, Ms O'Toole and Ms Todorovic, or should have been known to them, and when taken in combination, establish that Irshad Hussain was vulnerable or alternatively, in a weaker bargaining position, with respect to his dealings with the Corporate Defendants. In particular, they had knowledge that Irshad Hussain had difficulties understanding English because of the content and circumstances of their telephone calls with him. Indeed, the difficulty with the cancellation was seen to be because he had difficulties with understanding English and that he could not write a letter cancelling the policy. The Corporate Defendants' submission that the Retention Agents' knowledge of the personal characteristics was a moot point, is not correct.

1079 This is in a context where, as described above at [0], Select had described to ASIC that there was a discretion about requiring a cancellation to be made in writing, albeit they said the discretion would only be exercised in special circumstances. It is hard to conceive how the situation of Irshad Hussain did not fit within that description.

1080 Irshad Hussain tried for six months to cancel his policy after becoming aware that it did not provide him with the coverage that he thought it did. This is in a context where Irshad Hussain had been signed up to the policy over the telephone and without any dealings in writing and where no statement was made during that sales call or in the pre-recorded PDS played during that call that the policy could only be cancelled in writing. The Corporate Defendants did not have Irshad Hussain's signature. In addition, a false and/or misleading representation was made to Irshad Hussain about why it was necessary that a cancellation be made in writing. It was plain that Irshad Hussain wanted to cancel his policy, but he was not permitted to do so without a letter. He was not permitted to do so over the telephone, when his intentions were made clear. Given Irshad Hussain had very little knowledge of English and since at least 11 November

2016 it was known that he could not write a cancellation letter, it was not fair or reasonable for Select to require that Irshad Hussain send a request to cancel in writing.

1081 As explained above at [0]-[0], although Select may have preferred to receive cancellation requests in writing, there was no requirement that such requests be in writing. There was a discretion to accept cancellation by other means which could be exercised.

1082 In any event, for example, in the first call, on 24 October 2016, where Saeed Hussain requested cancellation on Irshad Hussain's behalf, the Retention Agent, Mr Henck, referred the request to "customer care". I note that the evidence in the s 19 examination of Mr Bouche, Retention Manager employed by BlueInc Services, is that the process is that the call is to be transferred to a Retention Agent (who would call back within 24 hours), not customer care. I note also that Mr Henck did not inform him that he needed to send a letter in order to cancel the policy.

1083 The Retention Agent, Ms O'Toole, during the call on 11 November 2016, advised Mushtaq Ali (who was translating for Irshad Hussain) that Irshad Hussain had to write a cancellation letter despite being told by Mr Ali that Irshad Hussain could not write a letter and would have difficulty getting someone else to write a letter for him. She also refused a request to send a letter which Irshad Hussain could sign and send back to cancel his policy, and she also refused to send a text or email with the address for the cancellation letter, stating: "we actually don't have the facility to do that". As ASIC submitted, Select was able to send text messages when premium payments were missed, and was able to send letters and documents in the mail. Mr Ali also asked if Irshad Hussain could come to the office to cancel the policy, which was also rebuffed. It will be recalled that it was Ms O'Toole, who made the false and/or misleading statement about it being a legal requirement for the cancellation of the policy to be in writing because it is a financial product: see above at [0]. I note that given Ms O'Toole's knowledge as to Irshad Hussain's ability to speak and understand English, Ms O'Toole ending the call by saying "if you're still having problems, get him to call us – ask Irshad to call us, okay?", is rather disingenuous. I note that this call, also rather disingenuously, commenced with Ms O'Toole saying she was calling to give Irshad Hussain an update on his account and to check that he was happy with the policy and that it was affordable for him. This call is made at a time when it is plain that Irshad Hussain wanted to cancel his policy, and it was because of that information she was calling him. During the call, Ms O'Toole also used sales tactics in an attempt to save the policy.

1084 When Saeed Hussain called again on 4 April 2017 (whilst posing as his cousin), the Retention Agent, Ms Todorovic, still refused to accept the cancellation request over the telephone advising that Irshad Hussain would need to send a letter, despite the obvious difficulties in doing so, which had repeatedly been made clear in earlier calls.

1085 The Corporate Defendants' submission that the Retention Agents were actively trying to assist Irshad Hussain to cancel his policy, cannot in the circumstances, be accepted. Such a submission is artificial, and removed from the reality of the situation which Irshad Hussain was in; a situation well known to the Retention Agents. It ignores the content and tenor of the calls. The Retention Agents generally, took advantage of his position.

1086 Of course, throughout this six month period from the time it was first made clear that Irshad Hussain wished to cancel his policy, until when it was cancelled, premiums for the policy were still charged. The conduct by the Retention Agents was "clearly unfair" and "not in good conscience".

1087 I am satisfied that ASIC has established that the retention conduct in relation to Irshad Hussain is unconscionable and that there is a contravention of s 12CB(1).

Freddie Lewis

1088 In respect to Mr Lewis, it is contended that Select (via its Sales and Retention Agents) contravened s 12DA(1) on two occasions by making two separate representations that were each misleading or deceptive, or were likely to mislead or deceive (FASOC [652]-[657]); contravened s 12DJ(1) during the sales call by coercing Mr Lewis into signing up to FlexiSure Life Cover and/or providing his credit card details over the telephone (FASOC [658]-[659]); contravened s 12CB(1) during the sales call to Mr Lewis by engaging in unconscionable conduct (FASOC [660]-[665]); contravened s 12DJ(1) during the retention process by unduly harassing Mr Lewis (FASOC [666]-[667]); and contravened s 12CB(1) during the retention process by engaging in unconscionable conduct (FASOC [668]-[673]).

1089 ASIC pleaded that Mr Lewis is an Aboriginal man who, in the period of November to January 2016, was around 49 years old and resided in a remote community in Arnhem Land. It was pleaded that he sometimes had difficulty understanding spoken English. It was contended that Mr Lewis was in a position of vulnerability and/or in a weaker bargaining position than Select.

1090 The personal circumstances of Mr Lewis as pleaded by ASIC are established by the evidence and the agreed facts.

1091 It was agreed that on 25 November 2015, Sales Agent, Gabrielle Watson, signed up Mr Lewis to FlexiSure Life Cover to the value of $220,000 with a policy acceptance date of 25 November 2015, a fortnightly premium commencing at $40.88 and no nominated beneficiary. Ms Watson took Mr Lewis' bank account details for the purposes of automatically deducting fortnightly premiums. On 10 February 2016, Mr Lewis was informed that his policy had lapsed because of non-payment of premiums. In total, Mr Lewis paid $81.76 in premiums. He subsequently received a refund of those premiums plus interest of $15.63.

1092 It was further agreed that the conduct of Ms Watson is taken to have been engaged in by Select by reason of s 12GH(2)(a). Ms Watson was also contracted by IMS from a labour hire provider at the time and her conduct is, therefore, taken to have been engaged in by IMS under s 12GH(2)(a). The conduct of the Retention Agents, referred to at FASOC [639]-[649] which includes Mr Chesters and Ms Clynes (but with the exception of Ms Ward), is taken to have been engaged in by BlueInc Services as they were all employees of BlueInc Services at the relevant time, pursuant to s 12GH(2)(a). The parties did not address the position of Ms Ward in this respect.

Evidence of Mr Lewis

1093 ASIC relied on the affidavit of Mr Lewis sworn on 30 April 2019.

1094 Mr Lewis is an Aboriginal man who was born in Darwin. He moved to Milingimbi at the age of eight or nine. He attended school in Milingimbi, where he finished primary school. He does not remember how old he was when he left school.

1095 Mr Lewis is employed as a driver for the Gapuwiyak Health Clinic. He is married and has one daughter, who is 23 years old. Mr Lewis lives in Gapuwiyak with his wife, daughter, niece, four sisters, brother-in-law and his mother. He has lived in Gapuwiyak since he was 21 or 22 years old. Gapuwiyak is an Aboriginal community in East Arnhem Land, Northern Territory.

1096 Mr Lewis' first language is English. He also speaks Djambarrpuyngu, which is a dialect of Yolngu Matha. Djambarrpuyngu is the common language amongst the Aboriginal tribes in Gapuwiyak. Mr Lewis speaks Djambarrpuyngu at home and in the community.

1097 Mr Lewis has some difficulty understanding English when people use long words or speak too quickly. Mr Lewis can read and write in English, but he has some difficulty understanding "big words".

1098 In 2015, Mr Lewis believes that he may have been receiving Centrelink payments, but he cannot quite remember. At some point, Mr Lewis began doing civil work for the shire in Gapuwiyak and around that time, he stopped receiving Centrelink payments.

1099 Mr Lewis' understanding is that insurance is "like if something breaks, you need to get it fixed, and you can get some money back for that". Mr Lewis says that he does not know what life insurance is and he does not think he has ever had insurance before.

Sales conduct

1100 On 25 November 2015, Ms Watson telephoned Mr Lewis and said that she was following up on a "survey" he had completed. There was significant background noise at the beginning of the sales call and Mr Lewis told Ms Watson that he had trouble hearing ("I can't listen). Ms Watson spoke in a relatively assertive manner during the call and had an English accent. For the most part, Mr Lewis' responses were "yes", "okay" and "mm" or "hmm".

1101 Ms Watson generally conducted the call on the assumption that Mr Lewis would be signed up to the policy. She provided him with a very brief overview of the life insurance policy and proceeded to give a quote for $220,000, with a fortnightly premium of $40.88. In relation to the exclusions, she jokingly referred to engaging in criminal activity ("you don't sound like a bank robber to me, Freddie"). Mr Lewis' evidence was that he does not understand what 'exclusions' means. Ms Watson told Mr Lewis that she would play a "quick pre-recorded message" of the PDS, which I note was spoken quickly and used complex terminology. Mr Lewis' evidence is that he does not understand the PDS, as it was spoken too quickly, nor what terms such as "PDS", "Financial Services Guide" or "premium" mean.

1102 Pausing there. I note that Mr Lewis's evidence is that he was attending a funeral at the time of the sales call. Shortly after the PDS was played, the following exchange occurred:

> GW: Yeah, beautiful. Excellent. What are you up to today then, Freddie. Are you doing anything nice?
>
> FL: Yes, just waiting to take the old lady to the cemetery, just waiting here with the family members.
>
> GW: Oh, I see. Oh, beautiful. Look, I won't keep you too much longer then, Freddie, okay?
>
> FL: Mm-hmm. Okay

1103 Despite that, Ms Watson pushed ahead with the sale and attempted to take Mr Lewis' payment details for the purposes of deducting fortnightly premiums. She used vague language when

describing this, with phrases such as "getting that started" and "linking up" the policy with a "payday". Mr Lewis asked whether he could call back ("I'm getting hot here because I need to sit down. There's too much noise in there. Can I give you guys a call later and you can just fax your number to me, make it easier?"), which Ms Watson resisted rather disingenuously (discussed below at [0]-[0]). She then pressed Mr Lewis for his bank details:

> GW: Beautiful. Now, Freddie, as I mentioned, we can link it up either via a BSB and account number or via a Visa MasterCard. Is there a particular account that works best for yourself?
>
> FL: As I said, can I do it later on?
>
> GW: Okay, is now not a good time then?
>
> FL: Yes.

1104 Ms Watson called Mr Lewis back later that day. Mr Lewis was evidently confused. After noting that Mr Lewis was "just a little bit busy" earlier, Ms Watson sought to obtain Mr Lewis' bank account details, to which he responded "Um, so what's this all about for?" Ms Watson stated that she required the account details so that money could be transferred into the account if a claim was made under the policy (discussed below at [0]-[0]). Mr Lewis provided Ms Watson with his bank account details. Ms Watson then ignored Mr Lewis' concerns about the cost of the policy ("this is too hard. I would like them, the changes of the prices, please?" and "Have you got any other good prices?"). Rather, she proceeded with the sale at the initial level of cover quoted.

1105 At the conclusion of the sales call, the following exchange occurred:

> GW: Yeah. Now, I'll just confirm, Freddie, that you have understood everything we have discussed today?
>
> FL: Mm-hmm.
>
> GW: Sorry, I just need a clear yes for the recording, Freddie, if you don't mind? Yeah? Have you understood everything we have discussed today?
>
> FL: Uh, yes, I do.

1106 Mr Lewis' evidence was that:

> I said 'yes' but I didn't understand what the caller was talking about. I don't know what 'direct debit' means and I didn't know I was letting the caller take money from my bank account.
>
> I said 'yeah' lots of times, but I didn't really understand what the calls were about. I didn't know nothing about what was happening. I couldn't understand everything the callers were saying to me because they spoke too fast. I didn't understand some of the big words they were saying to me.

Misleading and/or deceptive conduct

1107 There are two statements pleaded by ASIC.

1108 *First*, ASIC alleged that Ms Watson represented during the sales call that it would be difficult for Mr Lewis to contact FlexiSure. This representation was the response to Mr Lewis asking her whether he could give her a call back later, and if she could fax or text the number to him. She stated:

> Yes, so it can be quite difficult to get back in touch with us, Freddie, because we are an outbound number. As I mentioned, all that information will be coming out to you so you can obviously - -
>
> We can't actually text numbers, Freddie. We can obviously only call you. As I mentioned, we can set it up now for you so if something happens to you, even later on today, okay, you would still be covered if anything did happen to you, okay?

1109 This representation was misleading and/or deceptive, or likely to mislead and/or deceive, because Mr Lewis could have contacted FlexiSure by calling an inbound sales number. Moreover, by the end of the second telephone call on 25 November 2015, Ms Watson provided him with a telephone number to call if he needed to speak to somebody about the policy.

1110 I do not accept the Corporate Defendants' submission that Ms Watson did not make such a representation. The submission ignores the context in which this request was being made. The Corporate Defendants submit that Mr Lewis was asking for her specific number so they could continue the discussion about the policy as opposed to calling back FlexiSure. The statement was in the context that "we obviously can only call you". Bearing in mind the content of the call up until this point, no such inference can be drawn. Similarly, contrary to the Corporate Defendants' submission, the statement "we can't actually text numbers", is a general statement, and when considered in context not a statement confined to Ms Watson having difficulties texting, or being unable to do so. The statement was made representing it was difficult for Mr Lewis to contact FlexiSure. The Corporate Defendants' submissions attempt to put a subtlety on what occurred which does not arise.

1111 By representing that it would be difficult for Mr Lewis to contact FlexiSure, which is misleading or deceptive, or likely to mislead or deceive, there is a contravention of s 12DA.

1112 *Second*, the representation said to be made by Ms Watson was that Select required Mr Lewis' account details for the purpose of paying benefits to him.

1113 Two aspects of the call are said to establish that this representation was made. At the beginning of the second call, when Ms Watson asked for Mr Lewis' bank details, there is a long pause before Mr Lewis said "So what's this all about for?" His tone in asking that question also reflects that he was confused about what was happening. To that, Ms Watson stated:

> …but the reason we link it up to your account there, Freddie, obviously because it is a financial agreement but also if anything was to happen to you between now and then -- at least we've got an account to transfer the money into, okay. So if a claim was made, at least we do have an account to transfer the money into, okay. Does that make sense?

1114 In responding, Ms Watson did not explain that she was seeking his account details in order to take payments on a fortnightly basis to pay for FlexiSure Life Cover which he was purchasing on the call that day. Added to that, during the two sales calls, Ms Watson never expressly told Mr Lewis that she was taking bank account details or credit card details from him for the purpose of him making periodic premium payments.

1115 The purpose for which Select sought Mr Lewis' bank account details or credit card details was so that premium payments under the FlexiSure Life Cover policy could be periodically charged to that account. So much is readily apparent. From the time that the policy was taken out, money was charged to that account. In addition, it is admitted in the agreed facts that Ms Watson took credit card details from Mr Lewis that day for the purposes of premiums being charged to that credit card on an automatic, fortnightly basis.

1116 The Corporate Defendants submit that the passage relied on by ASIC, referred to above, is incomplete, and that it commences with the following statement:

> No payment is coming out today though, okay. I have pushed that back to the 12 – sorry, to the 9th of December, okay, but…

1117 The Corporate Defendants submitted that there were also statements that "you won't be paying anything until the 9th of December" and to pushing out "the first payment date", and that "if you need to change your payment date in the future, you can give us a call". The Corporate Defendants also point to the passage in the call where after Mr Lewis provided his bank details Ms Watson asked him if he had "the authority to provide this account information and that you authorise the insurer, St Andrew's Life, to debit this account for your premium payments in accordance with the direct debits authority in the PDS", to which Mr Lewis responded "Yes". That last statement is of no assistance to the Corporate Defendants, as it only occurred after the details had been provided. However, I do accept that sentence referred to in the impugned passage used the word "also", which is capable of implying there were other reasons.

1118 The Corporate Defendants are correct that those statements were made. It remains though that there is no express statement that Mr Lewis' card details would be taken from him for the purpose of him making periodic premium payments. At best, there is an implication.

1119 The statement complained about was in answer to the question "So what's this all about for?" The statement was designed to create the impression for Mr Lewis that providing the details was for his benefit, when it was not. This is in a context where there was evident confusion on Mr Lewis' part in relation to what was going on in the call. Ms Watson chose to give the response in that context. Although the answer commences on the basis of it being a financial agreement, the emphasis is on having the account to transfer money into (that is, at least they have it for that purpose). The impugned statement made in that context is capable of inducing error. Indeed, it was said to encourage him to provide the details of his account (on that basis).

1120 In the circumstances, I am satisfied that it has been established that the statement, in the context in which it was made, is misleading or deceptive and contravenes s 12DA(1).

Unconscionability (Sales conduct)

1121 I am satisfied that Mr Lewis's personal characteristics and circumstances, which were known or ought to have been known to Ms Watson, when taken in combination, establish he was vulnerable, or at the very least, in a weaker bargaining position with respect to his dealings with Select.

1122 It is apparent from the calls that Ms Watson would have known from the information provided that Mr Lewis was Aboriginal, he lived in Gapuwiyak and that it was in a remote area in the Northern Territory, and his age and date of birth. From the calls it would also have been, or ought to have been readily apparent to Ms Watson, that Mr Lewis had difficulty in understanding spoken English because of the content and circumstances of the calls. There were pauses before responses, evident confusion at times during the calls, responses reflecting difficulty in Mr Lewis' understanding of what was occurring and there were also a number of non-responsive answers. These matters also would or should have alerted Ms Watson to his difficulties in understanding English. I do not accept the Corporate Defendants' submission to the contrary.

1123 Quite apart from that, his personal circumstances also included his limited financial means (essentially financial vulnerability), although at the time of the sales calls, the extent of his financial means may not have been apparent to Ms Watson. That said, I accept the submission

that the content of the call reflects that he has limited financial literacy skills, which should have been apparent to Ms Watson that he was of limited financial means should have been apparent.

1124 Ms Watson continued to attempt to sell Mr Lewis a policy after he told her that he was attending a funeral at the time of the call and she persisted with the call and did not offer to call back at a time when there was less noise around and/or when he could sit down. The Corporate Defendants' submission that he never said he was at a funeral, is not correct. Although it may be accepted he did not use that word, what was said gave rise to the obvious inference that was the circumstance. Ms Watson should reasonably be expected to have appreciated this. The Corporate Defendants' submission that Mr Lewis continued to engage in the conversation, ignores the nature of the conversation and the position he was in (of vulnerability or at least a weaker bargaining position).

1125 The calls reflect that Ms Watson acted in bad faith in her dealings with Mr Lewis. She pursued her agenda in selling the policy, regardless of any understanding by Mr Lewis as to what was occurring, and the consequences thereof. During the calls, she made the misleading and deceptive statements, referred to above. She attempted to create an impression that providing his bank details was to his advantage. It was said to overcome his obvious hesitation in providing the bank details, as he did not understand why this was required. This, at the very least, obvious lack of candour with him, was done to advance her purpose, regardless of Mr Lewis' understanding. She took advantage of his position. It was an unfair sales tactic. The Corporate Defendants' submission that Mr Lewis willingly provided his credit card details entirely ignores the context in which this was done.

1126 It was, or at least should have been evident to Ms Watson, that Mr Lewis did not understand what was being offered. For example, he asked whether he needed to call if he wanted to use the money to get some food. The nature of the call was such that Ms Watson pushed him through the process regardless of his obvious difficulties in following what was occurring. The PDS was played to him about seven minutes into the call, reflecting that she considered a sale had been made. She did so without getting his consent to do so, without explaining the significance of it, and without any genuine or reasonable attempt by Ms Watson to confirm he understood what had been played to him.

1127 Ms Watson only quoted him a policy for $220,000, which had a significant premium. That figure was emphasised by Ms Watson as the amount payable. When providing that quote, Ms

Watson did state that "you can increase or decrease that level of cover in the future if you wanted to". However, when in the second call he said "I would like the changes of the prices, please … Have you got any other good prices", she did not respond but rather proceeded with the sale of the initial level of cover quoted. The Corporate Defendants' submission which challenges that other lesser policies were not offered, is based on a selective consideration of the calls. For example, it makes no reference to Mr Lewis' ignored request for a better price.

1128 Ms Watson sold the policy to him on the same day. She failed to make a genuine or reasonable attempt to confirm that he understood everything discussed, that he was being signed up to this insurance policy and that he was consenting to premium payments being charged to his credit card. Indeed, at no point in the calls did she even ask Mr Lewis whether he wished to purchase life insurance or expressly confirm that he understood that he was signing up to this policy that day.

1129 The Corporate Defendants' submissions to the contrary cannot be accepted. For example, it was submitted that nothing in the call indicated, or should have indicated, to Ms Watson that when Mr Lewis confirmed that he understood everything that was discussed on the call, in reality, Mr Lewis said 'yes' but did not understand what had been discussed. It was contended that this level of misunderstanding was only made apparent in Mr Lewis' affidavit and although that evidence was accepted by the Defendants, Ms Watson could not have been aware of it at the time of the sales calls. I do not accept the submission. The Corporate Defendants' submissions fail to grapple with the content of the calls, and the manner in which the calls proceeded. They simply ignore, or mischaracterise, aspects of the calls which do not assist their submission.

1130 I am satisfied that the conduct involved in signing Mr Lewis up to the policy and obtaining his credit card details, is unconscionable. Accordingly, there is a contravention of s 12CB(1).

Coercion (Sales conduct)

1131 ASIC contended that taking into account the personal characteristics and circumstances of Mr Lewis giving rise to his vulnerability or at least weaker bargaining position, the conduct of the Sales Agent coerced him into signing up to FlexiSure Life Cover and/or into providing his credit card details over the telephone in contravention of s 12DJ(1).

1132 The personal characteristics and circumstances are referred to above. Also relied on is that he had a low income owing to being in temporary work, being out of work, and/or being in receipt

of Centrelink payments and could not afford $40.88 per fortnight in premiums, and his lack of understanding which was or should have been obvious to the Sales Agent, who also did not expressly confirm he understood that he was signing up to FlexiSure Life Cover that day. It was submitted that these characteristics combined to limit his assertiveness and ability to 'push back', making him "easy prey" to a Sales Agent. That Mr Lewis was financially vulnerable, and could not afford a weekly premium of just over $20, it was submitted, was evidence that he was 'railroaded' into purchasing the policy.

1133 In this context, ASIC contended that the followingconduct amounted to coercion:

(1) the Sales Agent continued to attempt to sell Mr Lewis insurance after he told her that he was attending a funeral at the time of the call;

(2) she initially refused to allow him to call back at a time when there was less noise around and/or when he could sit down;

(3) the misleading or deceptive representations;

(4) only quoting for $220,000 and not offering alternative levels of cover;

(5) playing a pre-recorded PDS without first obtaining Mr Lewis' agreement to receive the PDS in this way;

(6) ignoring indications from Mr Lewis that he did not understand what was being offered to him and required of him;

(7) failing to make a genuine, or reasonable, attempt to confirm that he understood what had been discussed;

(8) rushing through the telephone calls; and

(9) signing up Mr Lewis to the insurance policy on the same day rather than giving him the opportunity to reflect.

1134 In effect, ASIC argued that Mr Lewis' will was overborne, in that he had not given meaningful or informed consent. This is the same submission as previously discussed. This conduct occurred over two calls separated in time, although on the same day.

1135 Although the underlying factual integers relied on by ASIC can be accepted as established, the conduct (even when considered in combination) did not attempt to remove his freedom to act. That Mr Lewis did not understand, or even that the Sales Agent ignored what should have been apparent as to his lack of understanding, does not mean that the conduct amounts to coercion. Illegitimate or improper conduct per se does not necessarily amount to coercion. The Sales

Agent plainly took unfair advantage of Mr Lewis. However, the conduct must involve some compulsion to act.

1136 I am not satisfied in the circumstances that it has been established the sales conduct is coercion within s 12DJ(1).

Retention conduct

1137 It was agreed that in the two months between 9 December 2015 and 9 February 2016, Retention Agents placed 24 telephone calls and sent three letters to Mr Lewis regarding unsuccessful premium collection payments.

1138 On 15 December 2015, Retention Agent, Ms Ward, telephoned Mr Lewis regarding unsuccessful premium payments. Mr Lewis was evidently confused at times during the call. He told Ms Ward that because he was not working, he wanted to cancel his policy and that he might recommence it when he resumed working.

1139 On 15 January 2016, Mr Lewis was called by Retention Agent, Mr Chesters. Mr Lewis repeatedly stated during this call that he was not working and that he did not have any money to pay for the policy. Mr Chesters said that he would arrange a call back in relation to cancelling the policy.

1140 On 25 January 2016, Ms Clynes telephoned Mr Lewis. Mr Lewis again stated that he was unemployed and looking for work. Despite that, it is clear that Ms Clyne's purpose in telephoning Mr Lewis was to retain the policy. For example, she repeatedly suggested that Mr Lewis reduce his level of cover as this is what "a lot of customers generally look at doing. If they can't afford the premium". She also indicated that Mr Lewis could use Centrelink payments or borrow from a friend to pay the insurance premiums. After insisting that he could not pay, Ms Clynes said that Mr Lewis needed to cancel the policy in writing:

> FL: I can't afford anything. Hmm.
>
> LC: Okay, Freddie. Well, look, that's fine. What we'll do is I'll note the policy that you're looking to cancel, okay? And - but we will need something in writing to get the policy cancelled. So we need a letter with your policy number, your name, your date of birth, "Please cancel," and your signature. Okay? Now, once we get that letter, we'll get the policy cancelled for you, okay?
>
> FL: Okay.

1141 The system notes of that call recorded that Mr Lewis could not afford his policy and that he wanted to cancel it. Despite that, Retention Agents attempted to contact him a further six times

by telephone. It was not until 10 February 2016 that Mr Lewis was informed that his policy had lapsed due to non-payment of premiums.

1142 Mr Lewis' evidence was that the calls were frustrating him. He did not believe that the Retention Agents were listening to him when he told them that he was unemployed and looking for work. He did not understand why they kept calling him and asking for payment.

Undue harassment (Retention conduct)

1143 I am satisfied that the approaches made to Mr Lewis by Retention Agents constitute undue harassment on account of their content, nature and frequency.

1144 In circumstances in which it was, or should have been, clear to Retention Agents that Mr Lewis did not understand that he had been signed up to the policy, and where he had repeatedly told Retention Agents that he could not afford to continue making payments as he was not working and that he wished to cancel the policy, it was patently unreasonable for Retention Agents to not permit him to cancel the policy over the telephone, to press that he keep the policy by taking a reduced level of cover and premiums or by using his Centrelink benefits to pay for it or to require notice of cancellation in writing and to continue to press for payment. Although in some respects this bears similarity to the conduct in respect to Irshad Hussain (in placing barriers to cancelling the policy) the circumstances of the conduct (with the Corporate Defendants initiating it) and the frequency of it, satisfies me that in this instance, it has been established to be undue harassment.

1145 I accept ASIC's submission that this conduct went beyond the normal limits which society would regard as acceptable or reasonable. It amounted to undue harassment and is contrary to s 12DJ(1).

Unconscionability (Retention conduct)

1146 I am satisfied that the Retention Agents who dealt with Mr Lewis, which includes Ms Ward, Mr Chesters and Ms Clynes, knew or should have known his personal characteristics and circumstances such that he was vulnerable, or at least was in weaker bargaining position. The content and circumstances of the calls reflect that they would have, or should have known that Mr Lewis was an Aboriginal man, who lived in Gapuwiyak community in the Northern Territory, a remote community, and that he had some difficulties understanding English. They knew that he had limited financial means, as he repeatedly informed them he could not pay the premiums and was out of work.

1147 As explained above, although Mr Lewis did not know that he had been signed up to an insurance policy at some stage he was aware "that something was wrong with my bank account. I was missing some money, so I blocked it. I changed my bank account after that because I was thinking that someone was stealing money from me, but I don't know who it was".

1148 In the above context, it is important to recall that the sale of the policy was on 25 November 2015. Between 9 December 2015 and 9 February 2016, Retention Agents telephoned Mr Lewis 24 times, and sent three letters, regarding unsuccessful premium collection attempts. It follows, that this conduct commenced very shortly after the sale of the policy. It did not cease until the policy lapsed for non-payment.

1149 At the time that Mr Chesters and Ms Clynes made calls to Mr Lewis they were participating in the Las Vegas Incentive. There is no proper basis for the Corporate Defendants' submission that as Retentions Agents the incentive was not open to them. The documentation for the incentive does not support that proposition. Indeed, Retention Agent, Ms Ledsham, in fact went to Las Vegas in connection with the Las Vegas Incentive.

1150 These calls were not, as the Corporate Defendants appear to imply, simply debt collection, but were directed to maintaining the policy in circumstances where Mr Lewis repeatedly stated he could not pay the premiums, wanted to cancel the policy, and he was not working. It is evident from the calls that he considered he had cancelled the policy, but the calls kept coming. During these calls, a Retention Agent even urged that he use Centrelink payments to cover his premium or borrow money from a friend, rather than do as he requested, which was to cancel the policy. As they failed to do as he requested, the premiums kept falling due, and they continued to press for payment when it would have been obvious he was unable to do so.

1151 The Retention Agents did not address what were obviously proper, legitimate and reasonable requests by Mr Lewis to cancel his policy.

1152 The Retention Agents did not act in good faith in failing to follow a reasonable request to cancel the policy which resulted in further falling premiums which Mr Lewis had made clear he could not pay. The Corporate Defendants then chased him for the debt. In the circumstances, requiring him to provide Select with a written document bearing his signature before permitting him to cancel his policy was unreasonable. This is in a context where the Corporate Defendants could have let the policy lapse, as they ultimately did, but not before the repeated attempts by the Retention Agents to persuade Mr Lewis, an unemployed man who repeatedly stated he

could not afford the premiums, to maintain his policy. They could also have exercised their discretion to accept cancellation of the policy over the telephone, as Select accepted that existed.

1153 The Corporate Defendants' submission as to what occurred during the calls, fails to grapple with the reality of the situation, which would have, or should have been apparent to the Retention Agents.

1154 The submission that the conduct of the Retention Agents did not exploit any vulnerability or weaker bargaining position of Mr Lewis, cannot be accepted. Nor can it be accepted that they did no more than follow what they had been told, that policies must be cancelled in writing, and follow up on overdue payments and in doing so gave him the option of continuing with a lower level of policy rather than cancelling the policy.

1155 I am satisfied that the conduct in not permitting Mr Lewis to cancel the policy and continuing to seek payment for the policy was, in all the circumstances, unconscionable towards Mr Lewis.

1156 I am satisfied that there is a contravention of s 12CB(1).

Cynthia Mirniyowan and Derek Wurrawilya

1157 In respect to Ms Mirniyowan, it was contended that Select (via its Sales Agent, James Dalgety) contravened s 12DB(1) by making four types of representations that were each false and/or misleading (FASOC [706]-[715]); contravened s 12DJ(1) by coercing Ms Mirniyowan into signing up to Let's Insure Funeral Cover with optional AIC, ADC and ADC booster and/or providing her credit card details over the telephone (FASOC [716]-[717]); and contravened s 12CB(1) during the sales calls to Ms Mirniyowan by engaging in unconscionable conduct (FASOC [718]-[724]). In relation to the retention conduct, it was alleged that Select (via its Retention Agents) contravened s 12DJ(1) by unduly harassing Ms Mirniyowan (FASOC [725]-[726]); and contravened s 12CB(1) by engaging in unconscionable conduct towards Ms Mirniyowan (FASOC [727]-[731]).

1158 ASIC pleaded that:

(1) Ms Mirniyowan is an Aboriginal woman who, in the period of April 2016 to February 2017, was around 34-35 years old, resided in a remote area of Arnhem Land, had difficulty understanding spoken English, could read and write in English to a limited degree and had a socio-cultural tendency towards gratuitous concurrence.

(2) Ms Mirniyowan's husband, Mr Wurrawilya, is an Aboriginal man who, in the period of April 2016 to February 2017, was around 40-41 years old, resided in a remote area of Arnhem Land, had difficulty understanding spoken English as it was his second language and he also had a socio-cultural tendency towards gratuitous concurrence.

1159 ASIC contended that Ms Mirniyowan was in a position of vulnerability and/or in a weaker bargaining position than Select.

1160 Ms Mirniyowan and Mr Wurrawilya's personal characteristics and circumstances pleaded by ASIC are established by the evidence and the agreed facts. That they have a socio-cultural tendency towards gratuitous concurrence is established by the evidence of Dr Eades, which I accept.

1161 It was agreed that on 28 April 2016, Mr Dalgety telephoned Ms Mirniyowan twice, as well as Mr Wurrawilya, for the purpose of marketing Let's Insure Funeral Cover. During the sales call with Ms Mirniyowan, Mr Dalgety signed her up to Let's Insure Funeral Cover to the value of $12,000, together with AIC to the value of $25,000, ADC to the value of $22,000 and ADC booster to the value of $66,000 for herself and Mr Wurrawilya with a policy acceptance date of 28 April 2016, a stepped fortnightly premium commencing at $23.90 and nominated beneficiaries being Timothy Wurrawilya and Tyeff Wurrawilya in equal parts. Mr Dalgety took Ms Mirniyowan's credit card details for the purposes of automatically deducting fortnightly premiums. Ms Mirniyowan was notified on 13 February 2017 that her policy had lapsed due to the non-payment of premiums. In total, Ms Mirniyowan paid $416.51 under the policy.

1162 It was further agreed that the conduct of Mr Dalgety is taken to have been engaged in by Select by reason of s 12GH(2)(a). It was also agreed that the conduct of Mr Dalgety, and the Retention Agents referred to at FASOC [678]-[702], which includes Ms Khan, Mr Davies and Ms Gustafsson (but with the exception of Mr Twineham and Taymer Pugh), who were all BlueInc Services employees at the relevant time, is taken to have been engaged in by BlueInc Services pursuant to s 12GH(2)(a). Mr Twineham and Taymer Pugh were contracted by IMS from a labour hire provider at the time of their conduct towards Ms Mirniyowan and Mr Wurrawilya.

Evidence of Ms Mirniyowan and Mr Wurrawilya

1163 ASIC relied on the affidavits of Ms Mirniyowan and Mr Wurrawilya affirmed on 28 April 2019.

1164 Ms Mirniyowan is a Warinindilyakwa woman who was born in Darwin and grew up in Angurugu on Groote Eylandt, Northern Territory. Ms Mirniyowan attended school until the age of 16.

1165 Ms Mirniyowan has worked at the Groote Eylandt Mining Company (GEMC) since March 2019. Her role involves doing rehabilitation work, like planting trees.

1166 She is married to Mr Wurrawilya and they have two children. They live in Umbakumba, an Aboriginal community on Groote Eylandt.

1167 Ms Mirniyowan's first language is Anindilyakwa, which is the language that she speaks at home and at work. She also speaks Kriol and English. Kriol is the language she speaks when visiting the mainland. English is her third language and she has some trouble understanding spoken English. Sometimes she will pass the telephone to Mr Wurrawilya if people ring and are speaking English. Ms Mirniyowan can read and write in English but has some difficulty with longer words. Ms Mirniyowan's English was not as good in 2016 as it is now. Her English has improved since working at the GEMC because she has attended numeracy and literacy classes.

1168 In 2016, Ms Mirniyowan was employed at the Alcohol and Other Drugs Clinic in Angurugu. She stopped working there in September 2018 after finishing her contract. Whilst working at the clinic, she was paid about $1,300 a fortnight. Every six months, Ms Mirniyowan is paid a mining royalty of $4,000, which she has received since she was 18 years old. She also receives a family allowance from Centrelink of about $218 per fortnight.

1169 Ms Mirniyowan's understanding about funeral insurance in 2016 was that "I would pay money to a company and they saved some of my money, and when someone died, they would give that back to my family". She similarly believed that accident insurance was "where I would pay money to a company and they saved some of my money, and if I got injured, the money I paid would come straight back to me".

1170 Ms Mirniyowan's understanding is that if someone in her community dies, then they would be paid about $20,000 by the Aboriginal Land Council for their funeral and related costs.

1171 Mr Wurrawilya is a Warinindilyakwa man who was born in Gove and grew up in Umbakumba. He attended school until he was about 18 or 19 years old. He is not working and is receiving Centrelink payments.

1172 Mr Wurrawilya is married to Ms Mirniyowan and he has known her for about 20 years. They have two children.

1173 Mr Wurrawilya's first language is also Anindilyakwa, which he speaks at home and in the community. He speaks some English but has difficulty understanding spoken English. English is his second language, which he first learned at school. He finds it very hard to understand written and spoken English and he does not understand "big words". He finds it harder to understand when people are talking English on the phone but it is easier when speaking in person. He can read a "little bit" of English.

1174 In 2016, Mr Wurrawilya was working at the Alcohol and Other Drugs Clinic in Angurugu where he provided assistance to clients with smoking, alcohol and cannabis issues. He was paid about $1,000 per fortnight. Every six months, Mr Wurrawilya is paid a mining royalty of $4,000, which he has received since he was 18 years old. He also receives "rent money" for land in Umbakumba of about $1,000 every four months from GEMC.

1175 Mr Wurrawilya understands funeral insurance is "where I would pay money and then, if I die, that money would be paid to my wife and kids". He understands that accident insurance is "where I would pay money and then, if I have an accident, I will get some money". He similarly believes that if a person dies in Umbakumba, the Aboriginal Land Council will pay the family of the person who died about $20,000 for the funeral and related costs.

Sales conduct

1176 There were three sales calls on 28 April 2016. I note that both Mr Wurrawilya and Ms Mirniyowan spoke very little during the three calls, with their responses consisting of mainly "okay", "yes" and "yeah".

1177 During the first call, Mr Dalgety telephoned Ms Mirniyowan and asked for Mr Wurrawilya, who she said was working in Angurugu. Mr Dalgety spoke quickly during this call, which Ms Mirniyowan said made it difficult to understand him. He initially provided Ms Mirniyowan with a brief overview of the funeral insurance policy, emphasising the large amounts of money that could be paid out. In relation to the exclusions, Mr Dalgety referred to participating in professional sports and criminal activities. He then proceeded to provide a quote with a weekly premium of $11.90, which he described as "extremely cheap". Ms Mirniyowan explained that Mr Wurrawilya was injured during a car accident when he was 17 or 18 years old, resulting in

a punctured lung. In response, Mr Dalgety increased the quote to $25,000 at a cost of $11.95 per week:

> JD: So if he was to get serious - if he was to have a car accident - you or him were to have a car accident and get seriously injured - it could be loss of use of limbs, it could be major head trauma, major burns from the car accident or you could be in a coma, you would receive $22,000 within 48 hours. And what I could do, just for yourself there, Cynthia, is - since you are a little bit concerned about that, I can actually put that up to $25,000 for you.
>
> CM: Yeah.
>
> JD: So $25,000 within 48 hours. If you were in a car accident and you received one of those injuries, you would get that money straight away. So you know you've got it there straight away

1178 In her affidavit, Ms Mirniyowan said that she told the Sales Agent about the car accident because she wanted to get compensation for Mr Wurrawilya. She thought that if she purchased the insurance, she would be paid compensation for Mr Wurrawilya's car accident within 48 hours.

1179 Without asking whether she wished to purchase the policy, Mr Dalgety asked Ms Mirniyowan for her beneficiaries' details and proceeded to read the short-form PDS. He then took her credit card details for the purposes of deducting fortnightly premiums and talked about "linking" up the deductions to a "pension day". He then stated that he would email the policy documentation and that he would call back to speak with Mr Wurrawilya.

1180 Shortly thereafter, Mr Dalgety telephoned Mr Wurrawilya. Mr Dalgety told Mr Wurrawilya that he had provided Ms Mirniyowan with a quote for $12,000 funeral cover with a "$100,000 pay out in the result of an accident" and "$25,000 serious injury cover each, per person" for "just $11.95 per week". He noted that:

> JD: … what Cynthia was - what she liked the most was the $25,000 we would pay out if either of you got involved in a serious accident and got, like -
>
> DW: Okay.
>
> JD: -- injury such as a major head trauma or loss of use of limbs or major burns or paralysis.
>
> DW: Mmm-hmm.
>
> JD: So we'd get that paid out to you, $25,000 to pay for your medical expenses and such. But you can spend it however you like - because she said you had a car crash when you were younger; is that correct?
>
> DW: Yeah.
>
> JD: Yeah. So you'd get a pay out there to cover you for that…

1181 Mr Dalgety asked whether Mr Wurrawilya was “happy with that cover” and “happy with the price”. Without pausing to allow Mr Wurrawilya to respond, Mr Dalgety stated that he would call back Ms Mirniyowan “and we can get that cover all in [place]”.

1182 The call with Mr Wurrawilya was brief. Mr Wurrawilya did not ask any questions. Mr Wurrawilya’s evidence was that it was very hard for him to understand Mr Dalgety because he was speaking too quickly and used complex words. Mr Wurrawilya’s evidence was that he believed that he would be paid money for the car accident that had occurred when he was a teenager.

1183 After the call with Mr Wurrawilya, Mr Dalgety telephoned Ms Mirniyowan and stated that Mr Wurrawilya was “really happy” with the policy:

> I rung Derek and I actually talked to Derek about the cover and everything, and he was really happy with it as well, and the good news is we can actually get that cover in place for you today.

1184 Towards the end of the third call, Mr Dalgety asked Mr Mirniyowan to confirm her understanding of their conversation that day:

> JD: So I'll make sure, Cynthia, you're happy you've understood everything we've discussed today?
>
> CM: Yeah, maybe. Yeah, maybe
>
> JD: Okay. Great. Great. Okay…

1185 Ms Mirniyowan’s evidence was that at the end of the call she knew she had purchased insurance because she had provided the Sales Agent with her card details.

Admission

1186 ASIC submitted that the sales call to Ms Mirniyowan was reviewed by the Corporate Defendants’ compliance staff and was rated as a ‘fail’, and that this should be taken as an admission of misconduct by the Corporate Defendants.

1187 In particular, attention was drawn to the following aspects of the review:

> Agent did not get a clear yes from the customer to start the policy.
>
> …
>
> “So I'll just confirm Cynthia that you have the authority to provide that account information and you do authorise the insurer St Andrews Life to debit this account with the premium payments in accordance with the direct debit authority in the PDS?" Agent pauses with no answer from customer. Agent "yes? I just need a clear yes on that one" to which the customer replies yes. This sounds like the customer was unsure

of what she was agreeing to.

…

Customer confirmed that she lived in an Aboriginal community and the agent went to his team leader to find out if he can make the sale. The agent came back on the phone and stated that the PDS would have to be sent via email to the customer. The agent later that day phones an insured party and asks several questions to which the answers from the party, for the most part, were "yes". The agent then tells the insured party that he will phone his wife to finalise the sale. The agent then phones the wife (policy owner) and states that her husband was really happy with the cover and finalised the sale. At no point were there questions asked to make sure that the policy owner made her own financial decisions and the agent should have waited until the customer phoned him before making the sale.

When concluding the sales call agent asked for referrals – unethical

1188 This QA assessment is an admission by Select as to unsatisfactory aspects of the sales call. Having considered the conduct, the observations in the QA report are plainly correct. As previously explained, ultimately, during closing submissions the Corporate Defendants admitted that the sales conduct is unconscionable. In that regard, therefore, the admission is of less moment. That said, this call and the quality thereof, reflects on the context in which the other claims, including those relating to the retention conduct, are made.

False and/or misleading representations

1189 There are four representations which are the subject of claims, one of which is admitted.

1190 *First*, the admitted representations are those made to Ms Mirniyowan and Mr Wurrawilya that each of them were "really happy" with the quote provided to them for the purchase of the Let's Insure Funeral Cover with AIC and ADC.

1191 The remaining representations are of a similar nature to some claims in respect to other Consumers.

1192 *Second*, it is said that the Sales Agent represented that there were no exclusions to the Let's Insure Funeral Cover, ADC and AIC, save for limited sporting based and criminal activity exclusions to the AIC. As with the other claims, this is said to be implied. I accept that the representations were made having regard to the statements in the call as to what Ms Mirniyowan would have been entitled to and the statement made that "the *only* exclusions for that one, Cynthia, are things such as being a professional sportsman or being involved in criminal activity as well," in a context where there was no other reference to exclusions.

1193 I note also that at no time did the Sales Agent inform Ms Mirniyowan of Let's Insure's definitions of "accident" or "accidental death" for the purpose of the ADC and AIC. I appreciate as the Corporate Defendants contend that the Sales Agent referred to particular components of the policy by reference to events (for example, that coverage would be for "serious injuries…So if you or Derek were seriously injured in an accident and get one of those injuries, you would get $22,000 paid out into your bank account") but they do not amount to a definition of the terms. As explained earlier, the submission that they are ordinary terms ignores the circumstances of the position of the Consumer, as was or should have been known to the Sales Agent.

1194 Also, for the reasons previously given, the reliance on the PDS does not assist. In addition, the Sales Agent did not explain the PDS, and although the short-form PDS he read over the telephone included the statement "You will receive a hard copy of the PDS and FSG, which includes our [privacy] statement with your welcome pack", it did not refer to any exclusions, and did not inform Ms Mirniyowan that the full list of exclusions were listed in the written PDS. The Sales Agent signed Ms Mirniyowan up that day.

1195 I am satisfied that the representation is established, and for the reasons previously given, is false and/or misleading. It falls within and is a contravention of s 12DB(1)(i).

1196 *Third*, ASIC alleged that Mr Dalgety made the all family members benefit representation. ASIC identified a number of statements made in the calls which, given that they were not qualified by the Sales Agent, were said to establish that representation. It was submitted that these statements were false and/or misleading because the policy only paid the total amount of benefits per insured who passed away and not the total amount of benefits per policy beneficiary. ASIC correctly submitted that the Sales Agent used such language as "each" and "per person". For example, reliance was placed on the passage, "$16,000 will be paid out within 48 hours if anything was to happen. But obviously that is per person as well" and the statement "so for yourself and Derek here, like I said, I've got your $12,000 funeral cover, $100,000 will be paid out in the result of an accident and $25,000 each if you are seriously injured via an accident. It could be a car crash or something like that, like I said before".

1197 However, those statements must be read in context. There are other aspects of the calls where the policy was described in such a way that it refers to it in a way that a single benefit would be paid in respect of the death or injury of the insured person. For example, before the second statement referred to above was made, as the Corporate Defendants submitted, Mr Dalgety had

also explicitly noted that payouts were split between beneficiaries. This was in the context where Mr Dalgety discussed with Ms Mirniyowan who the beneficiaries of the $100,000 that would be paid out if Ms Mirniyowan passed away from an accident would be. Ms Mirniyowan wanted her two boys to share it "50-50". Mr Dalgety then said that "what I've done is you – I've put – yeah, Timothy and your younger son down as 50 – 50 for that money…if you pass away due to an accident like a car crash or something like that, it would be $50,000 each".

1198 Having regard to a consideration overall of the calls, I am not satisfied that in these calls the representation was made.

1199 *Fourth,* ASIC alleged that Mr Dalgety made the standard cover representation; that ADC and AIC (including the ADC booster) were not optional extras and/or were a standard component of the insurance policy. The statements made by the Sales Agent which are relied on by ASIC, do imply that what is offered is standard cover. This is in a context where at no stage did the Sales Agent disclose that the ADC and AIC (including the ADC booster) were optional extras to the Let's Insure Funeral Cover. I am satisfied the representation was made, and it is false and/or misleading. It falls within and is a contravention of s 12DB(1)(i).

1200 It follows that I am satisfied that there are three contraventions of s 12DB(1).

Unconscionability (Sales conduct)

1201 As noted above, the Corporate Defendants ultimately accepted during closing submissions that the sales calls to Ms Mirniyowan were unconscionable. It is unnecessary, therefore, to address this claim. Accordingly, there is a contravention of s 12CB(1).

Coercion (Sales conduct)

1202 ASIC contends that, taking into account the personal characteristics and circumstances of Ms Mirniyowan (giving rise to her vulnerability and/or weaker bargaining position) and the conduct of Sales Agent, Mr Dalgety, Select coerced Ms Mirniyowan into signing up to Let's Insure Funeral Cover with optional AIC, ADC and ADC booster and/or providing her credit card details over the telephone and thereby contravened s 12DJ(1).

1203 Ms Mirniyowan is an Aboriginal woman, who was around 34-35 years of age at the time of the call, who resided in the remote community of Umbakumba in Arnhem Land, in the Northern Territory. She had difficulty understanding English. Those circumstances are established. She had limited financial means. ASIC also relied on the fact that Ms Mirniyowan exhibited the

socio-cultural tendency towards gratuitous concurrence. This is established by the evidence of Dr Eades. This is said to be relevant in assessing whether Ms Mirniyowan's will was overborne and whether, when she assented to matters, it reflected a genuine agreement or consent.

1204 At the completion of the 28 April 2016 telephonecalls, Ms Mirniyowan did not understand the nature of the Let's Insure Funeral Cover with ADC, AIC and ADC booster that she had been signed up to and Mr Dalgety could not have been reasonably satisfied that she did understand.

1205 It was submitted that Ms Mirniyowan's personal circumstances combined to limit her assertiveness and ability to 'push back'. The very quiet and soft manner in which Ms Mirniyowan spoke during the calls considered in context, would have signalled to Mr Dalgety that she was unsure about what he was saying. I note that in the QA assessment referred to above, the nature of Ms Mirniyowan's responses to questions on a particular topic led to the observation by the QA assessor that it "sounds like the customer was unsure of what she was agreeing to".

1206 ASIC also relied on the following matters:

(1) Mr Dalgety rushed Ms Mirniyowan (and Mr Wurrawilya) through the telephone calls on 28 April 2016;

(2) making the 28 April 2016 telephone calls to Ms Mirniyowan and Mr Wurrawilya in quick succession and in the manner it was done without affording them the opportunity to discuss the policies between themselves or reflect;

(3) at the completion of the sales calls, Ms Mirniyowan did not understand the nature of the Let's Insure Funeral Cover with ADC, AIC and ADC booster, which it was said indicated that her free will was overborne;

(4) Mr Dalgety increased the level of AIC from $22,000 to $25,000, without asking whether she wanted that increase;

(5) Mr Dalgety did not offer lower levels of cover;

(6) Mr Dalgety read a pre-recorded PDS without Ms Mirniyowan's consent to receive the PDS in this way; and

(7) Mr Dalgety failed to make a genuine, or alternatively reasonable, attempt to confirm that Ms Mirniyowan understood the nature of the Let's Insure Funeral Cover with ADC, AIC and ADC booster.

1207 Given Ms Mirniyowan's personal circumstances (which gave rise to a position of vulnerability and/or weaker bargaining position), the false and/or misleading statements made by Mr Dalgety to each of Ms Mirniyowan and Mr Wurrawilya, informing each that the other was "really happy" with the quote to purchase the policy, is significant. These were designed to make it more likely that the policy would be purchased. This had what appeared to be the desired impact on Ms Mirniyowan. In her affidavit, she says:

> When they told me Derek was 'really happy' it made me feel happier about what the caller was saying because when Derek is happy about something it makes me want to do it more.

1208 This false and/or misleading statement was made in a context where the calls were made to Ms Mirniyowan and Mr Wurrawilya in very quick succession, denying them the opportunity to communicate between themselves. Given the false and/or misleading statements, the inference is that preventing the two from speaking was deliberately engineered. In that context, the Sales Agent rushed through the call. Nonetheless, it is not suggested by Ms Mirniyowan that she considered this false and/or misleading statement compelled her or forced her into signing up to the policy. Ms Mirniyowan's evidence was that she knew she had bought insurance.

1209 Some of the integers relied on, for example playing the PDS or not offering lower premiums, are not directed to pressuring Ms Mirniyowan into signing up and/or providing her direct debit details over the telephone. I have discussed elsewhere the submission as to informed choice.

1210 It was submitted that Ms Mirniyowan was "pushed" into purchasing the policy in the circumstances identified in the integers. However, the concept of being "pushed" is different to there being acts which compel a consumer to act, and are such as to negate free choice.

1211 The Sales Agent took advantage of Ms Mirniyowan and his conduct was plainly unfair. However, as much as the conduct can be criticised, I am not satisfied that it has been established to be coercion within s 12DJ(1).

Retention conduct

1212 On 19 May 2016, 14 July 2016, 17 August 2016, 26 October 2016, 21 December 2016, 4 January 2017 and 18 January 2017, Ms Mirniyowan was advised by email and text message that the collection of her premium payments was unsuccessful. In the emails, it was noted that the payment collection was unsuccessful due to "invalid transaction" and "Not sufficient funds".

1213 In the period of May 2016 to February 2017, Retention Agents telephoned Ms Mirniyowan 27 times regarding unsuccessful premium payments.

1214 On 19 May 2016, Ms Mirniyowan was contacted by Retention Agent, Mr Twineham, in relation to a dishonoured premium. Ms Mirniyowan told Mr Twineham that she had lost her credit card and gave him her new card details. Ms Mirniyowan's evidence was that although she gave Mr Twineham her card details, she did not know what she was paying for.

1215 During the call on 14 July 2016 with Retention Agent, Ms Khan, Ms Mirniyowan was asked to make a "double payment". It was evident from statements made by Ms Mirniyowan in this call that she was experiencing financial difficulties ("I've got no money"). Again, most of her responses during this call consisted of "Yeah" and "Mmm". Ms Mirniyowan agreed to make a double payment the following week, which she says in her affidavit she understood. However, her evidence was that she "felt like [she] had to pay because [she] wanted to pay off so the caller wouldn't ring [her] again".

1216 Around this time in mid-2016, Ms Mirniyowan's evidence was that her mother had passed away and it was time for her "sorry business", which involved family gatherings and ceremonies over several months. This was stressful and the calls made Ms Mirniyowan feel even more stressed.

1217 Again, on 17 August 2016, Ms Khan telephoned Ms Mirniyowan about a dishonoured payment. Ms Mirniyowan said that she did not have any money in her account because she did not report to Centrelink, but that there might be money in her account the following day. By this, she meant that she had not kept her appointment with the job skills provider and had not called Centrelink to tell them why, which resulted in her not being paid.

1218 On 28 December 2016, Retention Agent, Mr Pugh, called Ms Mirniyowan. Ms Mirniyowan told Mr Pugh she was not feeling well. Her evidence was that she was "very sick" at the time of this call, which Mr Pugh would have suspected from her statements. Despite that, Mr Pugh proceeded to arrange a "catch up payment" with Ms Mirniyowan for the following day.

1219 On 10 January 2017, Ms Mirniyowan told Retention Agent, Mr Davies, she needed to do her Centrelink report. She agreed to split her payment over three fortnights to catch up on the payment. She spoke with Mr Davies again on 25 January 2017. During that call, she again expressed her financial difficulties, stating that "I've got debit card $329 and I don't get paid".

In her affidavit, Ms Mirniyowan explained that this meant she did not have any money in her account because it was overdrawn by $329, due to meeting the repayments on a loan.

1220 Ms Mirniyowan was advised by text message on 1 February 2017 that her premiums remained unpaid and to call urgently to avoid her policy being cancelled.

1221 Retention Agent, Ms Gustafsson, telephoned Ms Mirniyowan on 6 February 2017 in relation to the unpaid premiums. Ms Mirniyowan said she had lost her card and was waiting for a new one to be sent.

1222 On 13 February 2017, Ms Mirniyowan was notified by email and text message that her policy had lapsed due to the non-payment of premiums.

1223 Ms Mirniyowan's evidence was that she knew that the Retention Agents were calling her about missed payments but that the calls were "stressing [her] out". She realised she no longer had insurance when she stopped receiving the calls.

Undue harassment (Retention conduct)

1224 This is to be considered in the context of Ms Mirniyowan's financial circumstances, in that she had missed a number of premium payments as she had insufficient funds to pay the premiums, and that she had repeatedly informed the Retention Agents that she was unable to afford to pay the premium. For example, during the calls of 14 July 2016 and 17 August 2016 she told the Retention Agent that she had no money. During the call on 10 January 2017 she told the Retention Agent that she was waiting for her payment and had to do her Centrelink report. Select was aware by other means that the reason Ms Mirniyowan had repeatedly missed payment of her premiums was that she had insufficient funds. This fact was stated in the Let's Insure emails of 14 July 2016, 17 August 2016, 26 October 2016, 21 December 2016, and 4 January 2017, which stated "Your financial institution informed us your payment was declined for the following reason: Not sufficient funds".

1225 The retention conduct occurred in a context where the emails sent, for example, each say that failure to pay by a specified date will result in Select having to cancel the policy. Despite that, Ms Mirniyowan's failure to pay, due to an inability to do so, did not result in that outcome. Rather, the policy was kept in place, with the premiums continuing to fall due. Between May 2016 and February 2017, seven emails and seven SMS messages were sent to her following up the failure to pay.

1226 Between May 2016 to February 2017, Retention Agents telephoned Ms Mirniyowan 27 times regarding unsuccessful premium payments. This was despite the Retention Agents being told on six separate occasions she could not pay the premiums as she had no money. It was not until 13 February 2017 that the policy was cancelled though non-payment.

1227 Select was also on notice, at least by 5 May 2016, that Ms Mirniyowan had been signed up to a policy without receiving or understanding the policy documentation. This can be inferred from the brief QA call with Mr Wurrawilya on 5 May 2016. No inquiry was made of Ms Mirniyowan. Although the Compliance Manager, Mr Nguyen, did ask if she had received the documentation and understood the policy, he appears to have only called Mr Wurrawilya, on 5 May 2016, 20 May 2016 and 25 May 2016.

1228 In that context, the approaches made to Ms Mirniyowan by Retention Agents constituted undue harassment on account of their context, nature and frequency. The number of telephone calls, emails and SMS messages regarding missed premium payments in the period between May 2016 to February 2017 constituted harassment in that they were of a nature calculated to 'tire out' or 'exhaust' Ms Mirniyowan. These calls were made requiring payment rather than the Corporate Defendants addressing the obvious issue that she could not afford the policy. The Corporate Defendants' submission that Ms Mirniyowan did not ask for the policy to be cancelled, given the content of the calls, does not prevent the conduct from being unduly harassing. Moreover, the content of the calls reflect that they were not simply about debt collection. The Corporate Defendants' submission ignores the vulnerable position Ms Mirniyowan was in. The harassment was undue in circumstances where it is now admitted that the policy was sold to her in circumstances which were unconscionable (and where the retention conduct itself is unconscionable, as discussed below). This conduct went beyond the normal limits which society would regard as acceptable or reasonable; it amounted to undue harassment.

1229 The fact that the calls were made to collect an overdue payment does not prevent them in the circumstances in which they were made from amounting to undue harassment. Contrary to the Corporate Defendants' submission, there was no basis to assume, given what was known, that it was in the policy owner's interest to keep the policy. Moreover, it is no response that there is no evidence that the Retention Agents knew the circumstances in which the policy was sold. Select knew, and they were acting on behalf of Select.

1230 I am satisfied that there is a contravention of s 12DJ(1).

Unconscionability (Retention conduct)

1231 ASIC alleges that by not cancelling Ms Mirniyowan's Let's Insure Funeral Cover with optional ADC, AIC and ADC booster and/or continuing to seek payment for the insurance policy from her, Select engaged in conduct that was, in all the circumstances, unconscionable towards her and thereby contravened s 12CB(1).

1232 The relevant Retention Agents who dealt with Ms Mirniyowan knew, or ought to have known, of her personal characteristics and circumstances that made her vulnerable or in a weaker bargaining position. The Corporate Defendants' submission to the contrary cannot be accepted. These personal characteristics relied on including her age, that she lived in a remote community in Arnhem Land and had difficulty understanding spoken English, were known by the Retention Agents or at least should have been known from the contents of the communications and the circumstances in which the calls were being made.

1233 Ms Mirniyowan's financial circumstances were that she had missed a number of premium payments as she had insufficient funds to pay the premiums, she told Ms Khan during the telephone calls of 14 July 2016 and 17 August 2016 that she had no money; and she told Mr Davies during the telephone call on 10 January 2017 that she was waiting for her payment and had to do her Centrelink report.

1234 The retention conduct and the circumstances in which it took place are explained above, and it is unnecessary to repeat. As found above, the conduct amounted to undue harassment. The retention conduct, as reflected by some Agents, reflects a lack of good faith in their dealings with Ms Mirniyowan.

1235 I am satisfied that in the circumstances by not cancelling Ms Mirniyowan's policy and/or continuing to seek payment from her, Select engaged in conduct that was, in all the circumstances, unconscionable towards Ms Mirniyowan contrary to s 12CB(1).

Deepak Shrestha

1236 In respect to Mr Shrestha, it is contended that Select (via its Sales Agent, Alex Rogowski) contravened s 12DB(1) on two occasions by making two separate representations that were each false and/or misleading (FASOC [759]-[764]); contravened s 12DJ(1) during the sales call by coercing Mr Shrestha into signing up to Let's Insure Easy Life Cover with optional Easy Life AC and/or providing his credit card details over the telephone (FASOC [765]-[766]);

and contravened s 12CB(1) during the sales call by engaging in unconscionable conduct (FASOC [767]-[772]).

1237 ASIC pleaded that Mr Shrestha is a Nepalese man who, in the period of August 2017 to August 2018, was around 26-27 years old, came to Australia in October 2016 on a working sponsorship visa and was not a permanent resident and had difficulty understanding written and spoken English. It was contended that Mr Shrestha was in a vulnerable position and/or in a weaker bargaining position than Select.

1238 Mr Shrestha's personal circumstances as pleaded by ASIC are established by the evidence and the agreed facts.

1239 It was agreed that on 22 August 2017, Mr Rogowski signed up Mr Shrestha to Let's Insure Easy life Insurance to the value of $50,000 and optional Easy Life AC to the value of $50,000, with a policy commencement date of 31 August 2017, fortnightly stepped premium commencing at $13.89 and no nominated beneficiary. Mr Rogowski took Mr Shrestha's credit card details for the purpose of deducting fortnightly premiums. In total, Mr Shrestha paid $419.33 in premiums under the policy. His policy remains in force.

1240 It was further agreed that the conduct of Mr Rogowski is taken to have been engaged in by Select and by IMS, as Mr Rogowski was contracted by IMS from a labour hire provider at the relevant time, by reason of s 12GH(2)(a).

Evidence of Mr Shrestha

1241 ASIC relied on the affidavit of Mr Shrestha affirmed on 18 April 2019.

1242 Mr Shrestha attended an English speaking school in Nepal for five years and completed an intermediate level of studies when he was 16 or 17 years old. He is a chef and completed a diploma in Culinary Arts in Nepal. He is employed by the Merivale Group in Sydney.

1243 Mr Shrestha is married and has no children. His family (with the exception of his wife, who has lived with him in Australia since December 2018) live in Nepal and he occasionally sends money to them.

1244 Mr Shrestha's first language is Nepalese but he can also speak Hindi and English. English is his third language. He can read and write in English. In 2017, Mr Shrestha could not speak English as fluently as he can now and he had some difficulty understanding complex written and spoken English.

1245 Before August 2017, Mr Shrestha never had life insurance.

Sales conduct

1246 On 18 August 2017, Ravi Sheikh of 'A+ Advisers' called Mr Shrestha to arrange a free quote for life insurance. Mr Shrestha told Mr Sheikh that he already had insurance with "IMAN". Nevertheless, Mr Shrestha agreed to receive a call back from a Let's Insure "product specialist". He was told that he would receive a confirmation email with a copy of Let's Insure's PDS and FSG. Pausing there. ASIC contends that the email was not received. Mr Shrestha, in his affidavit says that he does not remember receiving any emails before 22 August 2017. There is no evidence that it was received, and as explained below, no inquiry was made by Mr Rogowski to that effect.

1247 On 21 August 2017, Mr Shrestha spoke with Sales Agent, Mr Rogowski. Mr Rogowski had a noticeable Canadian accent and at times spoke relatively quickly. Mr Rogowski told Mr Shrestha he was from Canada. At the beginning of the call, Mr Shrestha again told the Sales Agent that he already had life insurance. I note, however, that Mr Shrestha's evidence was that he was confused about the type of insurance that he held through IMAN. Rather, he held health insurance as opposed to life insurance. Mr Rogowski proceeded to provide Mr Shrestha with a generic quote, which he said would be emailed to him. As with the email referred to in the previous paragraph, the same allegation that it was not received is made by ASIC, based on the same evidence.

1248 Mr Rogowski called Mr Shrestha back the following day. Early in the call, the following exchange occurred:

> DS: To be really honest I think I'm not interested in getting a new insurance, I guess.
>
> AR: You're not interested in getting insurance?
>
> DS: Yeah, I think I'm fine with whatever I have.
>
> AR: Yeah, that's fine. I mean, were you thinking that, you know, what, you, you don't have any current coverage, though, do you?
>
> DS: No, I do have, from IMAN.
>
> AR: Okay, was that just through your super?
>
> DS: Yeah, that's from super, I guess.
>
> AR: Yeah. Just about everybody has it through their super as well, all right. Now, like, I'll give you a quick rundown of our coverage, Deepak…

1249 Despite Mr Shrestha indicating that he was not interested, Mr Rogowski proceeded with his sales pitch. Mr Shrestha's evidence was that he was not interested in purchasing any insurance; it was his first year living in Australia and he was struggling financially.

1250 Mr Rogowski provided him with a brief overview of the coverage and took some personal details from Mr Shrestha for the purposes of preparing a quote. Mr Shrestha told him, inter alia, that he was from Nepal, that he is 26 years old and had only been living in Australia for nine months and was on a skilled worker visa.

1251 Without asking whether this was a suitable level of cover, Mr Rogowski suggested a quote of "$300,000 of life cover for us to start" and "popped on our optional accident cover". In relation to the Easy Life AC, he said:

> AR: …Deepak, the way this one works is pretty simple. In case you pass away from an accident ever, right - so whether there's an accident at work, or at home, or even, you know, on the road when you're driving, all right, whatever it might be - we're actually going to pay that out on top of your life cover.
>
> DS: Ah hmm.
>
> AR: So, say if you were in the same accident but you survive and you've suffered some serious injuries, we're going to be able to pay you out while you're still alive, okay?
>
> DS: Yep.
>
> AR: And I'll list you the full set of injuries here. So those would be permanent blindness, a permanent paralysis, a major head trauma, major burns, a coma, permanent loss of hearing, permanent loss of speech, and permanent loss of or paralysis of two or more limbs. Okay?
>
> DS: Ah hmm

1252 In his affidavit, Mr Shrestha explained that he understood "accident cover meant that, if [he was] injured at work or somewhere else, [he] will get some funds under the policy. [He] did not understand that [he] had a choice about whether [he] took out the accident cover or not".

1253 And then:

> - - - now, look, just the exclusions from now on are pretty simple, intentional self-inflicted injuries, participating in professional sports. You're probably too busy to do any kind of pro sport, right?

1254 Mr Rogowski then provided Mr Shrestha with a series of three quotes in quick succession. Mr Shrestha said that the last of three quotes, being the lowest level of cover suggested by the Sales Agent, was "okay". After taking some details, Mr Rogowski then played a "really quick

recording" of the PDS. Mr Shrestha's evidence was that he does not understand what the words 'product disclosure statement' or 'exclusions' mean.

1255 Shortly thereafter, Mr Rogowski sought to take Mr Shrestha's payment details:

> AR: So like what I'll do, I won't put it for tomorrow, what I'm going to do is I'm going to put it for next Thursday, that's going to be the 31st of August, okay. So, Deepak, nothing until then, but you are covered from today at no extra cost. Does that make sense?
>
> DS: Yeah, but, um, what I want to do is actually, I haven't made up my mind that I'll get this cover right now. What I want to do is I want to go through all the policies and all the procedure once again and then only make a decision.

1256 Mr Shrestha's evidence at this point was that he wanted to exit the call and he was not interested in purchasing the insurance. Despite Mr Shrestha's indication that he wanted time to consider the issue, Mr Rogowski insisted that he could "start that policy…today" and send out the policy documentation, so that Mr Shrestha could call back if he had any "questions or concerns" or wanted to increase or decrease the level of cover. Mr Rogowski then pressed Mr Shrestha to take up the policy:

> AR: …Deepak, I just do need you to confirm that you are happy to continue and purchase that insurance policy today?
>
> DS: Um, I don't know what to say, like, I have already an insurance right now and I got to cancel those as well after actually.
>
> AR: Well, you don't necessarily have to cancel it. You said it was in your super, right?
>
> DS: Um, super, I think, yeah, yeah, because my company made that insurance for me and I just, I just need to pay it, like, monthly for it.
>
> AR: Yeah, yeah, of course, of course, right, and that just gives you enough time to, you know, again, read over the policy documents and have a read through. I mean, of course, I know you're, so you already have that life insurance in place. So just please, Deepak, before you make any of those decisions just make sure you receive and review our documents before deciding to cancel any existing coverage you may have, okay?
>
> DS: Okay, yeah.
>
> AR: And if you want this as additional cover or instead of your other one, that's entirely up to you. Deepak, just please read ours before you decide to cancel any ones you currently have, okay?
>
> DS: Mmm, yeah.
>
> AR: No worries. So just I do need that confirmation then that you were happy to continue and purchase the insurance policy?
>
> DS: Mmm, yeah, I'm happy to continue, yeah.

1257 Mr Shrestha said that he did not feel that the Sales Agent was listening to him or that he gave him any choice whether to take up the policy.

1258 The Sales Agent then took Mr Shrestha's credit card details for the purposes of charging premiums.

1259 It is to be recalled that Mr Shrestha's evidence was that he was confused about the difference between life insurance and health insurance. So much is plain from the following:

> DS: Yeah, and, um, how, how is it going to help me if I just want to go for a medical check-up, will I be held with all those, um - - -
>
> AR: It will, it will cover you for just everything that we talked about, so it's not a medical insurance. That's different, okay?
>
> …
>
> DS: Oh, yeah, but what I mean to ask is like, if I just [indistinct] just like when I, when I go with, go to a doctor for examination, and, um, will I be covered on - - -
>
> …
>
> AR: So, so you mean, you mean, you mean paying for the doctor when you go visit the doctor?
>
> DS: Yeah.
>
> AR: No, no, no, that's different. That's different. That's different.

1260 After realising that the policy would not cover him for certain medical expenses, Mr Shrestha clearly stated that he did not want the policy:

> DS: Um, I don't think now, um, now I'm not interested with the fact that I won't get to reclaim all the expenses that I - - -
>
> AR: What, what - - -
>
> DS: - - - that I will get, yeah.
>
> AR: What do you mean?
>
> DS: Like, now it's making me unwilling to get this insurance policy.
>
> DS: Yeah, but - - -
>
> AR: - - - with, with the accident cover, all right, if you suffered any of those injuries that I listed, of course if you wanted to use that money for whatever you wished, whether that's for medical expenses, the rehab, all right, bills with the house - - -
>
> DS: No, no, no, that, that was all like, all of those things are fine, but I thought this, all these medical expenses also would be covered.

1261 Mr Shrestha repeatedly stated that he did not want the policy, even describing it as "pointless" as it did not cover him for medical expenses, and he attempted to end the call ("Um, you know that, I think I'm just not interested at all now, like, um yeah, I'm not interested. Sorry to bother you but, bye bye"). Despite his objections, Mr Rogowski persisted, which had the obvious effect of confusing Mr Shrestha:

> AR: So this is going to give you the financial support, Deepak, so if any of those benefits, right, right, or we'll also help you out with any kind of ongoing financial support as well, right. I mean, would you prefer me to look at a lower level of cover, or were you happy with that $22 a fortnight?
>
> DS: Um, I don't know, I'm like you, so confused right now.

1262 Rather than assisting Mr Shrestha, Mr Rogowski responded to this by offering a lower level of cover. Mr Shrestha's evidence was that he was confused because he was only concerned with his medical expenses but the Sales Agent was rushing him through the call to complete the sale. Mr Shrestha ultimately signed up to $50,000 of cover after asking for the "minimum amount of life insurance".

1263 Mr Shrestha felt that he was pressured into the sale and that he did not have any choice. His evidence was that he wanted time to consider the matter before making a decision to purchase the policy. By the end of the call, although he knew that he had bought life insurance, he did not know what that meant or that he had also purchased accident cover.

False and/or misleading representations

1264 The representations relied on are of the same nature as relates to some other Consumers.

1265 *First*, ASIC allege that Mr Rogowski made the limited exclusion representation, being that there were no exclusions to the policy save for intentional self-inflicted injuries and participating in professional sports. This is again based on implication from express statements and silence on the topic, in the call.

1266 I am not satisfied that this representation is established. Although the Agent did say, "just the exclusions from now on are pretty simple, intentional self-inflicted injuries, participating in professional sports. You're probably too busy to do any kind of pro sport, right?" he followed it immediately with "look, um, the full list is in the PDS for you". As explained earlier, the PDS was not before Mr Shrestha at the time, but the statement goes to whether the inference sought can be drawn that these are only examples. ASIC contended that the reference to "full list" does not assist, as the Sales Agent did not explain what that meant. ASIC submitted that

in any event, the written PDS was not before Mr Shrestha at the time of the call and the pre-recorded short-form PDS did not refer to any exclusions. That does not assist in establishing the representation was made. I do not consider that it has been established it was represented that there were no exclusions to the policy save for intentional self-inflicted injuries and participating in professional sports.

1267 *Second*, ASIC allege that Mr Rogowski made the flat premium representation, namely that the insurance premium remained the same throughout the duration of the policy. This was said to be implied in all of the circumstances including express statements and silence. That is based on the following: the Sales Agent provided Mr Shrestha with quotes for Let's Insure Easy Life Insurance "under our stepped premium option"; that concept was not explained and a person in Mr Shrestha's position could not be expected to understand what the word "stepped" connoted in this context; the Sales Agent said "we'll start you off then with $50,000 of each cover, and that one was less than a $1 a day, okay, was $13.89 a fortnight, okay?"; and at no time was Mr Shrestha informed that the premiums would automatically increase over the life of the policy unless he took positive steps to opt out of that increase. Given Mr Shrestha's position, I am satisfied it was implied that the premium would stay the same throughout. The reference to the stepped option without any explanation, together with the failure to explain it would rise each year given the emphasis on the policy being only $1 a day, does not detract from that conclusion. The representation made is false and/or misleading. It falls within and is a contravention of s 12DB(1)(i).

Unconscionability (Sales conduct)

1268 I am not satisfied that Mr Shrestha was vulnerable, although I am satisfied he was in a weaker bargaining position, which would have been apparent to the Sales Agent from the content of the calls.

1269 Although, as the Corporate Defendants submitted, Mr Shrestha's evidence was that he can read and write in English, and he went to an English speaking school for five years, Mr Shrestha gave unchallenged evidence that in 2017, he was not as fluent in English as he is now. The Sales Agent was aware from the call that Mr Shrestha was from Nepal and had been in Australia for nine months. Mr Shrestha said that he did not have great difficulty understanding spoken and written English, but sometimes he had difficulty understanding complex spoken and written words. So much would have been apparent from the call, where Mr Shrestha said on more than one occasion that he was confused. It can readily be accepted that in that context

some terms used in the call were, at times, complex, which was not assisted by the speed at which the Sales Agent spoke.

1270 This is also in a context where Mr Shrestha already had an insurance policy. The Sales Agent repeatedly ignored the various express statements by Mr Shrestha that he did not want to purchase life insurance, that he was confused about what was being discussed (including about what to do) and his request to be given time to reflect and/or review the policy documents. This is in a context where the Sales Agent had failed to ascertain whether Mr Shrestha had received or reviewed the policy documents sent to him in the mail prior to the 22 August 2017 telephone call. Instead of listening to Mr Shrestha's concerns and requests the Sales Agent persisted to move ahead with the sale of the policy without addressing the issues raised. Indeed, in that context the Sales Agent did not make any genuine or reasonable attempt to confirm that Mr Shrestha did understand what was being purchased, and that he wished to purchase the policy. The Sales Agent did not act in good faith in his dealings with Mr Shrestha but was intent on making the sale. The approach or tactics he used were unfair in the circumstances. He exerted unfair pressure.

1271 Although Mr Shrestha was able to raise matters which made it clear he had obvious concerns about what was being discussed, he was diffident in his manner. It would have been apparent to the Sales Agent that Mr Shrestha was in a weaker bargaining position. The Sales Agent took advantage of that, and proceeded nonetheless, by not listening to and addressing Mr Shrestha's concerns.

1272 I am satisfied that the sales conduct is unconscionable and there is a contravention of s 12CB(1).

Coercion (Sales conduct)

1273 ASIC contends that taking into account the personal characteristics and circumstances of Mr Shrestha (giving rise to his weaker bargaining position) and the conduct of Sales Agent, Mr Rogowski, Select coerced him into signing up to Let's Insure Easy Life Insurance with optional Easy Life AC and/or providing his credit card details over the telephone in contravention of s 12DJ(1).

1274 The conduct relied on is as follows:

(1) the Sales Agent persisting in attempting to sell Mr Shrestha life insurance, notwithstanding his express statements that he already held life insurance and that he was confused about what had been discussed;

(2) ignoring his multiple express statements that he did not want to purchase life insurance;

(3) ignoring his request to be given time to reflect and/or review the policy documents;

(4) failing to ascertain whether Mr Shrestha had received or reviewed the policy documents sent to him in the mail prior to the 22 August 2017 telephone call;

(5) playing a pre-recorded PDS without first obtaining his express and/or informed agreement to receive the PDS in this way;

(6) making the false and/or misleading representation;

(7) failing to take genuine, or alternatively reasonable, steps to confirm that Mr Shrestha did wish to purchase Let's Insure Easy Life Insurance with optional Easy Life AC;

(8) failing to make a genuine, or alternatively reasonable, attempt to confirm that Mr Shrestha understood everything discussed during the telephone call, understood what Let's Insure Easy Life Insurance with optional Easy Life AC did and did not cover, wished to purchase Let's Insure Easy Life Insurance with optional Easy Life AC, and consented to having premium payments charged to his credit card;

(9) rushing him through the call; and

(10) pressuring him.

1275 ASIC submitted that in circumstances where Mr Shrestha did not understand the policy that he had been signed up to and had not wanted it, it is clear that his will was overborne, in that he had not given meaningful or informed consent. I have addressed this submission generally above.

1276 As previously discussed, it is important to consider the content of the call. The facts underpinning the integers relied on are established. As noted above, Mr Shrestha did give evidence that he felt he had no choice. I note as with other claims, a number of the integers are not directed at compelling the Consumer to sign up, or are of a type to overbear a person's will. Mr Rogowski did put pressure on him, by the failure to heed Mr Shrestha's requests. However, it is apparent from the call that at one stage he was going to end the call. As noted above, Mr Shrestha was able to raise matters, including his concerns. This included that before purchasing the policy, Mr Shrestha requested a policy with the lowest premium. It can be inferred he was exercising will in doing that. That is, he did not sign up for the policy in the amount originally

quoted to him but instead sought to bargain with the Sales Agent for a better deal. The conduct employed was plainly unconscionable, as discussed above. However, in the circumstances, I am not satisfied that coercion within s 12DJ(1) has been established.

AFSL General Obligations Contraventions

1277 This third category of claims alleges breaches by Select of AFSL general obligations provisions imposed upon it as the holder of an AFSL under ss 912A(1)(a) and 912A(1)(c) of the Corporations Act, on the basis that Select was not providing financial services efficiently, honestly and fairly in relation to the Refer a Friend program from January 2015 to May 2017 (the Refer a Friend Period) and was not compliant with financial services law in relation to the Conflicted Remuneration Contraventions and the Consumer Contraventions.

1278 Reference has already been made to the Refer a Friend program: see, for example, [0], [0] and [0] above.

Section 912A(1)(a)

1279 ASIC contended that Select contravened s 912A(1)(a) via its Refer a Friend program pursuant to which it elicited referrals from consumers and then used certain negotiating tactics on those referred persons. In circumstances where this program was not adequately monitored or supervised by Select and was abused by Sales Agents, and where Select failed to identify that use of Refer a Friend was causing or contributing to a spike in sales to Indigenous persons, this conduct contravened Select's obligations to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly.

1280 ASIC also contended that Mr Howden was involved in the contravention of s 912A(1)(a) within the meaning of s 79 of the Corporations Act.

Legal principles

1281 Section 912A(1) is as follows:

> **912A General obligations**
>
> *General obligations*
>
> (1) A financial services licensee must:
>
> (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
>
> (aa) have in place adequate arrangements for the management of

conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and

(b) comply with the conditions on the licence; and

(c) comply with the financial services laws; and

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and

(d) unless the licensee is a body regulated by APRA—have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and

(e) maintain the competence to provide those financial services; and

(f) ensure that its representatives are adequately trained, and are competent, to provide those financial services; and

(g) if those financial services are provided to persons as retail clients—have a dispute resolution system complying with subsection (2); and

(h) unless the licensee is a body regulated by APRA—have adequate risk management systems; and

(j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

1282 In *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* [2012] FCA 414; (2012) 88 ACSR 206 at [69]-[70], Foster J observed in relation to s 912A(1)(a):

[69] In support of the relief which it seeks based upon s 912A(1)(a) of the Corporations Act, ASIC made the following submissions:

(a) The words "efficiently, honestly and fairly" must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672. ([126])

(b) The words "efficiently, honestly and fairly" connote a requirement of competence in providing advice and in complying with relevant statutory obligations: *Re Hres and Australian Securities and Investments Commission* (2008) 105 ALD 124 at [237]. They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client's affairs: *Re Hres and Australian*

Securities and Investments Commission (2008) 105 ALD 124 at [237]. ([127])

(c) The word "efficient" refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672. Inefficiency may be established by demonstrating that the performance of a licensee's functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 679. ([128])

(d) It is not necessary to establish dishonesty in the criminal sense: *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 at 110. The word "honestly" may comprehend conduct which is not criminal but which is morally wrong in the commercial sense: *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 at 110. ([129])

(e) The word "honestly" when used in conjunction with the word "fairly" tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672. ([130])

[70] The submissions which I have extracted at [69] above are correct and I accept them.

1283 Foster J's statement was cited with approval in, for example: *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790 at [50]; *Australian Securities and Investments Commission v Avestra Asset Management Limited (in liq)* [2017] FCA 497; (2017) 348 ALR 525 at [191]; *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023; (2016) 336 ALR 209 at [674]; *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751; (2018) 266 FCR 147 at [2347]; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208; (2020) 275 FCR 57 at [505] and *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; (2020) 147 ACSR 266 at [50].

1284 ASIC also referred to the recent obiter comments of O'Bryan J in *Westpac Securities – Full Court*, at [426]:

> With respect, it is not apparent that either reason provides a sound basis for reading the phrase, as it appears in s 912A(1)(a) of the Act, compendiously in the manner suggested by his Honour. In particular, it is not apparent why a licensee cannot comply with each of the three obligations, efficiently, honestly and fairly, applying the ordinary meaning of each word. One of the meanings of the word "efficiently", and the meaning well adapted to the statutory provision, is competent, capable and having and using the requisite knowledge, skill and industry: cf *ASIC v Camelot* at [69(c)]. The word

> "honestly" includes dishonesty in the criminal sense but may also comprehend conduct which is not criminal but which is morally wrong in the commercial sense: *RJ Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 at 110. The word "fair" as used in s 912A(1)(a) has not received detailed judicial consideration. However, it seems to me that there is no reason why it cannot carry its ordinary meaning which includes an absence of injustice, even-handedness and reasonableness. As is the case with legislative requirements of a similar kind, such as provisions addressing unfair contract terms, the characterisation of conduct as unfair is evaluative and must be done with close attention to the applicable statutory provision: cf *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [364]. It seems to me that the concepts of efficiently, honestly and fairly are not inherently in conflict with each other and that the ordinary meaning of the words used in s 912A(1)(a) is to impose three concurrent obligations on the financial services licensee: to ensure that the financial services are provided efficiently, and are provided honestly, and are provided fairly.

1285 As O'Bryan J stated at [424], immediately before those observations, the point was not the subject of argument. Allsop CJ reserved "for an occasion where the matter was fully argued the question whether the phrase is compendious and, if it is, its meaning and application": at [170]. I note that there was no suggestion by ASIC that O'Bryan J's dicta had changed the law. I recite the submission for completeness and, as accepted by ASIC, it is in any event, of no practical moment in the resolution of the matter that arises in this case, given the manner in which ASIC presents its case.

Consideration

1286 ASIC's case is confined to the manner in which the Refer a Friend program was conducted between January 2015 and May 2017, which is the time from which the program was, according to Select, first included in its sales scripts. Although the program had been in place before, since June 2013, it was in the form of a flyer contained in welcome packs mailed to Select's customers. No complaint is made about that.

1287 The program operated as follows: the Sales Agent, at the conclusion of successful sales calls, would ask newly acquired customers (Referring Customers) to provide the contact details of friends and family members who might be interested in purchasing Let's Insure or FlexiSure insurance products (Referred Customers), and offer a $20 Coles Myer gift voucher to the Referring Customer for each Referred Customer who would go on to purchase an insurance product.

1288 In summary, ASIC contends that the Refer a Friend program was devised and executed unfairly in at least four distinct ways:

(1) the program did not require Sales Agents to obtain consent from Referred Customers to use their details, or afford Referring Customers the opportunity to obtain consent from the individuals whose contact details they were providing;

(2) Sales Agents repeatedly name-dropped Referring Customers, impliedly suggesting to Referred Customers that the Referring Customers endorsed the product;

(3) Sales Agents did not ask whether Referring Customers wished to participate in the program at all, but would seamlessly launch into the offer and request contact details, once the Referring Customer had purchased an insurance policy; and

(4) Sales Agents were participating in the Cruise Incentive, the Vespa Incentive and the Las Vegas Incentive while using Refer a Friend to achieve sales.

1289 ASIC submitted that each of Mr Mirrawana, Ms Shadforth, Ms Gaykamangu and Mr Nundhirribala were individuals whose contact details had been provided without their consent, through the Refer a Friend program. The evidence establishes that in each instance, those individuals were contacted by Select, unsolicited, and the Sales Agents name-dropped the individuals who had provided their contact details (who were known to them), and each of those individuals purchased insurance policies. Mr Mirrawana, Ms Gaykamangu and Mr Nundhirribala, after a sale had been made to them, were also asked for contacts in exchange for potential gift vouchers, before they themselves had the opportunity to consent to participate in the offer.

1290 To establish its case, ASIC identified a number of examples of what it submitted were instances where Select's financial services were delivered unfairly through its use of the Refer a Friend program. It is contended that Select should have, but failed, to prevent these things happening. These examples, it is submitted, establish that Select did not properly monitor Referring Customer and Referred Customer calls, or identify that the use of the program would result in, or at least contribute to, a spike in sales in areas with a high proportion of Indigenous persons. The QA program failed, for example, to detect the use of name dropping, or that no Referred Customer had given consent.

1291 Before considering the use of the Refer a Friend program any further, it is appropriate to address two matters raised by Select.

1292 *First*, to establish a contravention of this provision the Refer a Friend program must be a financial service covered by the AFSL within s 912A(1)(a). Select submitted that the manner

in which Select obtained someone's contact details did not affect the standards of performance of financial advice as required for s 912A(1)(a) to be engaged and it did not influence a decision in relation to a financial product. Rather, it only provided Select the opportunity to call the Referred Customer and then provide financial product advice. The way those details were obtained is neutral as regards the standard of the advice.

1293 Section 766A addresses when a financial service is provided. By virtue of s 766A(1)(a), financial services includes providing financial product advice, which is defined in s 766B(1), recited above at [0]. The approach to assessing whether such advice is given was considered in *Westpac Securities – Full Court* which is discussed above at [0]-[0]. It is unnecessary to repeat that consideration here. Suffice to recall, given Select's submission, that 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 de-contextualised parts of a whole conversation: *Westpac Securities – Full Court* at [12], [20], [217] and [241]. The definition of financial services also includes, by virtue of s 766B(1)(b), when a person 'deals' with a financial product. This is further defined in s 766C as including where a person (either a principal or agent) issues or arranges for a person to apply for or acquire a financial product.

1294 I note also that in *Westpac Securities – High Court*, in respect to s 766B(3), Gordon J observed at [54], citing, inter alia, *Project Blue Sky* at [69] and [71]:

> Section 766B(3) is to be read as a whole and given its ordinary meaning, in light of its context and purpose. It is not to be dissected into separate words or phrases, the meanings of which are then amalgamated into some composite meaning.

1295 The same reasoning would equally apply to a consideration of s 766B(1).

1296 I accept ASIC's submission that the Refer a Friend program falls within the definition of financial services. Select's submission artificially considers this program absent its use and purpose. It was plainly part of the sales process. Because the Sales Agents obtained the details from the Referring Customer without getting the consent of the Referred Customer, it enabled the Referred Customer to be the subject of a cold call. In those calls, financial product advice was given. It was a sales technique used to enable the cold calls to be made to Referred Customers in a context where the information that had been provided to the Sales Agent by the Referring Customer was used by them to suggest, inter alia, that the Referring Customers encouraged the Sales Agent to contact the Referred Customer, and that the Referring Customer

endorsed the product that was being sold. It was plainly being used to influence the Referred Customer in the sale of the insurance policy.

1297 *Second*, this is one of the areas where Select submitted that ASIC had strayed from its pleadings and were relying on matters not pleaded. I have addressed this topic generally at [0]-[0] above, and there is no need to repeat those comments here. I do not accept the submission. Properly read, the submissions advanced are consistent with the pleadings. Rather, t Select, at times, misconstrued ASIC's case. For example, Select complained that ASIC has sought to establish that the Refer a Friend program targeted Indigenous people, and that, properly read, such an allegation is not pleaded. That is to misunderstand ASIC's case. Rather, ASIC's submission focussed on the effect of this program on Indigenous people.

1298 It is also important to recall in this context that a contravention occurs when the AFSL holder has failed "to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly": s 912A(1)(a). Contrary to what appears, or is at least implied in Select's submission, it is not necessary for ASIC to prove that the Refer a Friend program failed in each case. Nor is ASIC required to prove, in this case, a pattern or system of conduct. In so far as Select relied on authorities where systemic conduct is alleged, they are inapt. However, that said, as explained below, some features relied on by ASIC are based on the sales script, and given this aspect of the script was mandatory, the conduct could properly be described as systematic.

1299 Moreover, although ASIC identifies at least four matters identified above at [0], which it says establishes the unfairness of the Refer a Friend program, it is not necessary to establish that any one matter by itself, would be sufficient. It is the combination of matters established which reflects on the nature of the Refer a Friend program.

1300 Returning to the basis on which ASIC contends that the Refer a Friend program was devised and executed unfairly.

1301 I accept that there are relevant admissions on this aspect of the case. Moreover, the Refer a Friend program was part of the sales script, and mandatory for the Sales Agents to read to consumers.

1302 *First*, in respect to failing to obtain consent from Referred Customers to use their details, or afford Referring Customers the opportunity to obtain consent from the individuals whose contact details they were providing, it can be readily accepted that occurred. The sales script

dictated such an approach. Sales Agents were required to ask Referring Customers whether the Referred Customers, to the Referring Customer's best knowledge, would be happy being referred (the Permission Question). The script did not, however, require Sales Agents to give Referring Customers an opportunity to seek consent from Referred Customers before they provided their contact details. It also did not require Sales Agents to actually seek that consent from Referred Customers themselves. It involved the Sales Agent asking someone else whether a person would be agreeable to receiving a call, which is plainly different from obtaining that person's consent.

1303 Mr Howden, in the course of his s 19 examination, admitted (in reference to Select's written submissions to the Royal Commission) that Referring Customers, such as Ms Marika, should "never have been asked for details" of friends and family "unless and until they have given their express consent". Mr Howden acknowledged that the sales script, as drafted, enabled Sales Agents to treat Referred Customers as having consented to being contacted by Select, notwithstanding that the Referred Customer had not given their permission to be contacted. The manner of the drafting of the script reflects that there had, at the time, been some consideration by Select as to the necessity for obtaining consent. Indeed, the obvious inference is that the scripts were drafted in that manner in an attempt to circumvent the need for obtaining the Referred Customer's consent. As a result, the Referred Customers were denied the opportunity to consider whether they would consent to their contact details being provided.

1304 Select submitted that this is insufficient to prove a contravention, because the Refer a Friend program is not a financial service. As explained above, that submission cannot be accepted.

1305 Select submitted that there was nothing inherent in obtaining a potential customer's contact details without their consent that meant financial services were not provided efficiently, honestly and fairly in contravention of s 912A(1)(a). At most, it resulted in potential customers being called without their express permission. It was what actually happened on the call that is important. Such a submission fails to grapple with the use to which this information was put, and designed to be put. Moreover, Select's submission does not address Mr Howden's admissions as to the significance of this feature.

1306 *Second*, as to the Sales Agents repeatedly name-dropping Referring Customers, impliedly suggesting they endorsed the product, in the examples given, it may be accepted that blatantly occurred.

1307 As stated by Mr Howden in a letter dated 9 November 2018 in response to a s 912C(1) Notice, Select required Sales Agents at the start of the call "to point out to the potential customer where they had obtained their details from and the reason for the call". That requirement gave rise to the potential use of the Referring Customer's details as a sales tactic. Name dropping in that context generated an assumption that the policies were endorsed by the Referring Customers. At the very least, the use of the Referring Customers' name in this context enabled Sales Agents to imply to the Referred Customer that the Referring Customer, who was known to them, had encouraged Select's contact of those persons, and/or endorsed or approved of Select's insurance policies. I do not accept Select's submission that the reason for requiring Sales Agents to give Referred Customers these details is simply so they knew how the Sales Agent had obtained their contact details and why they were being called. Indeed, I accept ASIC's submission there is no reason for Select to require Sales Agents to invoke the names of Referring Customers in this manner, other than to enable Sales Agents to imply that those individuals endorsed or approved the insurance policies, to suggest that those individuals thought that the policies would be appropriate for the Referred Customers and imply to the Referred Customer that the Referring Customer had encouraged Select to contact them.

1308 *Third*, in respect to the fact the Sales Agents did not ask whether Referring Customers wished to participate in the Refer a Friend program at all, that again may be accepted. The consequence is that the Referring Customers were not provided an opportunity to decline to participate in the Refer a Friend program and could not reflect on the implications of providing the contact details of their friends and family members. They could not consider the fact that they were providing private and personal contact details without consent from Referred Customers. That said, this factor considered in isolation does not by itself carry the requisite unfairness. But as Select fails to grapple with, these considerations are not to be considered in isolation.

1309 *Finally*, the Sales Agents were participating in the Cruise Incentive, the Vespa Incentive and the Las Vegas Incentive while using the Refer a Friend program to achieve sales. Those Incentives and their effect are discussed above at [0]-[0]. Select knew that Sales Agents were incentivised to increase the number of sales they had completed. Participation in the relevant Incentives provided an additional degree to which Sales Agents would benefit from the sale of insurance products to consumers. As ASIC submitted, the Referred Customers and Referring Customers were led to believe that Sales Agents were offering participation in the Refer a Friend program for their benefit, not knowing that there was an even greater-than-usual incentive for the Sales Agents to acquire leads and sell policies.

1310 I note, as explained earlier at [0], Mr Howden admitted that the Incentives that ran during the Refer a Friend Period, particularly the Vespa Incentive and the Cruise Incentive, "drove wrong behaviours" and led to an abuse of the referral process and targeting of Indigenous persons.

1311 I note as Select also generally submitted, that there are provisions in respect to anti-hawking in relation to cold calls which are not alleged or proved. In that event, it was submitted that such conduct is not unlawful, and the Court would be slow to find a breach of s 912A in that context. Although such provisions exist, as Select accepted, it is not necessary for underlying unlawful acts to be established, before a contravention of s 912A occurs.

1312 Taking into account the relevant considerations, I am satisfied that the Refer a Friend program between January 2015 and May 2017 was devised and executed unfairly. It was a program executed at a time where additional incentives were provided to Sales Agent to make sales, with additional benefits on offer based on the volume of sales made. In that context, the features inherent in the program which were unfair were also ripe for abuse. This is particularly so in relation to potentially vulnerable customers. It is in a context where this program was run at the same to as the Cruise Incentive, the Vespa Incentive and the Las Vegas Incentive. That is the context in which the spike in sales to Indigenous communities occurred.

1313 Turning to whether it has been established that Select failed to do all things necessary to ensure it sold insurance policies in an efficient, honest and fair manner.

1314 ASIC relied on three matters: Select's admission that its compliance-approved practices were in breach of its obligations; the sales calls themselves, and Select's failure to detect breaches that occurred in connection with them; and the 2015 spike in sales to postcodes with a high concentration of Indigenous residents.

1315 In its written submissions to the Royal Commission, Select admitted that, not only should consumers not have been asked for details of friends and family "unless and until they had given their express consent", but each instance in which that occurred "was a failure by the relevant representatives".

1316 As explained above, sales scripts during the Refer a Friend Period contained no requirement to seek consent from Referred Customers for the provision of their contact details to Select, or to be contacted at all by Select and no requirement to seek consent from Referring Customers to participate in the Refer a Friend program. Rather, as explained above, it can be inferred that this was an approach engaged in by Select, after consideration. It follows that the script itself

was defective. In that context, Select's submission which attempts to cast blame on particular Sales Agents, cannot be accepted. It fails to grapple with this evidence.

1317 Ms Dudbridge, in her response to Select on being terminated, said inter alia:

> The floor manager, Renni Attwell [sic], encouraged, if not promoted, the idea of gaining as many of these policies and 'referrals', i.e phone numbers from clients, for prospective clients, regardless of their ethnicity. When several numbers were gained from Aboriginal phones calls, we were encouraged to immediately ring the numbers or 'leads', to make a sale…
>
> Another factor to consider, the request for 'referrals' from customers was actually in the sales script and a mandatory factor when making any call. A policy enforced by the company, so much so, customers were offered a $20 gift voucher for every recommendation they made, if the prospective customers stayed on the policy for 3months. This part of the mandatory script, did not take into account age, race or ethnicity and again was encouraged by upper management. Therefore it should not be down to the sales agent who they should and shouldn't proposition with the mandatory call script.

1318 It reflects the obvious, that the conduct was in accordance with the script. This was implemented in the environment she described.

1319 The QA program, and some of its limitations, are referred to above at [0]-[0]. It is plain that deficient parts of calls that were monitored were missed (see for example, Mr Hoey's call to Mr Mirrawana).

1320 None of the compliance reporting during the Refer a Friend Period raised concerns that, on sales calls: Referred Customers had not consented to having their contact details provided to Select, or to Select contacting those individuals; the names of Referring Customers were being used to suggest a tacit endorsement of the product by people known to the Referred Customers; Referring Customers were not being afforded the opportunity to consent to participating in the Refer a Friend program; and Sales Agents were being inappropriately incentivised to obtain leads and make sales because of the Cruise Incentive, the Vespa Incentive and the Las Vegas Incentive on foot at the time.

1321 ASIC identified four specific examples, which are unchallenged. For example, as noted above, the QA monitoring did not detect that Mr Hoey had deviated from the sales script in failing to ask the Permission Question in his 23 March 2015 call with Mr Mirrawana (described above at [0]-[0]), but rather he received a pass for the call and a score of "98%" from the call monitoring team. In respect to Ms Dudbridge's sale of insurance to Ms Gaykamangu, although it was acknowledged that she should be refunded, the QA failed to detect that Ms Dudbridge had not asked the Permission Question or her inaccurate suggestion that Ms Wanybarrnga, the

Referring Customer, "really wanted" her to attempt to provide her with a rundown of Let's Insure Funeral Cover and provide her with a free quote. Rather, the Compliance Call Monitoring Checklist reflected that Ms Dudbridge had avoided "any misrepresentation or misleading information". Similarly, although the monitoring recorded a "fail" in respect to Ms Dudbridge's call to Mr Nundhirribala, and that this was an "unethical sale" and that contact details were sought in an inappropriate fashion, it failed to detect that Ms Dudbridge had not asked the Permission Question and had dishonestly suggested that the Referring Customer had "really wanted" her to attempt to provide him a rundown of Let's Insure Funeral Cover and provide him with a free quote. Again, the Compliance Call Monitoring Checklist reflected that Ms Dudbridge had avoided "any misrepresentation or misleading information". Finally, the QA monitoring failed to detect that Mr Shah had not asked the Permission Question on his call with Ms Shadforth and, notwithstanding that he had failed the Compliance Call Monitoring Checklist, concluded that "overall, this is an ethical sale".

1322 This is also in a context where Select acknowledged to the Royal Commission that it only listened to 1 in 10 calls and more junior Sales Agents were listened to more frequently than more senior Sales Agents (a factor that Mr Howden said contributed to Select failing to identify the alleged misconduct by Mr Hoey and Ms Dudbridge): and see [0] above.

1323 I also accept ASIC's submission that Select's failure to ensure that it complied with its obligations in implementing and running the Refer a Friend program are evident in the spike in sales that occurred between January 2015 and September 2015, which was not detected by Select's compliance systems (see [0]-[0] above). It is unnecessary to repeat how this spike came to Select's attention by St Andrew's, however, it is appropriate to expand upon the reasons for the spike and Mr Howden's reaction to this spike being brought to Select's attention.

1324 For example, Select informed St Andrew's in response to an email dated 31 October 2016 that:

> We believe two items led to this blip in numbers to these post codes, namely: a) overall increase in general sales volumes from March 2015 (launch of boat cruise incentive for 2nd quarter and "Vespa" prize"); and b) the launch of our "refer a friend" campaign. Whilst there is nothing wrong or illegal in selling to people that have been recommended by clients, a lot of indigenous clients have extended families.

1325 A file note of a meeting held on 27 February 2017 between Select and St Andrew's, reflects that Select determined that, in fact, a significant number of the calls made through Refer a Friend had failed QA and warranted a refund. Select's investigation determined, inter alia:

> The referral lead source accounted for 622 sales made in Selected Postcodes during the Review which represents 38% of all referral generated sales during the Review Period compared to the Selected Postcodes representing only 5-8% for other lead generation sources. Sales in the Selected Postcodes sourced through referrals during the Review Period accounted for 49%, which compared to only 8% outside of the Selected Postcodes.
>
> …
>
> Select advised that two incentive arrangements, being a boat cruise incentive for the 2nd quarter of 2016 and a "Vespa" prize that coincided with the introduction of the "Refer a friend" campaign (offering gift vouchers to customers) were contributing factors to the spike."

1326 To the Royal Commission in 2018, Mr Howden stated:

> In conjunction with St Andrews, Select conducted an internal investigation into the causes of the spike. That investigation revealed that the spike comprised approximately 641 sales of funeral insurance policies made from referral lead sources to persons living in the relevant postcodes (Affected Sales). I was surprised at the spike occurring as there was no specific change in lead generation or acquisition processes or targeting of sales within those specific postcodes. I attributed the spike to two sales incentive arrangements that coincided with the abuse of the existing referral campaign by some agents, namely:
>
> a Vespa scooter as a prize; and
>
> b 3-day cruise from Sydney to Gold Coast.

1327 I note also that when this matter was raised by St Andrew's with Select, in the email chain of 31 October 2016, Mr Howden assured St Andrew's that he had "no reason to believe that there has been any mis-selling. We have a very skilled and experienced Quality Control and Compliance team that actively listen to calls and mark sales and retention calls against comprehensive criteria". Of course, this is in a context where Select had not detected the spike, and calls with patent failings, such as to Mr Mirrawana, had been passed by the QA. I note also that Mr Howden accepted in cross-examination before the Royal Commission that the QA system was not sufficiently robust to deter the conduct of two Agents, Mr Hoey and Ms Dudbridge who, he said, were responsible for approximately 54% percent of the spike.

1328 Pausing there. I note that Mr Howden in his s 19 examination professed to not have been aware that there had been a spike in sales to postcodes with a high population of Indigenous people, until St Andrew's brought it to his attention in October 2016. Mr Howden was not called to give evidence and, given the issue, I infer any evidence from Mr Howden that he might have given on this topic would not have assisted the Corporate Defendants.

1329 Moreover as previously explained at [0]-[0], I accept that Mr Howden (and Select) had awareness of the issue in 2015. At least Mr Howden (and Select) was aware of a number of

sales to Indigenous areas and as a result of Refer a Friend program. It will be recalled that although Mr Hoey was given a verbal reprimand by Mr Howden and Mr Atwal in late 2015 for his involvement in selling policies using Refer a Friend to "friends and family members including in indigenous areas", a formal warning was not given to Mr Hoey (and Ms Dudbridge) until 2017, with the warnings being backdated to October 2015. It was in June 2017, after the spike in sales became known to St Andrew's and ASIC, that Mr Hoey and Ms Dudbridge were terminated for the conduct. Although in 2017 it was considered that Mr Hoey's and Ms Dudbridge's conduct was sufficiently serious to warrant termination, Select and Mr Howden did not do so in 2015. Rather, it will be recalled Mr Hoey was promoted and was offered further sales incentives. Despite the warnings being given, there is no mention of the warnings in the Compliance Reports from around this time (as might have been expected).

1330 I note also in this context that in 2014 Mr Hitchcock raised with Mr Howden problems associated with Select's marketing to Indigenous communities.

1331 The Defendants submitted that the review conducted after St Andrew's alerted them to the spike was conducted in hindsight, using enhanced compliance methods, and does not establish any link between the spike in sales and the Refer a Friend program. It submitted that the spike does not establish that Indigenous communities were targeted or that the Refer a Friend program was abused. That refunds were given with the benefit of hindsight does not establish any mis-selling. The fact that Select did not detect the conduct of Mr Hoey and Ms Dudbridge and a call made by Mr Shah to Ms Shadforth does not thereby establish that Select failed to adequately monitor telephone calls. Although ASIC submitted that Select failed to identify that the use of the Refer a Friend program would cause, or was causing or contributing to, a spike in sales in postcodes with a high proportion of Indigenous persons, the Defendants submitted that there is no pleading that the spike resulted from the unfair elements of the program ASIC identified. The Defendants complain that although ASIC pleads the monitoring was inadequate, it does not suggest what would have been sufficient. As to the admissions, they are only an opinion and of little weight as the underlying facts as to what is adequate are not exposed. The Defendants submitted that this is different to the facts considered in *Westpac Securities – Full Court*.

1332 There are differences between the factual circumstances considered in *Westpac Securities – Full Court* and this case, and a comparison between the two does not assist with the resolution

of this claim. Rather, the focus must be on the application of the relevant legal principles to the facts, as established, in this case.

1333 I have addressed the Defendants' submissions as to admissions, elsewhere. Suffice to say in this instance, I do not accept the submission that the admissions made are of little weight. The Defendants' submissions are entirely artificial. The suggestion, for example, that the failure to detect the conduct of Mr Hoey, Ms Dudbridge and Mr Shah in respect to four specified calls does not establish that Select failed to adequately monitor telephone calls, ignores the content of those calls. Moreover, it is not simply four calls that are of concern nor did the sales made in connection with the spike simply relate to Mr Hoey, Mr Shah and Ms Dudbridge (those being just examples referred to by ASIC). As noted above, Select failed to detect that 51 other Sales Agents had also contributed to the remaining 46% of sales in the identified postcodes. Refunds were provided to some of these customers after the review. This was on the basis that the call in which some of the customers were sold the product did not pass the enhanced QA process. The QA program (that was in place during the Refer a Friend Period) did not detect the spike, or the failings of the Sales Agents. Any proper QA program should have done so. The Defendants' submission attempts to distance themselves from the conduct that occurred, and the admissions previously made.

1334 Select did not adequately monitor telephone calls of Sales Agents soliciting contact details from newly-acquired customers for the purpose of the Refer a Friend program; adequately monitor telephone calls of Sales Agents made to persons whose contact details were obtained through the Refer a Friend program; or identify that the use of the Refer a Friend program would, or was causing or contributing to, a spike in sales in postcodes with a high proportion of Aboriginal and/or Torres Strait Islander populations in the period from January 2015 to September 2015.

1335 Select did not take adequate steps to ensure the Refer a Friend program was not abused. Plainly the QA system in use at the time was not sufficient for purpose, as reflected by the failure to detect obvious failings. The submission that Select did not in any way encourage Sales Agents to target Indigenous persons is of no moment. Apart from the fact as referred to above, that was not ASIC's case, that submission plainly ignores how the Refer a Friend program was used in practice by certain Sales Agents, which was not detected by QA.

1336 Select failed to ensure that financial services provided under its AFSL, that is, the sale of relevant Let's Insure and FlexiSure products through Refer a Friend, were provided efficiently, honestly and fairly. The contravention of s 912A(1)(a) is established.

Accessorial liability of Mr Howden

1337 The issue is whether Mr Howden was knowingly involved in the contravention, such as to attract accessorial liability. The relevant legal principles applicable to establishing accessorial liability are well established, and referred to above at [0]. It suffices at this stage to recall that to establish liability under s 79 of the Corporations Act, ASIC must establish that Mr Howden had knowledge of the essential facts or circumstances that constitute the contravention and with that knowledge that he aided, abetted, counselled or procured, or induced the contravention or was knowingly involved in it.

1338 In the last paragraph of the Defendants' closing submission, raised for the first time is an allegation of deficiency in the pleading. It was submitted that reliance upon s 79 is pleaded without identifying which of the subparagraphs are relied upon and there is no allegation that Mr Howden was "implicated" in the offending conduct such that he became "involved in" or "associated with" that conduct, citing *EZY Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134; (2018) 360 ALR 261 (*EZY*) at [13]. Those terms in the preceding sentence are a reference to what is required to establish being knowingly concerned in a contravention (in contrast to aiding, abetting, counselling and procuring): *EZY* at [11] citing *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 at [178]. It was submitted on that basis, the claim against Mr Howden must fail.

1339 I do not accept that submission.

1340 Although this was the last submission made by Mr Howden on this topic, it is appropriate to address this matter first. Leaving aside that it might be considered, if correct, to be the first basis of challenging the claim, what is notable is that it was not submitted in written nor oral submissions that Mr Howden did not know the case he had to meet. That is the very purpose of the pleading. Moreover, in that context, although there are various forms of accessorial liability identified in s 79, Mr Howden cites no authority for the proposition that pleading reliance on s 79 generally, without identifying the relevant subparagraph, is necessarily fatal to the claim. Although the concepts in s 79 have differences, conduct may satisfy more than one description. I note that if there was any lack of clarity it was open to Mr Howden to request particulars, and although that approach was taken in respect to other claims no such request

was made in respect to this claim. In any event, in practical terms the failure to do so in this case is of no moment. A reading of the FASOC reflects that the allegation is that Mr Howden was knowingly involved in the contravention. So much is acknowledged by the fact that, as explained above, Mr Howden refers to the requirements of proof for that basis of liability.

1341 Moreover, properly read, the FASOC does allege facts which go to participation. As explained, to be involved in conduct, there has to be some conduct which implicates a person in the offending conduct such that they become involved in or associated with that conduct. The FASOC alleges for example, that Mr Howden approved the sales script, and was involved in the compliance process, which would plainly satisfy that criteria.

1342 It is to be recalled that to establish liability it is not necessary to prove that Mr Howden knew that the facts and circumstances constituted a contravention, or intended it to be one.

1343 Turning to the substance of the claim.

1344 I am satisfied that Mr Howden was knowingly involved in the contravention.

1345 The bases relied on are that the conduct was unfair and that Mr Howden approved the introduction of the Refer a Friend program in 2013 and the scripts to be utilised in outbound telephone sales calls in 2015. The program was also not adequately monitored, which he was aware of from his involvement in the QA process.

1346 I have discussed elsewhere the various roles undertaken by Mr Howden. That discussion is applicable here. The evidence establishes that Mr Howden was in control, and if anything, was a micromanager.

1347 As explained above, I am satisfied that the Refer a Friend program was used in an unfair manner in the way described above, and that Select failed to take adequate steps to ensure that its insurance policies were sold in an efficient, honest and fair manner.

1348 Mr Howden approved the Refer a Friend program in 2013, at which stage the program was referred to in a flyer. Mr Howden was aware of the nature of the program, and the importance that a person not be referred without their permission. In that regard, the flyer included a section in which the Referring Customer could include the names and contact details of three individuals. The form encouraged customers to "get our friends' or relatives' permission to refer them", and at the end, included a disclaimer that, "By returning this REFER A FRIEND

form, you confirm that you have obtained your friends'/relatives' permission to disclose their details and for us to contact them".

1349 Mr Howden, as "Managing Director and Responsible Manager", signed the compliance forms and adopted the sales scripts for the Refer a Friend program in respect to outbound sales calls.

1350 As a result, Mr Howden knew that Referred Customers could not have given their consent to having their contact details provided to Select or being contacted by Select and that the Referring Customers were incentivised to provide contact details, without the Referred Customer's agreement to participate in the program having first been sought. Given the phrasing of the sales script, it would have been readily apparent that the Permission Question could not satisfy the relevant requirement of consent. It would also have been apparent that the Permission Question was an attempt to circumvent the requirement of consent.

1351 Mr Howden also knew that the Sales Agents were required at the outset to "point out to the potential customer where they had obtained their details from and the reason for the call", which as explained above, enabled Sales Agents to imply to the Referred Customer that the Referring Customer, who was known to them, had encouraged Select's contact of those persons, and/or endorsed or approved of Select's insurance policies. This knowledge, in particular the use of the Referring Customer's name, is in a context where the training materials given to Sales Agents in 2015 instructed, inter alia, that:

(1) "a strong introduction will grab the customer's attention, build rapport and set a positive mood for the call";

(2) the Sales Agent should "engage the customer with ice breaker questions";

(3) at the introduction of the call, the Sales Agent use "third party examples" such as "I speak to many people like yourself…who do have cover in place…"; and

(4) developing rapport was one of a number of "impulse factors that will drive the immediate decision".

1352 Given that was the training, the Refer a Friend program not only provided Sales Agents with contact details which could be used to contact the Referred Customer, but also enabled Sales Agents to use the name of the Referring Customer who had already purchased a policy as a sales tactic. It was used to encourage the Referred Customer to purchase the policy. As explained above, there is no reason to require the Sales Agent to inform the Referred Customer of the name of the Referring Customer, but for that purpose. No other purpose has been

identified. This is also in a context where, as Mr Howden was aware, there were incentive programs in operation which provided benefits depending on the volume of sales made. He had instituted those programs.

1353 Mr Howden said in his s 19 examination that he also knew that the Refer a Friend program was an effective lead generation strategy and in "the vast majority of cases when we got referrals, they did convert into sales".

1354 The Defendants admitted that Mr Howden knew the number of sales calls that were listened to for Select's QA purposes and Select's call monitoring targets. That is, Mr Howden had knowledge that only 10 percent of the sales calls were monitored, as that was the call monitoring target referred to in monthly compliance reports which he received during the period in which the spike occurred. Given the nature of the Refer a Friend program, the QA system was plainly inadequate, as was reflected in the fact that a spike was able to occur. Calls that were assessed, for example, Mr Hoey's call with Mr Mirrawana, was on their compliance system recorded as a pass with 98%. As reflected by my earlier findings, Mr Howden was aware of this issue in 2015, but took no formal action then against Mr Hoey or Ms Dudbridge. Mr Hoey gave evidence, which was unchallenged on this topic (which included inter alia, the circumstances in which he and Ms Dudbridge were asked to sign formal warnings in 2017, which were backdated). Indeed, Mr Hoey's evidence was that in 2015 he was told by Mr Howden that "nothing was going to happen. That will be it". There is no record of any issue at that time in the compliance reports (which would have been expected). Even when he was aware of the issue he took no steps to ensure that Select had responded to it, or responded correctly. It took St Andrew's bringing it to their attention before the further assessment of the calls occurred.

1355 As noted above, I do not accept any suggestion by Mr Howden in his s 19 examination that he was not aware that there had been a spike in sales to postcodes with a high population of Indigenous people, until St Andrew's brought it to his attention in October 2016. He was aware at least in 2015 that there was an issue (even if he may not have known the full extent of the issue, as was revealed by the later investigation). As noted above, Mr Howden did not give evidence on this, and given the issue, I infer that any evidence he could give would not have assisted him.

1356 I am satisfied that given Mr Howden's positions, he had knowledge of and involvement in the scripts which were defective, and the compliance and QA processes that failed to ensure the

Refer a Friend program was conducted efficiently, honestly and fairly. I am satisfied he was knowingly involved in the contravention.

Section 912A(1)(c)

1357 It is not in dispute that Select, as a financial services licensee, was required to comply with "financial services laws".

1358 The basis of this claim is twofold: *first*, by engaging in the Conflicted Remuneration Contraventions, Select failed to comply with financial services law and thereby contravened the general obligation it owed as a financial services licensee under s 912A(1)(c); and *second*, by engaging in the various Consumer Contraventions, Select failed to comply with financial services law and thereby contravened the general obligation it owed as a financial services licensee under s 912A(1)(c) of the Corporations Act.

1359 Put simply, the term "financial services laws" is defined in s 761A of the Corporations Act (which is contained in Ch 7) as including: "a provision of this Chapter or of Chapter 5C, 5D, 6, 6A, 6B, 6C, 6D or 8A; or a provision of Division 2 of Part 2 of the ASIC Act".

1360 The Conflicted Remuneration Contraventions are brought pursuant to ss 963E and 963F of the Corporations Act. Those provisions are contained in Ch 7 of the Corporations Act and are, therefore, financial services laws. The Consumer Contraventions are brought pursuant to ss 12DA, 12DB, 12CB and 12DJ of the ASIC Act, which are each contained in Div 2 of Pt 2 of the ASIC Act, and are therefore financial services laws.

1361 Given my conclusions in respect to each of the underlying claims, ASIC has established that Select has contravened s 912A(1)(c).

1362 ASIC also contends that Mr Howden was involved in the Conflicted Remuneration Contraventions (but not the Consumer Contraventions) pursuant to s 79. For the reasons previously given at [0]-[0] above, I accept that submission.

Directors' Duties Contraventions

1363 The last component of ASIC's case is that Mr Howden breached his duties as director and officer of Select and BlueInc Services, in s 180(1) of the Corporations Act. It is contended that these breaches arise as a result of his personal involvement in each of the Incentives in which Sales Agents partook; his failure to take reasonable steps to prevent Select and BlueInc Services from engaging in contraventions, or potential contraventions, of the conflicted remuneration

provisions; and exposure of Select and BlueInc Services to a foreseeable risk of harm, by virtue of their breaches, or potential breaches, of civil penalty provisions of the Corporations Act.

1364 ASIC contended, as a result, the Court should find that Mr Howden failed to act with the requisite degree of care and diligence as director and officer of Select and BlueInc Services in breach of s 180(1).

Legal principles

1365 Section 180 is as follows:

> *Care and diligence—directors and other officers*
>
> (1) A director or other officer of a corporation must exercise their powers and discharge their 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 corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
>
> Note: This subsection is a civil penalty provision (see section 1317E).
>
> *Business judgment rule*
>
> (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interests of the corporation.
>
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.
>
> Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.
>
> (3) In this section:
>
> ***business judgment*** means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

1366 The principles relevant to the application of the provision are conveniently summarised by White J in *Termite Resources NL (in liq) v Meadows, in the matter of Termite Resources NL (in liq) (No 2)* [2019] FCA 354: (2019) 370 ALR 191 (*Meadows*) at [180]-[184]:

> [180] The principles developed by the Courts concerning the duty imposed by s 180(1) were not in issue. It is convenient to adopt the summary which Brereton J gave in *Australian Securities and Investments Commission v Maxwell* [2006] NSWSC 1052; (2006) 59 ACSR 373:
>
> > [99] The statutory duty imposed by s 180(1) reflects, and to some extent refines, that which obtains at general law. As Santow J (as his Honour then was) explained in *ASIC v Adler* … both the common law and equity imposes on directors a duty of care and skill … the content of which is essentially the same as the statutory duty … . Similarly, the statutory duties imposed by s 181 and s 182 reflect, and to some extent refine, corresponding obligations of directors under the general law.
> >
> > [100] In determining whether a director has exercised reasonable care and diligence, as s 180(1) expressly contemplates, the circumstances of the particular corporation concerned are relevant to the content of the duty. These circumstances include the type of company, the provisions of its constitution, the size and nature of the company's business, the composition of the board, the director's position and responsibilities within the company, the particular function the director is performing, the experience or skills of the particular director, the terms on which he or she has undertaken to act as a director, the manner in which responsibility for the business of the company is distributed between its directors and its employees, and the circumstances of the specific case … .
> >
> > [101] Directors are not required to exhibit a greater degree of skill in the performance of their duties than may reasonably be expected for persons of commensurate knowledge and experience, in the relevant circumstances … And while directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company … they are entitled to rely upon others, at least except where they know, or by the exercise of ordinary care should know, facts that would deny reliance … .
> >
> > [102] The constitution of the corporation, and concomitantly the identity of those to whom the duty is owed, is of importance because the duties referred to in ss 180, 181 and 182 are not duties owed in the abstract, but duties owed to the corporation. As Clarke and Sheller JJA observed in *Daniels v Anderson* (at NSWLR 504), the duties imposed by former s 232 (the predecessor of s 180) reflected the concept of negligence at general law, in that a director owes to the company a duty to take reasonable care in the performance of the office. In *Vrisakis v ASC* (1993) 9 WAR 395, 449–50; 11 ACSR 162, 211–13; Ipp J (as his Honour then was) (with the concurrence of Malcolm CJ) held that although the statutory duty of care and diligence would be contravened if a director had not exercised a reasonable degree of care and diligence in the exercise of his powers or the discharge of his duties, even if there was no actual damage, that could only be so if it was reasonably foreseeable that the relevant conduct might harm the

interests of the company - which means the corporate entity itself, the shareholders, and, where the financial position of the company is precarious, the creditors of the company - and, moreover, that in determining whether the relevant duty had been breached, the foreseeable risk of harm must be balanced against the potential benefits which could reasonably be expected to accrue to the company from that conduct [see also *ASIC v Doyle* (2001) 38 ACSR 606, 641]. As His Honour explained:

> Under s 229(2), however, there is no reference to damage suffered by the company, and an offence may notionally be committed under that section without any damage having been sustained. The question is merely whether the defendant director has exercised a reasonable degree of care and diligence in the exercise of his powers in the discharge of his duties. Nevertheless, a criminal offence will not have been committed if an omission to take care did not carry with it a foreseeable risk of harm to the company. No act of commission or omission is capable of constituting a failure to exercise care and diligence under s 229(2) unless at the time thereof it was reasonably foreseeable that harm to the interests of the company might be caused thereby. That is because the duty of a director to exercise a reasonable degree of care and diligence cannot be defined without reference to the nature and extent of the foreseeable risk of harm to the company that would otherwise arise.
>
> Further, the mere fact that a director participates in conduct that carries with it a foreseeable risk of harm to the interests of the company will not necessarily mean that he has failed to exercise a reasonable degree of care and diligence in the discharge of his duties. The management and direction of companies involve taking decisions and embarking upon actions which may promise much, on the one hand, but which are, at the same time, fraught with risk on the other. That is inherent in the life of industry and commerce. The legislature undoubtedly did not intend by s 229(2) to dampen business enterprise and penalise legitimate but unsuccessful entrepreneurial activity. Accordingly, the question whether a director has exercised a reasonable degree of care and diligence can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.

[181] The standard of care required by s 180(1) is objective but account must be taken of the circumstances of the company and of the particular director or officer involved. The Court enquires as to what an ordinary person, with the knowledge and experience of the director or officer, could be expected to have done in the circumstances if he or she was acting on their own behalf: *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171; (2002) 168 FLR 253 at [372]. The "corporation's circumstances" include the type of company, the size and nature of its business, the provisions of its constitution, the composition of the Board and the distribution of the work between the Board and other officers: *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229; (2009) 75 ACSR 1 (*ASIC v Rich*) at

[7201]. In *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589; (2015) 241 FCR 502, Beach J elaborated the position:

> [440] It is not in doubt that the circumstances of the particular company concerned inform the content of the duty. These include the size and type of the company, the size and nature of the business it carries on, the terms of its Constitution, and the composition of the board of directors.
>
> [441] It is also not in doubt that in considering the acts or omissions of a particular director, one looks at factors including the director's position and responsibilities, the director's experience and skills, the terms and conditions on which he has undertaken to act as a director, how the responsibility for the company's business has been distributed between the directors and the company's employees, the informational flows and systems in place and the reporting systems and requirements within the company.
>
> [442] Further, one then looks at the relevant acts, omissions and circumstances in the given case.

[182] In *ASIC v Cassimatis (No 8)*, Edelman J reviewed the historical basis and nature of the common law, equitable and statutory bases for the duty of directors and officers to act with due care and diligence. His Honour's conclusions included the following:

(a) the dominant position is that directors owe a single general law duty, recognised by both common law and equity, to take reasonable care, at [427]; and

(b) the duty is concerned with negligence and not gross negligence, at [428].

[183] Edelman J also concluded that the foreseeable risk of harm to be considered in relation to an alleged breach of s 180(1) is not confined to financial harm but includes harm to all of the interests of the company, including its reputation; that the question of whether a director has exercised reasonable care and diligence is to be answered by balancing the foreseeable risk of harm against the potential benefits which could be expected to accrue to the company from the conduct in question; that the balancing of the risk against potential benefits should be carried out in a way which is similar to the negligence calculus discussed by Mason J *Wyong Shire Council v Shirt* [1980] HCA 12, (1980) 146 CLR 40 at 47 8; and that the exercise is "forward looking" to what a reasonable person would have done, not "backward looking" at what would have avoided the injury: *ASIC v Cassimatis (No 8)* at [483] [487]. See also *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552; (2016) 340 ALR 75 (*ASIC v Drake (No 2)*) at [395] [401].

[184] The duty imposed by s 180(1) requires directors and officers to be familiar with the fundamentals of the company's business, to keep themselves informed about the company's activities, to monitor generally the company's affairs, to maintain familiarity with its financial status and, in most cases, to have a reasonably informed opinion of the company's financial capacity: *ASIC v Rich* at [7203]. Questions of whether a director or officer has failed to meet the required standard of care and diligence are to be assessed with regard to the circumstances existing at the relevant time, without the benefit of hindsight,

and with the distinction between negligence and mistakes or errors of judgment kept firmly in mind: ibid at [7242]. Section 180(1) is not directed to mere mistakes or errors of judgment. The position was stated by Robson J in *Australian Securities and Investments Commission v Lindberg* [2012] VSC 332 at [72]:

> … Making mistakes does not by itself demonstrate lack of due care and diligence. The business judgment rule in s 180(2) also recognises that business judgments made in good faith and on a proper basis do not fall within s 180(1). Directors and officers of corporations are expected to take calculated commercial risks. A company run on the basis that no risks were ever taken would be unlikely to be successful. The proper taking of risk in making business decisions is entirely consistent with exercising care and diligence. The proper assessment of the risks and potential rewards is a matter that demands the exercise of care and diligence. The two concepts complement each other in the management of corporations.

1367 And further at [188]-[190]:

> [188] In s 180(3) "business judgment" is defined to mean "any decision to take or not take action in respect of a matter relevant to the business operations of the corporation".
>
> [189] The four elements in s 180(2) are cumulative.
>
> [190] It is a person who invokes the business judgment rule who has the onus of proving that he or she falls within its terms: *ASIC v Rich* at [7269]; *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [2011] FCAFC 19; (2011) 190 FCR 364 at [197]. The business judgment rule applies only to business decisions. A failure by directors to turn their mind to a particular issue does not attract the defence: *ASIC v Rich* at [7271] [7284].

1368 Mr Howden refers, inter alia, to *Australian Securities and Investments Commission v Maxwell* [2006] NSWSC 1052; (2006) 59 ACSR 373, where Brereton J at [100]-[101] observed:

> [100] In determining whether a director has exercised reasonable care and diligence, as s 180(1) expressly contemplates, the circumstances of the particular corporation concerned are relevant to the content of the duty. These circumstances include the type of company, the provisions of its constitution, the size and nature of the company's business, the composition of the board, the director's position and responsibilities within the company, the particular function the director is performing, the experience or skills of the particular director, the terms on which he or she has undertaken to act as a director, the manner in which responsibility for the business of the company is distributed between its directors and its employees, and the circumstances of the specific case *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, 427; (Romer LJ); *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 125 (Tadgell J); *ASC v Gallagher* (1993) 11 WAR 105; 10 ACSR 43; 11 ACLC 286; *Daniels v Anderson*, 504-505; *ASIC v Adler*, [372]; *Explanatory Memorandum to the CLERP Bill* 1999 para 6.75.
>
> [101] Directors are not required to exhibit a greater degree of skill in the performance of their duties than may reasonably be expected for persons of commensurate knowledge and experience, in the relevant circumstances …. And while

> directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company…, they are entitled to rely upon others, at least except where they know, or by the exercise of ordinary care should know, facts that would deny reliance *Re City Equitable Fire Insurance Co; Biala Pty Ltd v Mallina Holdings Ltd (No 2)* (1993) 11 ACSR 785, 856–8; 11 ACLC 1082; (1994) 15 ACSR 1, 60–2; *Daniels v Anderson* (1995) 37 NSWLR 438, 502-504; 16 ACSR 607, 665–6; *Re Property Force Consultants Pty Ltd* (1995) 13 ACLC 1051 (QSC).

1369 As to the passage at [101] in relation to relying on others, see also *Cribb v Kingsbury (No 2)* [2021] FCA 1397 at [77]; *Australian Securities and Investments Commission v Healey* [2011] FCA 717; (2011) 196 FCR 291 at [167].

Consideration

1370 ASIC submitted that its case against Mr Howden relates to the foreseeable risk of contravention by Select and BlueInc Services of the conflicted remuneration provisions and exposure to the risk of reputational harm, litigation or regulatory action. The case against him is not premised on there necessarily having been an actual breach by Select and BlueInc Services. Rather, Mr Howden's liability is primarily established by the fact that he was personally involved in all of the Incentives offered to Sales Agents and that he knew that those Incentives were operative during sales calls with consumers. Further, far from taking reasonable steps to prevent Select and BlueInc Services from engaging in contraventions, or potential contraventions, of the conflicted remuneration provisions, Mr Howden was personally involved in all of the Incentives, was the architect of at least the Vespa Incentive, and actively promoted at least two of the Incentives to the Sales Agents. Mr Howden knowingly exposed those companies to a foreseeable risk of harm – pecuniary, reputational and harm to the potential future existence of the corporation – by the provision of the Incentives to representatives of Select and employees of BlueInc Services.

1371 Mr Howden took issue with that approach, contending that ASIC's allegation against him depends on it establishing that the Corporate Defendants breached the conflicted remuneration provisions. It was submitted that the Conflicted Remunerations Contraventions are being used as a "stepping stone" to establishing liability pursuant to s 180(1).

1372 This dispute is academic, given that I have concluded that the Conflicted Remunerations Contraventions are established. No further consideration is, therefore, needed of this issue.

1373 Mr Howden submitted that if the Conflicted Remunerations Contraventions are established, nonetheless ASIC has not established a breach of s 180(1). It was submitted that not every

breach of the Corporations Act necessarily gives rise to a breach of the director's duties provisions, citing *Australian Securities and Investments Commission v Warrenmang Limited* [2007] FCA 973 at [29].

1374 It was submitted that ASIC must satisfy the Court that in this case there are particular reasons why Mr Howden breached his director's duties because of Select and BlueInc Services' breach of the conflicted remuneration provisions. Mr Howden submitted that reliance by ASIC on the fact that Mr Howden was personally involved in implementing the Incentives and that he failed to recognise that these Incentive scheme prizes constituted conflicted remuneration, are insufficient to establish that he breached s 180(1). It was submitted that there are two broad reasons for this conclusion. *First,* that Mr Howden relied on the compliance officers (Mr Hitchcock and Mr Nguyen) and *second*, that Mr Howden's failure to recognise that the Incentives might constitute conflicted remuneration did not fall below the standard of care a reasonable director in his position would have exercised. ASIC have not established that Mr Howden knew, or ought to have known, that the Incentive scheme prizes constituted conflicted remuneration or that he should have made further enquiries, in circumstances where his expertise was in accounting. The provisions are complex and have not been judicially considered. A lay person cannot be criticised for not correctly predicting that the prizes for the Incentives would be characterised as conflicted remuneration. It was submitted that these provisions were not "a big deal" in the industry such that a person in Mr Howden's position should have been aware of them, and in any event, there is no evidence from ASIC that they were.

1375 Addressing that last submission first. As ASIC submitted, it does not need to prove that Mr Howden was aware of the conflicted remuneration provisions as s 180 posits an objective test. The test is what an "ordinary person, with the knowledge and experience of the director or officer, could be expected to have done in the circumstances if he or she was acting on their own behalf": *Meadows* at [181], citing *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171; (2002) 168 FLR 253 at [372].

1376 Therefore, the Court is required to consider the position of a director with the experience of Mr Howden in relation to being a director of a company like Select, in the position of Select. In that context, Mr Howden must exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise.

1377 Before addressing Mr Howden's position, it is appropriate to make some observations about the conflicted remuneration provisions. These provisions were inserted into the Corporations Act by Act number 68 of 2012 and took effect from 1 July 2012. These were part of reforms to the corporations legislation, consisting of the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) and *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) (which included the best interests duty, ban on conflicted forms of remuneration, opt-in obligation and changes to ASIC's licensing and banning powers). It can readily be inferred that such reforms were significant for any industry participant with an AFSL covering the provision of personal or general advice in relation to financial products.

1378 In March 2013, ASIC issued regulatory guidance in relation to conflicted remuneration: ASIC Regulatory Guide 246 - Conflicted and other banned remuneration (RG 246). RG 246 warned industry participants that conflicted remuneration could take the form of "tickets to sporting events or concerts and subsidised travel", as well as promotions or other ways of recognising an employee based on product recommendations or sales. ASIC warned that those are benefits that could reasonably be expected to influence the adviser to recommend that its clients purchase a financial product.

1379 Select was a company which retailed life insurance products and it remunerated its sales team with commissions and with other incentives, as well as with salary. Based on RG 246, any benefits offered to Sales Agents in the course of providing financial product advice under an AFSL, therefore, ran the foreseeable risk of running afoul of the conflicted remuneration laws.

1380 The evidence establishes that Mr Howden had 20 years' experience in the insurance industry and at material times was a Responsible Manager under the AFSL.

1381 Mr Howden had sole decision-making authority and effectively maintained complete control over each of the companies: see [0] above. The structure of the businesses is referred to above. It suffices to recall that Mr Howden is the sole director, secretary and managing director of all Select and BlueInc Services. Select and BlueInc Services are ultimately 100% owned by BlueInc Group, of which Mr Howden is also the sole director. That entity is 100% owned by Howden Family Holdings, of which Mr Howden and his wife are the ultimate beneficiaries.

1382 Mr Howden consistently maintained compliance responsibility for Select and its AFSL during the relevant period. When the company applied for the AFSL, Mr Howden was listed as one of its two Responsible Managers. He personally attested during a s 19 examination to the fact

that he was "always one of the Responsible Managers on the license". As a Responsible Manager under Select's AFSL, Mr Howden took responsibility for, inter alia, compliance with Ch 7 of the Corporations Act, monitoring, training and development of representatives, dispute resolution with customers, and the provision of personal and general advice to retail clients. The general obligations of Select under s 912A(1) included the obligation to take reasonable steps to ensure that its representatives comply with the financial services laws, maintain competence to provide financial services and ensure that its representatives were adequately trained. One of the conditions of the licence which was granted is that "the licensee must establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws".

1383 The Services Agreement between Select and BlueInc Services includes, under the heading "General Select AFSL Obligations", that Select must use best endeavours to, inter alia, "comply with all applicable Commonwealth, State laws (including statutory requirements) and any relevant codes of practice, conduct or set of standards".

1384 In respect to an application to vary Select's AFSL, Mr Howden provided ASIC in October 2012 with documents describing Select's business and organisational competence. In the business description document, was an organisational chart which reflects that Mr Howden was the Managing Director and Responsible Manager. In the organisational competence document, under the heading "Responsible Manager Expertise", it stated that the "required knowledge, experience and skills", included knowledge of the relevant legislation. I note these documents record that they were prepared on 5 October 2012, a time after the conflicted remuneration provisions had been enacted. Further, in the organisational competence document, under "area of responsibility" is listed FSRA (Financial Services Reform Act) compliance, of which Mr Howden is responsible. That included the conflicted remuneration provisions.

1385 The documentary evidence is replete with such references, reflecting that it was Mr Howden who held the responsibility, the level of expertise and the skills, qualifications and experience in relation to compliance matters. The above are just a few examples.

1386 It may readily be inferred that Mr Howden was, or at the very least should have been, aware of the conflicted remuneration provisions.

1387 That said, the test is an objective one. A person in the positon held by Mr Howden with commensurate experience and responsibilities in a company of the nature of Select (and using

a business model of telemarketing with the use of incentives) should be aware of the provisions. Such knowledge would reasonably be expected.

1388 Moreover, in assessing the position of a reasonable director in Mr Howden's position, the following matters are also relevant.

1389 Mr Howden was the signatory on all sales scripts, and sales training. He was in receipt of and reviewed the monthly compliance reports prepared for Select. He was present at monthly meetings to discuss the reports. As correctly submitted by ASIC, it is the unchallenged evidence of Mr Hoey, that Mr Howden was in receipt of regular emails from the Head of Sales when sales were low, highlighting the lowest-performing Sales Agents. In his s 19 examination, Mr Atwal gave unchallenged evidence (claiming privilege) that, whilst he was Sales Manager and Sales Operations Manager, he would report to Mr Howden and other senior management every Monday morning about the prior week's results and other operational matters. Mr Shah's also unchallenged evidence in his s 19 examination about those meetings (which he said Mr Howden attended), included that he would report on the top and bottom performing staff each week and their weekly target.

1390 It is Mr Howden's own account in his s 19 examination that he sat in an office on the same level as the Sales Agents. It was an open plan, glass office and Mr Howden's door was always open, to anyone working under him. Mr Howden regularly interacted with staff, including Sales Agents and managers. He knew everyone individually and would routinely speak with them about sales and whether agents were meeting their targets. The inference to be drawn from the evidence (from the s 19 examinations of the agents), is that Mr Howden was a micromanager. Mr Howden was located in the same office, where posters for the Incentives and "leader board" screens were also located. Mr Howden presided over what at the very least, would be described as a very competitive, sales driven culture designed to sell more products by, inter alia, rewarding the top performers. These practices were known and endorsed by senior management, including Mr Howden, and set the culture of the sales environment.

1391 As previously explained, in relation to the Incentives, Mr Howden approved the Incentives. As Mr Atwal, who was Sales Manager, described, Mr Howden had sole responsibility setting policies, targets and incentives. Under privilege, Mr Atwal also said that Mr Howden was privy to the "rev-up" sessions of the sales teams.

1392 I do not accept Mr Howden's submission that he had either delegated his responsibilities for conflicted remuneration to others or had relied on others in this respect.

1393 Reliance is placed by the Defendants on Mr Hitchcock and Mr Nguyen. As noted above, from October 2012 to September 2015, Mr Hitchcock was Head of Compliance and Quality Assurance (and Responsible Manager and Key Person on Select's AFSL). However, during that period, Mr Hitchcock was only working one day per week or fortnight and was only present in the office on an ad hoc basis from July 2015. From January 2015, Mr Nguyen was engaged as a Compliance and Quality Assurance Team Leader and assumed responsibility from Mr Hitchcock for Select's compliance and QA function from October 2015. Mr Nguyen had no prior experience in a compliance role and no compliance qualifications when he commenced with Select. Mr Nguyen had only one year's experience in another financial services institution before commencing at BlueInc Group. Even if there may have been occasions when Mr Howden sought or relied on the advice of Mr Hitchcock, there is no evidence that Mr Howden personally delegated this responsibility in relation to the Incentives to these officers or that he personally relied on them. Nothing in any of the documents, the compliance reports or directors' reports supports the submission.

1394 The only evidence relied on by Mr Howden is one brief answer taken from Mr Hitchcock's s 19 examination, from which it is submitted that he turned his mind to the Incentives, did not identify any issues related to conflicted remuneration, was satisfied that the Incentives were compliant and from that Mr Howden was entitled to take comfort. The answer was not given in those words. There is no reference in Mr Hitchcock's evidence to any delegation, or that Mr Howden relied on it. Moreover, there is no support for it in the evidence. Mr Howden did not give evidence of that. In all the circumstances, that does not give rise to any inference of delegation. The submission does not sit with the unchallenged evidence of Mr Hitchcock and Mr Nguyen in their s 19 examinations that Mr Howden did not even seek the advice of either compliance manager on whether the Incentives were appropriate and lawful. For example, the first that Mr Hitchcock was aware of the Vespa Incentive was seeing the Vespa on the sales floor after the promotion of the incentive. That the Incentives were launched without Mr Hitchcock's knowledge, reflects on the position Mr Howden regarded himself in. This responsibility could not have been delegated if Mr Howden did not consider it necessary nor appropriate to inform the compliance manager of the Incentives. Given the evidence, and Mr Howden's conduct in running Select and BlueInc Services, delegation cannot be inferred merely from the position titles of Mr Hitchcock and Mr Nguyen. I accept ASIC's submission

that Mr Howden did not rely on the advice of others and that at the time the Incentives were introduced, Mr Howden did not responsibly delegate his duties as director with the care and diligence one would expect from a person in his position.

1395 Mr Howden's submission as to delegation also fails to grapple with the role he undertook in Select and BlueInc Services and the manner in which he did so. Moreover, importantly in this instance, Mr Howden has not given any evidence of purported delegation or reliance on others for ensuring compliance. This is a topic where he could have given evidence directly on point. He chose not to do so. Mr Howden's repeated submissions as to what he "would have known" (or not known), or that he was entitled to feel comforted, must be considered in that light. So too, given the evidence of the extent of his role, must the submission that he did not adopt, and should not have been taken to have adopted, personal responsibility for every aspect of the business. In the circumstances, I draw an inference that anything he could have said would not have assisted him in this aspect of the submission. The failure to call Mr Howden does give rise to a *Jones v Dunkel* inference.

1396 I accept ASIC's submission that a director in Mr Howden's position and with his skills and experience would, at least, be expected to inform himself of his obligations under the financial services law, including the conflicted remuneration provisions; seek advice from relevant persons (legal or otherwise experts in the area) as to compliance with those provisions before implementing the Incentives; if instituted, adapt the schemes so as to reduce any risk of driving poor sales practices which would include, inter alia, ensuring before implementation, a QA process which would properly monitor its operation, and enable that to occur contemporaneously so that the scheme could be appropriately monitored for bad behaviours. There is no evidence that any of those, or similar steps, were undertaken by Mr Howden.

1397 By not only failing to take such steps, but rather conceiving of and promoting the Incentives, Mr Howden exposed Select and BlueInc Services to, and failed to guard them against, a foreseeable risk of harm. I accept ASIC's submission that in the circumstances, any reasonable director in Mr Howden's position could have foreseen the distinct and not remote possibility that Select and BlueInc Services would receive a very public admonition for such breaches, as well as have to engage in significant remediation efforts. A foreseeable risk of a contravention by Select and BlueInc Services, with the consequences that would flow, is a foreseeable risk of harm to them.

1398 I am satisfied that Mr Howden has breached his directors' duties owed to Select and BlueInc Services under s 180(1).

Conclusion

1399 My conclusions are reflected in the reasons above. The parties are to liaise and provide a timetable for the preparation and listing of the penalty phase of these proceedings. In doing so, the parties are to provide to chambers draft orders reflecting the conclusions in these reasons.

I certify that the preceding nil (1399) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham.

Associate:

Dated: 8 July 2022

SCHEDULE OF PARTIES

NSD 1447 of 2019

Defendants

Fourth Defendant: RUSSELL HUGH HOWDEN