FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Insurance Australia Limited, in the matter of Insurance Australia Limited [2023] FCA 724

File number(s):	NSD 1070 of 2021
Judgment of:	**ABRAHAM J**
Date of judgment:	30 June 2023
Catchwords:	**INSURANCE** – proceeding for civil contraventions of *Australian Securities and Investments Commission Act 2001* (Cth) and *Corporations Act 2001* (Cth) – where conduct serious – where failures involved misleading or deceptive conduct or conduct that was likely to mislead or deceive and making false and/or misleading representations – where failures breached obligation to do all things necessary to ensure financial services were provided efficiently, honestly and fairly – where mitigating factors present – where parties agree on proposed declarations and pecuniary penalty – whether appropriate for Court to make declarations of contraventions and to impose civil penalties sought – method and recipients of adverse publicity notice. HELD – Court satisfied that declarations and pecuniary penalty sought appropriate having regard to all relevant matters.
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAA, 12BB, 12DA(1), 12DB(1)(g), 12DB(1)(i), 12GBA(1)-(3), 12GBB(5), s 12GLB(1)-(2) *Corporations Act 2001* (Cth) ss 1101B, 912A(1)(a), 912A(1)(c), 912B *Crimes Act 1914* (Cth) s 4AA *Federal Court of Australia Act 1976* (Cth) ss 21, 43
Cases cited:	*Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* [1997] FCA 450; (1997) 145 ALR 36 *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (t/as Bet365) (No 2)* [2016] FCA 698 *Australian Competition and Consumer Commission v MSY*

Technology Pty Ltd [2012] FCAFC 56; (2012) 201 FCR 378

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

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

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd [2022] FCA 1251; (2022) 164 ACSR 428

Australian Securities and Investments Commission v Colonial First State Investments Ltd [2021] FCA 1268

Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2) [2021] FCA 966

Australian Securities and Investments Commission v Commonwealth Securities Limited [2022] FCA 1253

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

Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd [2014] FCA 1387; (2014) 103 ACSR 453

Australian Securities and Investments Commission v Stone Assets Management Pty Ltd [2012] FCA 630; (2012) 205 FCR 120

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147

ASIC v Pegasus Leveraged Options Group Pty Ltd [2002] NSWSC 310; (2002) 41 ACSR 561

Commonwealth v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; (2015) 258 CLR 482

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

Forster v Jododex Australia Pty Ltd [1972] HCA 61; (1972) 127 CLR 421

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

Mill v The Queen [1988] HCA 70; (1988) 166 CLR 59

Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72; (2004) ATPR 41-993

NW Frozen Foods Pty Ltd v Australian Competition Commission [1996] FCA 1134; (1996) 71 FCR 285

Seven Network Ltd v News Ltd [2009] FCAFC 166; (2009)

	182 FCR 160 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; (2021) 284 FCR 24
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	101
Date of hearing:	11 May 2023
Counsel for the Plaintiff	Mr J R Clarke SC and Ms J Fumberger
Solicitors for the Plaintiff	Australian Government Solicitor
Counsel for the Defendant	Mr J C Sheahan KC, Ms S Mirzabegian SC And Ms E Steer
Solicitors for the Defendant	Herbert Smith Freehills

ORDERS

NSD 1070 of 2021

IN THE MATTER OF INSURANCE AUSTRALIA LIMITED ACN 000 016 722

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**INSURANCE AUSTRALIA LIMITED ACN 000 016 722** Defendant

ORDER MADE BY: **ABRAHAM J**

DATE OF ORDER: **30 JUNE 2023**

BY CONSENT, THE COURT DECLARES THAT:

Note to orders: Capitalised terms are defined at the end of the orders.

1. Between 16 March 2014 and 25 September 2019, on each occasion that IAL made a Renewal Offer to an Affected Customer in respect of an Affected Policy:

   (a) IAL applied a Cupping Mechanism which operated such that after loyalty discounts and/or no claim bonuses ("Discounts") were applied to a renewing customer's proposed renewal premium, a process was triggered if the calculation resulted in a decrease of that premium greater than the percentage limit set in the algorithm when compared to the customer's premium for the previous year and if that occurred, the customer's premium before discounts were applied (the "Base Premium") was recalculated and increased, so that when the customer's applicable Discounts were applied, the final premium would fall within the cupping limit. The recalculated final premium amount was the renewal premium proposed to the customer in the customer's Certificate of Insurance;

   (b) IAL represented by the terms of the Premium, Excess and Discounts guide applicable to the Relevant Policies, and by implication from the terms of the proposed Certificate of Insurance, that the Affected Premium payable by the customer on renewal of the policy had been calculated consistently with the

information and process set out in the Premium, Excess and Discounts guide regarding calculation of the premium; that the Affected Premium payable included the full value of the Discounts which the customer would reasonably have expected to receive; and that the Discounts had been applied to the premium that would otherwise have been payable by the Affected Customer had the Discounts not been applied (the "Premium and Discounts Representation");

(c) by reason of the application of the Cupping Mechanism as set out in paragraph (a) above, IAL:

(i) limited the extent to which the Discounts (set out in the Premium, Excess and Discounts guide and purported to be provided to Affected Customers in their Certificate of Insurance) were actually provided to customers such that the Affected Customers did not receive the full value of the Discounts they would reasonably have expected to receive;

(ii) increased the Base Premium offered to the Affected Customers and then applied the Discounts to that Base Premium;

(iii) by increasing the Base Premium before Discounts were applied, charged Affected Customers higher premiums upon renewal than if the Cupping Mechanism had not applied;

(iv) did not calculate the premium payable on renewal for Affected Customers consistently with the information and process set out in the applicable Premium, Excess and Discounts guide;

(v) failed to disclose to customers the existence, application and/or consequences of the Cupping Mechanism; and

(d) the conduct of IAL described above was in trade or commerce and in connection with the supply or possible supply of financial services.

2. IAL engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act in making the Premium and Discounts Representation on each occasion between 16 March 2014 and 25 September 2019 when it sent a Renewal Offer in respect of Affected Policies to Affected Customers, in the circumstances referred to in paragraph 1 above.

3. IAL contravened s 12DB(1)(g) of the ASIC Act by making a false and/or misleading representation in connection with the price of the Affected Policies on each occasion

that IAL made the Premium and Discounts Representation to an Affected Customer between 16 March 2014 and 25 September 2019, in the circumstances referred to in paragraph 1 above.

4. IAL contravened s 12DB(1)(i) of the ASIC Act by making a false and/or misleading representation in connection with the existence or effect of a condition, right or remedy on each occasion that IAL made the Premium and Discounts Representation to an Affected Customer between 16 March 2014 and 25 September 2019, in the circumstances referred to in paragraph 1 above.

5. By its conduct in paragraphs 1 to 4 above, IAL breached its general obligation to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act between 16 March 2014 and 25 September 2019.

6. Between 16 March 2014 and 25 September 2019 IAL breached its obligation to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act by:

   (a) its conduct in paragraphs 1 to 4 above, by making the Premium and Discounts Representation when sending Renewal Offers to Affected Customers in respect of the Affected Policies; and

   (b) introducing and applying the Cupping Mechanism, which had the effect that Affected Customers were charged a higher premium on renewal than they would have been charged if the Cupping Mechanism had not applied.

THE COURT ORDERS THAT:

Penalties and costs

7. Pursuant to s 12GBA(1) of the ASIC Act (as in force before 13 March 2019), within 30 days of this order, IAL pay to the Commonwealth of Australia $40 million in respect of IAL's conduct declared to be contraventions of s 12DB(1) of the ASIC Act occurring during the period from 15 October 2015 and 25 September 2019.

8. Pursuant to s 43 of the FCA Act, IAL pay ASIC's costs of and incidental to the proceeding, as assessed or agreed, within 28 days of such assessment or agreement.

Adverse publicity notice

9. IAL is to cause to be published, at its own expense, a notice in the terms set out at Schedule 2 to these orders ("Written Notice") in the following manner:

    (a) Within 30 days of the date of this Order, for a period of 90 days, by displaying a link in no less than 11 point font and no smaller than 50% of the size of the homepage banner, identified by the following crawlable text: "Notice ordered by Federal Court in ASIC case against IAL for failures to honour discount promises made to some consumers who held NRMA Insurance policies issued by IAL" to a PDF and/or webpage copy of the Written Notice in an immediately visible area of NRMA Insurance's website homepage (https://www.nrma.com.au/);

    (b) Commencing within 90 days of the date of this order, and for a period of no more than 6 months from commencement, include the following words, within the body of an email to customers (at least once per customer) who:

        (i) held a Relevant Policy between 28 April 2014 and 3 November 2019; and

        (ii) who continue to hold one or more of those policies (who have a preference for being communicated with by email),

    stating "Please find attached for your information a Notice ordered by the Federal Court in ASIC case against IAL for failures to honour discount promises made to some consumers who held NRMA Insurance policies issued by IAL" and attach a pdf copy of the Written Notice to such correspondence; and

(c) Commencing within 90 days of the date of this order, and for a period of no more than 6 months from commencement, include the following words, within the body of a covering letter to customers (at least once per customer) who:

(i) held a Relevant Policy between 28 April 2014 and 3 November 2019; and

(ii) who continue to hold one or more of those policies (who have a preference for being communicated with by post, or otherwise have not nominated a preference),

stating "Please find enclosed for your information a Notice ordered by the Federal Court in ASIC case against IAL for failures to honour discount promises made to some consumers who held NRMA Insurance policies issued by IAL" and enclose a printed copy of the Written Notice to such correspondence.

THE COURT NOTES THAT:

10. In these Declarations and orders, the following terms have the following meanings:

(a) **Affected Customer** means a customer who held a Relevant Policy in the period from 16 March 2014 to 25 September 2019 (of which there were 611,000 groups of customers) where: a Renewal Offer was made in that period in relation to that Relevant Policy; the Certificate of Insurance sent to the customer as part of that Renewal Offer provided for a Discount; and, the premium offered in the Certificate of Insurance was an Affected Premium with the effect that the full value of the Discounts to which the customer was eligible, and described in the Certificate of Insurance, was not passed onto that customer.

(b) **Affected Premium** means the renewal premium amount set out in the Certificate of Insurance, where the Cupping Mechanism applied in the calculation of that amount.

(c) **Affected Policy** means a Relevant Policy held by an Affected Customer.

(d) **ASIC** means the Australian Securities and Investment Commission.

(e) **ASIC Act** means the *Australian Securities and Investments Commission Act 2001* (Cth).

(f) **Corporations Act** means the *Corporations Act 2001* (Cth).

(g) **Cupping Mechanism** means the mechanism described at paragraph [38] of the Statement of Agreed Facts filed by the parties on 23 September 2022.

(h) **FCA Act** means the *Federal Court of Australia Act 1976* (Cth).

(i) **IAL** means Insurance Australia Limited.

(j) **Relevant Policy** means any one of the 13 insurance policy products offered by IAL under the NRMA Insurance brand as identified in Schedule 1 to these orders.

(k) **Renewal Offer** means, in the period between 16 March 2014 and 25 September 2019, a renewal letter or offer of renewal sent by IAL prior to the expiry of each existing Relevant Policy of an existing customer, offering a renewal of the customer's existing insurance policy on the terms set out in the offer.

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

SCHEDULE 1 – RELEVANT POLICIES

Product Category and Code	**Description**
Home	
BLDG	Home Buildings
CONT	Home Contents
HPAC	Home Package Buildings (BLDG) and/or Contents (GNCT)
LAND	Landlords – Buildings (BLDG) and/or Contents (GNCT)
Motor	
CRCP	Comprehensive Motor
CRFT	Car Fire, Theft (Third Party)
CRTP	Car Third Party Property Damage
BKCP	Bike Comprehensive
BKTP	Bike Third Party Property Damage
Boat	
BOT	Boat Contents (CONT) and Boat Hull (HULL), or standalone Boat Hull, with layup cover applied to boat hull
Caravan	
ONS	Onsite Caravan (ONST CARA) and/or Onsite Caravan Contents (ONST CONT)
CVT	Caravan Touring (CVT CARA) and/or Caravan Touring Contents (CVT CONT)
TRLR	Trailer

SCHEDULE 2 – WRITTEN NOTICE

Adverse Publicity Notice ordered by the Federal Court of Australia

The Federal Court of Australia finds that Insurance Australia Limited (**IAL**) *made false or misleading representations to some consumers about applicable discounts for policy renewals*.

On 30 June 2023, the Federal Court of Australia ordered IAL (the issuer of products under the NRMA insurance brand) to pay a penalty of $40 million to the Commonwealth for making false and misleading representations to certain customers about certain loyalty and no claims bonus discounts they would receive, but failing to deliver the full value of those discounts.

This affected about 466,000 NRMA branded Motor, Home, Boat and Caravan insurance policies between 15 October 2015 and 25 September 2019. Customers did not receive $35,393,000 of discounts they should have received. An additional 239,000 policies were also impacted in an earlier period from March 2014; however, the Court was unable to impose a penalty in relation to those policies due to limitations periods (but affected customers have been remediated by IAL, and have already been contacted and refunded as part of that process).

IAL sent renewal offer documents to affected customers representing that the discounts IAL promised had been passed on to them, but those discounts were actually applied to a higher base premium than those customers would otherwise have been charged.

IAL admitted that it had broken laws prohibiting it from making false, misleading or deceptive representations shortly after ASIC commenced proceedings against it and has apologised for its conduct.

IAL has completed issuing payments to all affected customers who are receiving payment as part of the remediation program.

Further information

The Court found that IAL made false or misleading representations to the affected customers that their renewal premiums:

- had been calculated as set out in IAL's Premium, Excess and Discounts guide;
- included the full value of discounts that the customers expected to receive; and
- that the discounts were applied to the base premium that IAL would have otherwise charged them.

For more information, read ASIC's media release and the Court's judgment.

REASONS FOR JUDGMENT

ABRAHAM J:

1 The defendant, Insurance Australian Limited (IAL) is an insurance company that issues products under a range of insurance brands including, relevantly, NRMA Insurance, which operates under an Australian financial services licence (AFSL).

2 IAL admits contraventions of ss 12DA(1) and 12DB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and ss 912A(1)(a) and (c) of the *Corporations Act 2001* (Cth) (Corporations Act).

3 The conduct occurred between 16 March 2014 and 25 September 2019 (the Relevant Period) when IAL offered renewals of NRMA Insurance branded policies to existing customers who held an NRMA Insurance Motor, Home, Boat or Caravan policy identified in Schedule 1 to the orders (each a Relevant Policy, and together, the Relevant Policies). The contraventions relate to the manner in which IAL calculated the renewing customer's premium in relation to loyalty and no claim bonus discounts (Discounts), and the manner it represented to its customers the premium had been calculated and applicable Discounts had been applied. These reasons address the relief imposed for those contraventions.

4 The matter proceeded by way of a very detailed statement of agreed facts and admissions (SAFA) and two supplementary statements of agreed facts and admissions (Supplementary Statements). There was little by way of dispute between the parties in submission. IAL have agreed to the declarations sought by the Australian Securities and Investments Commission (ASIC), in the terms they propose. IAL agrees that the $40 million penalty sought by ASIC is appropriate and generally agrees with its submissions. The principle issue of contention is the appropriate form of an adverse publicity order.

5 For the reasons below, declarations are made in the terms sought, a pecuniary penalty of $40 million is imposed on IAL, and an adverse publicity order is made (to be given effect by a single post out to all customers who held a Relevant Policy between 28 April 2014 and 3 November 2019 and still hold at least one of those policies).

ASIC's case

6 Given the level of agreement in this case, it is unnecessary to rehearse all the detail in the agreed statements, although that detail is important to understand the contraventions and the

relief imposed. Accordingly, attached to these reasons as Annexures A - C are the SAFA and Supplementary Statements.

7 The following is an overview of the contraventions.

8 In summary, during the Relevant Period, upon offer to renew an existing Relevant Policy on terms set out in the offer (Renewal Offer), IAL sent a proposed certificate of insurance (COI) to existing customers, which set out details of the Discounts that had purportedly been provided to the customer and the renewal premium payable. On its face, the COI represented that the full value of the Discounts had been applied to the premium that would otherwise have been payable by the customer had the Discounts not been applied, supported by calculations purported to confirm this. In fact, as outlined below, for some customers this was not the case. The COI also referred the customer to the Premium Excess and Discounts guide (PED) applicable to the Relevant Policy, which set out how the premium payable had been determined and the process applied in calculating the premium with the Discounts applied.

9 During the Relevant Period, in calculating renewing customers' annual premiums in respect of their Relevant Policy, IAL applied an algorithm (the Cupping Mechanism) which was triggered when a renewal premium (after applicable Discounts) fell by an amount greater than a set percentage limit (the Cup) compared to the customer's prior year premium. When that occurred, the customer's premium before the Discounts were applied (Base Premium) was recalculated and increased, so that when the customer's applicable Discounts were applied, the final premium would fall within the cupping limit. The result was that for those customers (Affected Customers) whose policies had the Cup applied (the Affected Policies), the renewal premiums were increased and the full value of the Discounts were not passed on. Those customers were charged higher premiums on renewal than if the Cupping Mechanism had not been applied to their policies. Where the Cup was not triggered, the Cupping Mechanism would not affect a renewing customer's premium.

10 Put another way, the Cupping Mechanism limited the extent to which promised Discounts were provided to customers in a manner that was not visible them. That was so, even if the customers checked the calculations provided to them in the COI for the very purpose of verifying their discounts. Further, once the Cup was triggered, even if it was not triggered again in subsequent years, some subsequent renewal premiums in respect of Affected Policies were higher than they otherwise would have been as a result of the Cup, as the way they were calculated included

reference to the previous year's inflated Base Premium. Neither the COI nor the PED identified that the previous year's premium affected the renewal premium during the Relevant Period.

11 During the Relevant Period (or until late September 2020, a year after the Relevant Period ended when IAL commenced paying remediation to affected customers), IAL did not disclose to its customers the existence, application and consequences of the Cupping Mechanism used in the calculation of Affected Customers' premiums. Instead, the terms of the COI implied to Affected Customers that the applicable Discounts had been applied to the premium that would otherwise have been payable by them.

12 The conduct occurred for the entirety of the Relevant Period, a significant period of time, exceeding 5½ years. It impacted approximately 611,000 groups of Affected Customers (where a group of Affected Customers may include one or more customers holding one or more policies), and approximately 705,000 separate Affected Policies. In total, cupping impacted those Affected Policies around 1,785,000 times. That is, each time an Affected Policy was impacted, the customer paid a renewal premium that was higher than they otherwise should have paid.

13 Over the course of the entire period of the conduct occurring during the Relevant Period, Affected Customers did not receive the Discounts to which they were entitled in an amount of $60,223,000 ($71,436,974 when including GST, Stamp Duty and FSL), where the total premiums paid by Affected Customers was $1,130,060,539.

14 Although the Relevant Period commenced 16 March 2014, due to limitation periods a penalty was sought in respect of contraventions occurring from 15 October 2015. Accordingly, having regard to the period from 15 October 2015 to 25 September 2019 (Penalty Period):

(1) the Cupping Mechanism impacted:

(i) the Affected Policies around 1,098,000 times;

(ii) approximately 222,000 Affected Policies and 209,000 Affected Customer groups whose renewal was first impacted by the Cupping Mechanism in that period; and

(iii) approximately 466,000 Affected Policies and 419,000 Affected Customer groups, including where the application of the Cup occurred outside the Penalty Period but the Affected Policy or customer group experienced a subsequent year impact in that period; and

(iv) the Affected Customers suffered financial harm in the amount of $35,393,000 ($41,926,682 when including GST, Stamp Duty and FSL), where the total premiums paid by Affected Customers was $722,253,823.

15 The Cupping Mechanism was implemented by IAL in the context of it undertaking the Go Discounts project, which was directed to changing and simplifying the way the Discounts were offered to customers, and potentially providing significant discounts to some customers. These contraventions occurred in the context of IAL intentionally designing, approving and implementing the Cupping Mechanism, where one of the considerations for its approval and implementation was its potential loss of profit if the Cupping Mechanism was not implemented.

Contraventions

16 IAL admits to, and the parties agree, the contraventions set out in Section D of the SAFA (Admitted Contraventions). It is convenient to reproduce ASIC's summary below.

17 In summary, the admitted contraventions are that:

(a) on each occasion that IAL issued an Renewal Offer to an Affected Customer, it made a representation (in the PED and COI) that:

(i) the Affected Premium payable by the customer on renewal of the policy had been calculated consistently with the information and process set out in the PED regarding calculation of the premium;

(ii) by implication from the terms in the COI, the applicable Discounts had been applied to the premium that would otherwise have been payable by the customer had the Discounts set out in the COI not been applied; and

(iii) the Affected Premium payable included the full value of the Discounts which the customer would reasonably have expected to receive (together, the Premium and Discounts Representation);

(b) the Premium and Discounts Representation was false, misleading or deceptive or likely to mislead or deceive in contravention of ss 12DA(1) and 12DB(1)(g) and (i) because IAL:

(i) limited the extent to which the Discounts set out in the PEDs and purported to be provided to Affected Customers in their COIs were actually provided to customers such that the Affected Customers did not

receive the full value of the Discounts they would reasonably have expected to receive;

(ii) increased the Base Premium calculated before discounts were applied offered to the Affected Customers and then applied the Discounts to that Base Premium;

(iii) by increasing the Base Premium before Discounts were applied, charged Affected Customers higher premiums upon renewal than if cupping had not applied;

(iv) did not calculate the premium payable on renewal consistently with the information and process set out in the PED; and

(v) failed to disclose to customers the existence, application and/or consequences of the Cupping Mechanism;

(c) to the extent that the Premium and Discounts Representation was a representation as to a future matter, by reason of the existence and application of the Cupping Mechanism during the Relevant Period, IAL did not have reasonable grounds for making the Premium and Discounts Representation (for the purposes of s 12BB of the ASIC Act);

(d) there was a relationship between IAL and its customers as insurer and insured, and IAL accordingly owed its customers a duty of utmost good faith;

(e) by breaching ss 12DA(1) and 12DB(1)(g) and (i), IAL contravened s 912A(1)(c) of the Corporations Act;

(f) IAL contravened s 912A(1)(a) by:

(i) making the Premium and Discounts Representation and breaching ss 12DA(1) and 12DB(1)(g) and (i);

(ii) introducing the Cupping Mechanism with the effect of limiting the extent of reductions in premiums provided to Affected Customers; and

(iii) applying the Cupping Mechanism such that Affected Customers were charged a higher premium on renewal than if the Cupping Mechanism had not been triggered

18 IAL also admits (and so, further, there is no issue between the parties) that:

(a) at all material times, each of the Relevant Policies was a financial product for the purposes of s 12BAA(1)(b), (5) and (7)(d) of the ASIC Act; and

(b) the conduct of IAL set out above was engaged in as part of IAL's insurance business and thereby in trade or commerce. The conduct was in relation to and in connection with the supply or possible supply of financial services, being the issuing of and dealing in an insurance contract and policy, being a financial product.

Evidence

19 As explained above, this matter proceeded by the SAFA and the Supplementary Statements. In addition, IAL read three affidavits.

20 *First*, the affidavit of Ms Christa Marjoribanks, verified 20 December 2022, the Executive General Manager, Product, Pricing & Governance for the Intermediated Insurance Australia business within IAG group. Ms Marjoribanks also leads the Pricing Taskforce program at IAG that includes the remediation program in respect of the issue the subject of these proceedings. Ms Marjoribanks' affidavit set out an explanation, based on her knowledge and experience, of how a number of concepts in insurance pricing are generally used. Ms Marjoribanks then outlined how IAG group's data was analysed in order to provide a high-level estimate of the impact of capping (see [55] below) in comparison to cupping, and the results of that analysis.

21 *Second*, IAL read the affidavit of Ms Hope Prior, verified 30 March 2023, the Executive Manager, operational Design and Delivery at IAG. Ms Prior's affidavit provided information regarding the number of policyholders presently holding NRMA Insurance policies, and certain cohorts of those customers, including those impacted by cupping, as well as estimates of the costs associated with, and impact of, sending communications to those cohorts of customers. Ms Prior's affidavit also provided information regarding the impact to IAG's call centres and associated costs arising from outbound communications to customers.

22 *Third*, IAL read a second affidavit of Ms Hope Prior, verified 8 May 2023. That affidavit provided supplementary information about certain matters referred to in Ms Prior's first affidavit. This included estimates of the costs associated with, and impact of, sending communications to a cohort of customers presently holding NRMA Insurance policies.

Declarations

23 The power to grant declaratory relief pursuant to s 21 of *Federal Court of Australia Act 1976* (Cth) (FCA Act) "is a very wide one" and the court is "limited only by its discretion": *Seven Network Ltd v News Ltd* [2009] FCAFC 166; (2009) 182 FCR 160 at [1016], citing *Forster v Jododex Australia Pty Ltd* [1972] HCA 61; (1972) 127 CLR 421 at 435. Three requirements need to be satisfied before making declarations: (1) the question must be a real and not a hypothetical or theoretical one; (2) the applicant must have a real interest in raising it; and (3) there must be a proper contradictor: *Foster* at 437-438. That a party has chosen not to oppose a grant of particular declaratory relief is not an impediment to such relief being granted by the Court: *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56; (2012) 201 FCR 378 at [14], [30]-[33]. Other factors relevant to the exercise of the discretion include: (a) whether the declaration will have any utility; (b) whether the proceeding involves a matter of public interest; and (c) whether the circumstances call for the marking of the Court's disapproval of the contravening conduct: *ASIC v Pegasus Leverages Options Group Pty Ltd* [2002] NSWSC 310; (2002) 41 ACSR 561 at 571; *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd*, *in the matter of Monarch FX Group Pty Ltd* [2014] FCA 1387; (2014) 103 ACSR 453 at [63]; *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630; (2012) 205 FCR 120 at [42].

24 For the contraventions of ss 12DA(1), 12DB(1)(g) and (i) of the ASIC Act and s 912A(1)(a) and (c) of the Corporations Act, the broad discretion under s 21 of the FCA Act and the power to make declarations of contraventions of laws relating to the provision of financial services under s 1101B(1)(a)(i) of the Corporations Act, empower the Court to make the declarations sought.

25 As indicated above at [4], ASIC seeks and IAL agrees to the making of declarations in a form set out by the parties regarding IAL's contraventions for the whole of the Relevant Period.

26 Even where there is agreement between the parties in respect of proposed declarations, it remains for the Court to decide whether declaratory relief is appropriate: *Australian Securities and Investments Commission v MLC Nominees*; [2020] FCA 1306; (2020) 147 ACSR 266 (*MLC Nominees*) at [109].

27 I am satisfied that the declarations ought to be made in the terms sought. They set out the basis on which the Court determined IAL's liability and on which the Court orders the pecuniary penalties imposed. There is a significant public interest in making the declarations sought, not

only to record the Court's disapproval of the contravening conduct, but as deterrence to IAL and others, from repeating such conduct. This in turn assists ASIC to fulfil its role. Consequently, the declarations sought have significant utility and I am satisfied that it is in the interests of justice that they be made.

Pecuniary penalty

28 ASIC seeks the imposition of a pecuniary penalty only in relation to the s 12DB(1) contraventions.

29 The balance of the contraventions either are not (and never were) civil penalty provisions (s 12DA(1) of the ASIC Act and s 912A(1)(c) of the Corporations Act), or were not civil penalty provisions during the Penalty Period (s 912A(1)(a) of the Corporations Act). Noting that s 912A(1)(a) did become a civil penalty provision on and from 13 March 2019, it only operates where the conduct constituting the contravention of the provision occurred "wholly on or after" 13 March 2019. Accordingly, ASIC does not seek a civil penalty under s 912A(1)(a) in respect of IAL's conduct. However, ASIC submitted the conduct constituting the contravention of s 912A(1)(a) is a serious contravention of the Corporations Act, and remains relevant to the consideration of penalty for the contraventions of s 12DB(1) of the ASIC Act.

30 The purpose of a civil penalty is primarily protective, in promoting the public interest in compliance by deterring further contravening conduct: *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 399 ALR 599 at [15]-[16], [43] and [45] (*Pattinson*). A penalty of appropriate deterrent effect "must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business": *Pattinson* at [17] citing *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [62].

31 Section 12GBA(2) of the ASIC Act, which was replaced by 12GBB(5) following amendments taking effect in March 2019, provides that, in determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters. Those matters include: 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 person has previously been found by the court in proceedings under subdivision G (in which 12GBA is located), to have engaged in any similar conduct. The Court is to decide what penalty is "appropriate" in all the circumstances.

32 In addition, there are a number of factors identified in the authorities, relevant to this task. For example, the assessment of penalty of appropriate deterrent value will have regard to: (1) the nature and extent of the contravening conduct; (2) the amount of loss or damage caused; (3) the circumstances in which the conduct took place; (4) the size of the contravening company; (5) the degree of power it has, as evidenced by its market share and ease of entry into the market; (6) the deliberateness of the contravention and the period over which it extended; (7) whether the contravention arose out of the conduct of senior management or at a lower level; (8) whether the company has a corporate culture conducive to compliance, as evidenced by educational programs or other corrective measures in response to an acknowledged contravention; and (9) whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to contravention: *Pattinson* at [18]. These are not to be considered to be a rigid list of factors to be ticked off: *Pattinson* at [19]. Rather, they are to inform a multifactorial investigation that leads to a result arrived at by a process of "instinctive synthesis" addressing the relevant considerations: *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 (*Reckitt Benckiser*) at [44].

33 ASIC submitted that conduct that occurred before the penalty period can reflect that there was a failure to take steps before the penalty period commenced, which continued throughout the penalty period. However, it also recognised that where an offending entity has remediated for the entire time period this may have a mitigating effect, showing that the offending entity did not confine its remediation to the penalty period. This is to be considered in the context of the entity's obligations under s 912B of the Corporations Act to have compensation arrangements in place to compensate persons for loss or damage arising from breaches of obligations under Chapter 7 of the Corporations Act.

34 The maximum penalty is also one of the relevant factors. In this regard, in *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357, the majority observed at [31]:

> …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.

35 In a civil penalty context, the relevance of a prescribed maximum penalty as a yardstick was explained by the Full Court of the Federal Court in *Reckitt Benckiser* at [155]-[156] as follows:

> 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.
>
> 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.

36 This passage was more recently cited with approval in *Pattinson* at [53].

37 ASIC relies on the ASIC Act before 13 March 2019. At that time, the Court's power to order payment of a pecuniary penalty was located in s 12GBA of the ASIC Act. Pursuant to s 12GBA(1), if the Court is satisfied that a person has contravened a provision of Subdivision D (including s 12DB(1)(g) and (i)) of the ASIC Act), the Court has power to order a person pay a pecuniary penalty in respect of each act or omission by the person to which s 12GBA applies, as the Court determines to be appropriate. The value of a penalty unit, as fixed under s 4AA(1) of the *Crimes Act 1914* (Cth), and subject to indexation under s 4AA(3), was: $180 for the period 31 July 2015 to 30 June 2017; and $210 for the period 1 July 2017 to 30 June 2020.

38 A contravention of s 12DB(1) occurs each time the relevant false or misleading representation is made to a person: *Australian Securities and Investments Commission v Commonwealth Securities Limited* [2022] FCA 1253 at [29].

39 Under 12GBA(3), the maximum pecuniary penalty payable for a contravention by a body corporate was 10,000 penalty units. Depending on when the contravention occurred during the Penalty Period, the maximum value of each contravention is $1.8m to $2.1m. I note that IAL admitted that it contravened s 12DB(1)(g) and (i) around 1,098,000 times: SAFA [61].

40 Where the theoretical maximum penalty is in the billions or trillions of dollars, the overall maximum penalty will not be a meaningful factor in the court's assessment. In these circumstances, the appropriate range is best assessed by reference to factors other than where

the conduct falls in the range of seriousness of offending in relation to the maximum penalty: *Reckitt Benckiser* at [157].

41 Ordinarily separate contraventions arising from separate acts should attract separate penalties. However, where separate acts give rise to separate contraventions which are inextricably interrelated, they may be regarded as a "course of conduct" for penalty purposes: *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243 at [234]. This avoids double-punishment for those parts of the legally distinct contraventions that involve overlap in wrongdoing: see for example, *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 at [39] and [41]. However, "[i]t is not appropriate or permissible to treat multiple contraventions as just one contravention for the purposes of determining the maximum limit dictated by the relevant legislation": *Yazaki* at [227]. "It cannot in itself operate as a *de facto* limit on the penalty to be imposed for contraventions": *Reckitt Benckiser* at [141] quoting *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (t/as Bet365) (No 2)* [2016] FCA 698 at [24] – [25].

42 The principle of totality requires the Court to make a "final check" of the penalties to be imposed on a wrongdoer, considered as a whole, to ensure that the total penalty does not exceed what is proper for the entire contravening conduct: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* [1997] FCA 450; (1997) 145 ALR 36 at 53, citing *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59.

43 An appropriate penalty is therefore one that is fashioned by reference to the facts of the particular case before the Court, in order to arrive at a penalty that is sufficient to deter the conduct in question, without being overly oppressive: *Pattinson* at [46].

44 The principles to be applied in considering a jointly proposed penalty were considered in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (*DFWBII*), where the majority observed at [46]:

> [T]here is an important public policy involved in promoting predictability of outcome in civil penalty proceedings and that the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers. As was recognised in *Allied Mills* and authoritatively determined in *NW Frozen Foods*, such predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their

attention.

45 Further, their Honours said at [58]:

> ... Subject to the court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and ... highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty.
>
> (emphasis added)

46 Those observations about the desirability of acting upon agreed penalty submissions were made in the context of a broader recognition that as a civil litigant in civil proceedings, civil penalties are but one of numerous forms of relief which regulators can pursue, and it is entirely orthodox for regulators to make submissions as to that relief: see *DFWBII* at [24], [57]-[59], [63], [103], [107]. Those principles to be applied in considering a jointly proposed penalty were recently considered in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; (2021) 284 FCR 24 (*Volkswagen*) at [124]-[131], referring to *DFWBII*, *NW Frozen Foods Pty Ltd v Australian Competition Commission* [1996] FCA 1134; (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; (2004) ATPR 41-993. A number of points were highlighted, including: *first,* the Court must be satisfied that the penalty proposed by the parties is appropriate: at [125]; *second*, if persuaded of the accuracy of the parties' agreement as to facts and that the proposed penalty is an appropriate remedy, it is highly desirable for the Court to accept the proposal: at [126]; *third*, in considering whether the proposed penalty is appropriate, it is necessary to bear in mind that there is no single appropriate penalty, but rather a permissible range. The proposed penalty may be "an" appropriate penalty if it falls within that range: at [127]; *fourth*, the Court should generally recognise that the proposed penalty was most likely a result of compromise and pragmatism on the part of the regulator, and while the regulator must estimate the penalty necessary to achieve deterrence, the Court must assess the proposed penalty on its merits, being wary of the possibility that the regulator may have been too pragmatic: at [129]; *fifth*, the Court's task is not limited to simply determining whether the jointly proposed penalty is within the permissible range, though that might be expected to be a highly relevant and perhaps determinative consideration. The overriding statutory directive is for the Court to impose a penalty that is determined to be appropriate having regard to all relevant matters: at [131].

Consideration

The nature and extent of the contraventions

47 It cannot be disputed that the contraventions of s 12DB(1)(g) and (i) are objectively very serious. So much is readily apparent from the SAFA.

48 I accept ASIC's submission as to the characterisation of this conduct, and the reasons it advances.

49 *First*, the contraventions involved the making of false, misleading and deceptive representations in respect of common home and motor NRMA Insurance branded policies (amongst others) to consumers (ie, the Affected Customers) regarding the price of those policies, specifically the premiums and discounts those consumers would receive. *Second*, the consumers were at a relative disadvantage when compared with IAL, as they had no way of knowing whether the Discounts had been applied, and the way the information was provided to the consumers in the COI denoted that the full Discounts had been applied and that customers could verify this. Although Affected Customers' personal circumstances would have varied greatly, many of the customers would have been low to middle income earners and more significantly affected by the conduct. *Third*, the significant length of time over which the contraventions occurred demonstrates one measure of the extent of the conduct. *Fourth*, the number of contraventions and number of Affected Policies and Affected Customers further demonstrate the extent of the conduct. *Fifth*, IAL is one the largest providers of these types of insurance policies in the market (those policies set out in Schedule 1 of the Orders), and NRMA Insurance is one of the most recognised and popular brands of such insurance in Australia. As a major insurer, who owes a duty of utmost good faith to its customers, customers would have relied on IAL to operate with integrity and in good faith. Customers would have expected that IAL would calculate and charge premiums to which they were entitled and consistently with its contractual arrangements.

The circumstances in which the conduct occurred

50 The nature and circumstances in which the contraventions occurred are detailed at SAFA [66]-[123].

51 The Cupping Mechanism was conceived, designed and implemented in the context of implementing the Go Discounts project: see SAFA [79]-[95].

52 ASIC highlights the following points. *First*, the very purpose and intended effect of the Cupping Mechanism was to reduce the actual discounts provided to customers whose

premiums would have otherwise been reduced by more than the Cup. *Second*, the business need to introduce the Cupping Mechanism arose because IAL wanted to avoid the risk to revenue posed by the large discounts generated by the Go Discounts project. *Third,* IAL staff were aware before, during and after implementation of the Cupping Mechanism that the Cupping Mechanism would operate to reduce discounts. *Fourth*, it was also clear to some staff that because of the way the Cupping Mechanism worked that customers would not know that IAL had recalculated their premium unless IAL disclosed that fact. The team responsible for developing the Cupping Mechanism (the Rating Engine Enhancements project team) were aware of its effect on Affected Customers; other staff involved in the implementation of the Cupping Mechanism were aware of and raised concerns about its effect; and IAL was presented with several opportunities over the course of 2014 to 2016 to remove the Cupping Mechanism in the context of considering whether to adjust the level, or whether it should be removed in its entirety, to enable Affected Customers to more fully benefit from the Discounts offered by IAL. *Fifth*, despite all of the matters above, and despite that one of the very aims of the Go Discounts project was to improve transparency of premium and discounts provided, the issue of ensuring that the effect of the Cupping Mechanism on Discounts was apparent to customers was not directly addressed by any committee or forum responsible for initially approving the Cupping Mechanism. *Sixth*, it was not IAL who identified the issue of the effect of the Cupping Mechanism (initiating the chain of events that led to it being reported to ASIC and the conduct ceasing), but rather an external service provider. The Cupping Mechanism, or the non-disclosure of it, was not brought to the attention of anyone at Board level, despite the knowledge of others referred to above.

53 ASIC submitted that the above circumstances demonstrate an intention to develop, apply and maintain a process that reduced, and was intended to reduce, discounts to customers to the advantage of IAL, and without that reduction being visible to customers. ASIC submitted that the Cupping Mechanism was deliberately designed to reduce Discounts received by consumers (although accepted that the representations were not deliberately false). In those circumstances, having regard to the terms in which the COIs and PEDs were worded, it was incumbent on IAL to disclose these matters to consumers, so that they understood that in certain circumstances some consumers were not receiving the Discounts they would otherwise expect and were entitled to. ASIC submitted the seriousness of the failure to do so must be measured against the fact that various persons within IAL recognised the issue, knew how the Cupping Mechanism worked, and yet IAL failed to prevent the conduct from occurring.

54 I accept those submissions.

55 IAL submitted it was relevant to assessing the nature and circumstances of the contravention that the Cupping Mechanism was implemented in tandem with a second component of the automated process introduced into IAL's pricing algorithm (the Capping Mechanism): SAFA [33]-[40]. IAL submitted that whereas the Cupping Mechanism imposed a limit on the maximum permitted decrease on a renewing customer's premium, capping was the 'flip side' of that coin, being the maximum permitted *increase* on a renewing customer's premium after a customer's Discounts had been applied. The mechanisms operated in tandem to limit the extent to which renewal premiums could vary, up and down, year on year, designed to avoid 'price shock' for renewing customers. A renewing customer's premium might be unaffected by either mechanism, or capping might reduce the premium payable by the customer, or (as was the case for the Affected Customers) cupping might cause the customer to pay a higher premium than they otherwise would have paid (including because the Discounts the customer was entitled to receive were not realised, either in full or in part).

56 IAL submitted that this was not a case where it contravened the law by charging fees for which it provided no services. The premiums charged were not suggested to be unreasonable or excessive by any objective measure, nor to be premiums that for any other reason could not properly be charged, provided the basis for them was properly represented and disclosed. The problem with IAL's conduct, admittedly a very serious problem, was that it did not properly disclose the basis for the calculation of the premiums so that its conduct was misleading. Neither capping nor Cupping was disclosed. IAL submitted the failure to disclose capping and cupping was consistent with the position of both ASIC and IAL that there was no intent to mislead - the contraventions were not deliberate. IAL further submitted that to say that capping was implemented to further IAL's financial interests to retain customers and increase or preserve revenue does not appropriately characterise the use or purpose of capping (and its interrelationship with cupping).

57 ASIC took issue with those submissions, given the nature of the contraventions in relation to cupping. It submitted that it was not possible for a policy held by an Affected Customer to be subject to the Cupping Mechanism *and* Capping Mechanism in any given year. Accordingly, no Affected Policy gained some benefit from capping in the same year. ASIC submitted that IAL had not quantified the extent to which customers affected by cupping were also affected by capping.. It also submitted that capping was implemented to further IAL's financial interests

to retain customers and increase (or, at the very least, preserve) revenue. This was said to be the same rationale for the introduction of the Cupping Mechanism, that is, that the absence of capping or the Cupping Mechanism would result in a loss of customers from increases or decreases in premiums of more than $100 and lower retention rates leading to revenue losses: SAFA [92], [95]. Each of cupping and capping were introduced by IAL to preserve revenue from a decline in gross written premiums if either (or both) were not introduced. Accordingly, ASIC submitted any comparison between the amounts by which premiums increased from cupping, against the amount by which premiums were reduced by capping during the same period, fails to measure the true financial position of IAL resulting from such conduct.

58 Although those submissions may be accepted, I accept IAL's submission as to what the failure to disclose capping or cupping says of the state of mind of IAL in implementing cupping, namely, that there was no intent to mislead. That fact is not in issue.

The amount of loss or damage suffered and extent of profit from the contraventions

59 This loss is summarised above at [13]-[14], and relevant information detailed at SAFA [63]-[65] and [126]-[130] (which includes details of IAL's revenue).

60 The total amount overcharged to customers in the Penalty Period was $35,393,000 (and $60,223,000 over the Relevant Period). It is plain from those figures that the number of Affected Customers and the size of the combined losses in the tens of millions of dollars is significant. It is also plain that when customers incurred losses because the Discounts were not passed on in full, the Cupping Mechanism was operating to increase or preserve IAL's revenue, which was a key consideration for implementing the Cupping Mechanism: SAFA [90].

61 ASIC also submitted that not only did IAL obtain the benefit of the inflated premiums, but it retained a significant number of customers who, had they been properly informed that they were not in fact being given the full Discounts to which they had otherwise become entitled and which they were led to believe they were receiving, may well have chosen to leave IAL and seek an alternative provider of the relevant insurance policy. From IAL's perspective, this is the potential loss of business from failing to retain customers. From the customers' perspective, this is the unquantifiable potential harm of hundreds of thousands of consumers not being told of the true nature of the Discounts they were receiving. This is the lost opportunity of those consumers to consider changing insurers during the Relevant Period, had they known the true position. I accept ASIC's submissions in this regard, and that the penalty to be imposed should

account for IAL maintaining and profiting from the Cupping Mechanism over a lengthy period of time.

Size and financial position

62 This is detailed at SAFA [8] and [126]-[130].

63 IAL is wholly owned by Insurance Australia Group Limited (IAG), which is a multinational insurance company and the largest general insurance company in Australia and New Zealand. During the Relevant Period, IAL held a significant part of the market share, being between around 17 – 23% of the Australian market for the types of policies represented by the Relevant Policies, and had significant assets and annual revenue: SAFA [127]-[128].

64 As submitted by ASIC, it is plain that IAL's financial position and size are relevant to the issue of deterrence in determining an appropriate pecuniary penalty. I also accept that there is no evidence to suggest that IAL could not pay the penalty proposed by ASIC, despite recent losses, particularly having regard to the financial position of the group (ie, IAG).

Deliberateness of the conduct

65 ASIC does not submit that the representations made by IAL that were misleading and deceptive were deliberately or intentionally made in breach of the law, as IAL did not implement the Cupping Mechanism with the intention or purpose of misleading consumers. However, ASIC again noted the intended design, purpose and operation of the Cupping Mechanism, and the knowledge and concerns of staff within IAL, as addressed above at [53]. In those circumstances, it submitted that it can be inferred that it should have been obvious to IAL that if the COI only presented the figures that were said to be those with discounts applied, that consumers would be misled as to the discounts they were being provided. Accordingly, IAL ought to have known that it was likely to be misleading customers as to the way in which it was calculating customers' premiums and applying discounts.

66 That is plainly correct, as is ASIC's submission that this aspect of IAL's conduct forms part of the circumstances relevant to the assessment of the relevant penalty.

The seniority of those involved

67 ASIC acknowledges that the Board was not aware of the Cupping Mechanism in the Relevant Period. That said, it submitted there were several senior staff members involved in the implementation of the Cupping Mechanism and the failure to remove it, including the CEO

Personal Insurance between 2013 and 2015, and the Executive General Manager Product and Pricing, whom reported to the former, which is detailed at SAFA [131]-[139]. IAL accepts that some of the staff in the Product and Pricing Team understood the operation of cupping and were aware of its effects including on Discounts. However, it reiterated that IAL did not implement cupping with the intention or purpose of misleading consumers.

68 IAL queried the description of some of the persons as "senior" staff, when considering the structure of the organisation. It submitted that only the roles of CEO Personal Insurance and Executive General Manager Product and Pricing are accurately described as senior management roles. Roles below the rank of Executive General Manager Product and Pricing were not "senior management" roles in either IAL or IAG during the Relevant Period, even though some of them contain the word 'senior' in their title. Little turns on this. There were some senior staff and persons who ought to have known what was occurring. Persons in the position of implementing such schemes were given the responsibility to do so, including ultimate decision-making on the resolution of issues/risk and accountability for program outcomes. IAL also submitted that ASIC's submission as to senior management must be read in light of the absence of evidence that the relevant senior managers were aware of IAL's failure properly to inform customers of the effect of cupping on the value of the Discounts they would receive. That submission ignores that the senior staff that were involved in implementing the Cupping Mechanism ought to have known what was occurring.

Corporate culture

69 ASIC accepts that IAL has sought to strengthen its compliance and risk management culture and processes since reporting the conduct to ASIC in 2019: see SAFA [140]-[156]. I accept that the steps taken by IAL since removing the Cupping Mechanism are demonstrative of genuine steps to embed a culture of compliance.

Cooperation

70 These matters are detailed at SAFA [157]-[159].

71 ASIC accepts four mitigating factors relevant to the assessment of penalty in this case.

72 *First*, IAL has engaged constructively with ASIC since these proceedings commenced, including by making early admissions in relation to its conduct as set out at SAFA [158]. ASIC also noted that while IAL was also cooperative with ASIC before the commencement of the proceedings throughout the investigative process, consistent with its obligations as an AFSL

holder, responding to compulsory notices is not cooperation of a kind that ought greatly to resonate in mitigation, as the law requires this: SAFA [157]. However, IAL is entitled to consideration for saving the community the costs of a lengthy trial. *Second*, IAL has undertaken a comprehensive remediation program to remediate customers for the application of the Cupping Mechanism, in accordance with the compensation arrangements is it legally required to have in place under s 912B of the Corporations Act: SAFA [149]-[152]. By at least 16 March 2023, payments to all Affected Customers had been issued, subject to limited exceptions: Further Supplementary Statement of Agreed Facts and Admissions [2]; SAFA [154]. *Third*, IAL has apologised for its conduct to Affected Customers, to the public at large on the commencement of these proceedings and to its shareholders as part of its FY21 results: SAFA [159]. I note that IAL reiterated in this Court its deep regret for what had happened. *Fourth*, since identifying and reporting the conduct to ASIC in September 2019, IAL has taken steps to review its pricing promises and systems through the establishment of the Pricing Taskforce: SAFA [145]-[148].

73 IAL submitted that once members of IAG's Group Leadership team were made aware of the effect of cupping on Discounts in 2019, IAL took steps to notify ASIC, remove cupping, commence remediating customers and undertake a structural program of pricing changes: SAFA [135], [121]. On 14 May 2019, an external service provider, who had encountered an issue with the operation of cupping at another insurer, alerted IAL: SAFA [119]. IAL subsequently undertook investigations to ascertain whether the same issue existed in its own brands and if so, in which brands and to what extent: SAFA [120]. Following that investigation, IAL reported the conduct to ASIC on 9 September 2019 pursuant to its obligations under s 912D of the Corporations Act: SAFA [121]. IAL removed the Cup (though not the cap) shortly afterwards from 26 September 2019: SAFA [121], [122].

74 Thereafter, IAL submitted, it promptly commenced work on a remediation response, starting with the establishment of a Pricing Taskforce, charged with reviewing and rectifying IAG's pricing practices (including those of IAL) as necessary: SAFA [145]. That work was self-initiated by IAG and IAL: SAFA [157]. The SAFA details the steps taken by IAG and IAL since 2019 at [140]-[156]. The remediation program, as IAL submits, speak to IAL's contrition and its determination to take responsibility for its contraventions in a timely and appropriate manner, citing *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 at [285]. It submitted that on the filing of the Concise Statement, IAL immediately and publicly apologised for its failings, acknowledged that its conduct was

significant and unacceptable, and stated that it was working to put things right for its customers as soon as possible. By its Concise Response, IAL promptly admitted contraventions. Those are all additional matters that evidence IAL's contrition. I accept those submissions.

75 I also accept that IAL has undertaken extensive reform directed at ensuring that the contravening conduct is not repeated.

Previous similar conduct

76 IAL has not previously been found to have engaged in any contravention of the ASIC Act or the Corporations Act: SAFA [125].

77 That said, I accept ASIC's submission it should be recognised that this conduct was not isolated, in the sense it continued for a significant period of time and across each of the Relevant Policies under the NRMA Insurance brand.

Course of conduct

78 ASIC submits IAL should be penalised for one course of conduct in the application of the Cupping Mechanism to the Relevant Policies throughout the Penalty Period. ASIC recognises that the factual substratum with respect to the representation is "unitary" and can be traced back to a single homogenous cause, citing *MLC Nominees* at [176].

79 Consequently, it is appropriate that a single penalty be imposed for the multiple contraventions involved in the proceeding.

Summary of submissions

80 ASIC submitted that, having regard to the circumstances outlined below, a very substantial penalty is required in order to fulfil the primary aim of deterrence. That IAL has undertaken and completed remediation of those Affected Customers, made changes to its corporate governance, and cooperated with ASIC in respect of these proceedings, does not alter the seriousness of the contraventions and the fact that corporations in IAL's position must take better care to ensure such contraventions do not occur in the first place, rather than cleaning up afterwards. ASIC outlined that the circumstances included:

(a) the very serious nature of the contraventions involving the making of false, misleading and deceptive representations to over 600,000 Affected Customers over a significant period of 5½ years, with over 700,000 Affected Policies, and comprising about

1,785,000 individual contraventions (including the subsequent year impact described above);

(b) that the contraventions resulted in Affected Customers not receiving represented discounts in an amount of $60,223,000 (and when including GST, Stamp Duty and FSL, $71,436,974), where the total premiums paid by Affected Customers was $1,130,060,539;

(c) that while Affected Customers' personal circumstances would have varied greatly, many of the customers would have been low to middle income earners and more significantly affected by the conduct;

(d) the position of trust held by IAL in society, in particular in respect of its brand NRMA Insurance, and all the more in circumstances where the law imposes an obligation of utmost good faith between the insurer and the insured;

(e) that those customers had no way of knowing about the false, misleading and deceptive conduct;

(f) that, from IAL's perspective, if the fact of the implementation of the Cupping Mechanism had been disclosed, and its effect on premiums and discounts stated, over $1 billion in premium revenue might have been "in play", ie some customers may have chosen to not renew those policies and sought insurance from another provider (as IAL indeed anticipated);

(g) that during the term of the Relevant Period, IAL earned between $260M and $930M per annum in profit, in circumstances where the business from the Relevant Policies comprised approximately 60% of IAL's business;

(h) the fact that the contraventions came about in circumstances where the introduction of the Cupping Mechanism was intended to cause (and did cause) the reduction in Discounts which were then not disclosed to customers on renewal of premiums;

(i) the fact that the effect of the contravention was not just a one-off but would have repeat consequences in subsequent years;

(j) that one of the very aims of the Go Discounts project was to ensure transparency in disclosing the customers' entitlements to Discounts, and to review the customer collateral documentation to be provided to renewing customers as part of the project;

(k) that having regard to the purpose and effect of the introduction and implementation of the Cupping Mechanism, and the goal of transparency in customer documentation, it

ought to have been obvious to IAL (including its relevant senior management) that the process by which the Cupping Mechanism was being introduced and its effect would be hidden by the proposed documentation to be provided to renewing customers;

(l) the fact that, in those circumstances, persons within IAL recognised the very issue the subject of the contraventions, and other persons recognised that the application of the Cupping Mechanism would be hidden by the nature of the information and calculations shown to renewing customers via the proposed COI (i.e. "the numbers would add up") but IAL still failed to have in place sufficient processes and governance as to ensure that the Cupping Mechanism was disclosed to customers or that consumers were not otherwise misled as to their premiums and Discounts; and

(m) the fact that the relevant failures included by persons who were within senior management of IAL, and IAL recognises the failures in the roles of relevant senior management in their "involvement in matters relevant to the multi-year pricing-related issues where discounts were not always applied in full to premiums for all customers who may have been eligible, which has resulted in adverse customer outcomes and material remediation costs".

81 IAL submitted this is a case where the parties agree that a civil penalty of $40 million is appropriate. The Court should be satisfied that a penalty in that amount will be more than sufficient to achieve the object of deterrence for the reasons outlined in ASIC's submissions and the matters referred to by IAL in its submissions. It submitted those reasons include the following:

(a) at the heart of the contravening conduct is IAL's failure to disclose the effect of a particular pricing mechanism (cupping) on the Discounts customers would have reasonably expected to receive;

(b) the IAL board was not involved in approving or implementing cupping or the misleading conduct;

(c) although senior management was involved in approving the implementation of cupping, there is no evidence to suggest that those persons were aware of, or involved in, IAL's failure to properly disclose the impact of cupping on the value of the Discounts received by customers whose premiums had been affected by the cup;

(d) it is accepted that there was no intention to mislead;

(e) once IAL was made aware of the potential issue in May 2019, IAL (and IAG) took action to investigate it, to report the issue to ASIC, cease the use of cupping, comprehensively remediate customers, impose sanctions via executive remuneration (a step taken by IAG's Board), and implement substantive changes to pricing and disclosure practices and remuneration, risk and compliance systems, including IAG initiating a broader consideration of pricing through its Pricing Taskforce; and

(f) while the conduct was serious (and IAL has acknowledged it as such), *Pattinson* directs the Court to set a penalty at a level no greater than sufficient to deter future contraventions (rather than a penalty which is proportionate to the seriousness of the conduct). The evidence permits a finding that, even without a substantial penalty, IAL is deterred. A $40 million penalty will remove any doubt as to specific deterrence and secure the goal of general deterrence.

Further consideration

82 Having considered the facts as agreed, the submissions of the parties, the evidence relied on, the contraventions and relevant principles, I am satisfied that it is appropriate to order the pecuniary penalties in the amount agreed.

83 The detailed SAFA filed by ASIC and IAL reflect that they have given close and careful consideration to the relevant issues, to the appropriate declarations, orders and pecuniary penalties. Relevantly, ASIC is a specialist regulator. In that context, in *DFWBII* the High Court at [60]-[61] noted the relevance of a specialist regulator being able to offer "informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance", albeit that such submissions will be considered on the merits in the ordinary way.

84 It is self-evident from the conduct described in the SAFA, as summarised above, that the seriousness of the contraventions warrants a significant penalty. The number of Affected Customers impacted by the conduct and the size of the combined losses in the tens of millions of dollars plainly reflect this. As to the circumstances of the contraventions, I refer in particular to, without repeating [8]-[15], [49]-[54].

85 It is important to recognise that deterrence is the primary consideration, and as such, it is necessary to impose a penalty of sufficient size to act as a strong deterrent to ensure IAL and others do not treat the risk of non-compliance as a mere cost of doing business.

86 In the circumstances of this case, the agreed penalty is appropriate to reflect the seriousness of the contravention, yet recognise the mitigating factors present, as described above. I am conscious that there is no one appropriate remedy, but a permissible range of penalties. The Court is to impose a penalty that is appropriate having regard to all relevant matters. I am satisfied of the accuracy of the parties' agreement as to facts and consequences, and that the agreed penalty proposed is an appropriate remedy in all the circumstances. Having considered totality, I find the proposed penalty amount does not exceed what is proper for the entire contravening conduct. Accordingly, in this case it is highly desirable for the Court to accept the parties' proposal and impose the proposed penalty: *Volkswagen* at [126]. I am satisfied that in the circumstances, the agreed penalty of $40 million satisfies the significant element of deterrence required. It carries a sufficient sting to ensure that the parties or others do not regard the penalty amount as an acceptable cost of doing business. Weighing all the relevant factors, bearing in mind the protective and deterrent purpose of a pecuniary penalty, as applied to the facts of this case, I am satisfied that agreed penalty is appropriate.

Adverse publicity order

87 The Court has power under s 12GLB(1)(a) of the ASIC Act (as in force prior to 13 March 2019) to make an adverse publicity order, as defined in s 12GLB(2), against a person who has been ordered to pay a pecuniary penalty under s 12GBA(1) (as in force prior to 13 March 2019).

88 The purposes of an order made under s 12GLB include: *first*, to alert affected persons to the fact that there has been misleading conduct; *second,* to protect the public interest by dispelling the incorrect or false impressions that were created; and *third,* to support the primary orders and assist in preventing repetition of the contravening conduct: *Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2)* [2021] FCA 966 (*ASIC v CBA (No 2)*) at [12]-[15]; *Australian Securities and Investments Commission v Colonial First State Investments Ltd* [2021] FCA 1268 at [84]; *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2022] FCA 1251; (2022) 164 ACSR 428 at [238].

89 The particular audience of the information must be considered in determining the method and mode in which the communication required by the order is made**:** *ASIC v CBA (No 2)* at [16].

90 There is no dispute between the parties that: an order should be made under s 12GLB(1)(a) of the ASIC Act for the publication of a notice by IAL; the content and form of the notice to be published; that within 30 days from the date of the order, the notice should be published by

displaying a link to a PDF or webpage copy of the notice in an immediately visible area on NRMA Insurance's website homepage for a period of 90 days; and that IAL should also send the notice to (at least) the cohort of Affected Customers who remain customers of IAL, by post or email (depending on the selected preference of the customer to receive post or emails). For completeness, I also note the parties agreed the time period relevant to the cohort to receive any written notice differed slightly from the Relevant Period, being 28 April 2014 to 3 November 2019. This reflects that the first and last policy renewals to which the Cupping Mechanism applied occurred slightly after cupping commenced and ceased.

91 However, an issue remained as to the scope of the customer cohort receiving the notice, namely, whether the notice should be sent to all customers who were and who could have been directly affected by IAL's conduct (ASIC's position), or whether it should be sent to only those customers who were in fact affected (IAL's position). Further the parties contested whether the notice should be distributed with the documents comprising the Renewal Offer (ASIC's position), or whether it should be sent as a stand-alone communication (IAL's position).

ASIC's submissions

92 ASIC highlighted the purpose of such orders, as referred to above at [88]. Those purposes are both punitive and protective. In reflecting the punitive purpose, an order should not just serve the notion of deterrence, but should also represent "a condign curial response to what has occurred": *ASIC v CBA (No 2)* at [13]. ASIC also focussed on the importance of the audience in fashioning the order to ensure the statutory purpose of the power is served. The way in which the audience will more readily digest and understand the information is relevant: *ASIC v CBA (No 2)* at [17].

93 In that context, ASIC submitted that those customers who held Relevant Policies during the Relevant Period should be notified of the contravening conduct as a proper matter to consider when deciding whether to renew their existing policies.

94 As to the cohort, ASIC submitted that it is appropriate that those who could have had (albeit did not have) the Cup applied be made aware of IAL's contravening conduct, in order to achieve the punitive and protective aims of the order under s 12GLB(1)(a). *First,* the Cupping Mechanism was indiscriminate in its operation; if the Cup was triggered, it would apply to reduce Discounts. That is, IAL's conduct is directly relevant to these people as it either did affect them, or could have affected them. *Second,* the reason for the introduction of cupping was to retain customers (or prevent customer churn). It is said that if IAL had not engaged in

misleading conduct and instead had disclosed that the Cupping Mechanism was applied to all of the Relevant Policies during the Relevant Period, some of the customers who held such policies (whether ultimately affected or not) might have considered not renewing such policies and changing insurer. Those customers should be notified of the conduct engaged in by IAL. ASIC submitted, contrary to IAL's submission, there was no evidence that distributing the notice to a wider cohort including customers who were not directly affected, would lead to any confusion for those recipients. In oral submissions responding to IAL, ASIC further submitted the letter that went to customers as part of the remediation process was deficient and that it was important people are properly told what happened.

95 As to the manner of sending the notice, ASIC is seeking that the notice be sent as part of the renewal materials. *First*, and principally, ASIC submitted those customers who held Relevant Policies during the Relevant Period should be notified of the contravening conduct as a proper matter to consider when renewing existing policies, and so such notice ought to be received as part of the renewal documents. *Second,* IAL submitted that whilst the message conveyed by the notice may be diluted if received as part of the renewal documents, and the notice potentially cause confusion, there was no evidence adduced to support that concern. Further, it submitted there is equally a risk that some customers would consider the standalone distribution of the notice to NRMA customers (even Affected Customers) to be a hoax or scam, and as such could ignore it. That assessment may occur even before the recipient has examined the content of the notice. ASIC submitted customers would understand the notice if sent with the renewal materials. *Third*, the relative cost of the proposals put forward by ASIC and IAL favour ASIC's proposal.

IAL's submissions

96 IAL submitted that the Court can be satisfied that all Affected Customers, being the persons who were misled by the contravening conduct, have been informed of IAL's conduct already as part of its remediation program. On this view, this was not a case where there remains a cohort of customers who were impacted by the contravening conduct but do not know what occurred or have not been remediated. IAL noted representations were not made to the world at large, but in any event, submitted the website publication would necessarily attract the attention of existing, new and potential customers who go to NRMA's website. Insofar as deterrence is an objective of publicity orders, it is entirely satisfied by the civil penalty order

in these proceedings. Additionally, IAL submitted that any wider cohort would necessarily include unaffected customers, thus potentially causing confusion for those recipients.

97 IAL submitted that a separate, standalone communication would be more appropriate and more effective than any communication bundled with renewal documentation, and would allow the anticipated customer response to be properly managed. IAL's practice is to issue renewals in advance of policy expiration, and several times thereafter where the customer does not renew on time. Any coupling of communications concerning the renewal and the notice is prone to dilute the message that the notice is intended to convey, and potentially confuse recipients. The dilution occurs in circumstances where customers receiving multiple page renewals might be expected to focus on that Renewal Offer. Further, it submitted the issuance of the notice as part of the renewal process imposes an unfair burden on IAL because it does not allow IAL appropriately to manage its response to the customer enquiries it expects to receive after the notice is issued.

Conclusion on adverse publicity order

98 I accept IAL's submission that it is more appropriate that the notice be sent in a stand-alone post out. If that approach did not occur, some customers would not receive their notice for approximately 12 months, noting that renewal offers are sent by reference to the date a policy was entered. It is important that the cohort to whom the letter is sent receive the information in a timely fashion. Moreover, I agree with IAL's submission that in the circumstances, this would allow any resulting phone inquiries to be addressed by dedicated persons, as opposed to via the general call centre. This response would be of assistance to the customers. It is readily understandable that receiving the notice as one of a number of documents at renewal may tend to confuse the recipient or be ignored by them. This would dilute the effectiveness of the order. I appreciate that ASIC submits that there is no evidence to support this proposition, but equally there is also no evidence to the contrary. There is also no basis to ASIC's suggestion that receiving a stand-alone letter may somehow be seen as a hoax or scam. ASIC's submission that their proposal is more cost effective, is unnecessary to resolve. The issue is not one of cost, as IAL are not contending that the stand-alone post out is the appropriate course because it is less costly. Although it did submit that the burden on IAL is not reduced if IAL is required to only send the Notice to customers once on renewal.

99 I am satisfied that in all the circumstances, the better method of communication is that suggested by IAL.

100 As to the cohort to receive the notice, I am satisfied that it should be sent to the broader cohort of customers, being all customers who held a Relevant Policy between 28 April 2014 and 3 November 2019 and still hold at least one of those policies, rather than groups of Affected Customers currently holding one or more of those policies. Although not every member of the broader cohort was financially impacted, they are entitled to be informed that the Cupping Mechanism did apply to their policy. As to the suggestion this might cause confusion, given the stand-alone post out, any resulting inquiry can be addressed by dedicated personnel with skills and experience in dealing with questions about pricing remediation.

101 According, I make the adverse publicity order in terms reflecting these reasons.

I certify that the preceding one hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham.

Associate: L Bellach

Dated: 30 June 2023

ANNEXURE A

STATEMENT OF AGREED FACTS AND ADMISSIONS

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NSD 1070 OF 2021**

IN THE MATTER OF INSURANCE AUSTRALIA LIMITED
ACN 000 016 722

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

INSURANCE AUSTRALIA LIMITED ACN 000 016 722
Defendant

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A. INTRODUCTION

1. This Statement of Agreed Facts and Admissions (**SAFA**) is made for the purposes of s 191 of the *Evidence Act 1995* (Cth) jointly by the Plaintiff, the Australian Securities and Investments Commission (**ASIC**) and the Defendant, Insurance Australia Limited (**IAL**).[1]

2. The SAFA relates to Proceedings NSD 1070/2021 commenced by ASIC against IAL on 14 October 2021 (**Proceedings**). By the Proceedings, ASIC has sought declarations that IAL contravened particular provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *Corporations Act 2001* (Cth) (**Corporations Act**), and orders that it pay pecuniary penalties to the Commonwealth and cause to be published (at its own expense) an adverse publicity notice in a manner and form approved by the Federal Court of Australia.

3. The facts agreed to, and the admissions made in this SAFA by IAL, are agreed to and made by IAL solely for the purpose of the Proceedings.

4. IAL admits that it contravened ss 12DA(1) and 12DB(1) of the ASIC Act and ss 912A(1)(a) and (c) of the Corporations Act as set out in section D of this SAFA.

B. PARTIES AND BACKGROUND

B1 ASIC

5. The Plaintiff is and was at all material times:

   5.1. a body corporate established by s 7 of the *Australian Securities Commission Act 1989* (Cth) and continued in existence by s 261 of the ASIC Act; and

   5.2. entitled by s 8 of the ASIC Act to sue in its corporate name.

B2 IAL

6. The Defendant at all material times:

   6.1. is and has been a body corporate incorporated in Australia;

   6.2. operates under Australian financial services licence number 227681;[2]

   6.3. is an insurance company that issues products under the NRMA insurance brand;[3] and

   6.4. has had a relationship with its insurance customers as insurer and insured.[4]

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1 The parties may seek to tender documents not inconsistent with this SAFA.
2 CS [6]; CR [7].
3 CS [6]; CR [7].
4 CR [29].

7. IAL is wholly owned by Insurance Australia Group Limited (**IAG**), which is a multinational insurance company and the largest general insurance company in Australia and New Zealand.[5]

8. In its most recent financial year, ending 30 June 2021, (which is outside the period in which the contraventions the subject of the Proceedings occurred, see below):

   8.1. IAL reported in its financial report total assets of $23,877 million, revenue of $15,644 million, loss of -$1,386 million before tax and -$997 million after tax;

   8.2. IAG reported in its annual report total assets of $33,449 million and a market capitalisation of $12,719 million, placing it within the ASX top 50;[6]

   8.3. IAG reported in its annual report revenue of $18,895 million and a loss of -$427 million; and

   8.4. an estimate of IAL's share of the Australian market as it relates to NRMA policies of the type listed in **Schedule 1** was approximately 12 percent.

9. On 11 August 2021, IAL announced its FY21 results and Nick Hawkins IAG CEO stated that:

> "Significant one-off corporate expenses mainly relating to business interruption, customer refunds and payroll remediation impacted our overall result, which was a net loss of $427 million (FY20: $435 million profit). These are historical issues we've identified, provisioned for and are fixing – and we are making investments to continue to lift our risk management and operational capabilities."[8]

B3 Relevant Policies

10. Between 16 March 2014 and 25 September 2019 (the **Relevant Period**), IAL:[7]

   10.1. offered NRMA brand insurance products to the public for Motor, Home, Boat and Caravan insurance, and specifically the 13 insurance policy products identified in Schedule 1 (**Relevant Policies**); and

   10.2. entered into NRMA Insurance branded contracts of insurance with customers in respect of those policies.

B4 Renewal of existing insurance policies

11. During the Relevant Period, IAL offered its customers renewal on the Relevant Policies[8] on standard terms.

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5 CS [6]; CR [7].
6 CS [6]; CR [7].
7 CS [2]; CR [1], [6], [19], [29].
8 CS [7]; CR [14]-[15].

12. At all material times during the Relevant Period, prior to the expiry of each existing Relevant Policy of an existing customer, IAL sent a renewal letter or offer of renewal to each such customer, which offered a renewal of the customer's existing insurance policy on the terms set out in the offer (**Renewal Offer**).[9]

13. The Renewal Offer included a proposed certificate of insurance (**COI**) and, if there had been any changes since the previous applicable version provided to the customer (at policy inception or renewal), the applicable Product Disclosure Statement (**PDS**) (or Supplementary PDS (**SPDS**)) for that policy.[10] A sample COI has been annexed to the SAFA as **Annexure 1** (IAG.0003.0076.0083).

14. In the case of customers who paid annually, Renewal Offers were considered by IAL to be accepted on payment by the customer of the amount set out in the COI. In the case of customers who paid by a frequency other than annually (such as monthly), the Renewal Offer was considered by IAL to be accepted by the customer on payment of the first instalment as set out in the COI.[11]

15. The Renewal Offer stated that the terms of the contract were set out in the proposed COI and PDS (and SPDS if applicable).[12]

16. The Renewal Offer was generally sent to existing customers around 4-6 weeks prior to the expiry of the existing policy.[13]

17. On some occasions, IAL also sent a follow up Renewal Offer prior to the expiry of the existing policy.[14] Where a customer's policy was not renewed by the renewal date, IAL also sent a reminder shortly after the renewal date.

18. During the Relevant Period, IAL used algorithms as part of its automated system to calculate insurance premiums for a renewing customer's Renewal Offer.[15]

B5 Premium, Excess and Discounts guide

19. At all material times during the Relevant Period, the proposed COI:

    19.1. referred a customer to the Premium, Excess and Discounts guide (**PED**) applicable to the Relevant Policies for more information about how the premium was calculated;[16] and

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9 CS [11]; CR [15].
10 CS [7]; CR [6], [15].
11 CR [16].
12 CS [11]; CR [6].
13 CS [11]; CR [15].
14 CS [11]; CR [6].
15 CS [13]; CR [14].
16 CS [8]; CR [17].

19.2. stated that the customer should refer to the PED for further information about how the customer's premium was determined.

20. During the Relevant Period, IAL published on its website a PED in respect of each of the Relevant Policies.[17]

21. The COIs incorporated by reference the terms of the applicable PED.[18]

22. During the Relevant Period, each PED for each type of Relevant Policy included statements about how a customer's premium would be calculated. Extracts from PEDs for each type of Relevant Policy applicable during the Relevant Period are set out in **Schedule 2**.[19] Sample PEDs have been annexed to the SAFA. **Annexure 2** was applicable to Motor policies at the beginning of the Relevant Period (IAG.0003.0151.0096). **Annexure 3** was applicable to Motor policies at the end of the Relevant Period (IAG.0003.0120.3012).

B6 Discounts

23. During the Relevant Period, IAL offered, advertised and promoted certain discounts (a loyalty discount and a no claim bonus discount, described below, and referred to as the **Discounts**) to eligible customers on renewal of the Relevant Policies.[20]

24. The PED in respect of the Relevant Policies, referred to:[21]

24.1. a loyalty discount (**Loyalty Discount**); and

24.2. a no claim bonus discount (**NCB Discount**),

and described how those discounts were to be calculated and applied upon renewal of the customer's existing insurance policy. The PED stated that the Loyalty Discount and NCB Discount would be applied to each of the Relevant Policies where the customer was eligible for the discount.[22]

25. The PED for the Relevant Policies referred to the Loyalty Discount as a percentage discount on the premium payable on renewal calculated by reference to the length of time a customer had held the Relevant Policy as well as certain other NRMA branded policies with IAL.[23]

26. The PED for the Relevant Policies referred to the NCB Discount as a percentage discount on the premium payable on renewal calculated by reference to whether the

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17 CS [8], CR [17].
18 CR [17].
19 CS [8]; CR [17].
20 CS [3]; CR [15], [19]-[20].
21 CS [8]; CR [15], [17].
22 CS [8]; CR [15], [17].
23 CS [9]; CR [6], [15].

customer had made a non-recoverable claim during each previous year the customer held the policy.[24]

B7 Calculation of premiums described in PEDs

27. In the PEDs applicable to the Relevant Policies during the Relevant Period, IAL (as detailed in Schedule 2):

    27.1. stated that the customer's "insurance premium is based on the likelihood of a claim being made on [the] policy in the future. There are a number of factors [NRMA] take[s] into account when determining [the customer's] premium. [NRMA] calculate[s] your premium by combining the pricing factors, No Claim Bonus, policy options, Loyalty Discount, [choice of excess] and government charges"; and

    27.2. listed the exact order of each step taken to calculate a customer's premium with the Loyalty Discount and NCB Discount applied after the determination of the premium using the pricing factors. For example for Motor policies, the PEDs described that Step 1 combined the pricing factors, Step 2 applied any eligible NCB Discount, Steps 3, 4 and 5 added the cost of any additional No Claim Bonus protection, excess reductions or additions were made and the cost of any optional cover was added, and Step 6 applied any eligible Loyalty Discount to the amount arising from Step 5.

28. From approximately mid-2019 the PEDs applicable to the Relevant Policies also stated (as detailed in Schedule 2): "Other commercial factors affect the premium you pay, including costs associated with operating our business. Each time you renew your insurance your premium is likely to change, even if your personal circumstances have not changed. This is because the premium you pay is calculated on our updated modelling, based on your circumstances and wider insurance trends."

29. The PEDs also usually stated that the customer's COI would show any NCB Discount that had been applied to the premium to be paid and that each year on renewal, the customer's NCB was recalculated.[25]

30. The PED described the Loyalty Discount as follows:

    30.1. each PED applicable to the Relevant Policies from 28 April 2014 to 19 March 2017 for Home policies, and from 28 April 2014 to 15 February 2017 for Motor, Caravan and Boat policies (as summarised in Schedule 2 below) state: "On renewal your Certificate of Insurance will show a list of what policies contributed to your Loyalty Discount."

    30.2. each PED applicable to the Relevant Policies from 20 March 2017 to the end of the Relevant Period for Home policies, and from 16 February 2017 to the end of the Relevant Period for Motor, Caravan and Boat policies (as summarised in

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[24] CS [9]; CR [6], [15].

[25] CS [10]; CR [6], [15].

Schedule 2 below) state: "To help ensure we are taking into account all of your policies and you are receiving the maximum discount you are entitled to your Certificate of Insurance will display information about the policies which contributed to your Loyalty Discount…"

B8 Premium and discounts set out in the proposed COI

31. During the Relevant Period, each proposed COI sent to each existing customer on renewal of the Relevant Policies:[26]

    31.1. set out the renewal premium payable by the customer to renew the insurance policy;

    31.2. set out if the customer was eligible for a Discount, the percentage Discounts applicable (and in some cases the dollar value of the Discounts); and

    31.3. set out that the renewal premium payable had been calculated by applying the applicable Discounts; and

    31.4. by reason of the matters in sub-paragraphs 31.1 to 31.3, implied that the applicable Discounts had been applied to the premium that would otherwise have been payable by the customer had the Discounts set out in the COI not been applied.

C. THE CUPPING MECHANISM

C1 Cupping

32. On or about 16 March 2014,[27] IAL introduced an automated process into the pricing algorithm used to generate renewal premiums for NRMA customers, which imposed a percentage-based limit on the amount by which a renewal premium offered to a customer once discounts were applied could differ from the premium paid by that customer for the same policy in the previous year.[28]

33. The process had two components. The first was known as "cupping" and imposed a limit or "cup" on the maximum permitted decrease after discounts (i.e. it could not *decrease* beyond a certain percentage-based amount) (**Cupping**). It is the application of this limit, which impacted the discounts provided to certain customers, the way it was applied and the failure to disclose it, that is the subject of the Proceedings. The second, known as "capping", imposed a limit or "cap" on the maximum permitted increase after discounts (i.e. it could not *increase* beyond a certain percentage-based amount) (**Capping**).[29]

34. At that time, IAL already had a separate process which allowed for cupping and capping but that process applied before discounts were applied and therefore did not

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[26] CS [12]; CR [15], [17].
[27] CS [4], [14], CR [9].
[28] CR [9], [10].
[29] CR [9], [10].

prevent discounts being passed on in full (called by IAL first level cupping or capping). The new additional mechanism introduced by IAL limited the changes to the premium after discounts were applied (called by IAL second level cupping or capping), and this new mechanism once implemented was not disclosed to customers.

35. Some of the policies that are the subject of the Proceedings were also impacted beneficially by Capping in other policy years.

36. Together, the Cupping and Capping mechanisms limited the upward or downward movement in a renewal customer's price from one year to the next.

37. Capping and Cupping could either have no effect on a renewing customer's premium, reduce the premium payable by a customer or cause the customer to pay a higher premium than he/she/they would otherwise have paid (including because the discounts the customer was entitled to receive were not realised, either in full or in part).

38. The cupping process operated such that:[30]

    38.1. after the Discounts were applied to a renewing customer's proposed renewal premium, a process was triggered if the calculation resulted in a decrease in that premium greater than the percentage limit (the **Cup**) set in the algorithm when compared to the customer's premium for the previous year;

    38.2. if that occurred, the premium amount calculated before discounts were applied (**Base Premium**) in respect of that customer was recalculated and increased such that when the customer's applicable Discounts were applied, the final premium would fall within the Cupping limit; and

    38.3. the recalculated final premium amount was the renewal premium proposed to the customer in the customer's COI, referred to in this document as the **Cupping Mechanism**.

39. Where Capping applied, the customer was offered a lower renewal premium than would otherwise have been offered.[31]

40. The existence, application and/or consequences of the Cupping Mechanism (or the Cup) was not disclosed to customers affected by the application of the Cupping Mechanism during the Relevant Period.[32] Likewise, customers were also not made aware of Capping, the upper limit put in place to prevent increases in price beyond a certain point by Capping.[33]

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30 CS [15]; CR [10], [11].
31 CR [10], [13].
32 CS [4]; CR [18], [29(b)].
33 CS [4]; CR [18], [29(b)].

C2 Applying Cupping to Relevant Policies

41. The Cupping Mechanism (as well as Capping) was applied to calculate the renewal premium of the Relevant Policies as a result of the implementation of Price Change Proposal (**PCP**) 346, and came into effect on 16 March 2014. Renewals sent from that date resulted in policies starting approximately 6 weeks later, on or about 28 April 2014.

42. Accordingly, the first date on which it was possible for a customer of a Relevant Policy to be issued a Renewal Offer containing a renewal premium that had been calculated where the Cupping Mechanism was part of the pricing algorithm was 16 March 2014. The first date on which such a policy commenced, following acceptance by the customer, was 28 April 2014.[34]

43. Although the Cupping Mechanism was part of the pricing algorithm used by IAL to calculate premiums for all customers who held a Relevant Policy during the Relevant Period, Cupping only negatively impacted a proportion of those customers (**Affected Customers**). The Affected Customers were those customers who held a policy in circumstances where:[35]

    43.1. the policy was a Relevant Policy in the Relevant Period;

    43.2. a Renewal Offer was made in the Relevant Period in relation to that policy;

    43.3. the COI sent to the customer as part of that Renewal Offer provided for a Loyalty Discount and/or NCB Discount; and

    43.4. Cupping applied in the calculation of the renewal premium amount set out in that COI (**Affected Premium**) and with the effect that the full value of the Discounts to which the customer was eligible, and as described in the COI, was not passed on to the customer;

    with each such policy being an **Affected Policy** or together, the **Affected Policies**.

C3 Ongoing effect of using the Cupping Mechanism

44. The effect of the Cupping Mechanism was that, where the Cup was triggered, IAL recalculated the Base Premium so that the Discounts stated on the COI as being applied to customers appeared to be as set out in the PED. For the Affected Customers, this resulted in a higher Base Premium and therefore customers were ultimately offered a higher final premium than what they would otherwise have been offered, had the Cupping Mechanism not been in place and the Cup not been triggered.[36]

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34 CS [4]; CR [9].
35 CR [19]-[20].
36 CS [16]; CR [6], [12].

45. After the first year the Cup was triggered, even if it was not triggered again, some subsequent renewal premiums in respect of Affected Policies held by Affected Customers were higher than they otherwise would have been as a result of the Cup, as the way they were calculated included reference to the previous year's inflated Base Premium.[37] Neither the PED for the Relevant Policies, nor the COI, identified that the previous year's premium affected the renewal premium during the Relevant Period.[38]

C4 Removal of the Cupping Mechanism

46. IAL removed the Cupping Mechanism from applying to Renewal Offers issued on or after 26 September 2019.[39] This was done through PCP P1070, which came into effect for renewing policies issued on or after 26 September 2019 and for renewals which would become policies if accepted on 4 November 2019. Accordingly, the last date on which a Renewal Offer was issued to a customer where the Cupping Mechanism formed part of the pricing algorithm was 25 September 2019, and the last date on which any such Renewal Offer fell due for renewal by a customer was 3 November 2019.[40]

47. IAL has remediated customers impacted by the ongoing impact of Cupping, referred to in paragraph 45 above, up to either 3 November 2019 or to the end of the relevant policy term for customers impacted during the 12 months prior to 3 November 2019. To the extent there is any residual subsequent year impact to customers after 3 November 2019, IAL has not otherwise rectified the ongoing effect of Cupping, and says that there has not been and will not be any ongoing detriment to customers after that time.

D. FORMAL ADMISSIONS

48. At all material times, each of the Relevant Policies was a financial product for the purposes of s 12BAA(1)(b), (5) and (7)(d) of the ASIC Act.[41]

49. The conduct of IAL set out above was engaged in as part of IAL's insurance business and thereby in trade or commerce.[42] The conduct was in relation to and in connection with the supply or possible supply of financial services, being the issuing of and dealing in an insurance contract and policy,[43] being a financial product for the reasons set out in paragraph 48 above.

50. On each occasion that IAL made a Renewal Offer to an Affected Customer in respect of an Affected Policy during the Relevant Period, including from 15 October 2015 to 25 September 2019 (**Penalty Period**), IAL, in trade or commerce and in connection with the supply or possible supply of financial services, represented, by the terms of the PED, and by implication from the terms of the COI (as set out at paragraphs 19 and

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37 CS [17]; CR [21].
38 CS [17], CR [6].
39 CS [18]; CR [23].
40 CS [18]; CR [23].
41 CS [1], [20], [24]; CR [28].
42 CR [28].
43 CR [28].

31 above), that the Affected Premium payable by the customer on renewal of the policy had been calculated consistently with the information and process set out in the PED regarding calculation of the premium, and that the Affected Premium payable included the full value of the Discounts which the customer would reasonably have expected to receive (the **Premium and Discounts Representation**).[45]

51. During the Relevant Period, by reason of the application of the Cupping Mechanism to the Relevant Policies, in respect of Affected Customers, IAL:[46]

    51.1. limited the extent to which the Discounts set out in the PEDs and purported to be provided to Affected Customers in their COIs were actually provided to customers such that the Affected Customers did not receive the full value of the Discounts they would reasonably have expected to receive;[47]

    51.2. increased the Base Premium offered to the Affected Customers and then applied the Discounts to that Base Premium;

    51.3. by increasing the Base Premium before Discounts were applied, charged Affected Customers higher premiums upon renewal than if Cupping had not applied;[48]

    51.4. did not calculate the premium payable on renewal consistently with the information and process set out in paragraph 27 above;[49] and

    51.5. failed to disclose to customers the existence, application and/or consequences of the Cupping Mechanism (set out above).

    Accordingly, the Premium and Discounts Representation was false, misleading or deceptive or likely to mislead or deceive.[50]

52. To the extent that the Premium and Discounts Representation was a representation as to a future matter, ASIC relies on s 12BB of the ASIC Act and IAL admits that by reason of the existence and application of the Cupping Mechanism during the Relevant Period, IAL did not have reasonable grounds for making the Premium and Discounts Representation.[51]

53. There was a relationship between IAL and its customers as insurer and insured, and IAL accordingly owed its customers a duty of utmost good faith.[52]

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45 CR [28].
46 CR [29].
47 CR [29(d)].
48 CS [29(e)].
49 CR [29(c)].
50 CS [21], CR [26], [29].
51 CS [22]; CR [31].
52 CS [23]; CR [29].

54. In the circumstances set out in paragraphs 48 to 53 above during the Relevant Period, IAL, in trade or commerce, in relation to and in connection with the supply or possible supply of financial services:[53]

54.1. engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act;[54] and

54.2. made false or misleading representations concerning:

54.2.1. the price of the Affected Policies, in contravention of s 12DB(1)(g) of the ASIC Act;[55] and

54.2.2. the existence or effect of a condition, right or remedy, in relation to the Affected Policies in contravention of s 12DB(1)(i) of the ASIC Act.[56]

55. In so doing, IAL admits that in the Relevant Period it breached its general obligation to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act.[57]

56. IAL admits that in the Relevant Period it failed to do all things necessary to ensure that its financial services were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Corporations Act by:

56.1. its conduct during the Relevant Period set out in paragraphs 48 to 54 above;[58]

56.2. introducing the Cupping Mechanism as referred to above in paragraphs 32 to 40, which had the effect of limiting the extent of the reductions in premiums provided to Affected Customers; and

56.3. applying the Cupping Mechanism to increase Affected Customers' Base Premiums, with the effect that Affected Customers were charged a higher premium on renewal than if the Cup had not been triggered as referred to above in paragraphs 38 and 44 and paragraphs 59 to 61 and 63 to 65 below.

E. OTHER FACTS

57. Cupping was one part of the Capping and Cupping process, which limited (upwards and downwards) changes to a renewing customer's premium. While Capping limited price increases, Cupping limited price decreases.[59] As set out above, the Cupping

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53 CS [24]; CR [28].
54 CS [24]; CR [25].
55 CS [24]; CR [26].
56 CS [24]; CR [26].
57 CS [25]; CR [33].
58 CS [25]; CR [34].
59 CR [9], [10] and [13].

Mechanism had the effect that an Affected Customer did not receive the Discounts, either in full or in part, which the customer might otherwise have received.

58. The existence, application and/or consequences of the application of Cupping was not disclosed to Affected Customers.

59. The Affected Policies were held by Affected Customers between 28 April 2014 and 3 November 2019 (inclusive), as explained above in paragraphs 41, 42, and 46.[60]

60. During that period, Cupping impacted the Affected Policies around 1,785,000 times (including the subsequent year impact described in paragraph 45 above). There were approximately 611,000 groups of Affected Customers (where a customer group may include one or more customers holding one or more policies),[61] and around 705,000 separate Affected Policies impacted.[62]

61. Between 15 October 2015 and 25 September 2019 (**Penalty Period**), Cupping impacted the Affected Policies around 1,098,000 times (including the subsequent year impact described in paragraph 45 above). There were approximately 222,000 Affected Policies and around 209,000 Affected Customer groups whose Renewal Offer was first impacted by Cupping in that period. In total, there were approximately 466,000 Affected Policies and around 419,000 Affected Customer groups impacted in the Penalty Period, including where the application of the Cup occurred outside the Penalty Period, but the Affected Policy or customer group experienced a subsequent year impact in that period.

62. Capping also applied to other NRMA customers who held Relevant Policies in these periods such that the premium charged to those customers was less than it otherwise would have been.

E1 The nature of loss or damage suffered

63. Affected Customers suffered financial harm as a result of IAL's conduct because they were required to pay higher premiums than the premium that should have been payable after the applicable Discounts.

64. Cupping operated during the Relevant Period, but the harm to Affected Customers occurred between approximately 28 April 2014 (being the first date a policy which fell due for renewal was impacted by the Cupping Mechanism) and 3 November 2019 (being the last date a policy which fell due for renewal was impacted by the Cupping Mechanism). It resulted in Affected Customers not receiving represented discounts in an amount of around $60,223,000 (excluding GST, Stamp Duty and Fire Services Levy (**FSL**)).[63] This amount was $71,436,974 including GST, Stamp Duty and FSL. The total premiums paid by Affected Customers during the Relevant Period was $1,130,060,539.

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60 CS [4]; CR [23], [30].
61 CR [22].
62 CS [5]; CR [22].
63 CS [5]; CR [24].

65. The financial harm to Affected Customers arising from Renewal Offers issued between 15 October 2015 and 25 September 2019 (the Penalty Period), occurred between 26 November 2015 and 3 November 2019 (inclusive), allowing a period of 6 weeks between when the Renewal Offers were issued and when the policies fell due for renewal. It resulted in Affected Customers not receiving represented discounts in an amount of around $35,393,000 (excluding GST, Stamp Duty and FSL).[64] This amount was $41,926,682 including GST, Stamp Duty and FSL. The total premiums paid by Affected Customers during the Penalty Period was $722,253,823.

E2 The circumstances in which the contraventions took place

Background to relevant Division, teams and roles

66. IAG's structure changed throughout the Relevant Period. However, at a high level, IAG was structured to have divisions which had responsibility for the various brands and products offered by IAG group entities such as IAL (which issued products in brands such as NRMA).

67. No single IAG division only worked on brands and products issued by IAL. One IAG division supported direct insurance brands and products, including those issued by IAL. The structure of IAG did not include a division dedicated only to products issued by IAL.

68. The IAG division responsible for the Relevant Policies changed name during the Relevant Period and was generally known as follows:

    68.1. between 1 January 2014 to until around December 2015, the Personal or Direct Insurance Division (although for a brief period at the beginning of 2014, the Direct Insurance business reported through to Enterprise Operations);

    68.2. from December 2015, the Australian Consumer Division; and

    68.3. from around 1 January 2018, the Australian Division.

69. During the Relevant Period and the lead up to it from June 2013, work undertaken by personnel or teams within IAG set out in this SAFA that related to products issued by IAL, including NRMA, were undertaken on behalf of and for IAL.

70. During the Relevant Period, the above Division was headed by a person who was described as the Chief Executive Officer or Chief Executive of the Division, who reported to the Chief Executive Officer of IAG. The exact title of that role also changed over time with the changes in the Division names but in this document is referred to as the **CEO Personal Insurance**, with the Division referred to as the **Personal Insurance Division**.

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[64] CS [5]; CR [22].

71. The Personal Insurance Division had teams responsible for aspects of the insurance brands or products such as designing the insurance products, pricing the insurance products, and managing portfolios of customers including for the Relevant Policies.

72. Within the Personal Insurance Division, the key teams responsible for the Relevant Policies were headed by an Executive General Manager who reported to the CEO Personal Insurance. The name of the position of the Executive General Manager changed (and their team name corresponded to their title) throughout the Relevant Period, and for convenience is referred to in this document as the **Executive General Manager Product and Pricing** and the relevant team overseen by them as the **Product and Pricing Team**. There were a number of different personnel who held the Executive General Manager Product and Pricing role during the Relevant Period.

73. Within the Product and Pricing Team, some team members from sub-teams had specific responsibility for some types of Relevant Policies that are the subject of the Proceedings. The way in which the Product and Pricing Team structured this responsibility for those Relevant Policies was by way of grouping personal insurance portfolios for different policy types (Motor, Home etc).

74. During the Relevant Period, reporting and responsibilities were structured within the Product and Pricing Team around the way those products were designed, priced and distributed and included:

    74.1. portfolio sub-teams who managed the overall strategy and budget of each portfolio;

    74.2. product sub-teams who managed the design and distribution of the insurance products within a portfolio; and

    74.3. various "pricing" sub-teams responsible for generating pricing options for consideration by the portfolio teams, implementing any changes to the pricing algorithms, or changes in ratings tables, and testing their functionality.

75. Each of the sub-teams referred to in paragraph 74 above had a team leader. Those personnel reported to the Executive General Manager Product and Pricing. The titles of those reporting to the Executive General Manager Product and Pricing changed over time but generally included General Manager / Head, Senior Managers and later Executive Manager.

76. Between January 2013 and July 2014, the general manager role reported to the Executive General Manager Product and Pricing:

    76.1. a person held the role of General Manager / Head of Commercial Pricing and Underwriting from at least 1 January 2013 to 27 January 2014 (**GM CP&U**); and

    76.2. another person who held the title General Manager / Head of Technical Pricing from at least 1 January 2013 (**GM Technical Pricing**) and then GM CP&U from 28 January 2014.

77. In relation to the role of Executive General Manager Product and Pricing, this position was held from at least 1 January 2013 to 18 July 2014 by one person. A different person held that role in the period from around 21 July 2014 to the end of 2017 (that person having previously held the position of GM Technical Pricing and GM CP&U as set out in paragraph 76.2 above).

78. From at least 2013, IAG had a reporting team that was comprised of people who held positions that reported directly to the IAG Chief Executive Officer (known as the Executive Team and from around December 2015 the Group Leadership Team). The Executive General Manager Product and Pricing role was not a member of the Executive Team or Group Leadership Team in that role, though the **CEO Personal Insurance** was.

Introduction of Cupping

79. Throughout 2012 to 2014, the IAG Personal Insurance Division undertook a project directed to simplifying the discount structure offered to customers, including for NRMA customers. This was referred to as Go Discounts.

80. Some of the key changes impacting customers as a result of the Go Discounts project were stated as being:

    - "Discounts will be clearly listed on the COI and customers will be able to determine how much they have saved through discounts
    - Our customers will feel valued because they will be recognised as an individual
    - Customers will be rewarded for the number of policies they have with us, not a combination of eligible polices [...]"

81. The Go Discounts project was part of a broader program of change within IAG known as the Go Change Program. That broader program had a number of streams of work overseen by an Executive Change Committee (**ECC**), the role of which included the approval of the annual funding and scope of each program as well as business cases. Members of the ECC were the CEO Personal Insurance and the Personal Insurance Division Executive team. The Personal Insurance Division Executive team included the Executive General Manager Product and Pricing; Chief Operating Officer, Personal Insurance; Executive General Manager Marketing Reputation & CTP; and Chief Financial Officer, Personal Insurance.

82. The Go Discounts project governance structure included the Product, Pricing & Customer Program Steering Committee which "provided strategic direction, governance and oversight for the Go Discounts project, and was also responsible for decision-making in relation to, among other things, project and risk management, as well as approval of business cases and project changes within certain defined tolerances." Members of the Product, Pricing & Customer Program Steering Committee included the Executive General Manager Product and Pricing.

83. The Go Discounts project governance structure also included the Executive General Manager Sponsor who:

    "...was responsible for the achievement of benefits and the key decision-maker for the Product, Pricing & Customer Program. The Executive Sponsor endorsed the business

> case proposition for each project within the program and was accountable for ensuring the program benefits deliver to the Go Change Program strategy. The Executive Sponsor was the ultimate decision-maker on the resolution of issues/risks and accountable for program outcomes. The Executive Sponsor was also required to frequently engage with the program for progress review, direction setting, decision-making and issue resolution, syndication, stakeholder management and benefit realisation."

84. The Executive General Manager Product and Pricing at the time held this position.

85. The Go Discounts project also involved the Rating Engine Enhancements project team which operated between August 2013 and April 2014. The Rating Engine Enhancements project team operated separately to the Go Discounts project but was closely connected to it.

86. The project streams involved in the Go Discounts project were Product; Sales & Service; Claims; Marketing; Change; Customer Collateral; e-Business; Retail Business Insurance; Technology; Business Intelligence; Risk; and the Program Management Office.

87. On 16 July 2013, the Product, Pricing & Customer Program Steering Committee endorsed a change request seeking funding to design and implement an automated premium adjustment solution for Capping and Cupping as part of the Go Discounts project. Members of this forum who attended this meeting included the Executive General Manager Product and Pricing; GM CP&U; Head of Product Development & Innovation; Head of Online Customer Experience Sales; Head of Customer Experience; Program Director; GM Technical Pricing; Head of Marketing; Change Management and the Head of Sales and Service.

88. On 24 July 2013, the ECC received a meeting pack noting that they were being asked to approve "the implementation of the capping and cupping solution and additional funding request of $1.4M". The ECC approved the final form of the change request, referred to at paragraph 87 above, seeking approval for funding to build and introduce an automated solution relating to both Cupping and Capping. The attendees of the ECC meeting included, as the Chair, the CEO Personal Insurance, and the Executive General Manager Product and Pricing; Executive General Manager Marketing Reputation & CTP; Chief Financial Officer, Personal Insurance; Chief Operating Officer, Personal Insurance; Head of Strategic Change & Delivery; and Go PMO Manager. The Executive General Manager Product and Pricing at the time endorsed the paper.

89. The solution being contemplated in the paper was described as an "automated premium adjustment capability". The paper also stated the following regarding the reason for the proposed change:

> "GO Discounts has a critical dependency on a solution that provides the capability to automatically adjust the Total Premium payable by customers after the discount structure changes and at the same time maintain the transparency of the discounts for the customer. The existing Gross Premium Capping Solution is processed prior to discounts & rewards being applied, so will not function appropriately post the GO Discounts changes."

90. At the beginning of the paper there was a grey highlighted box which contained the following:

"Summary: The objective of this change is to:

"a. Protect customers from price shock resulting for a large variability in the renewal premiums as a result of the change in the discount structure

b. Avoid the risk of impacting the existing BAU retention rates

c. Avoid the risk to retention improvements being projected for the GO Discounts initiative."

"The impact on customer retention rates in the first year as a result of a premium capping only solution would result in a GWP loss of $80M. Large year on year premium reductions are not expected to materially improve the retention rates, however, will result in a revenue loss of $55M (if reductions higher than $100 are passed in full)."

91. The paper explored a range of options to address premium movement, including implementing only Capping, implementing both Capping and Cupping, or neither.

92. Concerning implementing neither Capping nor Cupping, the paper stated in the "dis-advantages – risks & impacts" column:

"**Impacts customer experience**

• Not managing the impact of an increase or decrease of more than $100 on ~700K Policies

Brand & Reputation Risk

GWP Loss

• The impact on customer retention rates in the first year as a result of a premium capping only solution would result in a **GWP loss of $80M**.

• Large year on year premium reductions are not expected to materially improve the retention rates, however, will result in a revenue loss **of $55M** (if reductions higher than $100 are passed in full)

Impacts the GO Discounts Project & changes the project status to Red"

93. GWP stands for Gross Written Premium and it is a measure of the premiums expected to be paid across a portfolio. It is used by IAL as a measure of an anticipated loss in premiums.

94. Concerning implementing Capping only, the paper stated in the "dis-advantages – risks & impacts" column:

"**Impacts Customer Experience** - year on year premium decreases

Risk that a significant decrease in premiums could lead to -

• potential increase in customer churn at the high end of premium reductions - customers' perception of being overcharged leading to migration to competitors

• an increase in customer premium enquiries impacting call handling times

• increase in requests for retrospective refunds because of customer perception that we have been overcharging the customer in previous years - reputation risk

GWP Loss

Large year on year premium reductions are not expected to materially improve the retention rates, however, will result in a revenue loss **of $55M** (if reductions higher than $100 are passed in full).

This could result in higher pricing across the entire customer base"

95. A draft of the paper also included the following statement in the "disadvantages – risks & impacts" column with respect to the option of implementing neither Capping nor Cupping:

> **"GWP Loss**
>
> ...
>
> • Estimating a loss of 10% of the 320K policies which received an increase of greater than $100 would result in a **GWP loss of 20M**."

Prior to the implementation of Cupping

96. One of the deliverables of the Rating Engine Enhancements project team, described at paragraph 85 above, was to deliver the Cupping logic. The Rating Engine Enhancements project team had its own Rating Engine Governance Forum and Rating Engine Project Manager. The members of the Rating Engine Governance Forum included the GM CP&U and Program Director, Go Discounts.

97. On 12 July 2013, an Enterprise Architect in the Architecture Program & Practice team emailed the Chief of Architecture & Program Practice and a Solution Architect in the team and forwarded the meeting pack including the Change Request report submitted by the Senior Project Manager, Strategic Change and Delivery (see extracts of the final version of this report at paragraphs 88 to 94 above). He stated:

> "the impacts against the options that include cupping don't talk about the customer experience or market perception associated with offering a particular discount level and then adjusting the base premium to reduce the effective discount received on last-year's premium. To my simplistic way of thinking, this seems inconsistent with our customer-focused strategy and the goals of GO Discounts to provide a transparent, fair and easy to understand discount structure. I may be missing something though... This feels like an important part of the conversation that should be highlighted for ECC discussion. It isn't called out clearly in this options paper. Would anyone have any objections in architecture calling this impact out in the SDRB on Monday and asking for it to be made clearer to the exec when it goes before the ECC?"

98. In the period prior to the implementation of Cupping, in mid to late 2013, personnel in the Product and Pricing team (up to the GM, CP&U), the Rating Engine Enhancements project team and Go Discounts project team considered aspects of Cupping as follows:

    98.1. On 9 July 2013, a senior project manager (in Strategic Change and Delivery) sent an email to a senior manager (in Business Design), both personnel in the Go Discounts project team. This attachment to the email related to ways by which IAL could manage the impact on policy premiums resulting from the introduction of Go Discounts and changes to the discount structure. It set out example calculations relating to premiums using the Go Discounts pricing structure and without the Go Discounts pricing structure, and showed how the

capping and Cupping Mechanism set at +/- 10% would work on a sample calculation post Go Discounts. The amount of the Base Premium without the implementation of Cupping post Go Discounts was $1,360 (after which Discounts were applied), for a total premium of $498 (involving a percentage difference of -56% between the pre and post Go Discounts total premium), and with the implementation of Cupping post Go Discounts was $2,984 (after which Discounts were applied), for a total premium of $981 (involving a percentage difference of -10% between the pre and post Go Discounts total premium). This occurred in circumstances where no first layer cupping was present. A later version of this slide pack was circulated which showed a different worked example where the first layer cup had also been applied to the cupping example. The amount of the Base Premium without the implementation of Cupping post Go Discounts was $3,360.75 (after which Discounts were applied), for a total premium of $1,061.17 (involving a percentage difference of -20.74% between the pre and post Go Discounts total premium), and with the implementation of Cupping post Go Discounts was $3,858.86 (after which Discounts were applied), for a total premium of $1,204.99 (involving a percentage difference of -10% between the pre and post Go Discounts total premium).

98.2. On 15 July 2013, a manager in the Rating Engine Enhancement team[85] emailed some personnel in the Go Discounts project (including the GM CP&U and Program Director, Go Discounts) as well as another personnel in the Rating Engine Enhancement team attaching a diagram which illustrated how the Capping and Cupping solution would work. The diagram showed that the Cup would involve readjusting the Base Premium which resulted in reducing the dollar value of discounts received by customers in order to achieve a target premium.

98.3. On 8 November 2013, a manager in the Rating Engine Enhancement team emailed some personnel in the Go Discounts project as well as other personnel in the Rating Engine Enhancement team and stated:

> "A group of us has caught up with [GM CP&U] and decision was made to go with option 2 in the attached presentation (to include NCB in the total premium C&C [capping and cupping]) ..."

The attachment to the email described above stated that the issue being addressed was negative total premium identified during "BAT" which are scenarios designed to test extreme cases. Regarding option 2 to address this the document stated:

> "Change the requirements to C&C [Capping and Cupping] NCB at Total Premium and modify algorithm – Solution will ensure transparency on COI."
>
> "Pros

[85] The person who held this position in 2013 was later an attendee of the Price Change Governance Forum referred to in paragraphs 100 to 103 below. Between January 2014 and September 2014, this person held the role of Senior Manager, PLI, reporting to the GM CP&U. Between September 2014 and June 2017 this person held roles including: Senior Manager, Direct Portfolios; Senior Manager NRMA/RACV/SGI; or Senior Manager NRMA/RACV, reporting to the Executive General Manager Product and Pricing. This person received many of the emails / reports referred to in paragraph 104 below.

- Algorithm will be simplified and minimal impact on future releases
- Meet project timeframes
- Will still deliver on the purpose of the requirement
- Consistent treatment of discount at Total Premium C & C [Capping and Cupping]"

"Cons

- Customers might question the value of NCB protection
- Customers will not see the full impact of changes to NCB level..."

98.4. As part of the implementation of the Go Discounts project internal legal advisers were part of the stakeholders who were involved in the Customer Collateral stream (or work arising from it). IAL has not identified any internal or external legal advice which concerned or related to disclosures in customer collateral documents which related to the use of Cupping as part of the implementation of the Go Discounts project.

98.5. On 28 June 2013, the Senior Manager Business Design emailed the Senior Project Manager, Strategic Change and Delivery asking whether legal and compliance have been across how Cupping and Capping is intended to be applied. The Senior Project Manager, Strategic Change and Delivery responded stating that a staff member (from Risk Operations) was given a high level overview of the need and approach, and that "There are no changes to the customer collateral so legal have not had any involvement to date. Please let me know if you see any issue that we need to run by legal right away".

98.6. On 28 June 2013, the Senior Manager Business Design responded stating: "I was just thinking whether the calculation of the cupping after the discount is applied will make it difficult for the customer to understand the discounts calculation. Do you know if it impacts this? Is there anything we can look at that sets out the example and how it would appear on the COI?" The Senior Project Manager, Strategic Change and Delivery responded stating that scenarios can be run to decide if further action is needed.

After the introduction of the Cupping Mechanism

99. After IAL implemented Capping and Cupping to apply to the Relevant Policies in March 2014, on multiple occasions in the period to November 2016 it:

99.1. considered and changed the Cup level applied to the Relevant Policies (such that it was variously reduced and increased in that period. The Cap level was also considered and changed in that period); and

99.2. considered the impact of the Cup on Discounts and whether to remove Cupping.

IAL's changes to the Cup level

100. Changes to the Cup level were mainly considered and implemented by the Product and Pricing Team, and the Price Change Governance Forum, which was a sub-committee of the Personal Insurance Underwriting Committee. The Price Change Governance Forum was chaired by a senior manager of pricing (in Personal Insurance)

in the Product and Pricing Team. The Price Change Governance Forum was separate to the governance structure of Go Discounts but was responsible for considering and approving proposed changes to pricing implemented through the algorithm (known as PCPs), including those that were being implemented by the Go Discounts project.

101. Between at least August 2014[56] and November 2016, the Price Change Governance Forum considered PCPs which recommended changes to the Cup level applied to the Relevant Policies. Changes to the Cup over that period are set out in **Schedule 3**. Attendees of the forums included senior portfolio managers and managers of commercial pricing and underwriting in the Product and Pricing Team. Attendees at each forum depended on the price change being proposed.

102. On five occasions between August 2014 and June 2016, the Price Change Governance Forum considered and approved papers recommending that the level of the Cup applied to one or more types of Relevant Policies[57] be reduced (i.e. the percentage limit or variance between a customer's previous year's premium and current premium was made smaller, such that they would receive less of the flow through of a change in premium including decreased discounts). During this time, the lowest percentage limit applied was -2%. Some of the papers included statements regarding the impact of the change to the Cup, such as:

    102.1. "The proposal is to increase the cup to -3% which will result in an additional 50K customers or 36% of the Portfolio being at the threshold delivering an FY15 GWP benefit of ~$4m with an expected loss ~400 policies."

    102.2. "Technical impact models show that moving the 2nd level cup [i.e. Cup] from -5% to -3% will provide an extra ~0.3% premium increase while having little or no effect on renewal rates."

103. On six occasions between September 2014 and November 2016, the Price Change Governance Forum considered and approved papers recommending that the level of the Cup applied to one or more of the Relevant Policies[58] be increased (i.e. the percentage limit or variance between a customer's previous year's premium and current premium was made bigger, such that they would receive more of the flow through of a change in premium including increased discounts). Some of the proposals recommended that the level of the Cup only be increased for a short period of time (e.g. a period of 4 weeks or 1 year) before being reverted to its previous lower level. During this period, the highest percentage limit applied was -20%. Some of the papers included statements regarding the objective and/or impact of the change to the Cup, such as: "[t]his change allows for customer movement in NCB and loyalty entitlement."

Instances where IAL considered the impact of the Cup on Discounts and/or removing the Cup

104. Set out below are the occasions on which Cupping was considered by IAL after Cupping was implemented in March 2014, and in addition to when IAL considered

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56 The first amendment to the Cup for the Relevant Policies having been approved through PCP 411 on 28 August 2014.

57 See Schedule 1 for details about the different types of Relevant Policies.

58 See Schedule 1 for details about the different types of Relevant Policies.

Cupping in the context of increasing or decreasing the Cup level (as set out at paragraphs 100 to 103 above).

105. In June 2014, a slide pack prepared by a manager of technical modelling within the Product and Pricing Team was circulated to the Executive General Manager Product and Pricing, and other pricing and portfolio personnel. Below is a summary of the contents of the slide pack and comments made in relation to the slide pack:

105.1. The slide pack included four slides with the following statements:

[Slide 1:] "What is the 2nd layer C&C?

The 2nd layer C&C [i.e. Capping and Cupping] sits at the total premium level in the pricing algorithm (ie [sic] after NCB and Loyalty discounts).

This level was required to manage the year on year price change associated with changing our NCB and customer discount structure as part of Go Discounts."

[Slide 2:] "Why do we need to eventually remove the 2nd Layer C&C? [i.e. Capping and Cupping]

- When a customer's NCB reduces, it may prevent the full loading flowing through
- When a customer's loyalty discount increases, it may prevent the full discount flowing through

...

- If the 2nd layer C&C [i.e. Capping and Cupping] is set closer to 0% then the above issues become more frequent and more severe."

[Slide 3:] "Can we just switch the 2nd Layer C&C [i.e. Capping and Cupping] off?

No, this will just mean that most of the year on year impact from Go Discounts we wanted to control in year 1 materialises in year 2."

[Slide 4:] "Some options to remove 2nd layer C&C ...[Option 1:] geo level Capping/Cupping ...[and Option 2:] Changing the Cupping/Capping level by 'segment'".

105.2. In response, the Executive General Manager Product and Pricing emailed the recipients of the above slide pack, stating:

"All, can we also consider rather than the removal of the second layer [i.e. Capping and Cupping], how we can possibly widen the constraints over the next number of years to move customers closer to the right price.

Ideally I am after some view on strategy over x number of years that we can slowly reinstate the distribution. For example:

- Keep the cup in place at the current level
- Assume 3% average premium increases per year over the next 5 years
- Age the current portfolio appropriate [sic]
- Review the capping level to increase upwards progressively over the 5 years with a view to reinstating the top end of the distribution – what would this need to be"

105.3. In response to the above comments, the manager of technical modelling stated:

> "I'm happy to have a go at this. However, the question I would ask is what do we think is the "right price" that we should be moving our customers to. Remember for many customers their uncapped/uncapped premium has changed (and in some cases changed significantly) purely due to our new discount structure rather than any change whatsoever to the underlying risk of their elasticity."

106. In the period between late September 2014 and February 2015, further consideration was given to Cupping by pricing and modelling personnel in the Product and Pricing Team. On 22 September 2014, a Rating Engine manager circulated minutes of a 'Capping/Cupping Strategy meeting' to other commercial pricing and technical modelling personnel along with others in the Product and Pricing Team. The email referred to a meeting of some pricing personnel on capping and cupping strategy and attached a paper that included a recommendation to switch off Capping and Cupping. The email attaching the paper noted the minutes and actions from the September meeting included a range of actions to be progressed, including the below, but did not include removing Cupping for 'Go Discounts Renewals' as recommended in the paper:

> "GO Discounts Renewals:
>
> - These are the New Business policies that started after GO Discounts went live
> ...
> - ACTION – ... remove 2nd layer Capping [but not Cupping] on Go Discounts Anniversary Date ...Rating Engine team to look at options for controlling the potential increase if there has been a claim, one of those options to include continuing the use of 2nd layer capping;
>
> ...
>
> Pre-Go Discount Renewals
>
> - These are all of the policies we had on our book prior to GO Discounts
> ...
> - ACTION [for CRCP, BLDG, CONT & HPAC] – Widen 2nd layer capping/cupping as part of optimisation (TP & Portfolio). The recommendation is to widen layer as a safety net as opposed to removing straight away. This will cater for policies which were dropped off as part of optimisation.
> ...
> - ACTION [for CRTP, CRFT, BKCP, BKTP, LAND & L&L]: Portfolio to use C&C [i.e. cupping and capping] Impact tool to determine 2nd layer Capping/Cupping level and then remove 1st layer Capping/Cupping."

107. In mid-February 2015, the Rating Engine manager and other personnel in the Product and Pricing team attended a meeting at which Capping and Cupping was discussed. An email referring to the meeting provided an update on the action items set out under paragraph 106 above and stated: "the general consensus was that these [i.e. the action items] should have been actioned except for the removal of 2nd layer capping [i.e. Capping]." In response to this email, a Rating Engine manager circulated a document entitled the 'Capping & Cupping guidelines'. The guidelines attached to the

email did not apply exclusively to the Relevant Policies, but also other policies not the subject of the Proceedings. The guidelines provided as follows:

> "Why do we use capping/cupping?
> - Protect the renewal book
> - Manage the year on year price change a renewing customers experiences
> - Manage transition price shock some customers would see as we move to the GO Discounts NCB, loyalty and algorithm
> - Release 47 solution replaces the PPA capping mechanism within the IAL States
>
> ...
>
> General Considerations
> Total Premium Capping/Cupping
> - We will generally apply total premium capping/cupping to **manage price shock** after a significant change to the algorithm, discounts and/or loadings (e.g. GO Discounts) or for campaign cap/cup."

108. On 9 January 2015, a manager of Home pricing circulated a paper to a Senior Manager in a portfolio team, and some others in the pricing team and Rating Engine team proposing that that the Cup be removed entirely for one year on Relevant Policies held by IAL employees so that new discounts would be more fully realised by its staff. The paper included the following recommendations and statements:

> "As recommended by the rating engine team, a further interaction of second layer (total premium) will be built to allow fl_staff to allow different cup/caps [i.e. Cup / Cap] between staff and non-staff";
>
> "Second layer cup [i.e. Cup] for staff [be] removed (-999%) and cap set at -25% for all products";
>
> "After change is effective for 1 year, set second layer cup/caps back to non-staff rates"; and
>
> "Further learning: This exercise has given us further reason to remove, where possible, the use of second layer capping and cupping [i.e. Capping and Cupping]. If the second layer was not present then there would have been no problem in this [i.e. Discounts] flowing through correctly to the customer."

109. On 19 November 2015, a product manager (SGIO Products) emailed a Portfolio Manager (Motor) and a Senior Manager (Direct Portfolios), among others, in relation to a "session we had regarding date type and capping/cupping". The email attached a paper that stated the following under a section titled 'Discussion with Product Managers (outcomes) – Meeting 5th November 2015':

> "Context
>
> ...
>
> - Currently initial date type impact (i.e. heavy discounts) is managed individually by state through capping/cupping to ensure customer doesn't see material increases once date type points drop off on renewal
> - There is a need to review this temporary solution that was introduced as a result of Go discounts and revisit the purpose of 1st and 2nd layer capping/cupping
>
> Potential actions

...

- Revisit capping/cupping work from a couple of years ago where 2nd layer capping/cupping was potentially meant to be removed altogether
- If 2nd layer capping/cupping removed, work out potential impact".

110. On 8 March 2016, a briefing pack was circulated for a Price Change Governance meeting to some personnel in the Product and Pricing Team, including a Senior Manager (NRMA/RACV/SGI), and a Senior Manager in Pricing Innovation, among others. The briefing pack included a paper that proposed to remove all Capping and Cupping from a sub-set of the Relevant Policies, and included the following statements:

> "Price Change Objective: Ensure appropriate Premium movement associated with NCB Loyalty change"
>
> "It is proposed to remove all capping and cupping restrictions from PCA level"
>
> "Rationale
>
> - With the introduction of Go Discounts and associated revision of the pricing algorithm PCA capping and cupping was introduced to facilitate management of customer impact associated with the change in pricing structure
> - These levels [i.e. the Cap and Cup levels] were broadened at the anniversary of Go Discounts to allow to ensure [sic] changes to a customers loyalty entilemnet [sic] or NCB was reflected in their premium but were not removed entirely as we assessed the potential for any unintended impacts
> - There is no evidence to suggest that there is a need to hold any degree of capping and/or cupping at this level of the premium calculation
> - By removing these restrictions we can ensure a customer will receive the appropriate premium reduction associated with an increase in NCB and/or Loyalty entitlement".

111. On 9 March 2016, the above paper was considered and approved during a Price Change Governance Forum meeting. As set out at paragraphs 102 and 103 above, Cupping levels were widened for some policy types to varying degrees at various times around the anniversary of Go Discounts.

112. On 10 March 2016, a senior manager in pricing innovation sent a PCP to, among others, the Executive General Manager Product and Pricing attaching a slightly varied copy of the paper referred to above, and requesting sign off on the proposal to remove Cupping from a sub-set of the Relevant Policies. The variations included that the proposal was now limited only to a proposal to "remove cupping restrictions from PCA level capping/cupping" with some corresponding changes to the 'Rationale' stating "It is proposed we remove the cupping coponent [sic] but it has been decided to retain current capping levels in order to manage adverse customer impact... Capping will be removed once an automated solution is deployed to manage customer YOY premium impact across all States and Products".

113. On 14 March 2016, the Executive General Manager Product and Pricing responded to state they had reviewed and had some questions:

- "I'm not sure what the financial impact of removing the cupping is, and leaving the cap in place. Would be useful to have this included.
- There are ~38,000 receiving reductions of greater than 10% and the in [sic] customer feedback there are regular comments re price reductions, the size and the negative advocacy this can drive. The price change has noted that this won't impact the way we quote of what we say to customers [a reference to a tick box field on the price change proposal]. It seems relatively sizeable to me – have we tested this with our customer colleagues to get their views as to whether we would want to manage customer comes in a different way?"

114. On 15 March 2016:

114.1. the product manager forwarded the email from the Executive General Manager Product and Pricing to the Pricing Deployment Manager. The email stated, "Gauging the concern around negative advocacy etc I suggest it might be better to shelf this one until we have the capability to manage the impact at customer/policy level".

114.2. the senior manager of pricing innovation responded, including another pricing personnel of their response, "I thought we did have the capability to rate at the policy level" and asking confirmation from the pricing colleague.

114.3. the product manager responded, "Yes we do but at this stage it is only being utilised by NSW Motor … Essentially what I am proposing is the same approach as suggested for the capping component: 'Capping will be reviewed once an automated solution is deployed to manage customer YOY premium impact across all States and Products'".

115. The final occasion on which the level of Cupping was considered by the Pricing and Product Team following its implementation was in November 2016. At that time, the Cup for certain motor policies was increased to -15%. The PCP relevantly stated: "This change allows for customer movement in NCB and loyalty entitlement" and that the "(p)remium change for those customers with Loyalty discount movement has no Cap/Cup". The paper accompanying the price change proposal noted new steps and rules to "Allow full loyalty and NCB change" and "Update premium, allowing for full loyalty/NCB change".

Other industry context

116. On 22 June 2015, a manager in product innovation in the Product and Pricing Team emailed a senior compliance specialist about a report released by ASIC in February 2015 titled "Review of no-claims discount schemes" regarding the operation of no-claim discount schemes in motor vehicle insurance policies stating:

> "In regards to their [ASIC's] point around 'Some consumers may be unable to realise full discounts: that the existence and application of minimum premiums is generally poorly disclosed.' Would this apply in your view to our brands where any minimum premiums, capping and cupping occurs as part of the calculation of the gross premium? So the gross premium is determined (including those factors) and discounts are then taken transparently from that amount?

I'm assuming that their comment is more aimed at companies that apply those type of premium restrictions after the gross is calculated?"

The response was:

"Capping not an issue at all, cupping may be depending on when its done, so if there are minimum premium values after gross calcs then its very much an issue."

117. In October 2015, the Personal Insurance Underwriting Committee, that included the Executive General Manager Product and Pricing, was provided with a briefing pack noting that:

117.1. ASIC had concerns with the industry around inadequate disclosure of the application of "minimum premiums" through publication of ASIC Report 424 "Review of no-claims discount schemes" (minimum premiums refers to the practice of setting a minimum premium price amount below which a premium price cannot be charged);

117.2. A review had been completed in the personal insurance brands to identify the changes required to address the concerns raised.

118. While a working group was established to investigate the NRMA NCB discount, no changes were made at this time.

Identifying, ceasing and reporting the conduct

119. On 14 May 2019, a potential issue relating to how Cupping worked was brought to the attention of IAL by an external service provider who had encountered the issue at another insurer.

120. After the matter was raised, IAL took steps to ascertain whether the same issue existed in its own brands, and if so, in which brands, which products and how and to what extent customers may be impacted. In doing so, it was identified that Cupping after Discounts was in place in respect of the Relevant Policies.

121. In September 2019:

121.1. IAL self-reported the conduct to ASIC on 9 September 2019 pursuant to its obligations under s 912D of the Corporations Act.[69]

121.2. As stated at paragraph 46 above, IAL removed the Cupping Mechanism from applying to Renewal Offers issued on or after 26 September 2019.[70] This was done through PCP P1070, which came into effect for renewing policies issued on 26 September 2019 and for renewals which would become policies if accepted on 4 November 2019.

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[69] CS [18]; CR [2].

[70] CS [18]; CR [23].

121.3. IAL commenced preparing to remediate customers as described further below.

122. While Cupping was removed by 26 September 2019, Capping remains in place on some of the Relevant Policies as a means by which increases to year-on-year premium prices for renewing customers are limited.

123. The Proceedings arise following ASIC's investigation of IAL following the reporting described above at paragraph 121.1.[71]

E3 The application of capping

124. Capping was also applied to the Relevant Policies during the Relevant Period. This resulted in some customers not having to pay some part of the renewal premium determined for that customer. The application of Capping to the policies renewed during each financial year which occurred during the Relevant Period and Penalty Period (but not factoring in any subsequent year impact, interest, taxes or charges) is set out in the following tables:

	Estimated application of Capping – Relevant Period	
Financial Year	**No. of policies renewed during FY**	**Quantum effect from Capping**
2013/2014 (commencing with renewals effective from 28 Apr 2014)	142,334	$8,880,887
2014/2015	802,800	$59,785,615
2015/2016	68,990	$4,890,460
2016/2017	45,349	$3,494,563
2017/2018	46,618	$3,938,932
2018/2019	43,437	$3,739,437
2019/2020 (ending with renewals effective from 3 Nov 2019)	12,680	$1,124,635

	Estimated application of Capping – Penalty Period	
Financial Year	**No. of policies renewed during FY**	**Quantum effect from Capping**
2015/2016 (commencing with renewals effective from 26 Nov 2015)	40,034	$3,095,071
2016/2017	45,349	$3,494,563
2017/2018	46,618	$3,938,932
2018/2019	43,437	$3,739,437

[71] CS [18]; CR [2].

	Estimated application of Capping – Penalty Period	
Financial Year	**No. of policies renewed during FY**	**Quantum effect from Capping**
2019/2020 (ending with renewals effective from 3 Nov 2019)	12,680	$1,124,635

E4 Whether previously found to have engaged in similar conduct

125. IAL has not previously been found to have engaged in any contravention of the Corporations Act or the ASIC Act.

E5 IAL's size and financial position and degree of market power

126. Details of IAL's size and financial position, including as a subsidiary of IAG are set out in section B above.

127. At the end of each financial year during the Relevant Period IAL reported as follows:

	30-Jun-14 $M	30 Jun-15 $M	30 Jun-16 $M	30 Jun-17 $M	30 Jun-18 $M[72]	30 Jun-19 $M
Total assets	11,049	11,718	11,668	11,210	19,776	19,841
Revenue	6,977	7,042	7,458	7,464	13,518	15,176
Profit / loss before tax	551	263	441	634	933	415
Profit / loss after tax	387	192	305	449	670	287

128. IAL's share of the Australian market for the types of policies listed in Schedule 1 during the Relevant Period ranged between approximately 17 and 23 percent. This is an estimate of the total number of policies held by IAL (based on the policy types of the type listed in Schedule 1 able to be included using available data across the period) as a percentage of all policies of those types held in the market by all brands. NRMA's market share is referred to in paragraph 8 above.

129. The approximate share of the Australian market held by IAL NRMA branded policies of the type listed in Schedule 1 during the Relevant Period ranged between approximately

[72] Between FY17 and FY18, IAG completed work to consolidate its Australian Financial Services Licenses (**AFSLs**). Prior to 1 August 2017, the brands under IAL's AFSL included NRMA, SGIO, SGIC and The Buzz. After 1 August the brands under IAL's AFSL included NRMA (NSW/ACT/QLD/TAS), SGIC, SGIO, Coles + Bendigo Bank, BUPA, CGU, HBF, Swann Insurance, People's Choice Credit Union and WFI.

12 and 15.5 percent. This too is an estimate of the total number of policies held by NRMA (based on the policy types of the type listed in Schedule 1 able to be included using available data across the period) as a percentage of all policies of those types held in the market by all brands.

130. During the Relevant Period and the Penalty Period, for each financial year:

130.1. the number of Affected Policies as a percentage of the total number of policies written by IAL was: 1.4% (FY14); 6.36% (FY15); 5.48% (FY16); 4.75% (FY17); 2.59% (FY18); 2.33% (FY19) and 0.82% (FY20);

130.2. the average premium of each of the Relevant Policies written, or continuing was as follows:

Policy Type	FY14	FY15	FY16	FY17	FY18	FY19	FY20
Home							
Home Buildings (BLDG)	$635.38	$654.58	$683.43	$713.79	$757.76	$816.56	$869.78
Home Contents (CONT)	$353.58	$371.88	$391.45	$412.32	$431.53	$452.44	$470.33
Home Package Buildings and/or Contents (HPAC)	$930.70	$966.41	$1,007.04	$1,065.24	$1,125.92	$1,201.46	$1,279.22
Landlords – Buildings and/or Contents (LAND)	$630.60	$653.45	$683.17	$710.05	$738.23	$782.87	$834.27
Motor							
Comprehensive Motor (CRCP)	$620.28	$621.72	$637.37	$668.87	$712.46	$751.42	$802.36
Car Fire, Theft (Third Party) (CRFT)	$247.52	$242.08	$246.91	$253.76	$266.47	$276.73	$254.02
Car Third Party Property Damage (CRTP)	$203.82	$203.64	$207.71	$218.22	$231.85	$241.67	$256.53
Bike Comprehensive (BKCP)	$337.58	$341.82	$341.15	$351.07	$356.49	$360.27	$367.82
Bike Third Party Property Damage (BKTP)	$139.27	$138.23	$138.80	$143.75	$146.11	$149.34	$150.37

Policy Type	FY14	FY15	FY16	FY17	FY18	FY19	FY20
Boat							
Boat Contents, Hull, or standalone Boat Hull (BOT)	$319.80	$335.24	$341.63	$344.40	$349.30	$355.12	$370.19
Caravan							
Onsite Caravan and/or Onsite Caravan Contents (ONS)	$187.66	$180.39	$184.76	$195.57	$204.15	$225.07	$255.69
Caravan Touring and/or Caravan Touring Contents (CVT)	$369.17	$367.54	$382.29	$398.28	$419.10	$442.66	$482.42
Trailer (TRLR)	$120.98	$124.28	$127.82	$130.66	$134.37	$136.87	$143.59

130.3. the percentage of IAL's business that comprised the Relevant Policies was: 62.30% (FY14); 62.60% (FY15); 59.69% (FY16); 59.99% (FY17); 38.99% (FY18); 40.27% (FY19) and 41.30% (FY20).

E6 The deliberateness of the contraventions, the period over which it extended and the involvement of senior management

131. The implementation of the Cupping and Capping solution and additional funding request was approved at an ECC meeting attended by staff responsible for the Go Discounts program on 24 July 2013. The CEO Personal Insurance was chair of the ECC meeting (see paragraph 88 above) and remained CEO Personal Insurance until the end of 2015.

132. Once approved, Cupping, along with Capping, was implemented by teams within the Product and Pricing Team. Some of the persons in the Product and Pricing Team understood the operation of Cupping and were aware of its effects, including on Discounts.

133. After Cupping was implemented, steps were taken on a number of occasions to both increase and decrease the level of the cup as set out at paragraphs 102 and 103 above (and Schedule 3). In November 2016, after the Cup had already been widened for a number of policy types in a number of states, the Cup for certain motor policies in NSW was broadened and the accompanying "Deployment Rules" noted a key step for deployment at renewal was to: "Allow full loyalty and NCB change" and "Update premium, allowing for full loyalty/NCB change".

134. There were two people in the position of Executive General Managers of the Product and Pricing Team in the period from when the implementation of the Capping and Cupping solution and the additional funding was approved in July 2013 up to November 2016. The first of which left that role by July 2014; the second held that role between July 2014 and October 2017, and while Cupping was implemented, was

aware of its use, with the final changes to Cupping made in November 2016 (as set out in paragraph 133 above). From July 2013 to November 2016, the Executive General Manager Product and Pricing reported to the CEO Personal Insurance, who reported to the CEO.

135. Once members of the Group Leadership Team in 2019 were made aware of the effect of the Cupping on Discounts in 2019, steps were taken as set out in paragraph 121 to notify ASIC, remove Cupping, and commence remediation to customers.

No Board involvement

136. The IAL Board was not aware of the effect of Cupping on Discounts in the Relevant Period. Once identified, the steps set out in paragraph 121 above were undertaken.

137. In IAG's Financial Year 2021 results IAG's former Chair, Elizabeth Bryan, acknowledged that there had been "organisational and risk management failures" in the company, resulting in "costly and unacceptable" issues. The Chair's statement also noted that "strengthening risk management has been a major area of focus and investment for IAG over the past several years".

138. In recognition of the need to set higher standards for executive accountability, IAG made adjustments to remuneration in 2020 and 2021 (both for this issue the subject of the Proceedings and other issues not the subject of the Proceedings). In 2020, this included reductions relating to the issues the subject of the Proceedings for former personnel, and extended to remuneration deferred from prior years. This includes an individual in a senior executive role in the period between December 2015 and November 2017 (reporting to IAG's CEO at that time) while Cupping remained in place where that individual had overall responsibility for the Relevant Policies during that period. For these individuals the following was noted:

> "Specifically, the Board's concerns relate to [your involvement in] matters relevant to the multi-year pricing-related issues where discounts were not always applied in full to premiums for all customers who may have been eligible, which has resulted in adverse customer outcomes and material remediation costs".

139. The reductions in 2020 and 2021 totalled $6.9 million and included $3.5 million adjustments to executive remuneration made by the IAG Board in August 2020 for issues which included pricing-related matters.

E7 Compliance culture, corrective measures and enhancements

Outline of activities directed to enhancements

140. Since 2019, IAL has taken a range of steps aimed at strengthening its compliance and risk management culture and processes. This has included taking steps directed to improving its processes regarding disclosures made to customers about pricing, and the way IAL considers and assesses risk and compliance.

141. Since 2019, IAL has also undertaken a proactive review of its pricing aimed at ensuring issues affecting customers are identified and resolved (see paragraphs 145 to 148

below). It has also taken steps to remediate customers for Cupping (as set out in paragraphs 149 to 156 below).

142. The steps IAG has taken aimed at strengthening processes including as it relates to products issued by IAL and their pricing include:

142.1. establishing the Product Committee and the Pricing Committee to oversee product and pricing strategies and seek to enhance governance processes in these areas. The Executive General Managers Product and Pricing are members of these committees, along with risk personnel. These committees review and advise on substantive changes to pricing and product documentation and include cross-representation from both product and pricing teams;

142.2. steps aimed at enhancing IAL's processes relating to customer communications including PED/PDS including considering whether the proposed price change is consistent with previous customer communications in advance of approving changes to pricing; and

142.3. steps aimed at enhancing IAL's processes related to its management of its products through inception and their lifecycle. This includes how products are designed, manufactured, marketed and distributed, as well as once launched, how products are maintained and reviewed.

143. The steps IAG has taken aimed at strengthening operational aspects of product and pricing, including as they relate to products issued by IAL, and the way those functions work together, include:

143.1. as part of operating model changes in February 2020, the Technical and Commercial pricing functions were brought together under the same senior executive, Executive General Manager Product and Pricing; and

143.2. in late 2020, IAG re-structured its business, which was in part directed to having a dedicated focus on pricing practices and governance in each part of the business, with pricing functions for relevant products within the accountability of a senior executive.

144. The steps IAG has taken directed to strengthening risk and compliance, and the organisation's culture of compliance were:

144.1. since 1 July 2020, IAG's risk framework has included a balanced scorecard for all personnel, including senior managers and senior executives, which includes compliance and risk components. Balanced scorecard outcomes are linked to remuneration. This involves the identification and testing of key risk and compliance controls and targets being set for the overall effectiveness of controls. In addition, personnel are also assessed on how mature and embedded risk and compliance processes are within their business units and divisions;

144.2. In August 2021, IAG introduced a new enterprise-wide Risk Management System (known as SNOW), alongside updated risk management policies and procedures, aimed at improving the identification and resolution of risk and

compliance issues. Regular reporting on risk and compliance matters are received by Senior Management including Executive General Managers and Group Executives through Divisional Executive Risk Committee (**ERCO**) meetings. In addition, reporting on these matters are also provided to the Group Leadership Team and to the IAG Board Risk Committee.

Review of pricing practices

145. In addition, in late 2019, IAG established a review of its pricing promises and systems (**Pricing Taskforce**). The Pricing Taskforce was a dedicated program of work, the purpose of which was to review IAG's pricing practices (including those of IAL) across a wide range of products and brands, including NRMA, and to rectify issues and remediate impacted customers as quickly as possible where issues were identified.

146. In undertaking this work, IAG has at times deployed a workforce of up to 300 people, including specialist external consultants and internal subject matter experts, to assist with the specialised nature of the review of pricing promises and pricing systems and the associated remediation of customers. This has included:

    146.1. retaining external consultants with specialised skill and knowledge, including actuaries, from two consulting firms to assist with aspects of the Pricing Taskforce. This included:

        146.1.1. applying seconded specialists from two of these firms to the Pricing Taskforce to work with IAG in setting up the taskforce processes and developing refund calculations;

        146.1.2. applying a team of actuaries to the Pricing Taskforce;

        146.1.3. the engagement of a partner from one of the external consulting firms in an acting Executive General Manager role to assist to oversee the Pricing Taskforce (before later filling this role permanently);

    146.2. engaging a third external consulting firm to review the methodology used to identify impacted customers and its approach to remediation;

    146.3. dedicating the equivalent of approximately 20 IAG personnel in a full-time capacity to progress the work of the Pricing Taskforce, including work directed to customer remediation, as well as having over 250 personnel (including external consultants) involved in work to remediate customers.

147. Through its Pricing Taskforce work, IAG has pro-actively identified further matters which have been notified to ASIC pursuant to its obligations under s 912D of the Corporations Act and have become part of the remediation program.

148. The cost of the Pricing Taskforce and associated customer remediation program, including the administration and other related costs arising from the program, were estimated in IAG'S FY21 Results to be:

148.1. $484 million over two years (net pre-tax earnings impact) – including refunds to customers; or

148.2. $307 million over two years "after tax and outside equity interests"

(the payments and costs were not limited to the conduct the subject of these Proceedings).

IAL's customer remediation program for Affected Customers

149. IAL took steps to establish a remediation program for Affected Customers in late 2019. As set out above, IAL's work to remediate customers has involved having an external consultant consider and review its remediation methodology and approach.

150. IAL commenced paying remediation to Affected Customers on 28 September 2020. As at the date of this Statement of Agreed Facts and Admissions, remediation payments were ongoing.[73]

151. Remediation payments include an interest component[74] as well as GST, Emergency Services Levy and Stamp Duty where they applied.

152. As at 27 July 2022, IAL had paid, or attempted to pay, around $60,128,242 to customers of the total $60,223,000 referred to at paragraph 64 above. This reflects that the remediation to customers is 99.8% complete.[75]

153. At the time IAL remediated customers, it sent them a letter:

153.1. stating the customer did not receive the full discount to which they were entitled;

153.2. explaining that this happened as IAL "applied minimum and maximum limits when calculating your renewal premium, so it didn't change too much";

153.3. explaining that IAL "should have told [the customer] that [Cupping] impacted [their] discount"; and

153.4. apologising for the conduct.

154. Affected Customers will not receive remediation payments from IAL including where:

154.1. the remediation amount is less than $1; or

154.2. where IAL does not have bank details for a current or former customer and:

154.2.1. the remediation amount is less than $5; or

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73 CS [18].

74 CS [27]; CR [34(c)], [35], [36].

75 CR [24].

154.2.2. the refund is between $5 and $20, the customer is sent a cheque to their last known address and the cheque is returned or the customer does not bank the cheque prior to it becoming stale;

154.3. IAL has made several attempts to contact the customer through multiple channels within a 30-day period, including sending a cheque, but the customer does not bank the cheque prior to it becoming stale;

154.4. a customer has been unable to be contacted to obtain an address and/or bank details to send a refund; and

154.5. the customer is a company which has been liquidated and the liquidator has returned the cheque and the money is to be transferred to ASIC.

155. IAL's approach to minimum payment thresholds is broadly consistent with the matters set out in ASIC's Regulatory Guide 256 (**RG256**) and ASIC's draft regulatory guidance attached to CP350 (**RG000**).

156. Where any of the circumstances in paragraph 154 above apply and Affected Customers are not ultimately paid, IAL states it intends to make community service payments to appropriate organisations or if required, money may be paid to the unclaimed money pool, which will be transferred to relevant state government agencies.

E8 Cooperation with ASIC and contrition

157. At all times since reporting the conduct in September 2019, IAL has co-operated with ASIC. For example:

157.1. IAL itself initiated a remediation program and engaged with ASIC regarding its remediation program from early 2020;

157.2. IAL and ASIC representatives met regularly and IAL engaged with ASIC proactively regarding its work on the Pricing Taskforce as well as progress with customer remediation; and

157.3. throughout ASIC's investigation of the matters the subject of the Proceedings, IAL has responded to requests for information and documents in order to facilitate ASIC's investigation of this relatively complex matter in an efficient and timely way.

158. Since the commencement of the Proceedings, IAL indicated its intention to co-operate with ASIC in the Proceedings, admit to contraventions and bring the Proceedings to a resolution as swiftly and efficiently as possible.

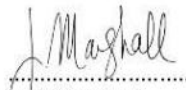
159. Further, IAL has acknowledged the seriousness of the conduct publicly and its regret that it failed to meet customer expectations. It has:

159.1. apologised directly to Affected Customers, when communicating with those customers regarding their remediation (see paragraph 153 above);

159.2. apologised publicly, on the occasion when ASIC commenced these proceedings; and

159.3. as part of its FY21 results communications, apologised to shareholders and stated the failings as unacceptable.

Date: 21 September 2022



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Jody Marshall
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Lawyer for the Plaintiff

Date: 23 September 2022

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Kate Cahill
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Lawyer for the Defendant

ANNEXURE B

SUPPLEMENTARY STATEMENT OF AGREED FACTS AND ADMISSIONS

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NSD 1070 OF 2021**

IN THE MATTER OF INSURANCE AUSTRALIA LIMITED
ACN 000 016 722

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

INSURANCE AUSTRALIA LIMITED ACN 000 016 722
Defendant

1. This Supplementary SAFA[1] is made for the purposes of s 191 of the *Evidence Act 1995* (Cth) jointly by the Plaintiff, ASIC and the Defendant, IAL.[2] The Supplementary SAFA relates to the Proceedings. The facts agreed to, and the admissions made in this Supplementary SAFA by IAL, are agreed to and made by IAL solely for the purpose of the Proceedings.

2. In its most recent financial year, ending 30 June 2022, (which is outside the period in which the contraventions the subject of the Proceedings occurred):

   2.1. IAL reported in its financial report total assets of $24,642 million, revenue of $15,174 million, loss of -$118 million before tax and -$99 million after tax;

   2.2. IAG reported in its annual report total assets of $34,083 million and a market capitalisation of $10,747 million, placing it within the ASX top 50; and

   2.3. IAG reported in its annual report revenue of $18,347 million and a profit of $347 million.

3. To supplement the table at paragraph 127 of the SAFA for the financial year ending 30 June 2020 (where a part of that period, between 1 July 2019 and 25 September 2019,

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1 Definitions used in the Statement of Agreed Facts and Admissions dated 26 September 2022 (**SAFA**) are also used in this document.

2 The parties may seek to tender documents not inconsistent with this SAFA.

Filed on behalf of the Plaintiff, ASIC
File ref: 21003453
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is within the Relevant Period), IAL reported in its financial report total assets of $20,450 million, revenue of $15,660 million, loss of -$400 million before tax and -$298 million after tax.

4. The recipient of the letter referred to at paragraph 138 of the SAFA attended the meeting referred to at paragraph 87 of the SAFA as a member of the Product, Pricing & Customer Program Steering Committee. At that time, this person's role did not involve responsibility for pricing or responsibility for the Relevant Policies beyond their role as a member of the Product, Pricing & Customer Program Steering Committee. The action log for that meeting records another member of the Product, Pricing & Customer Program Steering Committee was to liaise with the recipient of the letter regarding the customer collateral stream.

5. The recipient of the letter referred to at paragraph 138 of the SAFA did not author or receive the correspondence referred to in paragraphs 97 to 116 of the SAFA, and did receive a copy of the briefing pack referred to in paragraph 117 of the SAFA. The adjustment to remuneration for this individual was made on the basis of the role that the individual held between December 2015 and November 2017 (where the individual had overall accountability for the Relevant Policies during that period) and the associated impact on IAG's performance.

Date: 16 February 2023

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Jody Marshall
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Plaintiff

Date: 16 February 2023

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Kate Cahill
Partner
Herbert Smith Freehills
Lawyer for the Defendant

ANNEXURE C

FURTHER SUPPLEMENTARY STATEMENT OF AGREED FACTS AND ADMISSIONS

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NSD 1070 OF 2021**

IN THE MATTER OF INSURANCE AUSTRALIA LIMITED
ACN 000 016 722

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

INSURANCE AUSTRALIA LIMITED ACN 000 016 722
Defendant

1. This Further Supplementary SAFA[1] is made for the purposes of s 191 of the *Evidence Act 1995* (Cth) jointly by the Plaintiff, ASIC and the Defendant, IAL.[2] The Further Supplementary SAFA relates to the Proceedings. The facts agreed to, and the admissions made in this Further Supplementary SAFA by IAL, are agreed to and made by IAL solely for the purpose of the Proceedings.

2. Further to paragraphs 150 to 152 (and subject to paragraph 154) of the SAFA payments to all Affected Customers have now been issued.

3. During the Relevant Period and the Penalty Period, the amount of the discounts (including GST, Stamp Duty and FSL) not received by Affected Customers as set out in paragraphs 64 and 65 of the SAFA formed less than one percent of the total premiums paid across all Relevant Policies during each of those respective periods.[3]

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1 Definitions used in the Statement of Agreed Facts and Admissions dated 26 September 2022 (**SAFA**) are also used in this document.

2 The parties may seek to tender documents not inconsistent with this SAFA.

3 Being approximately 0.52% of the total premiums paid across the Relevant Policies in the Relevant Period and approximately 0.41% of the total premiums paid across the Relevant Policies in the Penalty Period, based on data from financial quarterly periods which are close but do not exactly align with the dates of Relevant Period and the Penalty Period.

File ref: 21003453

Filed on behalf of the Plaintiff, ASIC

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4. During the Relevant Period and the Penalty Period, the percentage of customers across all Relevant Policies who did not receive the amount of the discounts as set out in paragraphs 64 and 65 of the SAFA were approximately 7% and 8% respectively.

5. During the Relevant Period and the Penalty Period, the total premiums paid by customers across all Relevant Policies was approximately $13,859,979,287 and $10,171,454,100 respectively.[4]

Date: 16 March 2023

J Marshall.

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Jody Marshall

AGS lawyer

for and on behalf of the Australian Government Solicitor

Lawyer for the Plaintiff

Date: 16 March 2023

Kate Cahill

Partner

Herbert Smith Freehills

Lawyer for the Defendant

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[4] Based on figures derived using data from financial quarterly periods which are close but do not exactly align with the dates of Relevant Period and the Penalty Period.

Filed on behalf of the Plaintiff, ASIC

File ref: 21003453

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