FEDERAL COURT OF AUSTRALIA

Latitude Finance Australia v Australian Securities and Investments Commission [2025] FCAFC 124

Appeal from:	*Australian Securities and Investments Commission v Latitude Finance Australia (No 2)* [2024] FCA 1205
File number(s):	NSD 1663 of 2024
Judgment of:	**O'BRYAN, CHEESEMAN AND BENNETT JJ**
Date of judgment:	28 August 2025
Date of reasons:	3 September 2025
Catchwords:	**CONSUMER LAW** – prohibitions against misleading or deceptive conduct and false or misleading representations – where applicants published a large number of newspaper, radio, and television advertisements promoting the purchase of home and electrical goods from the second applicant's franchised stores by equal monthly payments of the purchase price for the goods over 60 months on "no deposit" and "no interest" terms (the **promotion**) – whether an ordinary and reasonable consumer would have been misled by the promotion – where grounds of appeal do not raise a point of law or legal principle or challenge any findings of primary fact – grounds principally concerns what an ordinary and reasonable consumer would have understood or been led to believe from the advertisements – no error in primary judge's assessment – appeals dismissed **PRACTICE AND PROCEDURE –** applications seeking leave to appeal from declaratory orders under s 24(1A) of the *Federal Court of Australia Act 1976* (Cth) – relevant considerations to the grant of leave – where grounds of appeal lack merit and refusal of leave would not occasion prejudice – leave granted because principal proceeding already disrupted and the Court had given close consideration to the grounds of appeal
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DF, and 12DB *Federal Court of Australia Act 1976* (Cth) ss 21, 24, and 37M *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B

Cases cited:

Alexander v Cambridge Credit Corporation Ltd (Receivers Appointed) (1985) 2 NSWLR 685

Australian Builders' Labourers' Federated Union of Workers – Western Australian Branch v J-Corp Pty Ltd (1993) 42 FCR 452

Australian Competition and Consumer Commission v Harvey Norman Holdings Limited [2011] FCA 1407

Australian Competition and Consumer Commission v Telstra Corporation Ltd [2004] FCA 987; 208 ALR 459

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

Australian Competition and Consumer Commission v Valve Corporation (No 3) [2016] FCA 196; 337 ALR 647

Australian Competition and Consumer Commission v Valve Corporation (No 4) [2016] FCA 382

Australian Postal Corporation v Stephens (No 2) [2011] FCA 992; 207 IR 454

Australian Securities and Investments Commission v Latitude Finance Australia (No 2) [2024] FCA 1205

Australian Securities and Investments Commission v Latitude Finance Australia (No 3) [2024] FCA 1433

Campomar Sociedad, Limitada v Nike International Limited (2000) 202 CLR 45

China Australia Travel Group Pty Ltd v Yang [2024] FCA 671

Computer Edge Pty Ltd v Apple Computer Inc (1984) 54 ALR 767

Decor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397

Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199

Fraser v NRMA Holdings Ltd (1995) 55 FCR 452

Google Inc v ACCC (2013) 249 CLR 435

Medical Benefits Fund of Australia Limited v Cassidy [2003] FCAFC 289; (2003) 135 FCR 1

Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541

Monash Health v Singh [2023] FCAFC 166; 327 IR 196

Moore (A Pseudonym) v R [2024] HCA 30; (2024) 98 ALJR 1119

National Exchange Pty Ltd v Australian Securities and Investments Commission [2004] FCAFC 90; 49 ACSR 369

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191

	Powerflex Services Pty Ltd v Data Access Corp (1996) 67 FCR 65 *Quincolli Pty Ltd v Fair Work Ombudsman* [2012] FCA 373 *RB (Hygiene Home) Australia Pty Ltd v Procter & Gamble Australia Pty Limited (No 2)* [2023] FCA 1491 *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 277 CLR 186 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	106
Date of hearing:	28 August 2025
Counsel for the First Applicant:	Mr J Sheahan KC with Ms M Hall
Solicitors for the First Applicant:	King & Wood Mallesons
Counsel for the Second Applicant:	Mr P Crutchfield KC with Mr N Walter
Solicitors for the Second Applicant:	Arnold Bloch Leibler
Counsel for the Respondent:	Ms N Sharp SC with Ms A Hammond and Mr S Speirs
Solicitors for the Respondent:	Australian Securities and Investments Commission

ORDERS

NSD 1663 of 2024

BETWEEN:	**LATITUDE FINANCE AUSTRALIA (ACN 008 583 588)** First Applicant
	HARVEY NORMAN HOLDINGS LTD (ACN 003 237 545) Second Applicant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Respondent

ORDER MADE BY:	**O'BRYAN, CHEESEMAN AND BENNETT JJ**
DATE OF ORDER:	**28 AUGUST 2025**

THE COURT ORDERS THAT:

1. The applications for leave to appeal dated 19 November 2024 made by the First and Second Applicants be granted.
2. The appeals be dismissed.
3. The Respondent file and serve written submissions with respect to the costs of the applications for leave to appeal and the appeal within 7 days of the publication of the Court's reasons for judgment.
4. The Applicants file and serve written submissions with respect to the costs of the applications for leave to appeal and the appeal within 14 days of the publication of the Court's reasons for judgment.
5. The question of costs be determined on the papers unless any party indicates in their written submissions that they wish to be heard orally.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 These reasons concern applications for leave to appeal from declaratory orders made by the Court on 5 November 2024 in a proceeding brought by the Australian Securities and Investments Commission (**ASIC**) against Latitude Finance Australia (**Latitude**) and Harvey Norman Holdings Ltd (**Harvey Norman**).

2 In the proceeding, ASIC alleged that, by publishing certain advertisements in newspapers and broadcasting certain advertisements on radio and television, Latitude and Harvey Norman:

(a) engaged in conduct in relation to financial services that was misleading or deceptive or likely to mislead or deceive contrary to s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);

(b) engaged in conduct that was liable to mislead the public as to the nature and/or the characteristics of financial services contrary to s 12DF(1) of the ASIC Act; and

(c) in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

(i) made a false or misleading representation that services are of a particular standard, quality, value or grade contrary to s 12DB(1)(a) of the ASIC Act;

(ii) made a false or misleading representation with respect to the price of services contrary to s 12DB(1)(g) of the ASIC Act; and

(iii) made a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy contrary to s 12DB(1)(i) of the ASIC Act.

3 ASIC sought a range of remedies against Latitude and Harvey Norman, including declaratory orders, injunctions, pecuniary penalties and adverse publicity orders.

4 The relevant advertisements were widely published and broadcast between 1 January 2020 and 11 August 2021 (**relevant period**): the newspaper advertisements were published in 168 newspapers; the radio advertisements were broadcast on 143 radio stations; and the television advertisements were broadcast on at least 900,000 occasions on 367 specified stations.

5 The trial before the primary judge was confined to the question of liability and was conducted by reference to 11 representative advertisements, being five newspaper advertisements, three radio advertisements, and three television advertisements. The content of each of the representative advertisements was described in detail, and reproduced, in the reasons of the primary judge: *Australian Securities and Investments Commission v Latitude Finance Australia (No 2)* [2024] FCA 1205 (**primary judgment** or **PJ**). The primary judge found that Harvey Norman was responsible for the publication and broadcasting of the advertisements (PJ [13]) and that Latitude was involved in developing and approving the content of the advertisements (PJ [59]).

6 With the objective of judicial efficiency, these reasons assume familiarity with the reasons of the primary judge and will minimise the reproduction of matters fully canvassed by the primary judge.

7 The reasons of the primary judge disclose that there was very little dispute with respect to the primary facts. ASIC relied on affidavits made by a number of witnesses, including four consumers. Latitude relied on affidavits made by two of its employees. Latitude also relied on an expert report prepared by Michael Ebstein concerning consumer credit products. Mr Ebstein has conducted a consulting firm since 1999 focussed on credit card products. Mr Ebstein was the only witness who was cross-examined (PJ [229]).

8 As summarised by the primary judge (PJ [6]), during the relevant period, Harvey Norman and Latitude prepared and published (including by broadcasting) a large number of advertisements across Australia which promoted the purchase of home and electrical goods from Harvey Norman stores by equal monthly payments of the purchase price for the goods over 60 months on "no deposit" and "no interest" terms (referred to by the primary judge as the **promotion**). The offer made in each of the promotions applied for a short period only (approximately seven days). The advertisements did not disclose that, to take advantage of the promotion, consumers were required to enter into a continuing credit contract with Latitude that was linked to a credit card account and were liable for an establishment fee and monthly account service fees in respect of the linked credit card account in amounts determined by Latitude from time to time (PJ [101]-[107]). Before 16 March 2021, consumers were required to pay an establishment fee of $25.00 (PJ [103]) and a monthly account service fee of $5.95 (PJ [105]). On and from 16 March 2021, the monthly account service fee was $8.95 per month and, since early 2023, the fee has been $9.95 per month (PJ [105]).

9 There were two main branches to ASIC's case which were referred to as the **payment method case** and the **fees and charges case** (PJ [85]).

10 In respect of the payment method case, ASIC alleged that the advertisements were misleading because they conveyed that a consumer could purchase selected goods at Harvey Norman by a payment method that comprised making 60 equal monthly payments of the purchase price on no deposit and interest-free terms, whereas an undisclosed condition was that the consumer:

(a) have, or apply for and be approved for, a credit card issued by Latitude; and

(b) use that credit card, or the account linked to that credit card, to purchase the goods from Harvey Norman stores.

11 The undisclosed condition was a material matter. The primary judge found that consumers who wished to make a purchase under the promotion "had to enter into a fundamentally different financial arrangement to the one promoted – namely, a continuing credit contract with Latitude" (PJ [388]) and that ordinary and reasonable consumers "have a real and legitimate interest in knowing the fundamental terms and conditions of the arrangement they are being invited to enter, so that they know the financial responsibilities they must undertake" (PJ [394]).

12 In respect of the fees and charges case, ASIC alleged that the advertisements were misleading because they conveyed that a consumer could purchase selected goods at Harvey Norman stores by paying the purchase price by way of 60 equal monthly payments, whereas an undisclosed condition was that the consumer must also pay:

(a) in respect of credit card accounts opened before 16 March 2021, an establishment fee of $25.00; and

(b) a monthly account service fee in the amounts of $5.95 before 16 March 2021, $8.95 from 16 March 2021 until early 2023, and $9.95 since early 2023.

13 Again, the undisclosed condition was a material matter. The monthly account service fee, charged over the payment period of 60 months, is a substantial amount. As illustrated by ASIC, a consumer who purchased a refrigerator from a Harvey Norman store with a retail price of $1,000 under the promotion on or after 16 March 2021 would pay a minimum amount of $1,537 over the payment period, with $537 being the component for monthly account service fees (ignoring the increase in fees from early 2023) (PJ [264] and [389]).

14 The primary judge found that ASIC had established the alleged contraventions (PJ [507]) and, on 5 November 2024, made the following two declarations (reflecting the two branches of ASIC's case) pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and s 12GBA(1) of the ASIC Act:

> 1. From 1 January 2020 to 11 August 2021, the Defendants together advertised in newspapers and on the radio and television that a payment method was available for purchasing eligible goods from Harvey Norman stores that comprised 60 equal monthly payments on no deposit and interest free terms (**advertised payment method**), when in fact an essential precondition for acquiring goods pursuant to the advertised payment method was that the consumer enter into a continuing credit contract that was linked to a credit card, and thereby on each occasion that an advertisement the subject of the proceedings was published or broadcast to a consumer, the Defendants:
>
> (a) in trade and commerce, and in relation to financial services (namely, a credit facility or dealing in a credit facility), engaged in conduct which:
>
> (i) was misleading or deceptive, or likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act; and
>
> (ii) was liable to mislead the public as to the nature or characteristics of the financial services offered, in contravention of s 12DF(1) of the ASIC Act; and
>
> (b) in trade and commerce, in connection with the supply or possible supply of financial services or in connection with the promotion by any means of the supply or use of financial services (namely, a credit facility or dealing in a credit facility), made a false or misleading representation:
>
> (i) that services were of a particular standard, quality, value or grade, in contravention of s 12DB(1)(a) of the ASIC Act; and
>
> (ii) concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, in contravention of s 12DB(1)(i) of the ASIC Act.
>
> 2. From 1 January 2020 to 11 August 2021, the Defendants together advertised in newspapers and on the radio and television that a consumer taking up the advertised payment method would only be liable to pay the price of the goods by way of 60 equal monthly payments, when in fact a consumer would also be required to pay an establishment fee (during the period 1 January 2020 to 15 March 2021) and ongoing monthly account service fees, and thereby on each occasion that an advertisement the subject of the proceedings was published or broadcast to a consumer, the Defendants:
>
> (a) in trade and commerce, and in relation to financial services (namely a credit facility or dealing in a credit facility), engaged in conduct which was misleading or deceptive or likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act; and
>
> (b) in trade and commerce, in connection with the supply or possible supply of financial services or in connection with the promotion by

> any means of the supply or use of financial services (namely, a credit facility or dealing in a credit facility), made a false or misleading representation:
>
> (i) that services were of a particular standard, quality, value or grade, in contravention of s 12DB(1)(a) of the ASIC Act; and
>
> (ii) concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, in contravention of s 12DB(1)(i) of the ASIC Act; and
>
> (iii) with respect to the price of services, in contravention of s 12DB(1)(g) of the ASIC Act.

15 Also on 5 November 2025, the primary judge made orders timetabling the proceeding to a hearing on the further relief sought by ASIC, which was scheduled for 19 May 2025.

16 On 19 November 2024, Latitude and Harvey Norman filed separate applications seeking leave to appeal against the judgment of the Court given on 5 November 2024 pursuant to s 24(1A) of the FCA Act. Applications for leave to appeal were required because, although declaratory relief is final in nature, the declarations made by the Court on 5 November 2024 did not finally determine the rights of the parties (with the result that the judgment of the Court remains interlocutory): see *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767 at 767-768 (Gibbs CJ, with whom Murphy and Wilson JJ agreed); *Australian Builders' Labourers' Federated Union of Workers – Western Australian Branch v J-Corp Pty Ltd* (1993) 42 FCR 452 at 454 (Lockhart and Gummow JJ); *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 at 457 (Black CJ, von Doussa and Cooper JJ); and *Monash Health v Singh* [2023] FCAFC 166; 327 IR 196 at [44] (Katzmann, Snaden and Raper JJ).

17 On 10 December 2024, Latitude and Harvey Norman brought an interlocutory application to vacate the timetabling orders for the hearing on further relief pending the determination of their applications for leave to appeal. Orders to that effect were made by Wigney J on that date, although his Honour observed:

> It may readily be accepted that the inevitable fragmentation of the proceedings that has resulted from the filing of the applications for leave to appeal is unfortunate and regrettable. It would plainly have been preferable, in terms of the efficient use of the judicial resources of the Court, for the matter to have proceeded to the relief stage before the appellate jurisdiction was invoked.

See *Australian Securities and Investments Commission v Latitude Finance Australia (No 3)* [2024] FCA 1433 (***Latitude No 3***) at [10].

18 We respectfully agree with his Honour's observation. The fragmentation of proceedings through the filing of applications for leave to appeal following declaratory orders is regrettable, as it frequently causes delay to the finalisation of proceedings: see *Australian Postal Corporation v Stephens (No 2)* [2011] FCA 992; 207 IR 454 at [16] (Rares J); *Quincolli Pty Ltd v Fair Work Ombudsman* [2012] FCA 373 at [3]-[8] (Jagot J); *Australian Competition and Consumer Commission v Valve Corporation (No 4)* [2016] FCA 382 at [6]-[15] (Edelman J); *China Australia Travel Group Pty Ltd v Yang* [2024] FCA 671 (***China Australia Travel***) at [15] (Bromwich J) and *Angel Holdco Pty Ltd v WIJOAV Services Pty Ltd* [2025] FCA 872 (***Angel Holdco***) at [23] (Moshinsky J)).

19 The principles governing applications for leave to appeal in this Court were stated in *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 and can be summarised as follows:

(a) An applicant must generally demonstrate that, first, the decision in question is attended with sufficient doubt to warrant its being reconsidered by the Full Court and, second, that substantial injustice would result if leave were refused, supposing the decision to be wrong.

(b) The two criteria are cumulative (that is, both must ordinarily be made out) and they are also inter-related.

(c) As to the first criterion, an applicant does not have to demonstrate that the proposed grounds of appeal are strongly arguable, or that the proposed appeal will or is likely to succeed. The applicant need only demonstrate that there is sufficient doubt about the correctness of the decision to warrant appellate reconsideration.

(d) As to the second criterion, an applicant is likely to suffer substantial injustice (if leave were to be refused supposing the decision to be wrong) if the decision has the practical effect of finally determining the rights of the parties, or determines "a substantive right".

20 On 21 May 2025, orders were made consolidating the two applications for leave to appeal into a single proceeding, and Latitude and Harvey Norman subsequently filed a consolidated draft notice of appeal. The draft grounds of appeal raise no point of law or legal principle. Nor do the grounds challenge any findings of primary fact. Rather, the grounds challenge the primary judge's assessment of whether the advertisements were misleading and deceptive, principally on the basis that his Honour erred in his assessment of what the advertisements conveyed to an

ordinary and reasonable consumer. In assessing the grounds, the Court applies a 'correctness standard' – whether the primary judge's assessment of whether the advertisements were misleading and deceptive was correct: see *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [18] (Kiefel CJ), [48]-[49] (Gageler J), and [85]-[97] (Nettle and Gordon JJ); *Moore (A Pseudonym) v R* [2024] HCA 30; (2024) 98 ALJR 1119 at [15].

21 For the reasons stated below, we agree with the assessment and conclusions of the primary judge. Indeed, we consider that the decision of the primary judge is not attended by any real doubt and that the draft grounds of appeal lack merit and are barely arguable. Further, although the declaratory orders made in the present case determine substantive rights of the applicants, the applicants will not suffer substantial injustice if leave to appeal were to be refused because the refusal of leave will not foreclose an appeal at the conclusion of the proceeding below. This strongly suggests that leave to appeal should not be granted: cf *China Australia Travel* at [17] and *Angel Holdco* at [22]. Nevertheless, we have decided that leave to appeal should be granted and the appeal dismissed. We have reached that decision having regard to the following two factors. First, the timetable for the penalty hearing in the principal proceeding has already been stayed for a considerable period. As a result, the principal proceeding is already fragmented to some extent and there will be no material efficiencies in the conduct of the principal proceeding by refusing leave. Second, the parties have argued the grounds of appeal fully and we have had the opportunity to give close attention to the arguments. As a result, there will be no efficiencies in refusing leave to appeal at this point with the prospect that the issues may be re-agitated at the conclusion of the principal proceeding.

22 For the foregoing reasons, immediately following the conclusion of the hearing of the applications for leave to appeal, orders were made granting leave to appeal and dismissing the appeal. Orders were also made for ASIC to file submissions on the question of the costs of the applications within 7 days of the publication of these reasons for judgment, and for the applicants to file responsive submissions within a further 7 days. The determination of the question of costs will be addressed in subsequent reasons of the Court.

23 As noted above, it is regrettable that the final determination of remedies in this proceeding has been delayed by the unmeritorious applications for leave to appeal. As the reasons of Wigney J in *Latitude No 3* show, it is often difficult for the Court to assess, in cases such as the present where a party applies for leave to appeal a judgment on liability, whether the overarching purpose of civil practice and procedure stated in s 37M of the FCA Act is best achieved by

granting a stay of the hearing on relief or by refusing the stay. Nevertheless, we consider that, in cases such as the present, the Court ought not grant a stay of the hearing on relief unless satisfied that the proposed grounds of appeal have reasonable prospects of success and that the balance of convenience otherwise favours the stay. The successful applicant is entitled to the benefit of the presumption that the judgment is correct (see *Powerflex Services Pty Ltd v Data Access Corp* (1996) 67 FCR 65 at 66, agreeing with the principles stated by the New South Wales Court of Appeal in *Alexander v Cambridge Credit Corporation Ltd (Receivers Appointed)* (1985) 2 NSWLR 685 at 694-5) and the Court will not lightly grant a stay that has the effect of delaying the finalisation of the proceeding with the associated inefficiencies from delay.

24 As a result of the dismissal of the appeals on 28 August 2025, the timetable for the further hearing on relief was reinstated in accordance with the orders made by Wigney J on 10 December 2024.

Consideration of the grounds of appeal

The applicants' overarching argument

25 The draft notice of appeal contains 10 grounds of appeal. As already noted, none of the grounds raise a point of law or legal principle. Nor do the grounds challenge any findings of primary fact. Each of the grounds principally concerns what an ordinary and reasonable consumer would have understood or been led to believe from the advertisements.

26 The applicants challenge the primary judge's central finding that ordinary and reasonable consumers who saw the representative advertisements would have included those who understood the advertisements to mean that they could purchase eligible goods from a Harvey Norman store at the advertised price of the goods, without paying a deposit, provided they paid the advertised price by 60 equal monthly payments and, provided they made those payments, they would not be charged interest in respect of their purchases and they would not be required to make any other payment in respect of their purchases or undertake any other financial commitment beyond the payment of the equal monthly instalments (which, as a shorthand, we will refer to as the **promotional message**). That finding is recorded in respect of each of the representative advertisements at PJ [374], [375], [409], [422], [436], [439] and [459].

27 In respect of that finding, the applicants submitted in writing:

> The meaning found by the trial judge assumes an unrealistic level of naivety possessed

> by ordinary and reasonable consumers. The Advertisements' banner statements are obviously not a complete set of the terms attaching to the finance offer. They are accompanied by voluminous fine print and clear footnote marks or spoken words. In addition, ordinary and reasonable consumers are curious as to free offerings, know that borrowing money comes at a cost which they must bear – particularly for a five year term – and know that all forms of finance inevitably come with terms and conditions. Consequently, the meaning the trial judge found was not the meaning conveyed to ordinary and reasonable consumers. Ordinary and reasonable consumers would understand that they could not pay the same total dollar amount for goods over five years, as the total dollar amount payable on the day they take possession of the goods. There is a universal understanding that time to pay comes at a cost. If the position were otherwise, one would expect few sensible consumers to pay up front.

28 In their written submissions, the applicants asked rhetorically, if the promotional message was correct, why would any consumer pay the full amount of the purchase price up front? In the course of oral argument, the applicants went even further and submitted that the ordinary and reasonable consumer would know it was too good to be true and understand that the advertisements involved 'puffery'. Those submissions reflected arguments advanced at trial, including that ordinary and reasonable consumers would know, in the context of the advertisements, that "there is no such thing as a free lunch, let alone charity" (see PJ [468]).

29 We reject those submissions, largely for the same reasons as they were rejected by the primary judge at PJ [467]-[481], which reasons we adopt. We add two further points. First, the primary judge's central finding reflects precisely what the advertisements stated. Second, there is nothing extraordinary, unusual or patently exaggerated about the content of the promotion stated in the advertisements. Consumers were offered selected goods, for a limited period (a few days), at an advertised purchase price which was payable in 60 monthly instalments. That is a simple transaction that is readily understood. There is no reason for a consumer to doubt or second guess the simple terms of the advertised offer, and a consumer would have no reason to suspect that it was mere 'puffery'. It can be accepted that, in today's dollars, the monetary value of the advertised purchase price paid over a five year period is less than the monetary value of the advertised purchase price paid today. However, that fact only serves to highlight that the advertised promotion would have been attractive to consumers and no doubt explains why the promotion was made. It does not lead to a conclusion that consumers must have known that *they* would be required to pay the difference in the time value of money. Even if a consumer turned their mind to such matters, the most likely conclusion that would be drawn from the promotion is that Harvey Norman was prepared to receive the reduced monetary value (associated with the instalment payments) in order to sell the selected goods. Judicial notice can be taken of the fact that consumer goods are frequently offered to the public at heavily

discounted prices for short periods of time, either to reduce the merchant's stock or to attract consumers to the merchant's store. As to the applicants' rhetorical question, why would any consumer pay the full amount of the purchase price up front, the short answer is that each promotion applied only to selected goods and only for a few days. Therefore, there was no reason for a consumer to doubt the promotional message conveyed by the advertisements. However, the promotional message was misleading.

30 Underlying the applicants' submissions is an argument that the Court should assume that the ordinary and reasonable consumer is circumspect, or wary, about claims made in advertisements, and therefore unlikely to be misled by the promotional message in the representative advertisements. The applicants sought to gain support for that argument from the reasoning of Gyles J in *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2004] FCA 987; 208 ALR 459. Neither the reasoning in that case, nor the conclusions, supports the argument advanced. The response of an ordinary and reasonable consumer to claims made in advertisements depends very much on the nature of the product being advertised and the nature of the claims being made, amongst other things. We reject the suggestion that the Court should assume in this case that ordinary and reasonable consumers who saw the representative advertisements would have been circumspect, or wary, about the claims made. The promotional message was clear and very attractive to consumers. It concerned the financial terms on which goods could be purchased at Harvey Norman stores. In our view, ordinary and reasonable consumers would have assumed that the offer made in the advertisements was stated accurately, particularly in light of Australia's strong consumer protection laws.

31 We agree with the primary judge's findings that the class of persons to whom the advertisements were directed were persons who are purchasers of home and electrical goods (which is a broad class of persons) and that the impugned conduct involved forms of advertising where it cannot be expected that consumers would pay close attention (we would add, particularly to fine print which is barely legible or discernible aurally). His Honour's findings, which are unchallenged, were as follows (at PJ [359]-[362]):

> 359 … determining whether given conduct is misleading or deceptive, or likely to mislead or deceive, is a matter for judicial estimation that takes into account the range of reasonable responses to the conduct that is in question.
>
> 360 Here, ordinary and reasonable consumers are the class of persons who are purchasers of home and electrical goods, such as those advertised in the representative advertisements. This class has no special attributes or capacities

> beyond the ability to read and understand, or hear and understand, the ordinary language in which the representative advertisements were expressed. Where, in these reasons I refer to ordinary and reasonable consumers in the context of the representative advertisements, I mean ordinary and reasonable consumers in this class.
>
> 361 The context in which the impugned conduct occurs is important. In *TPG*, the majority in the High Court emphasised (at [47]) that, unlike conduct that occurs in the calm of a showroom to which consumers have come with a substantial purchase in mind (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; 149 CLR 191), consumers who are subjected to advertisements that are part of a multi-media campaign—"an unbidden intrusion on the consciousness of the target audience" that "will not always be welcome"—cannot be expected to pay close attention to them, such as the scrutiny that takes place on advertisements in the context of legal proceedings. The attention given by ordinary and reasonable consumers to such advertisements may well be "perfunctory".
>
> 362 This does not mean, however, that such consumers are not taking reasonable care of their own interests. Even though intentionally misleading or deceptive conduct might not be involved in such a campaign, the advertiser cannot escape the consequences of how it has chosen to express an advertisement—such as by placing emphasis on parts of the advertisement that are calculated to be attractive to consumers, while relegating other, less attractive parts to "relative obscurity" (*TPG* at [51] – [52]), where ordinary and reasonable consumers are unlikely to have regard to them: *Australian Competition and Consumer Commission v Harvey Norman Holdings Limited* [2011] FCA 1407 at [37]. The "disclaimer cases" are a subset of this kind of conduct: see the cases collected in *RB (Hygiene Home) Australia Pty Ltd v Procter & Gamble Australia Pty Limited (No 2)* [2023] FCA 1491 at [154] – [161]. I mention this point because the representative newspaper advertisements, in particular, use devices of the kind referred to in the "disclaimer" cases.

Ground 1

32 By ground 1, the applicants contend that the primary judge erred in concluding that ordinary and reasonable consumers would have understood the representative advertisements as promoting a method for paying for goods, namely by instalments: see PJ [366], [374], [375], [388], [390], [409], [422], [436], [439], [459], [472] and [478]. The applicants contend that the primary judge should have concluded that ordinary and reasonable consumers would have understood that the advertisements were promoting an offer to acquire goods involving the provision of finance.

33 The finding for which the applicants contend, that the promotion was an offer to acquire goods "involving the provision of finance", is vague and obfuscatory. The purpose of advancing the contention was noted by the primary judge at PJ [468]-[469]:

> 468 The purpose of advancing these submissions was to address the issue of consumer expectations – specifically, to advance the contention that ordinary and reasonable consumers are aware that a provider of finance sets terms and

> conditions that accompany an offer of finance and that they will expect to pay some kind of fee or charge. According to Latitude, they would know that, in the context of the representative advertisements, "there is no such thing as a free lunch, let alone charity".
>
> 469 In short, the defendants contend that, notwithstanding the way in which the promotion was expressed in each representative advertisement, ordinary and reasonable consumers would have known, inevitably, that there would have been additional terms and conditions that imposed a cost on them.

34 In other words, there are two steps to the applicants' argument. First, the ordinary and reasonable consumer would understand from the advertisements that they were being offered finance to purchase goods at Harvey Norman. Second, the ordinary and reasonable consumer would understand that finance comes with a cost *which they would have to pay*.

35 We reject this ground of appeal for the same reasons as the primary judge. It falls "well short of the mark" (at PJ [480]).

36 The prominent words used in the promotion, which the primary judge referred to as 'banner statements' (at PJ [23]), conveyed simple, easily understood, messages: "60 months interest free", "no deposit", "no interest", "60 equal monthly payments" and "minimum financed amount $1000". The primary judge was correct to conclude (at PJ [374]-[375]) that ordinary and reasonable consumers who saw the representative advertisements would have understood the advertisements to convey the promotional message: that they could purchase eligible goods from a Harvey Norman store at the advertised price of the goods, without paying a deposit, provided they paid the advertised price by 60 equal monthly payments and, provided they paid the 60 equal monthly payments, they would not be charged interest in respect of their purchases or be required to make any other payment in respect of their purchases or undertake any other financial commitment. The primary judge was also correct to conclude (at PJ [374]) that ordinary and reasonable consumers would have understood the words "Minimum financed amount $1000" to mean that the instalment offer only applied where the price of the goods was $1,000 or more.

37 Further, as found by the primary judge (at PJ [366]):

> … the representative advertisements, on their face, were directed to how the purchase price for goods could be paid, not to how money can be borrowed.

38 We also agree with the following conclusions reached by the primary judge at PJ [471]-[472]:

> 471 … I accept that ordinary and reasonable consumers, in the main, know that borrowing money comes at a cost which they must bear, generally in the form of interest. I do not accept, however, that that knowledge leads to a finding that

> ordinary and reasonable consumers would have understood the representative advertisements as meaning that there were payment terms different to, or that qualified, say, the banner statements in the representative newspaper advertisements.
>
> 472 Whilst the promotion can be intellectualised as a method of borrowing money, I do not accept that all ordinary and reasonable consumers would think that, by paying the nominated purchase price for the goods by instalments, they were "borrowing" money for that purpose. Even though ASIC submits that the promotion "looked like a one-off loan" or that "some kind of finance was on offer", I am satisfied that ordinary and reasonable consumers would have included those who thought that they were doing no more than paying the purchase price for the goods they wished to buy on an instalment basis that Harvey Norman was prepared to accept to entice consumers to purchase from Harvey Norman stores (one aspect of ASIC's quid pro quo argument).

39 In the above passages, the primary judge accepted that ordinary and reasonable consumers understand that if they borrow money, that will come at a cost. However, that knowledge would not cause ordinary and reasonable consumers to believe that the offer being made through the promotion must include additional costs or payments. As the primary judge explained at PJ [478]:

> I am satisfied that, for many ordinary and reasonable consumers, the promotion was not a traditional form of consumer credit of the kind discussed by Mr Ebstein. It was a special offer in the terms in which Latitude and Harvey Norman chose to express it. There is no reason to think that ordinary and reasonable consumers would have seen the promotion as a traditional form of consumer credit when the advertisements, in effect, told them otherwise. Their attention was being directed only to the prominent terms in which the promotion was expressed, not to other, undisclosed terms, and certainly not to the fundamentally different financial arrangement that was, in truth, being offered.

40 We agree with the primary judge's analysis. Whether or not an ordinary and reasonable consumer would have associated instalment payments with the 'provision of finance', or some conception of finance, is beside the point. An ordinary and reasonable consumer would have understood from the promotion that they would not be required to pay anything more for the finance. That does not involve an extreme or fanciful reaction: *Campomar Sociedad, Limitada v Nike International Limited* (2000) 202 CLR 45 (***Campomar***) at [101]-[105]; *Google Inc v ACCC* (2013) 249 CLR 435 (***Google***) at [7] (French CJ and Crennan and Kiefel JJ). It simply reflects the promotion advertised by Harvey Norman and Latitude.

41 The applicants' submissions on this ground were directed to establishing that the case at trial was conducted on the basis, and the evidence supported a conclusion, that the instalment payments being offered through the promotion were a form of finance. In that regard, the applicants referred to the following matters:

(a) In its opening submissions at trial, ASIC described the instalment payments as a "one off loan" and, in its closing submissions, accepted that "some kind of finance was on offer".

(b) Each of the consumer witnesses deposed (in words to the effect) that by accepting the offer, they understood that they were agreeing to take out a 60 month interest free loan (although it should be noted that their unchallenged evidence included the further statements that they understood there was a minimum amount due each month, which would be the price of the product divided by 60, and as long as the payments due each month were paid, the loan would not incur interest and the repayments would be the only amounts to pay in connection with the interest free arrangement).

(c) The advertisements contained the phrases "Minimum financed amount $1000" (or similar), "interest free" and "no deposit", all of which would by their ordinary meaning be understood as being associated with finance.

42 So much can be accepted, but as explained by the primary judge, it is beside the point. An arrangement by which a purchase price is paid by instalments can readily be described as a form of finance, and is recognised as a financial product under the ASIC Act (being a credit facility within the meaning of s 12BAA(7)(k) and reg 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth)). Indeed, the purchase of goods on a deferred payment basis is commonly referred to as purchase on credit. However, that does not support a conclusion that ordinary and reasonable consumers would have understood the offer being made by the promotion other than as it was communicated, far less that it was an offer of finance which involved entering into a continuing credit contract which imposed additional costs that they would have to pay.

43 The applicants also sought to place reliance on the evidence of Mr Ebstein, specifically his evidence that ordinary and reasonable consumers know that there will be terms and conditions that apply in relation to personal lending products, and his evidence that, in Australia, he was not aware of any lender willing to make an interest free loan for five years. None of that evidence assists the applicants. The primary judge accepted that ordinary and reasonable consumers understand that, if they borrow money, that will come at a cost. But as his Honour explained, that understanding does not support a finding that ordinary and reasonable consumers would have understood the representative advertisements as meaning that there were payment terms different to, or that qualified, the banner statements in the advertisements.

44 We therefore reject ground 1.

Ground 2

45 By ground 2, the applicants contend that the primary judge erred in finding that the advertisements conveyed to ordinary and reasonable consumers that:

(a) provided they paid the 60 equal monthly payments, they would not be required to make any other payment in respect of their purchases or undertake any other financial commitment beyond the payment of the equal monthly instalments; and

(b) there were no fees or charges associated with the promotion or any fees or charges that applied only applied in circumstances of non-compliance,

(the relevant findings in respect of the first advertisement being at PJ [375], [380], [385], [388], [401], [402] and [405], and repeated for the other advertisements at PJ [409], [422], [425], [427]-[432], [436], [439], [448], [450]-[455] and [459]).

46 The applicants contend that the primary judge should instead have concluded that ordinary and reasonable consumers would have understood that, while the advertisements concerned a form of finance, the particular way the finance was facilitated, and the particular terms and conditions attaching to that finance (including any fees and charges), were not disclosed in the banner statements in the advertisements and that there was a reasonable prospect of an additional cost of some kind attaching to the benefit of deferring payment of the purchase price over 60 months.

47 The applicants' first argument was that the primary judge did not explain why the advertisements conveyed the promotional meaning. We reject that argument. The primary judge explained (at PJ [374]-[376]) that the advertisements conveyed the promotional meaning because that was the clear (and we would add ordinary) meaning of the banner statements, which were the statements that Harvey Norman and Latitude chose to highlight in the advertisements. The phrase "60 months interest free" was the largest of the banner statements and was the central feature of all of the advertisements. The ordinary meaning of that phrase, in the context of the advertisements, is that credit for the purchase price would be provided for 60 months on an interest free basis. That statement was further explained by another banner statement, "60 equal monthly payments". The ordinary meaning of that phrase, in the context of the advertisements, is that the purchase price would be payable by 60 equal monthly payments. In context, the phrases "interest free" and "no interest" convey that no charges will

be imposed for the purchase credit, at least if there is no default in the repayment of the credit. The primary judge's finding with respect to the promotional message is correct.

48 The applicants' second argument was that the primary judge misdescribed the content of the advertisements, in that the banner statements did not always appear, or were not spoken, in the same order or with the same priority. It can be accepted that there were differences in the 11 representative advertisements, but the primary judge's description and assessment of each of the advertisements is correct. Each of the advertisements was alerting prospective consumers to the promotion and, unsurprisingly, each featured the banner statement "60 months interest free". In some of the radio and television advertisements, that banner statement was repeated, in a spoken voice, on multiple occasions. Each of the advertisements included the banner statement "60 equal monthly payments" (accepting that that statement was included, but not given as much emphasis, in representative advertisement 8 which was a shorter radio advertisement).

49 The applicants' third argument was that the primary judge erred in concluding that the following statements (or statements to similar effect) appearing in the newspaper advertisements, spoken in the radio advertisements and appearing in visual images in the television advertisements (which we will refer to as the **ancillary statements**) were not effective in qualifying the meaning conveyed by the banner statements:

> Offer ends [date]. Apply in store/online. Available for in-store and selected online purchases. Approved applicants only. Fees & charges apply. Interest applies if you do not comply with terms and conditions.

50 The applicants advanced three arguments in support of their submission. First, the applicants challenged the primary judge's finding that ordinary and reasonable consumers would have included those who would not have been cognisant of the ancillary statements given the small lettering in which the statements appear (PJ [377]). Second, the applicants challenged the primary judge's finding that ordinary and reasonable consumers would have included those who did see the small lettering of the ancillary statements but who immediately dismissed it in the reasonable expectation that, because the statements were in such small lettering, they must have been addressing subsidiary or unrelated matters that did not meaningfully qualify the banner statements (PJ [378]). Third, the applicants argued that any reasonable consumer who read the ancillary statements would understand from their contents that terms and conditions applied or at the very least might apply.

51 The question that arises on this argument is whether the misleading message conveyed by the banner statements was remedied by the ancillary statements. Ultimately, the question is one of overall assessment of the publication or communication. The correct approach was summarised by Edelman J in *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196; 337 ALR 647 (at [214]) (upheld by the Full Court in *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, noting that there was no challenge to his Honour's relevant statements of principle which are recorded by the Full Court at [158]):

> One consequence of the need to consider the conduct in light of all relevant circumstances is that any allegedly misleading representation must be read together with any qualifications and corrections to that statement. Hence, although a qualification to a statement might be effective to neutralise an otherwise misleading representation, this might not always be so, particularly if the misleading representation is prominent but the qualification (often linked to the representation by an asterisk) is not: *Medical Benefits Fund of Australia Limited v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1, 17 [37] (Stone J). As Keane JA expressed the point, the qualifications must have "the effect of erasing whatever is misleading in the conduct": *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 [83].

52 Where there is a substantial disparity between the primary representation conveyed by particular conduct (here, the advertisements) and the true position, a disclaimer or qualification must be very clear in order to erase or dispel the otherwise misleading effects of the primary representation: *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90; 49 ACSR 369 at [55] (Jacobson and Bennett JJ); *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [83] (Keane JA, with whom Williams JA and Atkinson J agreed).

53 Applying those principles, we consider that the primary judge's findings with respect to the ancillary statements are correct.

54 In the newspaper advertisements, the ancillary statements were made in much smaller lettering compared to the banner statements (PJ [24]). We agree with the primary judge's findings that the words were likely to have been overlooked by ordinary and reasonable consumers and, even if read, would have been understood as addressing subsidiary matters and not meaningfully qualifying the banner statements.

55 In the radio advertisements, there is no challenge to the primary judge's finding that the banner statements were spoken at a moderate pace and in an upbeat tone, whereas words similar to the ancillary statements were spoken more softly and delivered at a rapid pace, as an aside (PJ

[40]). Audio recordings of the radio advertisements were before us and we have listened to them. We agree with the primary judge's findings that ordinary and reasonable consumers who heard the radio advertisements would have included those whose attention was not arrested by the words of the ancillary statements, given the pace and tone in which the words were spoken; further, even if those words were noticed, the ordinary and reasonable consumer would not have placed significance on them as an intended qualification of the banner statements having regard to the pace and tone in which the ancillary statements were spoken (PJ [423]).

56 In the television advertisements, the ancillary statements appeared on visual images on screen throughout the advertisements in small lettering (PJ [43]-[46], [49]-[50], [54], [442] and [461]). Audio visual recordings of the television advertisements were before us and we have viewed the recordings. We agree with the primary judge's findings with respect to the ancillary statements (at PJ [444]):

> These statements are barely visible on watching the advertisement in real time. I am satisfied that ordinary and reasonable consumers would have included those who would not have been cognisant of these statements given the small lettering in which they appear. For many, these statements would have been effectively eclipsed by the prominence given to the banner statements.

57 For those reasons, we reject ground 2.

Ground 3

58 By ground 3, the applicants contend that the primary judge erred (at PJ [377]-[387], [400], [410], [412], [414], [423]-[425], [444]-[446] and [465]) in failing to find that:

(a) the existence (and/or content) of the smaller text in the advertisements (including to the effect that fees, charges and/or exclusions applied);

(b) the asterisk placed on the larger text; or

(c) the occurrence (and/or content) of the more quickly spoken words (including to the effect that fees, charges and/or exclusions applied),

qualified or provided additional information to reasonable consumers about the banner statements and/or that reasonable consumers would have been aware of such indications of qualification and/or information (including because the additional information was supplementary to and not inconsistent with the more prominent statements in the advertisements).

59 The question that arises on this ground is whether the misleading promotional message conveyed by the banner statements was remedied by other statements comprising:

(a) the ancillary statements (the subject of ground 2);

(b) an asterisk and associated numeral placed next to one of the banner statements; and/or

(c) other statements contained in the advertisement that the primary judge described as "fine print" (PJ [384]) (and which we will refer to as the **fine print statements**).

60 With respect to the ancillary statements, their ineffectiveness to qualify the banner statements was addressed in ground 2 and need not be repeated.

61 With respect to the asterisk and associated numeral, the most prominent banner statement in the newspaper advertisements was the statement "60 months interest free". The primary judge found (at PJ [18]) that all of the newspaper advertisements had a large red banner (across the advertisement) with the following words (and notation) appearing thereon in large white letters:

> 60 MONTHS INTEREST FREE*[1]

62 The asterisk and accompanying numeral referred to certain statements that appeared in very small text at the bottom of the advertisement (the fine print statements). By way of illustration, the first advertisement contained the following fine print statements at the bottom of the advertisement in barely legible text (reproduced by the primary judge at PJ [32] and in the copy of the advertisement in Schedule A to the primary judgment):

> Ends 28/04/20. Harvey Norman® stores are operated by independent franchisees. The products in this advertisement may not be on display or available at all Harvey Norman complexes. If you wish to view these products in person, you should ring 1300 GO HARVEY (1300 464 278) before attending any complex to check to see if a franchisee at that complex has these products in store. Accessories shown are not included. ^Available online and in selected stores. †Colours may vary between stores. *1. 60 Months Interest Free - No Deposit, No Interest with 60 Equal Monthly Payments until April 2025: Approved applicants only. Conditions, fees and charges apply. Minimum amount financed $1000 on transactions made between 23/04/20 and 28/04/20. Interest applies if you do not comply with terms and conditions. Excludes mobile phones, gaming consoles, gift cards, digital cameras and lenses, hot water system supply & installation, Octopuss installation services, Microsoft Surface Studio, Apple, Miele and Harvey Norman Customer Direct products. Excludes brands and other products that are offered for sale under agency agreements with Harvey Norman franchises. Refer to product websites for conditions, fees and charges. Credit is provided by Latitude Finance Australia (ABN 42 008 583 588). Australian Credit Licence 392145. *2. Applicable Gift Card value is based on the purchase price of the Eligible Purchase: spend $1,000 or more and receive a $50 Gift Card; spend $2,000 or more and receive a $100 Gift Card; spend $3,000 or more and receive a $150 Gift Card; spend $4,000 or more and receive a $200 Gift Card; spend $5,000 or more and receive a $250 Gift Card; spend $6,000 or more and receive a $300 Gift Card. The Eligible Customer will

> receive the Gift Card when they take delivery of their purchased products. Gift Cards are issued by Derni Pty Ltd and expire 36 months from the date of issue. See in store or online for full terms and conditions. *3. Discounts are off the normal ticketed prices. Terms and conditions apply, see in store for details. *4. Bonus is by redemption from the supplier. Various postage and handling fees may be applicable in order to receive the bonus and are dependent on the supplier's offer. Terms and conditions apply, see in store for full details.

63 It can be seen that the asterisk and numeral 1 notation refer to lines of text midway through the fine print statements.

64 The visual images in the television advertisements contained the banner statement "60 months interest free" but did not contain the asterisk and accompanying numeral. The visual images in the television advertisements contained statements to the effect of the ancillary statements and, in some images, an abbreviated version of the fine print statements.

65 The applicants submitted that an ordinary and reasonable consumer would not have been oblivious to the asterisk next to the banner statement, and would have understood the social and linguistic convention that an asterisk directs attention to other pertinent information, which invariably includes a qualification or supplement.

66 In relation to the fine print statements, the applicants submitted that the primary judge failed to consider how the mere existence of "large slabs of fine print" (the applicants' own words) in the newspaper and television advertisements (rather than the content of the fine print itself) can detract from the meaning of the banner statements, indicating to consumers that they are qualified in some way. The applicants submitted that, in treating the content of the fine print as irrelevant to the meaning conveyed by the advertisements, the primary judge had engaged in "dominant message analysis", which he had earlier called a distraction (at PJ [368]). The applicants advanced a similar argument in relation to the radio advertisements – that consumers would have at least heard the more quickly spoken words in the radio advertisements. The applicants argued that the mere presence of these "ubiquitous advertising features" would have indicated to those ordinary and reasonable consumers that there were likely to be qualifications to the banner statements.

67 We reject each of the applicants' submissions and arguments for the reasons given by the primary judge. Many ordinary and reasonable consumers would have been oblivious to the asterisk (PJ [381]). Others might have noticed it but would not have been sufficiently directed to the specific sentences within the fine print statements to which the asterisk referred (PJ [382]). To many, if not most, ordinary and reasonable consumers, the fine print statements

would have appeared as a block of very fine print and they would not have engaged with it. We agree with his Honour's conclusion (at PJ [384]), referring to *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***TPG***), that:

> The shortened terms [the fine print statements] are presented as a mass of barely legible, and not readily digestible, material. This is an example of an advertisement selecting some words for emphasis (the banner statements) and relegating the balance to relative obscurity: *TPG* at [51]. Ordinary and reasonable consumers are not expected to undertake works of supererogation to prospect for information that might falsify that which is otherwise clearly and prominently stated in the advertisement.

68 The observations of the High Court majority in *TPG* at [51] and [52] are directly applicable to the advertising in this case and provide a complete answer to the applicants' arguments (references and citations omitted):

> 51 … this is not a case where the tendency of TPG's advertisements to lead consumers into error arose because the target audience might be disposed, independently of TPG's conduct, to attend closely to some words of the advertisement and ignore the balance. The tendency of TPG's advertisements to lead consumers into error arose because the advertisements themselves selected some words for emphasis and relegated the balance to relative obscurity. To acknowledge, as the Full Court did, that "many persons will only absorb the general thrust" is to recognise the effectiveness of the selective presentation of information by TPG. The Full Court erred in failing to appreciate the implication of that finding.
>
> 52 It was common ground that when a court is concerned to ascertain the mental impression created by a number of representations conveyed by one communication, it is wrong to attempt to analyse the separate effect of each representation. But in this case, the advertisements were presented to accentuate the attractive aspect of TPG's invitation relative to the conditions which were less attractive to potential customers. That consumers might absorb only the general thrust or dominant message was not a consequence of selective attention or an unexpected want of sceptical vigilance on their part; rather, it was an unremarkable consequence of TPG's advertising strategy. In these circumstances, the primary judge was correct to attribute significance to the "dominant message" presented by TPG's advertisements.

69 We therefore reject ground 3.

Grounds 4 and 5

70 The applicants addressed grounds 4 and 5 jointly, and the same argument was advanced in respect of both grounds.

71 By ground 4, the applicants contend that the primary judge erred in finding that ordinary and reasonable consumers would have a reasonable expectation that they would be informed of the fundamental terms and conditions of the arrangement by which the finance the subject of the advertisements was offered (involving a continuing credit facility). By ground 5, the applicants

contend that the primary judge erred in finding that there was a failure to disclose important qualifying facts that ordinary and reasonable consumers would have reasonably expected to be disclosed, namely that consumers would be liable to pay not only the price of the goods by way of 60 equal monthly payments but that there were fees or charges associated with the promotion or that the fees and charges applied not just in circumstances where consumers were non-compliant with the offer. The relevant findings are at PJ [391]-[395], [403]-[405], [409], [426]-[431], [436], [449]-[454] and [459].

72 The applicants' submissions on these grounds challenge the primary judge's reasoning that the advertisements were misleading in either of two ways, which his Honour described as follows (at PJ [392]):

(a) on the basis that consumers were, or were likely to have been, misled or deceived into the mistaken belief that the banner statements constituted a complete statement of the method of paying for the goods; or

(b) on the basis that the advertisement did not disclose an important qualifying fact that consumers would reasonably have expected to have been disclosed in the circumstances.

73 In respect of the reasoning in paragraph (a), the applicants repeated their submission that the primary judge erred in finding that the advertisements conveyed a complete statement of the method of paying for the goods (relying, we understand, on the submissions advanced in respect of appeal grounds 1, 2 and 3). In respect of the reasoning in paragraph (b), the applicants submitted that the statutory prohibition of misleading and deceptive conduct does not impose a duty of disclosure, and is not a mandatory charter requiring advertisers to prominently disclose all fundamental terms.

74 We consider that there is no error in the primary judge's reasoning at PJ [392]. However, we also consider that these particular modes of analysis, which reflected submissions advanced by ASIC at trial, are unnecessary in the circumstances of this case.

75 The orthodox methodology for applying the prohibitions against misleading and deceptive conduct in Australia's consumer protection laws was explained by the High Court in *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 277 CLR 186 (***Self Care***) (at [80]-[83], citations omitted), which the primary judge referenced at PJ [352]:

> 80 The principles are well established. Determining whether a person has

> breached s 18 of the ACL involves four steps: *first*, identifying with precision the "conduct" said to contravene s 18; *second*, considering whether the identified conduct was conduct "in trade or commerce"; *third*, considering what meaning that conduct conveyed; and *fourth*, determining whether that conduct in light of that meaning was "misleading or deceptive or … likely to mislead or deceive".
>
> 81 The first step requires asking: "what is the alleged conduct?" and "does the evidence establish that the person engaged in the conduct?". The third step considers what meaning that conduct conveyed to its intended audience. As in this case, where the pleaded conduct is said to amount to a representation, it is necessary to determine whether the alleged representation is established by the evidence. The fourth step is to ask whether the conduct in light of that meaning meets the statutory description of "misleading or deceptive or … likely to mislead or deceive"; that is, whether it has the tendency to lead into error. Each of those steps involves "quintessential question[s] of fact".
>
> 82 The third and fourth steps require the court to characterise, as an objective matter, the conduct viewed as a whole and its notional effects, judged by reference to its context, on the state of mind of the relevant person or class of persons. That context includes the immediate context – relevantly, all the words in the document or other communication and the manner in which those words are conveyed, not just a word or phrase in isolation – and the broader context of the relevant surrounding facts and circumstances. …
>
> 83 Where the conduct was directed to the public or part of the public, the third and fourth steps must be undertaken by reference to the effect or likely effect of the conduct on the ordinary and reasonable members of the relevant class of persons. The relevant class of persons may be defined according to the nature of the conduct, by geographical distribution, age or some other common attribute, habit or interest. It is necessary to isolate an ordinary and reasonable "representative member" (or members) of that class, to objectively attribute characteristics and knowledge to that hypothetical person (or persons), and to consider the effect or likely effect of the conduct on their state of mind. This hypothetical construct "avoids using the very ignorant or the very knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful". The construct allows for a range of reasonable reactions to the conduct by the ordinary and reasonable member (or members) of the class.

76 The primary judge's principal reasoning was in accordance with that orthodox methodology. The primary judge found (at PJ [375]) that the advertisements conveyed the promotional message to prospective consumers – namely, that they could purchase eligible goods from a Harvey Norman store at the advertised price of the goods, without paying a deposit, provided they paid the advertised price by 60 equal monthly payments and, provided they paid the 60 equal monthly payments, they would not be charged interest in respect of their purchases or be required to make any other payment in respect of their purchases or undertake any other financial commitment. We agree with that finding. The primary judge also found that what was conveyed was misleading. As his Honour explained at PJ [388]:

> However, the truth of the matter is that, contrary to what was stated in the advertisement, consumers could not simply purchase eligible goods from a Harvey Norman store at the advertised price of those goods on no deposit terms, provided they paid the price by 60 equal monthly payments. Purchase on those terms, and those terms alone, was not available. Rather, consumers who wished to make such a purchase had to enter into a fundamentally different financial arrangement than the one promoted – namely, a continuing credit contract with Latitude that was linked to a credit card (the GO Mastercard), whether or not they wanted a credit card (let alone a GO Mastercard), which required them to pay an establishment fee and ongoing monthly account service fees in respect of that linked account.

77 We therefore reject grounds 4 and 5.

Ground 6

78 By ground 6, the applicants contend that the primary judge erred in finding (at PJ [373]) that the advertisements conveyed ASIC's 'dominant message' and that this dominant message was misleading or deceptive having regard to:

(a) his Honour's finding (at PJ [368]) that the 'dominant message' analysis is a distraction; and

(b) the fact that the trial had been conducted on the basis that ASIC's 'dominant message' was true.

79 This ground was barely addressed in the applicants' written submissions, and certainly not in a meaningful manner. At the hearing of the appeal, the applicants described the ground as raising a 'peripheral issue' and did not address it orally. However, the applicants said it was not abandoned.

80 The ground should have been abandoned. It misrepresents the primary judge's reasoning. Two short points can be made in that regard.

81 First, the primary judge did not find that the 'dominant message' analysis is a distraction. His Honour said that the *debate between the parties* about whether the central question (what the representative advertisements would have conveyed to ordinary and reasonable consumers) is appropriately answered by a so-called 'dominant message' analysis is a distraction (at PJ [368]). Having regard to the submissions advanced at trial by Latitude (PJ [278]-[286]) and Harvey Norman (PJ [337]-[339]) with respect to the so-called 'dominant message' analysis, the trial judge's description of the debate as a distraction is understandable.

82 Second, the primary judge did not contradict himself by subsequently embracing a so-called 'dominant message' analysis. His Honour was focused on the question stated at PJ [367]: what

the representative advertisements would have conveyed to ordinary and reasonable consumers, in the relevant class, in the relevant period, in relation to the promotion. At PJ [373], his Honour implicitly found that the advertisements conveyed the 'dominant message' alleged by ASIC (and expressly found that that message was misleading or deceptive). The context makes abundantly clear that, when his Honour referred to the 'dominant message' alleged by ASIC, his Honour was referring to ASIC's central allegation – that the advertisements conveyed an offer for consumers to purchase selected goods at Harvey Norman stores by making 60 equal monthly repayments on no deposit and interest free terms.

83 Further and in any event, as the High Court majority confirmed in *TPG*, there is no error in considering what is the 'dominant message' of an advertisement, in the sense of what an ordinary and reasonable consumer would understand the advertisement to convey (see at [45], [52] and [53]). Relevantly in the context of advertising, the prohibitions against misleading and deceptive conduct are concerned with the message or messages conveyed by the advertisement and whether the advertisement, viewed as a whole, has a sufficient tendency to lead a person exposed to the advertisement into error (that is, to form an erroneous assumption or conclusion about some fact or matter): *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 200 (Deane and Fitzgerald JJ); *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 (Gibbs CJ); *Campomar* at [98]; *TPG* at [39]. The primary judge applied those orthodox principles.

Ground 7

84 By ground 7, the applicants contend that the primary judge erred in failing to take into account the evidence of 'Dr Michael Ebstein', including that interest free payment plans available for use at Harvey Norman are associated with credit cards, and from that evidence his Honour ought to have drawn an inference that this was known by reasonable consumers.

85 Again, this ground was barely addressed in the applicants' written submissions (with the submissions merely reproducing the ground of appeal), and was not addressed in oral submissions. However, the applicants said it was not abandoned.

86 As a preliminary point, the ground of appeal refers to Mr Ebstein with the title 'Dr'. Mr Ebstein's evidence does not indicate that he holds a PhD and the instructions given to him to prepare an expert report address him as Mr Ebstein. The parties' submissions at trial refer to him as Mr Ebstein, as do the reasons of the primary judge. The attribution of the title 'Dr' was not otherwise explained. We will follow the form of address used at trial.

87 This ground of appeal should have been abandoned. The primary judge did not fail to take into account the evidence of Mr Ebstein. His Honour took account of Mr Ebstein's evidence for the purposes propounded by the parties as can be seen at PJ [251], [252], [260], [263], [273], [274], [287]-[294], [311], [365]. However, his Honour concluded that Mr Ebstein's evidence, which concerned the state of knowledge of ordinary and reasonable consumers of credit products in Australia, did not alter his assessment that the advertisements were misleading and deceptive. Specifically, his Honour found (at PJ [478]):

> I am satisfied that, for many ordinary and reasonable consumers, the promotion was not a traditional form of consumer credit of the kind discussed by Mr Ebstein. It was a special offer in the terms in which Latitude and Harvey Norman chose to express it. There is no reason to think that ordinary and reasonable consumers would have seen the promotion as a traditional form of consumer credit when the advertisements, in effect, told them otherwise. Their attention was being directed only to the prominent terms in which the promotion was expressed, not to other, undisclosed terms, and certainly not to the fundamentally different financial arrangement that was, in truth, being offered.

88 The applicants have not demonstrated error in that finding. For those reasons, ground 7 is rejected.

Ground 8

89 By ground 8, the applicants contend that the primary judge erred in finding (at PJ [492]) that, overall, the consumer evidence adduced by ASIC was "consistent with the conclusions I have reached". The applicants contend that the evidence was, in material respects, inconsistent with the conclusions reached by his Honour.

90 Again, this ground was barely addressed in the applicants' written or oral submissions. The applicants' written submissions in chief stated that they relied on their submissions at trial, without identifying any specific parts of those submissions. That approach to an appeal in this Court should be deprecated. The applicants' written submissions in reply addressed the consumer evidence very briefly (and, in part, raised issues regarding the relevance of the consumer evidence that is not within the ground of appeal). At the hearing of the appeal, the applicants again described the ground as raising a "peripheral issue" and did not address it orally. However, the applicants said it was not abandoned.

91 The ground was certainly peripheral. The primary judge stated that he would have reached the same conclusions in the proceeding independently of the consumer evidence (PJ [491]). Accordingly, the ground of appeal, even if upheld, would not require any interference in the primary judge's conclusions and declaratory orders.

92 Further, and more significantly, the applicants again misrepresent the primary judge's reasoning. At PJ [492], his Honour said:

> … I accept that, although the deponents had different understandings of what was being offered by the promotion, and although some idiosyncratic perceptions were revealed, their evidence, overall, was consistent with the conclusions I have reached, in that each deponent was unaware that he or she was required: (a) to obtain a GO Mastercard to take advantage of the promotion; and (b) to pay fees and charges in addition to the monthly payments on account of the purchase price of the goods.

93 In other words, the conclusions reached by the primary judge, with which the consumer evidence was consistent, were the following two conclusions: that ordinary and reasonable consumers would not have been aware that they were required to obtain a credit card (or credit card account) in order to take advantage of the promotion, or that they were required to pay fees and charges in addition to the monthly payments on account of the purchase price of the goods.

94 The primary judge summarised the consumer evidence at PJ [114]-[179]. Although evidentiary objections were taken to the evidence, most of the evidence was ruled admissible (see PJ [180]-[205]) and there is no appeal against the evidentiary rulings made at trial. In so far as the applicants sought to re-agitate such evidentiary objections, or reformulate them, through their written reply submissions, that attempt is rejected on the basis that there is no appeal against those rulings.

95 The consumer evidence summarised by the primary judge at PJ [114]-[179] was not challenged on cross-examination (the deponents were not cross-examined at all). The unchallenged evidence included the following:

(a) Mr Harris, who heard the promotion on the radio in mid-2020, deposed as follows (reproduced at PJ [115]):

> 18. My understanding of the Harvey Norman 60 months interest free offer was that there was a minimum amount due each month, which would be the price of the product I purchased divided by 60 months and as long as I made the payment due each month, I wouldn't incur interest. I thought the repayments towards the purchase price of the product would be the only amounts I would pay in connection with the interest free arrangement. I also understood the words "no deposit" in the catalogue advertisement or radio advertisements to mean that I could purchase the PS4 and TV using the 60 months interest free offer with Harvey Norman and get the bonus gift card without paying a deposit or any payment at the time I made the purchases.

(b) Mr Hill, who between May and June 2021 saw approximately five advertisements each week for the promotion on television, deposed as follows (reproduced at PJ [131] and [132]):

> 15. I understood from the Harvey Norman advertisements that I would be able to pay my purchase of the laptop off over a 60-month period without being charged any interest as long as I was approved to borrow the funds, and that no fees would be charged. I did not know that I would need to sign up for a GO Mastercard credit card offered through Latitude to access the interest free offer. At that time, I was not expecting to be charged any fees to access the interest free offer because I did not see any reference to Latitude or Harvey Norman charging any fees to access the offer in the Harvey Norman advertisements.
>
> …
>
> 17. … I understood from the Harvey Norman advertisements that I had five years to pay off the purchase price of any products I was to buy, and that no interest would be charged. This arrangement was better for me than taking out a loan directly from a bank or getting another credit card. My existing credit card with St George was maxed out at the time. I needed a laptop for work and saw the advertisements and thought that the 60 month interest free offer was an easy way to purchase the laptop without having to pay any money upfront.

(c) Mr North, who in December 2020 saw a number of advertisements on television advertising the promotion (and also heard similar advertisements on the radio), deposed as follows (reproduced at PJ [151]):

> 14. My understanding from seeing the Harvey Norman advertisements, was that if I spent a minimum of $1,000 at Harvey Norman, I would be able to pay off my purchase over a 60 month period without being charged interest. My understanding of the interest free promotion was that there would be no interest or fees charged in connection with the repayments. From seeing the Harvey Norman advertisements, I did not think that you would need to sign up for a credit card in order to take advantage of the 60 months interest free offer. I understood that each specific 60 months interest free offer was available for a limited time.

(d) Ms Jenkins, who in February 2020 saw an advertisement in the Sunday Telegraph newspaper advertising the promotion, deposed as follows (reproduced at PJ [169]):

> 17. My understanding from the Harvey Norman advertisement was that I could pick out the items that I wanted to purchase and then Harvey Norman would give me a 60 month interest free loan for the purchase price of those items. For example, I understood that if I purchased items for say $2,700, I would be paying off those items over 60 months, with no interest. I assumed that if I did not make the payments within 60 months, I would then be charged interest on the remaining balance at the end of the 60 month interest free period.

96 That unchallenged evidence is wholly consistent with the primary judge's conclusions as referred to above. We reject ground 8.

Grounds 9 and 10

97 Grounds 9 and 10 relate to only two of the 11 representative advertisements. Ground 9 concerns representative advertisement 8 (being the radio advertisement described at PJ [39]) and ground 10 concerns representative advertisement 11 (being the television advertisement described at PJ [52]-[56]). Each of those advertisements is in a more abbreviated form than the other advertisements. By grounds 9 and 10, the applicants contend that these abbreviated forms of the advertisements lacked some of the features or elements of the other advertisements that the primary judge relied on in concluding that the other advertisements conveyed the misleading promotional message. The applicants contend that the primary judge erred in concluding that the two abbreviated advertisements were also misleading because they lacked those features or elements.

98 The applicants addressed these grounds briefly in their written and oral submissions, arguing that the primary judge's reasons did not grapple with these advertisements on their own terms and by reference to the significance of the different media.

99 The words spoken in the relevant radio advertisement (representative advertisement 8) were reproduced by the primary judge at PJ [39] and were as follows:

> MALE SPEAKER: Harvey Norman summer sizzlers. Lenovo IdeaPad Slim 1 laptop, just $333. Dyson V7 cord-free vacuum, $399. Hisense 512 litre French door fridge, $999. Purchase with 60 months interest-free and receive a bonus gift card up to the value of $500. *Minimum financed amount $1000. Approved applicants only. 60 equal monthly payments. Interest applies if you do not comply with terms and conditions. Fees and exclusions apply. Savings off normal ticketed prices.* Summer sizzlers at Harvey Norman.
>
> FEMALE SPEAKER: Go.

100 As noted earlier, the primary judge found (at PJ [40]) that the words of the script were spoken at a moderate pace in an upbeat tone, except for the italicised words which were spoken more softly and delivered at a rapid pace, as an aside.

101 We have listened to the advertisement and we agree with the primary judge's finding that it delivers the same promotional message as the other advertisements (PJ [438]). We consider that the statement "purchase with 60 months interest free and receive a bonus gift card" is particularly noticeable in the context of the advertisement and would be likely to have drawn

the attention of ordinary and reasonable consumers. It is the central message of the promotion and is misleading. Further, although the italicised words were spoken more quickly, the statement "60 equal monthly payments" is clearly enunciated and would also have been likely to attract consumers' attention.

102 In respect of the relevant television advertisement (representative advertisement 11), the primary judge made the following findings (at PJ [464]-[465]):

> 464 Representative Advertisement 11 is different to Representative Advertisement 9 and Representative Advertisement 10 in that reference to the 60 months interest-free promotion occurs at the end of the advertisement. It contains the banner statements (except for the statement "Minimum financed about $1000", although this statement appears in small print below the graphics). Statement B and Statement C are quickly replaced by a banner referring to the bonus gift card, leaving Statement A in place. With respect to the payment method, the voiceover refers only to "Buy on 60 months interest-free and receive a bonus gift card".
>
> 465 It is fair to say that the reference in Representative Advertisement 11 to the payment method is more limited than in Representative Advertisement 9 and Representative Advertisement 10. However, the message described in [374] – [375] is clear. Text appears below the banner statements that contains a mass of detail, largely directed to the value of the bonus gift card. The text nevertheless concludes with a statement in substantially similar terms to that quoted at [461] above. However, as with Representative Advertisement 9 and Representative Advertisement 10, I am satisfied that many ordinary and reasonable consumers would be oblivious to this text or, if not oblivious to it, unable to read it when the advertisement is shown in real time. Even if they could read it, the findings I have made at [379] – [380] apply equally, as they do for Representative Advertisement 10.

103 We have viewed the advertisement and we agree with the primary judge's findings that the promotional message is clear.

104 We therefore reject grounds 9 and 10.

Conclusion

105 For the reasons given above, immediately following the conclusion of the hearing of the applications for leave to appeal, orders were made granting leave to appeal and dismissing the appeal. As stated earlier, we consider that the grounds of appeal lack merit and are barely arguable. Despite that, we consider that leave to appeal should be granted in this case because the application concerns declaratory orders affecting substantive rights and we have given detailed attention to the grounds of appeal, such as they are.

106 Orders were also made for ASIC to file submissions on the question of the costs of the applications within 7 days of the publication of these reasons for judgment, and for the applicants to file responsive submissions within a further 7 days. The determination of the question of costs will be addressed in separate reasons of the Court in due course.

I certify that the preceding one hundred and six (106) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices O'Bryan, Cheeseman and Bennett.

Associate:

Dated: 3 September 2025