FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v ACBF Funeral Plans Pty Ltd, in the matter of ACBF Funeral Plans Pty Ltd [2023] FCA 1041

File number(s):	NSD 1182 of 2020
Judgment of:	**GOODMAN J**
Date of judgment:	5 September 2023
Catchwords:	**CONSUMER LAW** –misleading or deceptive conduct – insurance product marketed by a company (**representor**) to Aboriginal persons – whether the representor engaged in conduct in contravention of s 12DA and 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth) by making representations that: (1) the provider of the funeral product was an Aboriginal owned and managed entity; (2) the insurance product had the approval of the Aboriginal community; (3) the insurance product was more beneficial to Aboriginal persons than other insurers' products; (4) upon the death of a nominated person, there would be a payout of all of the *"Chosen Benefit Amount"* – whether the parent company of the representor was liable to a pecuniary penalty as a party knowingly involved in, or a party to, contraventions of s 12DB by the representor – contraventions of civil penalty provisions – appropriate penalty
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth), ss 12BAA, 12BAB, 12BB, 12DA, 12DB, 12GBA, 19 *Evidence Act 1995* (Cth), s 140 *Federal Court of Australia Act 1976* (Cth), s 21 *Trade Practices Act 1974* (Cth), s 75B
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513 *Australian Competition and Consumer Commission v Lactalis Australia Pty Ltd (No 2)* [2023] FCA 839

Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College) (ACN 085 570 547) (No 3) [2021] FCA 737; (2021) 154 ACSR 472

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181; (2016) 340 ALR 25

Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 7) [2016] FCA 484

Australian Competition and Consumer Commission v SIP Australia Pty Limited [2003] FCA 336; (2003) ATPR 41-937

Australian Competition and Consumer Commission v MSY Technology Pty Ltd [2012] FCAFC 56; (2012) 201 FCR 378

Australian Competition and Consumer Commission v Yazaki Corporation [2018] FCAFC 73; (2018) 262 FCR 243

Australian Competition and Consumer Commission v Employsure Pty Ltd [2023] FCAFC 5; (2023) 407 ALR 302

Australian Consumer and Competition Commission v Coles Supermarkets Australia Pty Ltd [2015] FCA 330; (2015) 327 ALR 540

Australian Securities and Investments Commissions v Wilson (No 3) [2023] FCA 1009

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

Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2021] FCA 647; (2021) 287 FCR 109

Love v Commonwealth [2020] HCA 3; (2020) 270 CLR 152

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1

Markarian v The Queen [2005] HCA 25; (2005) 228 CLR 357

McHugh v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2020] FCAFC 223; (2020) 283 FCR 602

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 67 ALJR 170

Productivity Partners Pty Ltd (trading as Captain Cook College) v Australian Competition and Consumer Commission [2023] FCAFC 54

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
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Date of last submission/s:	29 November 2022
Date of hearing:	22 and 23 November 2022
Counsel for the Plaintiff:	Mr D J Batt KC with Mr T Goodwin and Ms S Hogan
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the First and Second Defendants:	No appearance by the first or second defendants

ORDERS

NSD 1182 of 2020

IN THE MATTER OF ACBF FUNERAL PLANS PTY LTD (ACN 081 021 141)

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**ACBF FUNERAL PLANS PTY LTD (ACN 081 021 141)** First Defendant
	YOUPLA GROUP PTY LTD (ACN 074 081 146) Second Defendant

ORDER MADE BY: **GOODMAN J**

DATE OF ORDER: **5 SEPTEMBER 2023**

THE COURT DECLARES THAT:

1. By representing during the period between 1 January 2015 and 30 November 2018 (**relevant period**), in the course of offering, promoting and selling the Aboriginal Community Funeral Plan, that, upon death of a Nominee, a Plan Holder would receive a payout in the form of a lump sum of the Chosen Benefit Amount, the first defendant:

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

   (b) made, in trade or commerce, in connection with the supply or possible supply or promotion of financial services, a false or misleading representation in contravention of s 12DB(1)(a) of the ASIC Act; and

   (c) made, in trade or commerce, in connection with the supply or possible supply or promotion of financial services, a false or misleading representation in contravention of s 12DB(1)(e) of the ASIC Act.

THE COURT ORDERS THAT:

1. Pursuant to s 12GBA(1) of the ASIC Act (as it stood during the relevant period), the first defendant pay to the Commonwealth of Australia a pecuniary penalty in the sum of $1,200,000.
2. The originating process filed on 29 October 2020 is otherwise dismissed.
3. Any party seeking an order as to costs is to notify the Associate to Goodman J within 21 days of the date of these Orders.

THE COURT NOTES THAT:

1. Pursuant to the orders made on 15 July 2022, the plaintiff is not to seek to enforce the pecuniary penalty the subject of order 1 above without leave of the Court.

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

REASONS FOR JUDGMENT

GOODMAN J

A. INTRODUCTION

1 Between 1 January 2015 and 30 November 2018 (**relevant period**), the first defendant, (**ACBF** Funeral Plans Pty Ltd), a wholly owned subsidiary of the second defendant, **ACBF Group** Holdings Pty Ltd, sold a funeral insurance policy called the *"Aboriginal Community Funeral Plan"* (**ACF Plan**). Between at least 1 January 2015 and July 2018, ACBF also offered and promoted the ACF Plan.

2 On 29 October 2020, the plaintiff (**ASIC**) commenced this proceeding. ASIC's case involves the following essential propositions.

3 *First*, that in offering, promoting and selling the ACF Plan as it did during the relevant period, ACBF made **representations** to potential consumers that:

(1) ACBF was owned or managed by an Aboriginal person or persons (**Aboriginal Ownership/Management Representation**);

(2) the ACF Plan had Aboriginal community approval (**Aboriginal Approval Representation**);

(3) the ACF Plan was more beneficial to Aboriginal consumers than other funeral insurance products generally available at the time (**Aboriginal Benefit Representation**); and

(4) upon the death of a nominated person, an ACF Plan holder would receive a lump sum payment of their Chosen Benefit Amount (**Payout Representation**).

4 *Secondly*, this conduct contravened s 12DA and 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) because:

(1) contrary to the Aboriginal Ownership/Management Representation;

(a) no director of ACBF (or of any company in the ACBF group) was an Aboriginal person;

(b) no shares in ACBF were owned by an Aboriginal person or an Aboriginal organisation;

(c) no shares in any company in the ACBF group were owned by an Aboriginal person or an Aboriginal organisation (save that, as to **Aboriginal Community**

Benefit Fund Pty Ltd, a subsidiary of ACBF Group and a company which, prior to the relevant period, had ceased to offer, promote or sell any funeral insurance policy to new customers, five of the 100 issued shares were owned by an Aboriginal person);

(d) ACBF was not (and all other companies in the ACBF group were not) managed by any Aboriginal person;

(2) contrary to the Aboriginal Approval Representation, the ACF Plan did not have Aboriginal community approval during the relevant period;

(3) contrary to the Aboriginal Benefit Representation, during the relevant period the ACF Plan was less beneficial (alternatively not more beneficial) to **Potential Consumers** than other generally available funeral insurance products; and

(4) contrary to the Payout Representation, ACBF paid only funeral and related expenses that had in fact been incurred.

5 *Thirdly*, ACBF Group is liable to a pecuniary penalty because it was knowingly concerned in, or party to, ACBF's contraventions of s 12DB, because:

(1) during the relevant period, Mr Ron Pattenden and Mr Jonathon Law; together with Mr Michael Wilson (for the period 1 January 2015 to 17 December 2017 only) or Mr Bryn Jones (for the period 18 December 2017 to 30 November 2018 only), were directors of both ACBF Group and ACBF and were the controlling minds of those companies (**controlling mind directors**);

(2) throughout the relevant period, ACBF was a wholly owned subsidiary of ACBF Group; and

(3) the controlling mind directors knew of the making of the representations and of the falsity of those representations.

6 ASIC seeks relief in the form of declarations of contravention and the imposition of pecuniary penalties.

7 For the reasons set out below I have concluded that:

(1) the Aboriginal Ownership/Management Representation and the Aboriginal Approval Representation were made (see [D.3.1] and [D.4.1] below), however ASIC has not

established that the making of those representations constituted a contravention of either s 12DA or s 12DB of the ASIC Act (see [D.3.2] and [D.4.2] below);

(2) the Aboriginal Benefit Representation was not made (see [D.5.1] below);

(3) the Payout Representation was made and that the making of this representation constituted a contravention of both s 12DA and s 12DB of the ASIC Act (see [D.6] below). It is appropriate to make declarations of contravention concerning each section (see [F.2] below). For the contravention of s 12DB of the ASIC Act, a pecuniary penalty of $1,200,000 is appropriate (see [F.3] below); and

(4) ASIC has not proven that ACBF Group was knowingly concerned in, or party to ACBF's contraventions of s 12DB of the ASIC Act (see [E] below).

B. OVERVIEW OF ASIC'S EVIDENCE

8 ASIC relied upon the following evidence:

(1) five affidavits from consumers who were ACF Plan holders, namely Mr Lionel Ayoub, Ms Sandra McGuiness, Ms Elizabeth Williams, Ms Janice Edwards and Ms Robin Weatherall;

(2) an affidavit from a former ACBF field representative, Mr Jean Laterre;

(3) four affidavits from employees of ASIC: Ms Cici Ding, a data analyst; Ms Catherine Deakin, a Senior Manager in ASIC's Financial Services Enforcement Division; Ms Lucy Rees-Graham, a lawyer within ASIC's Financial Services Enforcement Division; and Ms Sarah Pringle, another lawyer within ASIC's Financial Services Enforcement Division;

(4) expert reports from:

(a) Dr Heron Loban, a Senior Lecturer and Head of Discipline in Indigenous Studies at the School of Humanities, Languages and Social Sciences at Griffith University (Queensland). Dr Loban is a Torres Strait Islander with extensive experience interviewing, representing and working with Aboriginal persons from remote, rural and regional Australia gained from working as a legal practitioner and from conducting research in relation to Aboriginal criminal justice issues. Dr Loban's doctoral thesis, conferred in 2019, was titled *"Aboriginal and Torres Strait Islander People and Consumer Law"*;

(b) Ms Jenni Baxter, an actuary and partner in the actuarial practice of Deloitte Consulting Pty Ltd;

(c) Emeritus Professor Jon Altman of the School of Regulation and Global Governance College of Asia and the Pacific;

(5) Mr Mark Holden, a solicitor in the employ of the Financial Rights Legal Centre;

(6) evidence obtained by ASIC from Mr Jones using its powers under s 19 of the ASIC Act and in particular a transcript of an examination of Mr Jones conducted on 26 June 2020 under s 19(1) of the ASIC Act (**Jones transcript**) and responses provided by Mr Jones under s 19(2) of the ASIC Act in March 2020 and October 2020 (the **first Jones s 19(2) response**; and the **second Jones s 19(2) response**, respectively); and

(7) numerous miscellaneous business records.

9 The evidence runs to several thousand pages.

C. CENTRAL FINDINGS OF FACT

10 On 29 October 2020, ASIC filed its Statement of Claim. On 22 December 2020, ACBF and ACBF Group filed a Defence to the Statement of Claim. On 10 March 2021, ASIC filed a Reply to that Defence. On 5 February 2021, ASIC filed an Amended Statement of Claim. On 19 February 2021, ACBF and ACBF Group filed a **Defence** to the Amended Statement of Claim.

11 On 11 March and 27 April 2022, ACBF and ACBF Group respectively went into liquidation. ASIC sought, and was granted, leave to continue the proceeding, subject to a condition that ASIC not seek to enforce any pecuniary penalties or costs orders made in its favour without further leave of the Court. The liquidator of the defendants sought, and was granted, leave to be excused from any further appearance in this proceeding, save as to any application by ASIC for leave to enforce any pecuniary penalties or costs orders.

12 On 29 November 2022, pursuant to leave that I had granted, ASIC filed a Further Amended Statement of Claim.

13 On the basis of the admissions made in the pleadings described at [10] above (supplemented in the case of the directorships of ACBF and ACBF Group described below by reference to current and historical extracts of ASIC's records), the following central and uncontroversial facts are established.

C.1 ACBF and ACBF Group

14 Throughout the relevant period, ACBF was a wholly owned subsidiary of ACBF Group and the directors of ACBF Group and ACBF were:

(1) Mr Ron Pattenden for both companies (entire relevant period);

(2) Mr Jonathan Law, for both companies (entire relevant period). Whilst the defendants admitted this allegation, ASIC's records suggest that Mr Law commenced as a director of ACBF Group on 18 May 2017. Little turns on this distinction;

(3) Mr Michael Wilson for both companies (1 January 2015 to 19 December 2017 only);

(4) Mr Bryn Jones for both companies (18 December 2017 to 30 November 2018 only);

(5) Ms Kerrie McCallie who was not a director of ACBF Group but was a director of ACBF for the period 1 January 2015 to 18 May 2017 only;

(6) Mr Isaac Simon for both companies (30 November 2018 only); and

(7) Ms Leanne Court for both companies (30 November 2018 only).

15 During the relevant period, Mr Pattenden, Mr Law, and Mr Wilson or Mr Jones, were the controlling minds of both companies.

C.2 Issuance of the ACF Plan

16 In January 2005, ACBF released the ACF Plan. ACBF sold the ACF Plan during the relevant period and offered and promoted the ACF Plan for the period from 1 January 2015 until around July 2018.

17 During that period, ACBF used:

(1) **marketing material** including the ACBF website; ACF Plan brochures; ACF Plan flyers; ACF Plan Visual Presentations; and ACF Plan advertisements placed in the Koori Mail, a fortnightly newspaper consumed predominantly by Aboriginal persons; and

(2) **point of sale documentation** including ACF Plan Rules; ACF Plan Information Guides; ACF Plan Holder Application Forms and Additional Nominee Application Forms.

C.3 Matters relevant to the ACF Plan

C.3.1 Name

18 At all relevant times ACBF used the words *"Aboriginal Community"* in the full name of the ACF Plan; and the full name of the ACF Plan without abbreviation in marketing material and point of sale documentation for the ACF Plan, although on occasions this was abbreviated after its first use to *"the Plan"*.

C.3.2 Terms and conditions of the ACF Plan

19 The ACF Plan Rules set out a series of contractual terms. Of present relevance are the following:

(1) up to about 20 November 2018, cl 1.2 provided that *"Aboriginal Person"* included: (a) a member of the Aboriginal race of Australia; (b) persons that such a person regarded as members of his or her family; and (c) persons that an Applicant (defined in cl 1.3) considered came within the categories set out in (a) and (b);

(2) up to about 20 November 2018, cl 1.3 provided that *"Applicant*" meant a person who made an application to ACBF pursuant to cl 5.1;

(3) up to about 20 November 2018, cl 1.8 provided that a ***"Nominee"*** meant a person nominated by an Applicant or a Plan Holder and accepted in writing by ACBF as a person by reason of whose death ACBF would, subject to the Rules, pay a **Payout** and who had not pursuant to cl 9 of the Rules ceased to be a Nominee;

(4) up to about 20 November 2018, cl 1.11 provided that Payout meant a benefit consisting of the payment of money;

(5) up to about 20 November 2018, cl 1.14 provided that ***"Plan Holder"*** meant a person who made an application to ACBF pursuant to cl 5.1, whose application was accepted by ACBF and who had not pursuant to cl 9 ceased to be a Plan Holder, and included the predecessors and successors of such a person; and

(6) up to about 20 November 2018, cl 10.6 provided that, in the event of a death of a Nominee, the ACF Plan would only pay for expenses of and incidental to the Nominee's funeral and burial or cremation.

C.3.3 Chosen Benefit Amounts

20 From 1 January 2015 until about September 2017, a Plan Holder could choose benefit amounts for Nominees ranging from $4,000 to $15,000 (**Chosen Benefit Amount**), depending upon the

health classification level set by ACBF for the nominee. The health classification was assigned and based upon the information provided to ACBF by the Plan Holder and/or a Nominee over the age of 18.

C.3.4 Logos

21 During the relevant period (but not at all times), there were various ACBF **logos**, of the nature of the logos set out below, that were culturally associated with Aboriginal persons, namely:

(1) the Aboriginal Figures logo:

(2) the Caring logo:

(3) the 20th Anniversary logo:

(4) the Quarter Sun logo:

22 During the relevant period ACBF, in connection with the offer, promotion and sale of the ACF Plan, used one or more of the logos on marketing material, on point of sale documentation and on clothing, identification cards, business cards and company cars used by its field representatives. Field representatives are discussed further at [25] and [26] below.

C.3.5 Aboriginal Community Promotional Statements

23 During the relevant period up to about July 2018, ACBF offered and promoted the ACF Plan using statements (**Aboriginal Community Promotional Statements**) that were to the effect that:

(1) the ACBF group of companies had been providing funeral cover for Aboriginal persons around Australia for 20 or more years;

(2) the ACBF group of companies was commenced in the late 1980s after Aboriginal health workers in the area of Armidale in New South Wales enquired whether it was possible to set up a fund that would help Aboriginal families meet the costs associated with funerals; and

(3) the ACF Plan was Australia's only funeral plan that was dedicated to the Aboriginal community.

C.3.6 Advertisements in the Koori Mail

24 Throughout 2015, ACBF advertised the ACF Plan in the Koori Mail. When doing so, ACBF used one or more of the 20th Anniversary Logo; the Quarter Sun Logo; and the Aboriginal Community Promotional Statements.

C.3.7 Field representatives and their promotion of the ACF Plan

25 During the relevant period, ACBF had field representatives, who were employed by ACBF or its wholly owned subsidiary **ACBF Administration** Pty Ltd as agents for ACBF. The role of field representatives included offering, promoting and selling the ACF Plan by: travelling to locations, typically regional towns, with a high proportion of Aboriginal residents; attending meetings at Aboriginal organisations to explain the role of ACBF and to answer questions; attending Aboriginal community events and festivals; and visiting the houses of Aboriginal persons who had expressed an interest in knowing more about the ACF Plan or in making a Plan Holder application. Field representatives also visited existing ACF Plan Holders for, *inter alia*, customer service and compliance purposes, which included updating contact details, discussing questions, concerns and the terms and conditions of the ACF Plan.

26 In carrying out their role, field representatives: wore clothing, used identification and business cards, and drove (or frequently drove) cars that bore one or more of the logos; and used printed material that bore one or more of the logos and/or one or more of the Aboriginal Community Promotional Statements. Further, field representatives were required to wear an ACBF

company T-shirt in the course of their employment; and if a person showed interest in the ACF Plan, the field representative would present the Visual Presentation.

C.3.8 Payouts

27 During the relevant period up to about July 2018, ACBF offered, promoted and sold the ACF Plan by making the following statements about what the ACF Plan provided:

(1) *"fast payouts of $4,000 to $15,000"*; and

(2) *"fast payouts ranging from $4,000 to $15,000"*.

28 During the relevant period:

(1) the Visual Presentation included the following statements, or statements to the following effect:

(a) *"The whole payout must be used for the sole purpose of paying funeral and related expenses"*;

(b) *"You will need to choose a benefit amount for each person you wish to be part of your plan. The benefit amount is the amount you want the insurer to pay after that person passes away for their funeral and related expenses"*; and

(c) *"After your first plan payment is received: *where the benefit amount of $4,000 or $6,000 is chosen, there is immediate cover for this amount, *where a higher benefit amount is chosen, there is immediate cover for $6,000 and the amount of cover increases each year until it reaches the chosen benefit amount, as set out in the table on the next page"*;

(2) the ACF Plan Information Guide made the following statements, or statements to the following effect:

(a) *"What documents do you require to process a claim? Usually, we will need at least the following documents: *An official document confirming the Nominee has passed away. *An official document stating the cause of the Nominee's passing. *An undertaking signed by the payee that the payout will be used for the sole purpose of meeting funeral and related expenses"*; and

(b) *"How much will be paid when a Nominee passes away? The amount depends on a number of things, including the chosen benefit amount, the length of time the*

person has been a Nominee, and the person's health at the time you applied for that person to become a Nominee";

(3) the ACF Plan Application Form, under the heading *"Payouts"*:

(a) stated, with some minimal variation during the relevant period, *"When a benefit amount of $4,000 or $6,000 is chosen in respect of a Nominee, we will pay the chosen amount following the death of that Nominee"*;

(b) stated, with some minimal variation during the relevant period, *"If you choose a benefit amount of $8,000 or more in respect of a Nominee, there will be a waiting period – running from the date on which we accept the person as a Nominee – before the full benefit amount chosen will be paid following the death of the Nominee. The amount we will pay following the death of a Nominee will be as set out in Table 1"*; and

(c) set out in table form the *"Amount of payout following death of Nominee"*, in a way that listed lump sum amounts, including the Chosen Benefit Amount; and

(4) the Additional Nominee Application Form, under the heading *"Payouts"*:

(a) stated, with some minimal variation during the relevant period, *"When a benefit amount of $4,000 or $6,000 is chosen in respect of a Nominee, we will pay the chosen amount following the death of that Nominee"*;

(b) stated, with some minimal variation during the relevant period, *"If you choose a benefit amount of $8,000 or more in respect of a Nominee, there will be a waiting period – running from the date on which we accept the person as a Nominee – before the full benefit amount chosen will be paid following the death of the Nominee. The amount we will pay following the death of a Nominee will be as set out in Table 1"*; and

(c) set out in table form the *"Amount of payout following death of Nominee"*, in a way that listed lump sum amounts, including the Chosen Benefit Amount.

29 During the relevant period until about mid-2018, ACBF provided Nominees with a certificate which stated their Chosen Benefit Amount. The certificate included the following statement:

> The Chosen Benefit Amount is payable for the abovementioned Nominee only and on the following conditions: * The ACF Plan is current at the time of passing, *There has not been a total of 4 payments missed on the plan in a calendar year.

C.3.9 Disclaimer

30 During the relevant period, ACBF and ACF Plan documents were labelled with, and field representatives were required to give, a **disclaimer**.

31 The disclaimer did not state that: ACBF was not owned or managed by an Aboriginal person or persons; ACBF did not have Aboriginal community approval; the ACF Plan was no more beneficial to Aboriginal persons than other funeral insurance products generally available in the market; or the ACF Plan did not provide a Plan Holder with a payout in the form of a lump sum of the Chosen Benefit Amount upon the death of a Nominee.

32 From about 12 September 2018, ACBF on occasion used **a new disclaimer**, in the terms of the previous disclaimer but with the additional words *"We are not an Aboriginal company"*, on some ACF Plan documents.

C.4 Consumers of the ACF Plan

33 To the extent that Potential Consumers of the ACF Plan were Aboriginal persons, they were likely to:

(1) consider that funerals, funeral rites and other rituals associated with death have important Aboriginal cultural significance;

(2) attend, or have cultural obligations to attend, funerals more often than the general Australian population;

(3) pay, or have cultural obligations to pay, for the funerals of close family members and related expenses, including travel and accommodation for wider family members and other Aboriginal community members from the Aboriginal community of the deceased; and

(4) incur or be liable to incur significant costs in meeting those cultural obligations.

D. DID ACBF CONTRAVENE SECTION 12DA OR SECTION 12DB OF THE ASIC ACT?

34 I now turn to consider whether ACBF contravened s 12DA or s 12DB of the ASIC Act.

D.1 Legal framework

35 During the relevant period:

(1) s 12DA(1) of the ASIC Act provided:

> **12DA Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

(2) s 12DB(1) of the ASIC Act provided in so far as is presently relevant:

> **12DB False or misleading representations**
>
> (1) A person must not, in trade or 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:
>
> (a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
>
> …
>
> (e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits; or
>
> (f) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation.

D.2 Some matters of general application

D.2.1 Trade or commerce

36 For each of s 12DA and s 12DB the conduct (i.e. the representations) must have occurred in trade or commerce. I am satisfied that as the representations (to the extent they were made) were made in the course of offering, promoting and selling the ACF Plan they were made in trade or commerce.

D.2.2 In relation to financial services

37 It is also necessary for the representations (if made) to have been: (1) in relation to financial services (s 12DA); or (2) in connection with the supply or possible supply of financial services (s 12DB).

38 During the relevant period, s 12BAB(1)(b) of the ASIC Act provided that, for the purposes of Division 2 of Part 2 of the ASIC Act (in which ss 12DA and 12DB were found) a person provided a *"financial service"* if they *"dealt"* in a *"financial product"*.

39 The definition of *"financial product"* included facilities through which persons managed financial risk, including by managing the financial consequences to them of particular circumstances happening (s 12BAA(1)(b) and 5(a)). The ACF Plan meets this definition.

40 ACBF also *"dealt"* with the ACBF Plan, by reason of its issue of that plan to consumers: s 12BAB(7)(b) of the ASIC Act.

41 It follows that ACBF was providing a *"financial service"* and the representations (if made) were conduct: (1) *"in relation to financial services"* for the purposes of s 12DA; and (2) *"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"* for the purposes of s 12DB.

42 I turn now to consider the four representations alleged by ASIC.

D.3 The Aboriginal Ownership/Management Representation

D.3.1 The conduct

43 ASIC contended that ACBF, in the course of promoting, marketing and selling the ACF Plan, conveyed an implied representation that ACBF was owned or managed by an Aboriginal person or persons.

44 I am satisfied that this representation was made. The clear, and overwhelming message conveyed by the marketing material and the point of sale documentation is that ACBF was an Aboriginal company and thus impliedly that it was owned and/or managed by Aboriginal persons. That message was conveyed through, *inter alia*:

(1) the use of imagery and colours associated with the Aboriginal community. As ASIC submitted, and as was borne out by the evidence, the use of that imagery and those colours has a heightened significance in the context of a target audience of Aboriginal persons. The expert evidence of Dr Loban was that where such imagery, colours (and words such as *"Aboriginal"*) are used, there is an expectation by Aboriginal persons of some form of Aboriginal ownership or management;

(2) the phrase *"Aboriginal Community"* in the name of the ACF Plan;

(3) the logos, which incorporated imagery and colours associated with Aboriginal persons (see [21] above);

(4) the Aboriginal Community Promotional Statements (see [23] above);

(5) advertisements of the ACF Plan in the Koori Mail using some of the logos and the Aboriginal Community Promotional Statements; and

(6) identifying information (uniforms, identification cards and business cards) used by field representatives, as well as on vehicles used by them.

45 Dr Loban's evidence included:

(1)

> Because of the high cultural value placed on in relationships (relationality), an Aboriginal organisation that used "Aboriginal community" would be seeking to clearly identify itself as run and managed for and by Aboriginal people.; and

(2)

> Visual representations of Aboriginal cultural material such as the tri-colours of the Aboriginal flag are also reflected in the colour of the ACBF logo. Because of the strong and direct connection that Aboriginal people make with the tri-colours of the Aboriginal flag and because of its deep social history and connection to Aboriginality and Aboriginal identity their use in the logo would signal to an Aboriginal person that ACBF represents them and represents Aboriginality.

46 Whilst evidence of consumers is not necessary, or sufficient, to establish that a particular representation was conveyed, the consumer witness evidence adduced by ASIC is consistent with the proposition that the Aboriginal/Ownership Management representation was conveyed to those consumers. That evidence included evidence from:

(1) Mr Ayoub:

> I do remember clearly that at the time I signed up everything about the company told me it was Aboriginal. The name on the forms "Aboriginal Community Funeral Plan" and the logo that has black people with a sunrise in Aboriginal colours and with artwork along the lines of Aboriginal art, told me it was Aboriginal. In my experience, if an organisation uses those words and symbols then they are Aboriginal.

(2) Ms Williams:

> To me, an Aboriginal company is owned, managed and run by a majority of Aboriginal people. An example is the Aboriginal Medical Service here in Walgett, which has a majority of Aboriginal people working in it. Even the Chief Executive Officer of the Aboriginal Medical Service is Aboriginal…This is why I signed up with the Fund [ACBF] in 2017. I expected the Fund to be just like the Aboriginal Medical Service. I remember clearly that when I saw the logo on the car it was in our colours – Aboriginal colours. The logo, the picture and the colours, told me that the Fund relates to us, Aboriginal people, and is an Aboriginal organisation.

(3) Ms Edwards:

> When I signed up to the Fund in July 2017, I thought it was owned and run by Aboriginal people. The logo and the name of the plan 'Aboriginal Community Funeral Plan' told me that it was an Aboriginal organisation. …
>
> When an organisation uses "Aboriginal" in a name like "Aboriginal Community Funeral Plan" that says to me it's Aboriginal. In my experience if something has the word "Aboriginal" in the name, Aboriginal people have to own it and run it. You have to be First Nation people, connected to country, to use the name Aboriginal otherwise you're lying to people.

(4) Ms Weatherall, that she recalls signing up to the ACF Plan in January 2017 thinking that it was an Aboriginal run and owned organisation. Further:

> The logo told me that ACBF is owned and run by Aboriginal people, that it was ours and that it's set up by black people to help black people… I also thought at the time I signed up that ACBF was owned and run by Aboriginal people because of the name "Aboriginal Community Benefit Fund". I believe that you can't have the word "Aboriginal" in the name if it is not owned and run by Aboriginal people… The logo and word "Aboriginal" in the name also told me that this is the funeral insurance to choose for our people, that ACBF is ours and is set up for the benefit of our people.

(5) Ms McGinness, that certain imagery and artwork used by ACBF, specifically the snake image on the ACF Plan policy certificate received after she signed up to the ACF Plan in 2015, told her ACBF was "Aboriginal".

47 Mr Laterre, whom it will be recalled was a long-standing field representative, provided evidence that most customers with whom he dealt thought ACBF was owned and run by Aboriginal people, which he believed was due to the branding, wording, logos and behaviour of field representatives.

48 The Aboriginal Ownership/Management Representation was conveyed despite the presence of the disclaimers. That is so for two reasons.

49 *First*, context. In my view, the disclaimer (if read) would not have detracted in any significant way from the overall message conveyed. The message conveyed, as I mentioned above, was overwhelming.

50 *Secondly*, content. The original disclaimer was to the following effect:

> ACBF is a private company which is not connected with or sponsored by any governmental or similar body or Aboriginal organisation.

51 This form of words – *"not connected with or sponsored by"* – conveyed a message as to ACBF's association with others, not as to its ownership or management. It left open the possibility that ACBF was itself an Aboriginal organisation.

52 The new disclaimer commenced in about September 2018, with the addition of the words *"we are not an Aboriginal company"*. However, even in that form, the new disclaimer was insufficient to detract from the overall impression that ACBF was an Aboriginal owned or managed company.

D.3.2 Was the Aboriginal Ownership/Management Representation conduct that contravened s 12DA or s 12DB(1)(f) of the ASIC Act?

D.3.2.1 The allegation of falsity

53 ASIC contended that the Aboriginal Ownership/Management Representation was misleading or deceptive or likely to mislead or deceive because it was false; and that it was false because during the relevant period:

(1) no director of ACBF (or any company in the ACBF group) was an Aboriginal person;

(2) no shares in ACBF were owned by an Aboriginal person or an Aboriginal organisation;

(3) no shares in any company in the ACBF group were owned by an Aboriginal person or an Aboriginal organisation (save that five per cent of the shares in Aboriginal Community Benefit Fund were owned by an Aboriginal person); and

(4) ACBF was not (and all other companies in the ACBF group were not) managed by any Aboriginal person.

54 As is apparent, the contentions in [53(1) and (4)] concern management of ACBF and other companies in the *"ACBF group"* and the contentions in [53(2) and (3)] concern ownership of ACBF and other companies in the *"ACBF group"*.

D.3.2.2 The ACBF group of companies

55 A concept central to this part of ASIC's case is that of the *"ACBF group"* (or the *"ACBF group of companies"*). ASIC did not define this concept in its Further Amended Statement of Claim. Nor did it seek to do so in its submissions. Thus, there is no defined set of companies comprising the *"ACBF group"* against which the allegation of falsity may be tested.

56 Within the evidence before the Court is evidence of the existence of the following companies (**apparent group companies**) within the relevant period which appear to have been related (in the broad sense of that term):

(1) ACBF Group;

(2) ACBF;

(3) ACBF Administration;

(4) **ACBF Funeral Plans Australia** Pty Ltd (known as Community Funeral Plans Pty Ltd from 30 August 2017);

(5) Aboriginal Community Benefit Fund;

(6) **Aboriginal Community Benefit Fund (No 2)** Pty Ltd; and

(7) **ACBF Consultants** Pty Ltd.

57 However, the manner in which the case has been framed and the evidence before the Court do not allow a conclusion to be drawn that these were the *only* companies in the *ACBF group*. Nor did ASIC invite the Court to draw such a conclusion.

D.3.2.3 Management

58 As noted above, the allegation of falsity concerns (in part) the constitution of the management of the *"ACBF group"*. ASIC's allegation is that the Aboriginal Ownership/Management Representation was false because, *inter alia*, during the relevant period ACBF and the other companies in the *"ACBF group"*: (1) had no director who was an Aboriginal person; and (2) were not managed by any Aboriginal person.

59 Three points must be noted. *First*, absent a definition of the set of companies comprising the *"ACBF group"* there can be no definition of the set of directors of those companies. *Secondly*, ASIC did not define the concept of *"management"* or *"managed"* in its Further Amended Statement of Claim or its submissions. *Thirdly*, ASIC did not identify the set of persons alleged to have been involved in management.

60 If the analysis were to be undertaken by reference to the apparent group companies then the persons who *managed* those companies during the relevant period included (at least):

(1) the following directors – Mr Pattenden, Mr Law, Mr Wilson, Mr Jones and Ms McCallie (excluding Mr Simon as he was a director for only the final day of the relevant period); and

(2) the following other persons:

(a) Mr Geoff Clayton (Chief Operating Officer of ACBF Administration from November 2017);

(b) Ms Sandra Thurley;

(c) Ms McCourt, who during the relevant period was described on various documents as the *"General Manager"*; and

(d) perhaps Mr David Hughes, who appears to have been a solicitor advising ACBF, but is also a person identified by Mr Jones in the second Jones s 19(2) response as someone to whom ACBF staff reported.

D.3.2.4 Ownership

61 The other part of the allegation of falsity concerns ownership. ASIC contended that the Aboriginal Ownership/Management Representation was false because during the relevant period *no* shares in ACBF or any other company within the ACBF group were owned by an Aboriginal person or organisation (with the exception of Aboriginal Community Benefit Fund).

62 Two points must be noted. *First*, absent a definition of the set of companies comprising the *"ACBF group"* there can be no definition of the set of shareholders in those companies. *Secondly*, ASIC did not identify in the Further Amended Statement of Claim, or its submissions, the set of persons alleged to have held shares in companies within the *"ACBF group"*.

63 If the analysis were to be undertaken by reference to the apparent group companies then the persons who held shares during the relevant period included: ACBF, Just Solutions Ltd, ACBF Consultants, ACBF Administration, Elah Valley Pty Ltd, Mr Pattenden, Ms McCallie and Mr Duncan. The evidence is ambiguous as to whether a Shar Tucker held shares (in ACBF Funeral Plans Australia) during the relevant period.

D.3.2.5 Proof of Aboriginality of managers and shareholders

64 ASIC did not define in its Further Amended Statement of Claim or submissions the concept of an *"Aboriginal person"*. It did define *"Aboriginal organisations"* as *"Aboriginal owned and managed organisations"* at paragraph 34.3 of the Further Amended Statement of Claim. The definition of *"Aboriginal organisation"* is thus dependent upon ownership or management by *"Aboriginal persons"*.

65 Nor did ASIC address this issue in its evidence or submissions, whether by reference to: (1) authorities such as *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 at 70 (Brennan J); *Love v Commonwealth* [2020] HCA 3; (2020) 270 CLR 152; *McHugh v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2020] FCAFC 223; (2020) 283 FCR 602; *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647; (2021) 287 FCR 109; (2) the definition of *"Aboriginal person"* in cl 1.2 of the ACF Plan Rules (see [19(1)] above); or (3) otherwise. Instead, as will be seen below, ASIC relied upon statements made by Mr Jones that certain people were not Aboriginal.

D.3.2.6 The evidence relied upon by ASIC

66 I turn now to consider the evidence that ASIC identified as the evidence it relied upon to establish the falsity of the Aboriginal Ownership/Management Representation. That evidence was as follows.

67 *First*, the following answers provided by Mr Jones in the first Jones s 19(2) response:

> **6. In the Relevant Period, were any of the management positions occupied by Aboriginal or Torres Strait Islander persons? If so, specify the individual(s) and the role(s) held**.
>
> Yes, Isaac Simon (Former Director) and Jamal Idris (Current Director) are both employed in the business as managers and Directors. Isaac Simon has been a shareholder since November 2018. I do not believe from my searches that the former management contained any Aboriginal or Torres Strait Islander persons.
>
> **7. In the Relevant Period, were any of the directors or shareholders of Youpla or its subsidiaries Aboriginal or Torres Strait Islander persons? If so, specify the individual(s)**.
>
> Yes, Isaac Simon (Former Director) and Jamal Idris (Current Director) are both employed in the business as managers and Directors. Isaac Simon has been a shareholder since November 2018.1 do not believe from my searches that the former management contained any Aboriginal or Torres Strait Islander persons.

68 *Secondly*, the following parts of the Jones transcript:

(1)

> Q. Okay. And at the time of you joining ACBF, what did you understand about the management structure of the company, at the time of your joining?
>
> A. Was that Ron owned the company here in Australia, that he owned the underwriter and, basically, there was an administration company that 2 administered the services of each of the entities underneath.

...

(2)

Q. Thank you. And at the time of your joining, was it your understanding that Ron Pattenden had control of the day-to-day management of ACBF?

A. It became evident to me that everything went through him, yes.

Q. Okay. Were there other managers involved in the day-to-day functioning of the company at the time that you joined?

A. Yes, there was.

Q. Okay. Who were those managers?

A. Michael Wilson.

Q. Yes. Were there others?

A. At that stage there was Michael Wilson, there was Sandy Thurly, that handled the sales aspect, and then everything else went through Ron, John Law and the corporate solicitor at the time, which was David Hughes from Small Myers Hughes.

Q. And what was Michel Wilson responsible for?

A. Everything, basically.

Q. Okay. But in terms of day-to-day management, you've indicated that the day-to-day decision went through Ron Pattenden?

A. Yes, it did.

A. So was Michael Wilson then also responsible for that?

A. Sorry? Sorry, say that again.

Q. So what were Michael Wilson's duties with the 25 company at the time that you joined?

...

(3)

A. There was, to my knowledge, there was no aboriginal management or ownership.

...

(4)

Q. Sorry, I'll seek some clarification. Are we talking about Youpla Group Pty Ltd, which you previously said is the mother company, is that correct?

A. That's correct.

Q. Okay. So prior to you joining the company, who are the main shareholders of that group?

A. It was Just Solutions, which was Ron Pattenden.

Q. So is it just one shareholder at that time?

A. I believe there was a smaller shareholding in Jonathan Law.

Q. Who is Jonathan Law?

A. That was the previous director. Basically, they both had a shareholding in Just Stories- sorry, not Just Stories, Just Solutions.

...

69 *Thirdly*, the following responses provided by Mr Jones in the second Jones s 19(2) response:

> **11. In your 24 March 2020 response to ASIC's 20 March 2020 Notice, you stated in response to question 6 that "I do not believe from my searches that the former management contained any Aboriginal or Torres Strait Islander persons." Describe the searches that you undertook in order to provide this response.**
>
> Speaking to the longest serving staff, the shareholders and other directors, I was told that there were Indigenous staff over the years, however I was never told that any held Management roles. This is not to say that management roles weren't held by an Indigenous person.
>
> **12. Prior to the change of ownership of Youpla in November 2018, were any of Youpla's directors or Shareholders Aboriginal?**
>
> Dudley Duncan is a shareholder and possibly an ex-director of The Aboriginal Community Benefit Fund. Pty Ltd
>
> **13. On what basis are you able to confirm that the following people are not Aboriginal:**
>
> **a. Kerrie McCallie**; I have never met Kerrie McCallie, so I cannot confirm either way.
>
> **b. Sandra Thurley**; and Sandra Thurley was born in England.
>
> **c. Jonathan Law**. I've met Jonathan Law twice, all be it short, I do not believe he identifies as Indigenous

70 *Fourthly*, current and historical company extracts for ACBF, ACBF Group and ACBF Administration.

71 This evidence is plainly inadequate to establish the falsity of the Aboriginal Ownership/Management Representation.

72 The evidence of Mr Jones set out at [67] to [69] above does not establish that there were no Aboriginal persons who held shares in a company in the *"ACBF group"*, or that there were no Aboriginal persons involved in the management of those companies during the relevant period, particularly when:

(1) Mr Jones appears to have joined ACBF in September 2017, about two-thirds of the way through the relevant period. There is an obvious limitation on the worth of his evidence as to the position before he joined ACBF. As he acknowledged at answers 21 and 23 in the first Jones s 19(2) response, he has little knowledge of the period prior to his joining ACBF;

(2) his *"searches"* concerning the former management referred to in the first Jones s 19(2) response at answers 6 and 7 (see [67] above) were explained in the second Jones s 19(2) response at answer 11 (see [69] above) in terms which did not establish that there were no Aboriginal persons in the former management. Indeed Mr Jones acknowledged that there were Aboriginal staff who may have held management positions;

(3) Mr Jones identifies that Mr Duncan was (at least in Mr Jones's view) an Aboriginal person who was a shareholder of Aboriginal Community Benefit Fund and may have been a director of that company (see the second Jones s 19(2) response, answer 12). The evidence establishes that Mr Duncan holds five per cent of the shares in Aboriginal Community Benefit Fund. This appears to have been acknowledged by ASIC (see [4(1)(c)] above);

(4) Mr Jones was unable to opine as to whether Ms McCallie was an Aboriginal person (second Jones s 19(2) response, answer 13);

(5) his answers concerning Ms Thurley and Mr Law (second Jones s 19(2) response, answers 13b. and c.) do not establish that they are not Aboriginal persons;

(6) he expresses no views as to the Aboriginality of other managers or shareholders identified above (such as Mr Pattenden, Mr Wilson, Mr Hughes and Mr Clayton);

(7) his evidence does not address whether he is an Aboriginal person; and

(8) his answer, in the third passage extracted from the Jones transcript (see [68(3)] above), that *"There was, to my knowledge, there was no Aboriginal management or ownership"* is of little weight in view of the above matters. I take the expression *"to my knowledge"* to mean *"as far as I am aware"* rather than the expression of an opinion based upon actual knowledge.

73 The historical company extracts for ACBF, ACBF Group and ACBF Administration do no more than identify who the directors of those companies were at various times (including the relevant period); and, to some extent, who the shareholders were at particular times.

74 Further, to establish the negative proposition as to ownership pleaded by ASIC, it would also be necessary to identify the ultimate natural person shareholders of the companies holding shares in the companies in the *"ACBF group"* and to consider whether they are Aboriginal persons.

75 In a footnote to its submissions, ASIC referred to paragraph 61(a) of the Defence, which is in the following terms:

> 61. And the Defendants say further to the matters described above that as a result of the matters pleaded at paragraphs 11, 12, 27, 28, 29 and 30 of the SOC and paragraphs 1, 9(b), 22 to 23 of this Defence, a reasonable person in the position of an ACF Plan Holder would have:
>
> a. understood ACBF was not Aboriginal owned or managed;
>
> ...

76 It seems – noting that this paragraph was referred to only in a footnote and was not the subject of elaboration in ASIC's oral or written submissions – that ASIC relied upon this paragraph as an admission that ACBF was not *"Aboriginal owned or managed"*. I do not interpret paragraph 61(a) in that way, for the following reasons. *First*, it is not expressed as an admission that ACBF was not *"Aboriginal owned or managed"*. It does not respond to such an allegation, rather it is a *"further response"* to particular matters. *Secondly*, the cross-referenced paragraphs in paragraph 61(a) relate primarily to the disclaimers and paragraph 61(a) appears to be an expansion of the proposition in paragraph 31 of the Defence that the disclaimers were effective. *Thirdly*, it is an averment as to the understanding of a reasonable person in the position of an ACF Plan Holder. *Finally*, to the extent that it may be suggested that there is an implicit acknowledgement that ACBF was not *"Aboriginal owned or managed"*, such an implication cannot stand with the explicit denial of that proposition in paragraph 30 of the Defence.

77 The analysis set out at [53] to [76] above has been undertaken by reference to the case as pleaded and particularised. In ASIC's written submissions – on one interpretation – the allegation of falsity was addressed at one point by reference to the ownership and management of ACBF only (and not of other companies in the *"ACBF group"*). That case, had it been pleaded, would also have failed because ASIC did not:

(1) prove that ACBF Group, as the owner of all of the shares in ACBF, was not an *"Aboriginal organisation"*;

(2) identify the set of managers of ACBF during the relevant period; and

(3) prove that the managers (and the ultimate owners of the shares in ACBF Group) were not Aboriginal persons.

78 Thus, ASIC's case based upon the Aboriginal Ownership/Management Representation is not made out. In summary:

(1) ASIC alleged that the Aboriginal Ownership/Management Representation was false because *no* company within the *"ACBF group"* was owned or managed by Aboriginal persons;

(2) the set of companies forming the *"ACBF group"* was undefined in the Further Amended Statement of Claim and in ASIC's submissions. Some companies which may be within that set have been identified by the Court but the evidence does not allow a conclusion that these are a complete set of the companies in the *"ACBF group"*;

(3) the sets of persons who *"owned"* and *"managed"* respectively the companies within the *"ACBF group"* were also undefined in the Further Amended Statement of Claim and in ASIC's submissions;

(4) without precision as to the members of the sets of: (a) the companies in the *"ACBF group"*; (b) the owners of shares in the companies in that group; and (c) the persons who were managers of those companies, the proposition that the Aboriginal Ownership/Management Representation was false for the reasons set out at [53(1) to (4) above] is not established;

(5) further, the evidence as to who was and was not an Aboriginal person did not address any particular set of persons and critically did not rise above the level of uncertain assertion by Mr Jones; and the proposition that no shareholder was an Aboriginal person during the relevant period is falsified by ASIC's acceptance that Mr Duncan was Aboriginal person;

(6) even on the assumption that the only companies in the *"ACBF group"* are the apparent group companies, the proposition that the Aboriginal Ownership/Management Representation was false for the reasons set out at [53(1) to (4)] above is not established, for want of precision as to the set of managers of those companies; and because the evidence as to the Aboriginality of the owners of shares and directors in the identified companies is inadequate; and

(7) if the case were (contrary to the manner of its pleading) limited to the ownership and management of ACBF, it would still fail for the reasons set out at [77] above.

D.4 The Aboriginal Approval Representation

D.4.1 The conduct

79 ASIC contended that ACBF impliedly represented to potential consumers that the ACF Plan had Aboriginal community approval.

80 ASIC relied upon the same conduct as for the Aboriginal Ownership/Management Representation.

81 In my view, that conduct, which is described at [D.3.1] above, also conveyed a representation that the ACF plan had approval from (at least part of) the Aboriginal community. This representation was particularly conveyed by the Aboriginal Community Promotional Statements (see [23] above). Again, evidence from consumers as to how they perceived particular conduct is neither necessary, nor sufficient. Nevertheless, the lay evidence is supportive of the proposition that the Aboriginal Approval Representation was made. For example, Mr Ayoub's evidence was that:

> I didn't think about who owned the Fund. Like I don't know who owns the Aboriginal Medical Service. But if something is Aboriginal it means to me that there would at least be Aboriginal elders or respected Aboriginal people making decisions and giving input about how to set it up and how to run the service in a way that looks after and cares for Aboriginal people. That is what I thought was there. That is what they portrayed to me.
>
> The way the Fund was presented told me that it had approval and input from the Aboriginal community. It told me that they would have meetings and committees and BBQs and get input and advice from Aboriginal elders or respected people and make sure that things are done in the right way according to Aboriginal laws and culture and family ways…

82 I note that Dr Loban opines in her report that an Aboriginal person *"would not necessarily think that the Aboriginal community had approved the ACF Plan, but they would assume that ACBF was Aboriginal and would therefore adhere to Aboriginal cultural norms and values in its management and operations"*. I accept ASIC's submission that this opinion is not an impediment to finding that ACBF impliedly represented that the ACF Plan was approved by the Aboriginal community.

D.4.2 Was the Aboriginal Approval Representation conduct that contravened s 12DA(1) or s 12DB(1)(e) of the ASIC Act?

83 ASIC relied upon the following evidence to establish the proposition that the ACF Plan did not have the approval of the Aboriginal community.

84 *First*, the *"... complete absence of material that would support the proposition that the ACF Plan had Aboriginal community approval"*.

85 *Secondly*, the following answer by Mr Jones in the second Jones s 19(2) response:

> **18. What other consultation has taken place with Aboriginal and Torres Strait Islander communities in relation to the design of products offered, including the change of policy in relation to suicides in 2017? With which communities did that consultation occur?**
>
> I cannot speak to the consultation that happened prior to my appointment, however the above community leaders have all spoken into the new product design, which has been submitted to Fair Trading NSW and raised in our meeting with ASIC's Nathan Boyle and Elizabeth McNess on the 11th November 2019 . The features of the product include: Level Contributions, December Contribution Holiday, Optional Withdrawal Benefit, Option to Cap Contributions. We have also made provisions to suspend members contributions, who are in hardship and or incarcerated.

together with a contended failure by Mr Jones to *"list any consultations with Aboriginal communities until June 2018"*.

86 *Thirdly*, a Cultural Audit Report from MURA Connect, commissioned by ACBF Group and dated March 2018, which (ASIC contends) found that: the majority of staff at ACBF were non-Indigenous and that there was *"a lack of cultural understanding and cultural confidence*" amongst a majority of staff; ACBF Group had failed to recruit staff with an understanding of Aboriginal and Torres Strait Islander culture and history and the ability to communicate effectively and sensitively with Aboriginal and Torres Strait Islander people; and there was little evidence that ACBF Group had connections to Aboriginal organisations or communities beyond word-of-mouth networks developed by field representatives.

87 None of this evidence establishes that the ACF Plan did not have the approval of the Aboriginal community.

88 ASIC has pleaded a case of falsity based upon a negative proposition – that the ACF Plan did not have the approval of the Aboriginal community – and it bears the onus of proving that proposition. The absence of evidence of material supporting the proposition that the ACF Plan did have Aboriginal community approval does not establish that such approval did not exist.

89 The evidence of Mr Jones in his second s 19(2) response addresses a question which asks about *consultation* with Aboriginal and Torres Strait Islander communities concerning the *design of products*. It does not establish an absence of approval of the ACF Plan. Further, that evidence is silent as to the position prior to Mr Jones's appointment in December 2017.

90 The MURA Connect report addresses staffing of ACBF. It does not address the question of Aboriginal community approval.

91 ASIC has not directed the Court to any evidence capable of proving the absence of Aboriginal community approval for the ACF Plan. For example, there is no evidence from any person purporting to speak on behalf of the (or a) Aboriginal community on the issue of absence of approval by such community (or communities) of the ACF Plan. Further, the expert evidence of Dr Loban emphasises that the concept of *"Aboriginal community"* has both a physical (location) and a relational dimension.

92 For the above reasons, ASIC has not proven that the ACF Plan did not have Aboriginal community approval and the claim based upon the Aboriginal Approval Representation must fail.

D.5 Aboriginal Benefit Representation

D.5.1 The conduct

93 ASIC alleges that ACBF impliedly represented to Potential Consumers that the ACF Plan was more beneficial to Aboriginal persons than other funeral insurance products generally available at that time.

94 ASIC's submission in support of this allegation is, in essence, that: (1) the marketing material and point of sale documentation conveyed that the ACF Plan was tailored to Aboriginal persons; and (2) this carried with it an implied representation that the ACF Plan was more beneficial to Aboriginal persons than other funeral insurance products generally available at that time.

95 I do not accept this submission.

96 As discussed above, it is clear that an implied representation was made that the ACF Plan was promoted by an Aboriginal owned and managed organisation. I also accept that the message conveyed that the ACF Plan was targeted at, and tailored to, Aboriginal persons. Further, there was an implied representation that the ACF Plan would be beneficial to those who became Plan Holders, in the sense that their position would be better with the ACF Plan than without it.

97 However, it does not follow that there was an implied representation that the ACF Plan was more beneficial to Aboriginal persons than other funeral insurance products generally available

at that time. In particular, no implied representation was made in the nature of a comparison between the ACF Plan and other generally available funeral insurance products.

98 For completeness, I note that in oral submissions, ASIC referred in passing to a media release issued by ACBF on 27 June 2018 which included:

> **ACFP vs Other Funeral Funding Options**
>
> Unlike other funeral funding options, ACFP offers members:
>
> - cover from the date of first payment;
> - choice of funeral director;
> - guaranteed claim payout for any new medical conditions acquired post-application;
> - simplified application process, including reduced paperwork;
> - ability to miss up to three payments in any calendar year and remain covered;
> - refund of all contributions in case of suicide, without administrative charges;
> - cover regardless of employment status; and
> - culturally appropriate communications
>
> (emphasis in underline added)

99 The media release contains an *express* representation that the ACBF Plan was more beneficial to ACF Plan Holders than *"other funeral funding options"* in respect of eight identified matters. However, this does not establish the Benefit Representation, because the pleaded case involves an *implied* representation arising from the offering, promotion and sale of the ACF Plan to Potential Consumers in the manner referred to in paragraphs 10 and 16 to 22 of the Further Amended Statement of Claim, (none of which involved communications through media releases); and not *express* communications via a media release. Further the case as pleaded (and the expert evidence of Ms Baxter) does not address the above eight matters.

100 ASIC called in aid of its submission some of the lay consumer evidence. However, that evidence does not suggest that those consumers perceived that the ACF Plan was more beneficial to them than other funeral insurance products generally available, save, perhaps, to the limited extent that Ms Edwards stated: *"I thought they would be cheaper than other funeral insurance"*. Otherwise, the evidence of the consumer witnesses was general and to the effect that they placed greater trust in and preferred Aboriginal organisations.

101 ASIC also relied upon the following opinion of Dr Loban:

> An Aboriginal person would assume that the ACF Plan was safe and beneficial for them as an Aboriginal person because they would assume that it would operate in a manner consistent with Aboriginal cultural values and norms which prioritise relationships in the Aboriginal community – this is particularly so given the nature of the product was a funeral plan.

102 That opinion self-evidently does not provide support for the proposition that the Benefit Representation was made.

D.5.2 Was the Aboriginal Benefit Representation conduct that contravened s 12DA or s 12DB(1)(a) or (e) of the ASIC Act?

103 For the reasons set out above, I am not persuaded that the Aboriginal Benefit Representation was made. Thus, it is unnecessary to consider whether the alleged Aboriginal Benefit Representation contravened s 12DA or s 12DB(1)(a) or (e) of the ASIC Act.

D.6 Payout representation

D.6.1 Conduct

D.6.1.1 Section 12DA

104 ASIC contends that ACBF represented to Potential Consumers that, upon the death of a nominee, a Plan Holder would receive a payout in the form of a lump sum of the Chosen Benefit Amount.

105 That such a representation was made is readily apparent from the admissions concerning the marketing material, the point of sale documentation and certificates described at [C.3.8] above and is confirmed by the documents tendered by ASIC.

106 That representation was conveyed notwithstanding that:

(1) the ACF Plan Application Form included immediately under the text set out at [28(3)] above:

> **Limitations and Exclusions to Payouts**
>
> The availability of payouts is subject to the limitations and exclusions set out in clause 10 of the Rules.

and

(2) the ACF Plan Rules contained cl 10.6, which provided:

> ACBF will only pay a Payout by reason of the death of a Nominee and for the sole purpose of meeting the whole or part of the expenses of and incidental to that Nominee's funeral and burial or cremation

given: (a) the generality of the text at (1) above; and (b) the fact that cl 10.6 appeared only in the ACF Plan Rules and formed part of what might be considered as the *"fine print"*, when considered against the statements set out at [C.3.8] above, which appeared more prominently in the marketing materials and point of sale documentation.

107 Again, evidence from consumers is not necessary or sufficient, but it does provide some support as to the nature of the representation conveyed. In this regard: Mr Ayoub stated that he believed when he signed up that his next of kin would receive his full Chosen Benefit Amount upon his death; and Ms Edwards stated that she believed when she signed up that, by virtue of her choosing a benefit amount of $6,000, this sum would be available for her next of kin to spend on her funeral and *"if they spent less than that they could keep any leftover money"*.

D.6.1.2 Section 12DB(1)(a) and (e)

108 Section 12DB(1)(a) relevantly concerned representations that the ACF Plan was of a particular standard, quality or value; and s 12DB(1)(e) relevantly concerned representations that the ACF Plan had particular benefits. For the reasons set out above with respect to s 12DA, I am satisfied that the Payout Representation was a representation that the ACF Plan had a particular quality or value (s 12DB(1)(a)) and that the ACF Plan had particular benefits (s 12DB(1)(e)).

D.6.2 Was the Payout Representation conduct that contravened s 12DA(1) or s 12DB(1)(a) or (e) of the ASIC Act?

109 ASIC contended that the Payout Representation was misleading or deceptive or likely to mislead or deceive because it was false; and that it was false because ACBF paid only funeral and related expenses that had in fact been incurred. ASIC also contended that the Payout Representation was a representation as to a future matter, within the meaning of s 12BB of the ASIC Act; and that ACBF lacked reasonable grounds for making the Payout Representation.

110 I am satisfied that the Payout Representation was misleading for the purposes of ss 12DA and 12DB. It was a representation as to a future matter, namely that the Chosen Benefit Amount would be paid upon the death of the Nominee. The effect of s 12BB of the ASIC Act is that absent evidence of ACBF having had reasonable grounds for making the Payout Representation, the Payout Representation is taken to have been misleading. No evidence of

reasonable grounds for the making of the Payout Representation is before the Court. Moreover, it is difficult to envisage what reasonable grounds ACBF could have had in making the Payout Representation when cl 10.6 of the ACF Plan Rules was directly inconsistent with that representation. Further, there is some evidence before the Court (in the form of a spread sheet) that during the relevant period, a number of claims were paid in sums less than the Chosen Benefit Amount.

E. IS ACBF GROUP LIABLE TO A PENALTY FOR ACBF'S CONTRAVENTIONS OF SECTION 12DB OF THE ASIC ACT WITH RESPECT TO THE PAYOUT REPRESENTATION?

E.1 Introduction

111 For the reasons set out above, the only contraventions by ACBF that have been established relate to the Payout Representation. Thus, this section of these Reasons for Judgment focuses upon the exposure of ACBF Group to penalties for ACBF's contraventions relating to that representation.

E.2 Legal framework

112 During the relevant period, s 12GBA(1) of the ASIC Act provided in so far as is presently relevant:

> If the Court is satisfied that a person:
>
> (a) has contravened a provision of Subdivision C, D or GC (other than section 12DA);
>
> or
>
> ...
>
> (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of a such a provision,
>
> the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.

113 The effect of s 12GBA(1)(e) (read with (a)) is that a person who has been in any way, directly or indirectly, knowingly concerned in, or party to a contravention of Sub-division C, D or GC (other than s 12DA) may be liable to pay a pecuniary penalty. Section 12DB is a provision within **Sub-division D**.

114 In the present case, ASIC alleges that ACBF Group was knowingly concerned in or party to ACBF's contraventions of s 12DB concerning the Payout Representation. To succeed, ASIC must satisfy the Court, on the balance of probabilities, that ACBF Group was knowingly

concerned in, or party to, those contraventions. In considering whether it is so satisfied, the Court is required to take into account, amongst other things, the nature of the cause of action and the gravity of the matters alleged: s 140 *Evidence Act 1995* (Cth). Taking those matters into account, the Court must feel an actual persuasion of the occurrence or existence of the material facts constituting the case made by ASIC. As Dixon J (as his Honour then was) explained in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361 to 362:

> … The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be provided. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

115 In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170, Mason CJ, Brennan, Deane and Gaudron JJ explained at 170 to 171:

> The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commented in *Briginshaw v Briginshaw*:
>
> > The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved …

116 In the present case, the nature of the cause of action and the gravity of what is alleged are reflected by the observations of the members of the High Court of Australia in ***Yorke*** *v Lucas* [1985] HCA 65; (1985) 158 CLR 661, to the effect that an analogous provision, namely s 75B

of the ***Trade Practices Act*** *1974* (Cth), imported requirements of the criminal law (see in particular 667 to 670 (Mason ACJ, Wilson, Deane and Dawson JJ) and 673 to 674 (Brennan J). In *Productivity Partners Pty Ltd (trading as Captain Cook College) v Australian Competition and Consumer Commission* [2023] FCAFC 54, Wigney and O'Bryan JJ explained at [300]:

> As was authoritatively determined by the High Court in *Yorke v Lucas*, accessorial liability for civil wrongs in the (then named) Trade Practices Act imports the requirements of the criminal law (at 669 per Mason ACJ, Wilson, Deane and Dawson JJ and at 673 per Brennan J). With reference to the principles established in *Giorgianni v The Queen* (1985) 156 CLR 473 (***Giorgianni***), the plurality concluded that accessorial liability required intentional participation in the wrongful conduct, and that to form the requisite intent, the accessory "must have knowledge of the essential matters which go to make up the offence whether or not [the accessory] knows that those matters amount to a crime" (at 667). Brennan J stated the same principle as requiring "knowledge of the essential facts which constitute the offence" (at 674). In the context of the prohibition of misleading and deceptive conduct, the plurality concluded that a person cannot be knowingly concerned in a contravention unless the person has knowledge of the essential facts constituting the contravention (at 670). Brennan J expressed the requirement as "knowledge of the acts constituting the contravention and of the circumstances which give those acts the character which s. 52 defines, namely, 'misleading or deceptive or ... likely to mislead or deceive'" (at 677).
> ...
>
> (emphasis in original)

117 This is not to say that direct evidence is required in order to establish ASIC's case. It is open to the Court to draw inferences from the available evidence: see *Australian Securities and Investments Commissions v Wilson (No 3)* [2023] FCA 1009 at [108] to [112] (Jackson J) and the authorities there cited.

118 Section 75B of the Trade Practices Act, which was under consideration in *Yorke*, provided that a reference to a person *"involved"* in a contravention was to be read as a person who (relevantly) *"has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention"*. At 669 to 670, Mason ACJ, Wilson, Deane and Dawson JJ explained:

> So far we have dealt only with par. (a) of s. 75B which refers to involvement of persons who are accessories. The appellants also rely upon par. (c) of the same section which extends the definition of a person involved to a person who has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention. **There can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention**. It cannot, therefore, be suggested that Lucas falls within the first limb of par. (c). It might be thought possible to construe the express requirement of knowledge as extending not only to being "concerned in" but also to being "party to" a contravention. However, there are two reasons, in our view, why it is inappropriate to do so.

> First, the natural construction of par. (c) is to regard the word "knowingly" as qualifying only the words "concerned in" which immediately follow it. The punctuation strongly suggests such a construction. Secondly, the word "knowingly" would be an un-necessary qualification of the words "party to". **In the context of the paragraph, a person could only properly be said to be "party to" a "contravention" if his participation was in the context of knowledge of the essential facts constituting the particular contravention in question**. Whilst it is not a contradiction in terms to speak of a person being "party to" something of which he is unaware, some indication is needed to convey such a meaning. There is nothing in the paragraph itself which would point to any conclusion other than that the words "party to" are used to refer to a participant in the nature of an accessory. Moreover, the wider context of the whole section leads to the same conclusion. We have already indicated why par. (a) requires knowledge. Paragraph (b), which speaks of inducing a contravention by threats, promises or otherwise, and par. (d), which speaks of conspiring with others to effect a contravention, both clearly require intent based upon knowledge and there is force, we think, in the observation made in the judgment of the Full Court below (20) that there is-
>
> > ... no reason why Parliament would have intended that a section which renders natural persons liable for a contravention by a corporation should require some mental element or absence of innocence in every case to which it refers except one which itself requires in its first limb that the person was 'knowingly' concerned in the contravention.
>
> **In our view, the proper construction of par. (c) requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention**.
>
> (emphasis added)

119 In *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College) (ACN 085 570 547) (No 3)* [2021] FCA 737; (2021) 154 ACSR 472 at 497 to 498 ([98] to [102]), Stewart J set out the following conspectus of principles concerning proof that a person was knowingly concerned in, or party to, a contravention, which I gratefully adopt:

> [98] There are two requirements that must be established before it can be concluded that a person was knowingly concerned in, or party to, a contravention.
>
> [99] First, the person must have had actual knowledge of all the essential facts constituting the contravention: *Yorke v Lucas* at CLR 669–70; ALR 312. That is not imputed or constructive knowledge but, rather, actual knowledge: *Young Investments Group Pty Ltd v Mann* (2012) 293 ALR 537; 91 ACSR 89; [2012] FCAFC 107 at [11] per Emmett, Bennett and McKerracher JJ. However, it is not necessary that the person knew that those matters constituted a contravention: *Rafferty v Madgwicks* (2012) 203 FCR 1; 287 ALR 437; [2012] FCAFC 37 at [254] per Kenny, Stone and Logan JJ. The requisite actual knowledge must be present at the time of the contravention; a later acquisition of knowledge of the essential matters is not sufficient: *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2)* (2005) 53 ACSR 305; [2005] NSWSC 267 at [113]–[118] per Palmer J; *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181; 325 ALR 414; 105 ACSR 116; [2015] FCA 342

(*ActiveSuper*) at [405] per White J.

[100] Actual knowledge may be inferred from "a combination of suspicious circumstances and a failure to make an inquiry"— which is sometimes referred to as "wilful blindness", but "knowledge must be the only rational inference available": *Pereira v Director of Public Prosecutions* (1988) 82 ALR 217 at 220 per Mason CJ, Dean, Dawson, Toohey and Gaudron JJ. It has also been said that "actual knowledge may be inferred from ignorance dishonestly and deliberately maintained or wilful blindness": *Lloyd v Belconnen Lakeview Pty Ltd* (2019) 377 ALR 234; 142 ACSR 445; [2019] FCA 2177 at [321] per Lee J.

[101] In a case such as the present which, relevantly, involves a case asserting knowing concern in unconscionable conduct, it is necessary to show that the person said to be knowingly concerned knew of all the circumstances by which the conduct is ultimately found to have been unconscionable in contravention of the statutory norm: *Stefanovski v Digital Central Australia (Assets) Pty Ltd* (2018) 368 ALR 607; [2018] FCAFC 31 at [71] per McKerracher, Robertson and Derrington JJ.

[102] Secondly, the person must have engaged in conduct (by act or omission) which can properly be said to "implicate" them in the contravention or which shows a "practical connection" between them and the contravention: *ActiveSuper* at [407]–[410]; *Ashbury v Reid* [1961] WAR 49 at 51; *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299 at 357 per Wilcox J. It is not necessary that the person physically do anything to further the contravention; it is sufficient if the person, by what they said and agreed to do, in fact became associated with and thus involved, in the relevant sense, in the conduct constituting the contravention: *R v Tannous* (1987) 10 NSWLR 303 at 308 per Lee J, Street CJ and Finlay J agreeing; *Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) 154 IR 228; [2006] WASC 144 at [29] per Le Miere J; *Qantas Airways Ltd v Transport Workers' Union of Australia* (2011) 280 ALR 503; [2011] FCA 470 at [324]–[325] per Moore J; *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833 at [118]–[119] per Flick J; *Termite Resources NL (in liq) v Meadows* (2019) 370 ALR 191; 135 ACSR 45; [2019] FCA 354 at [717] per White J.

E.3 Conduct

120 As noted above, ASIC seeks to prove that ACBF Group was knowingly involved in or party to ACBF's contraventions by proving that during the relevant period ACBF was a wholly owned subsidiary of ACBF Group; the controlling mind directors, in their capacity as directors of ACBF Group, made decisions on behalf of ACBF; and the controlling mind directors knew of: (a) the making of the Payout Representation; and (b) the falsity of that representation.

121 It is convenient to address the issue of whether ACBF Group was knowingly involved in or party to ACBF's contraventions by reference to the following questions:

(1) did the controlling mind directors have knowledge of: (a) the Payout Representation; and (b) the facts which rendered that representation false?; and

(2) if so, should that knowledge be attributed to ACBF Group?

E.3.1 Did the controlling mind directors have knowledge of the making of the Payout Representation and the facts which rendered that representation false?

122 ASIC seeks to prove that the controlling mind directors knew of the making of each of the representations and of the facts rendering those representations false through answers provided by Mr Jones in response to the exercise by ASIC of its powers under s 19 of the ASIC Act; a series of documents; and some paragraphs from Mr Laterre's affidavit.

123 ASIC's submissions addressed the requisite knowledge of the controlling mind directors as to *all* of the representations together, without separately identifying the facts relevant to the Payout Representation. Thus it is necessary to address the evidence relied upon by ASIC to prove the requisite knowledge with respect to all of the representations. That evidence, arranged chronologically, comprises:

(1) a letter from Legal Aid New South Wales addressed to Ms McCallie of ACBF and dated 3 March 2015 which claimed that ACBF had made misrepresentations to a Ms King, including that ACBF was *"an Aboriginal organisation"* (but not including any claim relating to the Payout Representation);

(2) a very similar letter from Legal Aid New South Wales to Ms McCallie of ACBF dated 28 April 2015 concerning representations made to a Ms Donovan;

(3) correspondence in early July 2015 between lawyers acting for ACBF and Legal Aid New South Wales concerning disputes raised by Legal Aid New South Wales, which was sent to Ms McCallie and Mr Wilson of ACBF;

(4) an email from Mr Wilson to Ms McCallie dated 14 December 2015 titled *"Vanuatu meeting"*, together with an attachment titled *"ACBF Vanuatu Meeting Follow-Up"*;

(5) a letter from Legal Aid New South Wales to Ms McCallie dated 18 December 2015 concerning alleged misrepresentations, including that ACBF was an *"Aboriginal organisation"*, which Ms McCallie passed onto Mr Wilson;

(6) an email from Mr Wilson to Mr Pattenden (and copied to Mr Hughes, Mr Nicholas Dodds and Ms McCallie) dated 5 January 2017 providing a link to a proposed television advertisement for their comments;

(7) a file note titled *"File Note Admin Staff Meeting"* held on Tuesday, 8 May (which I infer was 8 May 2018). It appears to record the presence of Mr Jones and *"Geoff"* who I infer was Mr Clayton;

(8) notes of an *"Employee Staff Meeting Update"* held at the *"Sales Centre Office"* on *"23 May"* (which I infer was 23 May 2018). It appears to record the presence of Mr Jones but no other director, together with 21 staff members (identified only by their first names);

(9) minutes titled *"Staff meeting 04.06.2018"* at which Mr Jones was present;

(10) an email from Mr Graham (Marketing Strategist, Flagship Digital) to Mr Jones and Ms Court titled *"Meeting Summary"* and dated 20 June 2018;

(11) an email from Mr Simon, *qua* Chief Executive Officer of Mura Connect to Ms Court (and copied to (*inter alia*), Mr Jones) titled *"As discussed Hold on uniforms"* and dated 11 July 2018;

(12) emails between Mr Graham of Flagship Digital and Ms Court and Mr Jones dated 28 August 2018;

(13) an email exchange between Mr Simon and Mr Connor Court titled *"Artwork Request"* in early September 2018, to which Mr Jones was copied;

(14) an email from Mr Connor Court of ACBF to Ms Court and Mr Jones dated 25 September 2018, forwarding an email from Mr Steven Caldwell of Caldwell Entertainment Pty Ltd titled *"Rebuttal Video Changes + Informative Video"* which itself attaches other emails;

(15) an email dated 2 October 2018 from Mr Clayton to Mr Pattenden, Mr Jones and others attaching an extract from the **Interim Report** of the **Royal Commission** into Misconduct in the Banking, Superannuation and Financial Services Industry *"regarding ACBF Group"* and indicating that submissions in response were due on 26 October 2018;

(16) an exchange of emails between Mr Graham of Flagship Digital and Ms Court titled *"Summary and next steps"* dated 8 and 9 October 2018 and which were copied to various people, including Mr Jones;

(17) a chain of emails titled *"ACBF"* and dated from 18 October 2018 to 24 October 2018 involving Mr Jones, Mr Pattenden, Mr Clayton and others;

(18) an email from Mr Clayton to a Mr Adrian Edwards and Mr Jones titled *"Ron's email"* dated 23 October 2018;

(19) an email from a Grainne Cooper of ACBF to Mr Clayton, Ms Court and Mr Jones titled *"Complaint – follow on from"* and dated 1 November 2018 describing a telephone call received by ACBF's customer service team that day making complaints including that *"you're not an Aboriginal company"*;

(20) the following answer given by Mr Jones in the first Jones s 19(2) response:

> 22. **Who creates Youpla's advertisements and marketing material used in the Relevant Period?**
>
> Since December 2017 the Board of Directors approve marketing as a group (if any). Prior to December 2017 the company employed direct marketers. This was stopped prior to the Royal Commission and has not recommenced.

(21) the following extracts from the Jones transcript:

(a)

> Q: Okay. Since you became director in 2017, who's been in charge of making marketing decisions?
>
> A. Ultimately it is the board. I initially – to my ignorance, I initially started working towards that. Obviously with the Royal Commission, a complete and utter stop and, obviously, the revelation of the Royal Commission and some of the suggestions, I wanted to make sure that we were squeaky clean, moving forwards, by way of marketing. In March or April we had a compliance …
>
> ...

(b)

> Q. Thank you. And at the time of your joining, was it your understanding that Ron Pattenden had control of the day-to-day management of ACBF?
>
> A. It became evident to me that everything went through him, yes.
>
> Q. Okay. Were there other managers involved in the day-to-day functioning of the company at the time that you joined?
>
> A. Yes, there was.
>
> Q. Okay, Who were those managers?
>
> A. Michael Wilson.
>
> Q. Yes. Were there others?

A. At that stage there was Michael Wilson, there was Sandy Thurly, that handled the sales aspect, and then everything else went through Ron, John Law and the corporate solicitor at the time, which was David Hughes from Small Myers Hughes.

Q. And what was Michael Wilson responsible for?

A. Everything, basically.

Q. Okay. But in terms of day-to-day management, you've indicated that the day-to-day decision went through Ron Pattenden?

A. Yes, it did.

Q. So was Michael Wilson then also responsible for that?

A. Sorry? Sorry, say that again.

Q. So what were Michael Wilson's duties with the company at the time that you joined?

A. He was a director, he ran the accounts and he made all the management decisions.

…

(22) the following answers given by Mr Jones in the second Jones s 19(2) response:

3. In the period prior to becoming CEO

...

c. Who did you report to

… At all times I was required to report to Ron Pattenden and David Hughes.

…

7. Prior to you becoming CEO, what was Ron Pattenden's role and what matters was he responsible for?

Director/Shareholder, however it was clear he was in charge of making directives.

…

9. Was Ron Pattenden involved in making decisions about product documentation, advertisements, logos?

Prior to my joining, I've been told that Ron Pattenden was in charge of making the decisions about the product documentation, advertising and logos.

10. Was Ron Pattenden involved in making decisions about business expenditure?

All large expenditure was run by Ron Pattenden.

(23) the following evidence from Mr Laterre in his affidavit:

> 18. The Offer of Employment is signed by Ken Alchin but he left ACBF in or around 2014. After he left, I understood that Kerrie McCallie and Michael Wilson were ACBF's directors and that, at least until Bryn Jones and Geoff Clayton took over the running of ACBF (which from memory occurred in 2017), the ACBF business was owned by a man named Ron Pattenden. I understood from my conversations with Kerrie and Michael that they needed to run all management decisions past Ron, including on salaries and promotions, decisions about company cars and changes in policies or sales strategies.
>
> …
>
> 21. On 14 February 2014 I received a letter from ACBF which described changes to the terms of my sales bonus and is at tab 4. The last paragraph of the letter stated:
>
> > We expect to offer you the position of State field manager of Queensland under revised employment conditions when Ron Pattenden is next in Australia, hopefully within the foreseeable future.
>
> 22. After receiving this letter, I asked Kerrie McCallie about this promotion a number of times. Each time Kerrie indicated to me that it was up to Ron Pattenden to make the final decision next time he was in Australia. In or about 2016, I spoke directly to Ron on the phone about being promoted to a management position within the sales team but I understood from Ron that I was the most successful field representative working for ACBF and that he wanted to keep in the field rather than giving me a management role which would take me out of the field.

124 I am not persuaded by the evidence relied upon by ASIC that the controlling mind directors had knowledge of the Payout Representation, or of its falsity. This is so, for the following reasons.

125 *First*, there is no evidence that Mr Jones – who was one of the controlling mind directors – had such knowledge, despite ASIC's use of its s 19 ASIC Act powers to obtain evidence from him (and its tender of parts of the evidence obtained from the exercise of that power). ASIC, in its submissions, referred to answer 14 in the first Jones s 19(2) response, which was in the following terms:

> **14. In the Relevant Period, what documentation or evidence does ACBF require before reimbursing funeral expenses? Are payments for expenses paid directly to consumers or to service providers?**
>
> In almost all cases the expenses are paid to the service providers. However, upon a valid Death Certificate being provided, any receipts of payments made towards funeral related expenses will be reimbursed and where a receipt of invoice can not be provided, individuals are able to sign a statutory declaration that the expenses are legitimate funeral related expenses. Funeral Directors

> accounts are paid directly first in most occasions.

126 However, this is not evidence that Mr Jones had knowledge of the Payout Representation, or of the facts which rendered the Payout Representation false.

127 *Secondly*, ASIC's submissions, and the evidence cited in support thereof are set at a high level of abstraction, as is illustrated by the following submission:

> In circumstances where the directors of ACBF Group were responsible for decisions as to the content of the materials that ACBF used to offer, promote and sell the ACF Plan, and the methods it used to do so, they were also clearly aware of such content and such steps. It follows that they knew the facts which establish the making of the Representations, and that the Representations were false and misleading. In turn, ACBF Group is fixed with this knowledge.

128 The evidence relied upon also exists at a level of abstraction and does not descend into detail. For example:

(1) there is evidence that since December 2017 the board of directors of ACBF Group has approved marketing – *"if any"* – as a group (see answer 22 to the first Jones s 19(2) response at [123(20)] above). This is not evidence that a particular item of marketing was approved by the ACBF Group directors, much less an item containing the Payout Representation;

(2) there is evidence of communications between employees and directors of ACBF or ACBF Group, but none of this relates directly to the Payout Representation; and

(3) Mr Jones's evidence is that: *"everything went through"* Mr Pattenden; Mr Pattenden was in charge of *"making directives"*; he had *"been told that Ron Pattenden was in charge of making the decisions about product documentation, advertising and logos"*; *"all large expenditure was run by"* by Mr Pattenden; and at the time Mr Jones joined *"the company"* Mr Wilson "*ran the accounts and made all the management decisions"*. However, there is no evidence that matters specific to the Payout Representation were the subject of management decisions made by Mr Wilson, or run through Mr Pattenden.

129 *Thirdly*, and in particular in view of the nature and gravity of the cause of action alleged, it is impermissible to reason from general statements of the kind set out in the preceding paragraphs to a particular finding that any of the controlling mind directors had knowledge of the Payout Representation and moreover the facts giving rise to its falsity. I do not accept ASIC's submission that I should reason in such a manner.

130 *Finally*, the extract from the Interim Report (see [123(15)] above) contains:

> By contrast, I consider that there are a number of features of ACBF's products that indicate that those products are neither tailored to meet the needs of Aboriginal and Torres Strait Islander people nor beneficial for them.
>
> ...
>
> Fifth, the ACBF Plan is an 'expenses only' policy. ACBF did not dispute in its submissions that this is not sufficiently clear from some of the ACBF's promotional marketing material.

131 These views do not establish that the controlling mind directors, had they read (or be taken to have read) the covering email and the extract from the Interim Report, had knowledge of the making, or the falsity, of the Payout Representation. I note that the final sentence of the above-quoted passage contained a footnoted reference to a transcript of evidence apparently given by Mr Jones to the Royal Commission, but this transcript was not in evidence before the Court.

132 For the above reasons, I am not satisfied that the controlling mind directors had the requisite knowledge in respect of ACBF's contravention of s 12DB of the ASIC Act concerning the Payout Representation.

E.3.2 Attribution

133 In view of my findings that ASIC has not established that the controlling mind directors had the requisite knowledge concerning the Payout Representation, it is unnecessary to consider whether any such knowledge of those directors is attributable to ACBF Group.

F. RELIEF

134 I turn now to consider the question of relief.

F.1 Contraventions proven

135 For the reasons set out above, I am satisfied that ACBF contravened ss 12DA and 12DB with respect to the Payout Representation. I am not satisfied that the other alleged contraventions have been proven.

136 The reasons which follow deal with the question of relief with respect to the contraventions with respect to the Payout Representation.

F.2 Declarations

137 The Court has power under s 21 of the *Federal Court of Australia Act 1976* (Cth), to grant the declaratory relief sought by ASIC. The question in respect of which the declaration is sought

is real, not hypothetical or theoretical; ASIC has a real interest in raising the issue; and there is a proper contradictor: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 at 87 [92] (Dowsett, Greenwood and Wigney JJ) ***(ABCC v CFMEU)***. The fact that ACBF is in liquidation and chose not to appear does not mean that there is no proper contradictor. It has an interest sufficient to oppose the declaration, which is sufficient to make it a proper contradictor: see *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56; (2012) 201 FCR 378 at 387 [30] (Greenwood, Logan and Yates JJ).

138 I am satisfied that it is appropriate to make the declarations sought with respect to ACBF's contraventions of the ASIC Act concerning the Payout Representation. As the Full Court noted in *ABCC v CFMEU* at 87 [93], *"declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions"*. This is such a case.

F.3 Penalty

139 ASIC seeks a penalty of $800,000 for the contraventions arising out of the Payout Representation.

F.3.1 Legal framework

140 By reason of s 12GBA of the ASIC Act (as it was during the relevant period) the Court may order a person to pay a pecuniary penalty that the Court considers appropriate in respect of each relevant act or omission. In determining the appropriate penalty, the Court is required by s 12GBA(2) of the ASIC Act to have regard to all relevant matters and in particular: the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; the circumstances in which the act or omission took place; and whether the contravener has previously been found by the Court in proceedings under Sub-division D to have engaged in similar conduct.

141 The approach to be taken in deciding what penalty is appropriate was explained by the High Court of Australia in *Australian Building and Construction Commissioner v* ***Pattinson*** [2022] HCA 13; (2022) 274 CLR 450. In *Pattinson*, the plurality (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) held that civil penalties, in contrast to punishments imposed by the

criminal justice system, are imposed primarily, if not solely, for the purpose of deterrence: *Pattinson* at 457 ([9] to [10]) and 459 to 460 ([15] to [17]). The penalty must be sufficiently high that it is not considered to be an acceptable cost of doing business, but should not exceed what is necessary to achieve the object of deterrence: *Pattinson* at 457 [10], 460 [17] and 475 [66].

F.3.2 Section 12GBA(2)(a) – the nature and extent of the acts or omissions and the loss and damage suffered

142 The first mandatory consideration is the nature and extent of the acts or omissions and the loss and damage suffered.

143 ACBF's contraventions involved the propounding of a misleading representation made to Potential Consumers in marketing materials, in point of sale documentation and by ACBF's field representatives, over a period of approximately four years. There are likely to have been many thousands, perhaps tens of thousands, of contraventions and it is not possible to know the true number. A reasonable estimate of the *minimum* number of such representations may be derived from the number of ACF Plans sold during the relevant period, namely 5,106.

144 Whilst the number of consumers who became ACF Plan Holders by reason of the Payout Representation is unknown and unknowable on the evidence, it is reasonable to infer that a significant number of the 5,106 new Plan Holders did so in reliance upon that representation; and that they have paid premiums that they would not have paid if they had known the true position. There is also the loss suffered by Plan Holders who, while ACBF was operating, received a Payout of an amount less than their Chosen Benefit Amount.

145 On each occasion that the Payout Representation was made, ACBF contravened both s 12DB(1)(a) and s 12DB(1)(e).

F.3.3 Section 12GBA(2)(b) - the circumstances in which the acts or omissions took place

146 The second mandatory consideration is the circumstances in which the acts or omissions took place.

147 The persons to whom the representations were made were mostly Aboriginal persons. As noted at [C.4] above, they were likely to: consider that funerals, funeral rites and other rituals associated with death have important Aboriginal cultural significance; attend, or have cultural obligations to attend, funerals more often than the general Australian population; pay, or have cultural obligations to pay, for the funerals of close family members and related expenses,

including travel and accommodation for wider family members and other Aboriginal community members from the Aboriginal community of the deceased; and incur or be liable to incur significant costs in meeting those cultural obligations. These propositions were confirmed by the expert evidence of Dr Loban and Emeritus Professor Altman; and by the lay evidence. As to the latter, Ms Williams's evidence was that *"Sorry Business is very important to Aboriginal people. It is important for the community to pay their respects to someone after they pass away and so it is important for the community to attend the funeral"*. Similarly, Ms Weatherall stated that *"funerals can be hard for Aboriginal people. We are a close-knit community and Sorry Business is very important in our culture. It is important for our families to be together when someone dies but funerals are expensive and hard to pay for"*.

148 As such, the Payout Representation was made to a portion of the population likely to be particularly susceptible to acting upon it. Further to the extent that consumers were induced to act upon the Payout Representation and enter into the ACF Plan, the nature of that product was such that those consumers would likely make payments to ACBF for a number of years (and perhaps decades).

F.3.4 Section 12GBA(2)(c) – whether ACBF has previously been found by the Court in proceedings under Sub-division D to have engaged in similar conduct

149 The third mandatory consideration is whether ACBF has previously been found by the Court in proceedings under Sub-division D to have engaged in similar conduct.

150 On 24 September 1999, Justice O'Loughlin made orders in proceeding D12 of 1999 in this Court, in which ASIC was the applicant and Aboriginal Community Benefit Fund, Aboriginal Community Benefit Fund (No 2), ACBF Group Holdings Management No 1 Pty Ltd, ACBF Group Holdings Management No 2 Pty Ltd, ACBF Group Holdings Promotions Pty Ltd and ACBF Group were the respondents. It is apparent from those orders that the proceeding related to alleged contraventions of Sub-division D. However, the orders do not meet the description in s 12GBA(2)(c) because: ACBF was not a party to the orders; and the orders do not record a finding by the Court that any of the respondents had engaged in similar (i.e. misleading or deceptive) conduct. Rather, the orders (which include various undertakings given by the respondents) appear to reflect a resolution reached between ASIC and the respondents. Whilst the orders are nevertheless a relevant matter to be taken into account given that ACBF Group, ACBF's parent company, was a respondent and allegations of misleading or deceptive conduct were involved, this is a matter of lesser weight than it would be if specific deterrence were a

live issue. As ASIC accepted, the question of specific deterrence is moot when ACBF is in liquidation.

F.3.5 Other relevant matters

151 I turn now to consider other relevant matters.

F.3.5.1 Maximum penalty

152 In determining an appropriate penalty, the Court should have regard to the prescribed statutory maximum penalty: *Pattinson* at 472 ([53] to [55]); *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ). In *Australian Competition and Consumer Commission v* ***Reckitt*** *Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25, the Full Court (Jagot, Yates and Bromwich JJ) explained at 62 ([154] to [156]):

> 154 In considering the sufficiency of a proposed civil penalty, regard must ordinarily be had to the maximum penalty. In *Markarian*, a criminal sentencing context, it was observed at [31] that:
>
> > careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.
>
> 155 The reasoning in Markarian about the need to have regard to the maximum penalty when considering the quantum of a penalty has been accepted to apply to civil penalties in numerous decisions of this Court both at first instance and on appeal (*Director of Consumer Affairs, Victoria v Alpha Flight Services Pty Ltd* [2015] FCAFC 118 at [43]; *Australian Competition and Consumer Commission v BAJV Pty Ltd* [2014] FCAFC 52; (2014) ATPR 42-470 at [50]-[52]; *Setka v Gregor (No 2)* [2011] FCAFC 90; (2011) 195 FCR 203 at [46]; *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29; (2011) 202 IR 467 at [28]-[29]). As *Markarian* makes clear, the maximum penalty, while important, is but one yardstick that ordinarily must be applied.
>
> 156 Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed.

153 The maximum penalty is 10,000 penalty units, for each relevant act or omission: s 12GBA(3) of the ASIC Act. During the relevant period a penalty unit was $170 (to 30 July 2015); then $180 to 30 June 2017; and thereafter $210. Thus, the maximum penalty for each act or omission is variously $1,700,000, $1,800,000 and $2,100,000.

154 In the present case, as noted above, there are likely to have been many thousands, perhaps tens of thousands, of contraventions. In these circumstances, the appropriate range of penalty is better assessed by reference to other factors: *Reckitt* at 62 [157]; *Australian Consumer and Competition Commission v* ***Coles*** *Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at 546 [18] (Allsop CJ).

F.3.5.2 The status of ACBF as a company in liquidation

155 The fact that ACBF is in liquidation is not of itself an impediment to the making of a pecuniary penalty order. Such an order may in an appropriate case reflect the Court's disapproval of the contraventions and of the seriousness with which the contraventions are regarded, for the purpose of achieving general deterrence: *Australian Competition and Consumer Commission v SIP Australia Pty Limited* [2003] FCA 336; (2003) ATPR 41-937 at [59] (Goldberg J); *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513 at 519 to 520 ([19] to [21] per Moore, Dowsett and Greenwood JJ); *Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 7)* [2016] FCA 484 at [20] to [28] (Yates J). The present is a case in which it is appropriate to impose a penalty, notwithstanding that it will likely not be paid as ACBF is in liquidation, for the purpose of deterring others minded to engage in similar contraventions.

F.3.5.3 Profitability of ACBF during the relevant period

156 The evidence records that ACBF earned significant revenue and profits from the ACBF Plan during the relevant period. The evidence does not allow an assessment of the proportion of those gains attributable to the Payout Representation.

F.3.5.4 Deliberateness of the conduct

157 ASIC submitted that the making of the Payout Representation was deliberate and callous. However, there is insufficient evidence from which to draw such an inference.

F.3.5.5 Consumer complaints

158 The Court has not been directed to any evidence of consumer complaints concerning the Payout Representation (as opposed to the other representations).

F.3.6 Tools of analysis

F.3.6.1 Course of conduct

159 As the number of contraventions is large but they arise, as ASIC submitted, out of the same course of conduct – the act (or omission) of misrepresenting to Potential Consumers that the Chosen Benefit Amount would be paid upon the death of the Nominee – it is appropriate to use the course of conduct principle as a means of analysis and to reduce the risk of punishing ACBF more than once for what is in essence the same conduct: *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243 at 296 [234] (Allsop CJ, Middleton and Robertson JJ); *Australian Competition and Consumer Commission v* ***Employsure*** *Pty Ltd* [2023] FCAFC 5; (2023) 407 ALR 302 at 314 [51] (Rares, Stewart and Abraham JJ). As Derrington J noted in *Australian Competition and Consumer Commission v Lactalis Australia Pty Ltd (No 2)* [2023] FCA 839 at [14], this does not mean that multiple contraventions become one contravention; rather those contraventions are treated as attracting one penalty.

F.3.5.2 Section 12GBA(4) of the ASIC Act

160 As noted above, ACBF is liable for contraventions of both s 12DB(1)(a) and s 12DB(1)(e) in respect of each act or omission by which the Payout Representation was made. However, s 12GBA(4) of the ASIC Act provides that where conduct constitutes a contravention of two or more provisions of (relevantly) Sub-division D, a person is not liable to more than one pecuniary penalty under s 12GBA in respect of the same conduct.

F.3.6.3 Totality

161 It is appropriate to have regard to the totality principle to ensure that the penalty to be imposed does not exceed that which is reasonably necessary for deterrence: *Pattinson* at 469 [45]; *Employsure* at 314 [52].

F.3.7 Conclusion as to penalty

162 In fixing a pecuniary penalty, the Court is required to engage in an *"intuitive or instinctive synthesis"* of all relevant matters: *Reckitt* at 66 [175]; *Employsure* at 312 [42]. The Court must

exercise its discretion, weighing together all relevant factors, rather than engage in a sequential, mathematical process. Taking all of the above matters into account I have determined that the penalty required in order to convey an appropriate message of general deterrence without going beyond what is reasonably necessary, is $1,200,000.

G. CONCLUSION

163 For the reasons set out above, it is appropriate to make declarations concerning the contraventions of ss 12DA and 12DB of the ASIC Act by reason of the Payout Representation. An order should be made requiring ACBF to pay a pecuniary penalty in the sum of $1,200,000 for its contraventions of s 12DB of the ASIC Act.

164 ASIC also sought an order that ACBF and ACBF Group pay its costs of the proceeding. In view of the limited success enjoyed by ASIC, I am not presently minded to make the costs order sought by ASIC. Nevertheless, I will provide an opportunity for any party who, after considering these Reasons for Judgment, wishes to seek a costs order to do so.

I certify that the preceding one hundred and sixty-four (164) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Goodman.

Associate: 

Dated: 5 September 2023