

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Latitude Finance

Australia (No 2) [2024] FCA 1205

File number: NSD 843 of 2022

Judgment of: **YATES J**

Date of judgment: 18 October 2024

Catchwords: **CONSUMER LAW** – misleading or deceptive conduct – alleged contraventions of ss 12DA(1), 12DF(1) and 12DB(1)(a), (i) and (g) of the *Australian Securities and Investments Commission Act 2001* (Cth) – where defendants prepared, published and broadcast, or caused to be prepared, published and broadcast, a large number of newspaper, radio, and television advertisements in Australia – where the advertisements promoted the purchase of home and electrical goods from the second defendant’s franchised stores by equal monthly payments of the purchase price for the goods over 60 months on “no deposit” and “no interest” terms (the **promotion**) – whether the representative advertisements conveyed the impression to ordinary and reasonable consumers that the material terms of the payment method were only those referred to in the promotion – whether the representative advertisements conveyed the impression to ordinary and reasonable consumers that the consumer would only be liable to pay the price of those goods by way of 60 equal monthly payments, or alternatively, that any fees or charges would be relatively insubstantial – whether these impressions were misleading or deceptive (or likely to mislead or deceive) where, to access the promotion, consumers were required to have, or apply for and be approved for, an eligible credit card issued by the first defendant and to pay an establishment fee and monthly account service fees in respect of the account linked to the credit card

Legislation: *Competition and Consumer Act 2010* (Cth) Sch 2 (Australian Consumer Law) s 18
Australian Securities and Investments Commission Act 2001 (Cth) ss 12BAA, 12BAB, 12DA, 12DB, 12DF, 12DL, 12GBA, 12GBB, 12GD, 12GH, 12GLA, 12GLB, 19
Federal Court of Australia Act 1976 (Cth) ss 21, 23
Australian Securities and Investments Commission Regulations 2001 (Cth) reg 2B

Legal Profession Uniform Law 2014 (NSW)

Cases cited:

Annand & Thompson Pty Ltd v Trade Practices Commission (1979) 40 FLR 165

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

Australian Competition and Consumer Commission v Global One Mobile Entertainment Limited [2011] FCA 393

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

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

Australian Competition and Consumer Commission v Telstra Corporation Limited [2007] FCA 1904; 244 ALR 470

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; 250 CLR 640

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2020] FCAFC 130; 278 FCR 450

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2011] FCA 1254

Australian Securities and Investments Commission v Forge (2007) NSWSC 1489

Comite Interprofessionnel du Vin de Champagne v Powell [2015] FCA 1110; 330 ALR 67

Commercial Union Insurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389

Council of the New South Wales Bar Association v EFA (a pseudonym) [2021] NSWCA 339; 106 NSWLR 383

Finance Sector Union of Australia v Commonwealth Bank of Australia [2005] FCA 1847; 224 ALR 467

Forge v Australian Securities and Investments Commission [2004] NSWCA 448; 52 ACSR 1

Jones v Dunkel (1959) 101 CLR 298

King v Health Care Complaints Commission [2011] NSWCA 353

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

Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission [2022] FCAFC 170; 295 FCR 106

Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited [2010] HCA 31; 241 CLR 357

National Exchange Pty Ltd v Australian Securities and

Investments Commission [2004] FCAFC 90; 49 ACSR 369
Novartis Pharmaceuticals Australia Pty Ltd v Bayer Australia Ltd [2015] FCA 35; 322 ALR 621
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd [1982] HCA 44; 149 CLR 191
RB (Hygiene Home) Australia Pty Ltd v Procter & Gamble Australia Pty Limited (No 2) [2023] FCA 1491
Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd [2023] HCA 8; 408 ALR 195
South West Helicopters Pty Ltd v Stephenson (No 2) [2018] NSWCA 99; 98 NSWLR 96
Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd (1981) 37 ALR 161
Telstra Corporation Limited v Cable & Wireless Optus Ltd [2001] FCA 1478
The Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; 258 CLR 482
Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (1992) 38 FCR 1
Trivago N.V. v Australian Competition and Consumer Commission [2020] FCAFC 185; 384 ALR 496
viagogo AG v Australian Competition and Consumer Commission [2022] FCAFC 87

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	507
Date of hearing:	15 April 2024 – 18 April 2024, 13 May 2024
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ORDERS

NSD 843 of 2022

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **LATITUDE FINANCE AUSTRALIA ACN 008 583 588**
First Defendant

HARVEY NORMAN HOLDINGS LTD ACN 003 237 545
Second Defendant

ORDER MADE BY: **YATES J**

DATE OF ORDER: **18 October 2024**

THE COURT ORDERS THAT:

1. The parties bring in agreed draft orders or, if agreement cannot be reached, competing draft orders, giving effect to these reasons, by 4.00 pm on 28 October 2024.

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

REASONS FOR JUDGMENT

INTRODUCTION	[1]
THE CONDUCT	[6]
Introduction	[6]
Newspaper advertisements	[14]
Radio advertisements	[36]
Television advertisements	[41]
The involvement of officers/employees of Latitude and Harvey Norman in the conduct	[57]
THE STRUCTURE OF ASIC’S CASE	[84]
LATITUDE’S PROVISION OF FINANCE	[101]
THE EVIDENCE	[108]
Lay and consumer evidence	[108]
The consumer affidavits	[114]
<i>Mr Harris</i>	[114]
<i>Mr Hill</i>	[128]
<i>Mr North</i>	[148]
<i>Ms Jenkins</i>	[166]
<i>Ruling on evidence</i>	[180]
Other consumer evidence	[206]
Expert evidence	[223]
ASIC’S SUBMISSIONS	[230]
The payment method case	[230]
<i>The newspaper advertisements</i>	[231]
<i>The radio and television advertisements</i>	[239]
<i>Reasonable expectation</i>	[243]
The fees and charges case	[254]
<i>The newspaper advertisements</i>	[257]
<i>The radio and television advertisements</i>	[266]
<i>Reasonable expectation</i>	[269]

Other submissions	[270]
LATITUDE’S SUBMISSIONS	[276]
The “dominant message” analysis	[278]
Inference to be drawn from Mr Ebstein’s report	[287]
The payment method case	[295]
<i>Reasonable expectation</i>	[308]
The fees and charges case	[322]
<i>Reasonable expectation</i>	[328]
The consumer and other evidence	[330]
HARVEY NORMAN’S SUBMISSIONS	[335]
The dominant message analysis	[337]
The payment method case	[342]
The consumer and other evidence	[345]
THE LAW	[348]
Relevant statutory provisions	[348]
Relevant case law	[352]
CONSIDERATION	[367]
A preliminary observation	[367]
Analysis of the representative advertisements	[374]
<i>The newspaper advertisements</i>	[374]
<i>Representative Advertisement 1</i>	[374]
<i>Other newspaper representative advertisements</i>	[409]
<i>Radio advertisements</i>	[422]
<i>Representative Advertisement 6</i>	[422]
<i>Other radio representative advertisements</i>	[436]
<i>Television advertisements</i>	[439]
<i>Representative Advertisement 9</i>	[439]
<i>Other television representative advertisements</i>	[459]
General findings	[466]
<i>Familiarity with personal credit</i>	[467]

<i>Cumulative effect</i>	[482]
<i>All or nothing case?</i>	[488]
<i>Consumer evidence</i>	[491]
<i>Inferences</i>	[495]
DISPOSITION	[507]
SCHEDULE A	

YATES J:

INTRODUCTION

- 1 The Australian Securities and Investments Commission (**ASIC**) claims relief under the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) and the *Federal Court of Australia Act 1976* (Cth) (the **Federal Court Act**) against Latitude Finance Australia (**Latitude**) and Harvey Norman Holdings Ltd (**Harvey Norman**) in relation to the publication of certain advertisements.
- 2 Specifically, ASIC claims (amongst other relief): (a) declarations under s 21 of the Federal Court Act and s 12GBA(1) of the ASIC Act; (b) injunctions under s 23 of the Federal Court Act and s 12GD(1) of the ASIC Act; (c) pecuniary penalties under s 12GBB of the ASIC Act; and (d) punitive orders requiring adverse publicity under s 12GLB(1) of the ASIC Act or, alternatively, non-punitive orders requiring adverse publicity under ss 12GLA(1) and (2)(d) of the ASIC Act.
- 3 ASIC’s originating process (which was amended pursuant to leave granted on 30 June 2023) is now supported by an amended concise statement (the **concise statement**).
- 4 On 10 November 2022, prior to the first case management hearing, and at the request of the parties, I made an order that there be separate hearings on the questions of liability and relief. On 17 April 2023, I made a further order providing for the listing of the proceeding for a hearing on liability. The date of the hearing was fixed by an order made on 5 May 2023.
- 5 The proceeding is presently before me to determine the question of liability only, based on the allegations in the concise statement with reference to 11 representative advertisements.

THE CONDUCT

Introduction

6 During the period 1 January 2020 to 11 August 2021 (the **relevant period**), the defendants prepared and published (including by broadcasting), or caused to be prepared and published, a large number of advertisements across Australia in newspapers and on television and radio, which promoted the purchase of home and electrical goods from Harvey Norman stores by equal monthly payments of the purchase price for the goods over 60 months on “no deposit” and “no interest” terms (the **promotion**).

7 According to ASIC, the payment method involved in the promotion, as advertised:

... looked like a one-off loan. It was not. In fact, it was a rolling credit facility with an associated credit card. The reality was that consumers could not avail themselves of the payment method unless they already had, or applied and were approved for, an eligible credit card issued by Latitude. The Advertisements did not disclose, or adequately disclose, the true scope of this financial arrangement. Further, the Advertisements did not disclose, or adequately disclose, the substantial establishment and monthly account service fees associated with the financial arrangement.

8 In opening its case, ASIC stressed that, although it was not necessary to quantify, at the present stage of the proceeding, the number of advertisements that were published or broadcast (and, hence, on its case, the number of separate contraventions of the ASIC Act), the defendants had admitted that, in the relevant period:

- (a) the television advertisements were broadcast on at least 900,000 occasions on 367 specified stations;
- (b) the radio advertisements were broadcast on 143 radio stations; and
- (c) the newspaper advertisements were published in 168 newspapers.

9 ASIC described this as an “advertising blitz” that “one may readily anticipate most adults in Australia saw, watched or heard”. It submits that this reinforced the “dominant message” of the advertisements (as to which, see [84] – [100] below). According to ASIC, this:

... had the impact that consumers would consider they already knew “the deal” and therefore did not take any particular care in seeking to understand the “fine print” of subsequent Advertisements. Thus, an important contextual matter is that consumers likely “*saw the advertisements in more than one form and on more than one occasion*”, such that impressions conveyed by one Advertisement likely had a continuing effect on that consumer viewing another Advertisement.

(Footnotes omitted.)

10 As ASIC puts it in closing submissions:

It was such that the Advertisements would have been seen by millions of people in Australia, and likely on multiple occasions and across multiple media. The Advertisements' dominant message would have been reinforced by repetition and reasonable consumers would "tune out" to the remainder of it.

11 To demonstrate the scale of the advertising campaign, ASIC tendered a sample of media bookings, invoices, and advertising calendars. The evidence included invoices rendered by Harvey Norman on Latitude for marketing support.

12 The defendants admitted the summary description of the national advertising campaign in the concise statement (i.e., that, during the relevant period, a number of advertisements were prepared and published in newspapers and broadcast on television and radio across Australia), while taking exception as to what was conveyed in the advertisements. In its concise statement in response, Harvey Norman initially denied involvement in the advertising campaign, claiming that Generic Publications Pty Limited (**Generic Publications**), a wholly owned subsidiary of Harvey Norman, arranged the campaign.

13 In its opening submissions, however, Harvey Norman acknowledged that, for the purposes of this proceeding, "the conduct of Generic Publications Pty Ltd in arranging the advertising campaign ... can be taken to be the conduct of" Harvey Norman.

Newspaper advertisements

14 The parties conducted the case with reference to five agreed representative newspaper advertisements, which took a variety of forms. Some advertisements were on one page, some were on two or more pages. Some were spread throughout the newspaper. Some were in the form of a wraparound (so that the advertisement appeared on the first and last pages of the newspaper).

15 The advertisements were published in: (a) The Advertiser on 23 April 2020 (published as a wraparound, totalling four pages) (**Representative Advertisement 1**); (b) The Sydney Morning Herald on 23 – 24 January 2021 (published on one page) (**Representative Advertisement 2**); (c) The Herald Sun on 24 February 2021 (published over three pages) (**Representative Advertisement 3**); (d) The Age on 23 March 2021 (published over two pages) (**Representative Advertisement 4**); and (e) The Weekend Australian on 13 – 14 March 2021 (published on one broadsheet page) (**Representative Advertisement 5**).

16 The newspapers referred to in (b) and (c) above contained additional advertisements for Harvey Norman that referenced the promotion. The additional advertisements are not part of the representative advertisements. In oral closing submissions, I was told that, even though these advertisements were not part of the representative advertisements, it had been agreed that “the context of the newspaper would be relevant” and these advertisements should be taken into account to the extent that they had “any significance”. This cryptic observation was never explained, and the parties did not advance any submission with respect to these particular advertisements.

17 Despite their various forms, the representative newspaper advertisements were presented with common elements.

18 All the advertisements had a large red banner with the words appearing thereon in large white letters (**Statement A**):

60 MONTHS INTEREST FREE*¹

19 In each case Statement A was accompanied by the following statement in similar but smaller lettering (**Statement B**):

NO DEPOSIT NO INTEREST

20 As is apparent, the words NO DEPOSIT and the words NO INTEREST were preceded by a ticked-box device. In some cases, Statement B was in white letters against a blue background with red ticks. In other cases, it was in black letters against a white background with red ticks.

21 Under Statement B the following statement was made in similar but smaller lettering (**Statement C**):

with 60 equal monthly payments until [month/year inserted]. Minimum financed amount \$1000.

22 In some cases, Statement C was in white letters against a blue background. In other cases, it was in black letters against a white background.

23 I will refer to Statement A, Statement B, and Statement C, as depicted in the representative advertisements, as **the banner statements**.

24 Under Statement C, the following further statements were made in much smaller lettering (**Statement D**):

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

25 In some cases, Statement D was in white letters against a blue background. In other cases, it was in black letters against a white background.

26 A separate box under (or, in Representative Advertisement 4, beside) these statements promoted a Bonus Gift Card (of a certain value or certain values) on interest-free purchases (the **Bonus Gift Card statement**). The Bonus Gift Card statement was represented no less prominently than the banner statements.

27 Representative Advertisements 1 to 5 are reproduced in Schedule A to these reasons (albeit not true to size).

28 Other than Representative Advertisement 2, the graphical elements to which I have referred were accompanied by images of Harvey Norman goods.

29 In some of the advertisements, Statements A, B, C, D, and the Bonus Gift Card statement, were made more than once. In Representative Advertisement 1, the statements were made three times (each time in a different presentation). In Representative Advertisement 3, the statements were made two times (in different presentations).

30 Each of the representative newspaper advertisements included statements in tightly-packed text in very small lettering over several lines (i.e., “fine print”). In its submissions, ASIC described these statements as being in one of three broad forms: (a) shortened terms; (b) varied shortened terms; or (c) extended terms. I say “broad forms” because within each form there were textual variations, mainly concerning the goods that were eligible for the promotion.

31 These statements appeared in different parts of the advertisements:

- (a) in Representative Advertisement 1, the shortened terms appeared at the bottom of the last page of the advertisement;
- (b) in Representative Advertisement 2, the shortened terms appeared under the Bonus Gift Card statement at the bottom of the page;
- (c) in Representative Advertisement 3, the shortened terms appeared at the bottom of the second page and also at the bottom of the third page of the advertisement;

- (d) in Representative Advertisement 4, the varied shortened terms appeared at the bottom of, and across, the two pages of the advertisement; and
- (e) in Representative Advertisement 5, the extended terms appeared at the bottom of the page.

32 The shortened terms in Representative Advertisement 1 were:

Ends 28/04/20. Harvey Norman® stores are operated by independent franchisees. The products in this advertisement may not be on display or available at all Harvey Norman complexes. If you wish to view these products in person, you should ring 1300 GO HARVEY (1300 464 278) before attending any complex to check to see if a franchisee at that complex has these products in store. Accessories shown are not included. ^Available online and in selected stores. †Colours may vary between stores. *1. 60 Months Interest Free - No Deposit, No Interest with 60 Equal Monthly Payments until April 2025: Approved applicants only. Conditions, fees and charges apply. Minimum amount financed \$1000 on transactions made between 23/04/20 and 28/04/20. Interest applies if you do not comply with terms and conditions. Excludes mobile phones, gaming consoles, gift cards, digital cameras and lenses, hot water system supply & installation, Octopuss installation services, Microsoft Surface Studio, Apple, Miele and Harvey Norman Customer Direct products. Excludes brands and other products that are offered for sale under agency agreements with Harvey Norman franchises. Refer to product websites for conditions, fees and charges. Credit is provided by Latitude Finance Australia (ABN 42 008 583 588). Australian Credit Licence 392145. *2. Applicable Gift Card value is based on the purchase price of the Eligible Purchase: spend \$1,000 or more and receive a \$50 Gift Card; spend \$2,000 or more and receive a \$100 Gift Card; spend \$3,000 or more and receive a \$150 Gift Card; spend \$4,000 or more and receive a \$200 Gift Card; spend \$5,000 or more and receive a \$250 Gift Card; spend \$6,000 or more and receive a \$300 Gift Card. The Eligible Customer will receive the Gift Card when they take delivery of their purchased products. Gift Cards are issued by Derni Pty Ltd and expire 36 months from the date of issue. See in store or online for full terms and conditions. *3. Discounts are off the normal ticketed prices. Terms and conditions apply, see in store for details. *4. Bonus is by redemption from the supplier. Various postage and handling fees may be applicable in order to receive the bonus and are dependent on the supplier's offer. Terms and conditions apply, see in store for full details.

33 The varied shortened terms in Representative Advertisement 4 were:

Ends 31/03/21. Harvey Norman® stores are operated by independent franchisees. The products in this advertisement may not be on display or available at all Harvey Norman complexes. If you wish to view these products in person, you should ring 1300 GO HARVEY (1300 464 278) before attending any complex to check to see if a franchisee at that complex has these products in store. Accessories shown are not included. #Ultra High Definition not broadcast on free-to-air TV in Australia. †Colours may vary between stores. *1. 60 Months Interest Free - No Deposit, No Interest with 60 Equal Monthly Payments until March 2026: Approved applicants only. Conditions, fees and charges apply. Minimum amount financed \$1000 on transactions made between 16/03/21 and 31/03/21. Interest applies if you do not comply with terms and conditions. If there is an outstanding balance after the interest free period ends in March 2026, interest will be charged at 25.90%. Excludes mobile phones, gaming consoles, gift cards, digital cameras and lenses, hot water system supply & installation, Octopuss

installation services, Microsoft Surface Studio, Apple, Miele and

[continued on the following page of the advertisement:]

Harvey Norman Customer Direct products. Excludes brands and other products that are offered for sale under agency agreements with Harvey Norman franchises. Visit harveynorman.com.au or see in store for details. Credit is provided by Latitude Finance Australia (ABN 42 008 583 588). Australian Credit Licence 392145. *2. Applicable Gift Card value is based on the purchase price of the Eligible Purchase: spend \$1,000 or more and receive a \$50 Gift Card; spend \$2,000 or more and receive a \$100 Gift Card; spend \$3,000 or more and receive a \$150 Gift Card; spend \$4,000 or more and receive a \$200 Gift Card; spend \$5,000 or more and receive a \$250 Gift Card; spend \$6,000 or more and receive a \$300 Gift Card; spend \$7,000 or more and receive a \$350 Gift Card; spend \$8,000 or more and receive a \$400 Gift Card; spend \$9,000 or more and receive a \$450 Gift Card; spend \$10,000 or more and receive a \$500 Gift Card. The Eligible Customer will receive the Gift Card when they take delivery of their purchased products. Gift Cards are issued by Demi Pty Ltd and expire 36 months from the date of issue. See in store or online for full terms and conditions.

34 The extended terms in Representative Advertisement 5 were:

Ends 14/03/21. Harvey Norman® stores are operated by independent franchisees. Accessories shown are not included. The products in this advertisement may not be on display or available at all Harvey Norman complexes. If you wish to view these products in person, you should ring 1300 GO HARVEY (1300 464 278) before attending any complex to check to see if a franchisee at that complex has these products in store. ^Available online and in selected stores. †Colours may vary between stores. Ultrabook, Celeron, Celeron Inside, Core Inside, Intel, Intel Logo, Intel Atom, Intel Atom Inside, Intel Core, Intel Inside, Intel Inside Logo, Intel vPro, Intel Evo, Itanium, Itanium Inside, Pentium, Pentium Inside, vPro Inside, Xeon, Xeon Phi, Xeon Inside, Intel Agilex, Arria, Cyclone, Movidius, eASIC, Iris, MAX, Intel RealSense, Stratix, and Intel Optane are trademarks of Intel Corporation or its subsidiaries. *1. Conditions of 60 Months Interest Free until March 2026: Available to approved Latitude Go Mastercard customers on transactions made between 01/03/21 and 15/03/21 where the amount financed is \$1000 or more. Offer available on purchases from Harvey Norman franchises. Excludes mobile phones, gaming consoles, gift cards, digital cameras and lenses, hot water system supply & installation, Octopuss installation services, Microsoft Surface Studio, Apple, Miele and Harvey Norman Customer Direct products. Excludes brands and other products that are offered for sale under agency agreements with Harvey Norman franchises. Offer available on advertised or ticketed price. Total amount is payable by 60 approximate equal monthly instalments (exact amounts specified in your statement). If there is an outstanding balance after the interest free period ends in March 2026, interest will be charged at 25.90%. This notice is given under the Latitude GO Mastercard Conditions of Use, which specify all other conditions for this offer. A \$25.00 Establishment Fee applies to new approved applicants. Account Service fee of \$5.95 per month applies. Also available to existing CreditLine, Latitude Gem Visa and Buyer's Edge customers. Refer to product websites for conditions, fees and charges. Credit is provided by Latitude Finance Australia (ABN 42 008 583 588). Australian Credit Licence 392145. *2. Applicable Gift Card value is based on the purchase price of the Eligible Purchase: spend \$1,000 or more and receive a \$50 Gift Card; spend \$2,000 or more and receive a \$100 Gift Card; spend \$3,000 or more and receive a \$150 Gift Card; spend \$4,000 or more and receive a \$200 Gift Card; spend \$5,000 or more and receive a \$250 Gift Card; spend \$6,000 or more and receive a \$300 Gift Card; spend \$7,000 or more and

receive a \$350 Gift Card; spend \$8,000 or more and receive a \$400 Gift Card; spend \$9,000 or more and receive a \$450 Gift Card; spend \$10,000 or more and receive a \$500 Gift Card. The Eligible Customer will receive the Gift Card when they take delivery of their purchased products. Gift Cards are issued by Derni Pty Ltd and expire 36 months from the date of issue. See instore or online for full terms and conditions.
*3. Savings are off the normal online displayed prices.

35 The margins used for the shortened terms, the varied shortened terms, and the extended terms, as quoted in these reasons, assists in reading, and hence, comprehending them. In the newspaper advertisements themselves, the text extended to the margins used for the newspaper—a much wider field of vision. This makes for challenging reading. To add to that challenge, the text was on newsprint.

Radio advertisements

36 The parties conducted the case with reference to three agreed representative radio advertisements.

37 **Representative Advertisement 6** was broadcast between 26 March 2020 and 8 April 2020:

MALE SPEAKER: 60 months interest-free at Harvey Norman and receive a bonus gift card. The more you spend, the greater the value of the gift card, up to \$300 when you purchase using 60 months interest free. Furniture, bedding, computers, electrical, bathrooms and flooring, 60 months interest free. No deposit, no interest with 60 equal monthly payments until March 2025. *Minimum finance amount \$1,000, approved applicants only. Interest applies if you do not comply with terms and conditions. Fees and exclusions apply.* Buy with 60 months interest free and receive a bonus gift card now at Harvey Norman.

FEMALE SPEAKER: Go.

38 **Representative Advertisement 7** was broadcast between 23 and 28 April 2020:

MALE SPEAKER: At Harvey Norman our spacious stores are open, with teams practising social distancing to keep our community safe. Until Tuesday, buy with 60 months interest-free and receive a bonus gift card. No deposit, no interest, with 60 equal monthly payments until April 2025. Fridges, washing machines, air purifiers, laptops, home wi-fi, mattresses and sofa beds. Shop in store or online, with Click & Collect and delivery available. *Minimum financed amount \$1000. Approved applicants only. Interest applies if you do not comply with terms and conditions. Fees and exclusions apply.* Harvey Norman. We have your essentials covered.

FEMALE SPEAKER: Go.

39 **Representative Advertisement 8** was broadcast between 14 and 31 January 2021:

MALE SPEAKER: Harvey Norman summer sizzlers. Lenovo IdeaPad Slim 1 laptop, just \$333. Dyson V7 cord-free vacuum, \$399. Hisense 512 litre French door fridge, \$999. Purchase with 60 months interest-free and receive a bonus gift card up to the value of \$500. *Minimum financed amount \$1000. Approved applicants only. 60 equal*

monthly payments. Interest applies if you do not comply with terms and conditions. Fees and exclusions apply. Savings off normal ticketed prices. Summer sizzlers at Harvey Norman.

FEMALE SPEAKER: Go.

40 Each advertisement was 30 seconds in duration. Except for the word “go”, each advertisement was delivered in (what appears to have been) the same male voice, over the same musical background (a jingle in the form of a repeated musical motif). The words of the script were spoken at a moderate pace in (what ASIC describes as) “an upbeat tone”, except for the italicised words in the above quotations which were spoken more softly and delivered at a rapid pace, as an aside.

Television advertisements

41 The parties conducted the case with reference to three agreed representative television advertisements.

42 **Representative Advertisement 9** was televised between 27 March 2020 and 11 April 2020.

The spoken part of the advertisement was:

MALE SPEAKER: Get 60 months interest free now at Harvey Norman and receive a bonus gift card. The more you spend using interest-free, the greater the value of the bonus gift card, up to \$300. Get what you need now with great deals across a huge range of furniture and bedding. Get 60 months interest free and receive a bonus gift card. The more you spend using interest free, the greater the value of the bonus gift card, up to \$300. Limited time only, now at Harvey Norman.

FEMALE SPEAKER: Go.

43 In the course of the advertisement, the following images were shown ephemerally, and in moving form, on the screen to coincide with the spoken words:

Harvey Norman

60 MONTHS

INTEREST FREE

NO DEPOSIT **NO INTEREST**
 with 60 Equal Monthly Payments until March 2025

PLUS BONUS GIFT CARD*

Credit provided by Latitude Finance Australia ABN 42 008 583 588 Credit Licence 392145.
 Minimum financed amount \$1000. Approved applicants only. Interest applies if you do not comply with terms & conditions.
 Fees, charges, conditions & exclusions apply. See website for details

Harvey Norman

60 MONTHS

INTEREST FREE

PLUS BONUS GIFT CARD*

\$50 GIFT CARD <small>when you spend \$1,000+</small>	\$100 GIFT CARD <small>when you spend \$2,000+</small>	\$150 GIFT CARD <small>when you spend \$3,000+</small>	\$200 GIFT CARD <small>when you spend \$4,000+</small>	\$250 GIFT CARD <small>when you spend \$5,000+</small>	\$300 GIFT CARD <small>when you spend \$6,000+</small>
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*Gift Cards issued by Darni Pty Limited. Conditions apply. See in store or online for details.
 Credit provided by Latitude Finance Australia ABN 42 008 583 588 Credit Licence 392145.
 Minimum financed amount \$1000. Approved applicants only. Interest applies if you do not comply with terms & conditions.
 Fees, charges, conditions & exclusions apply. See website for details

44 In the above image, the small rectangle to the right of screen containing the words “\$300 GIFT CARD when you spend \$6,000 +” flashed red to coincide with the spoken words: “The more you spend using interest-free, the greater the value of the bonus gift card, up to \$300”.



45 In the above image, the textual graphics were shown on screen for approximately five seconds, accompanied by footage of various goods within a Harvey Norman store.





46 In the same manner as the earlier image, the small rectangle to the right of screen containing the words “\$300 GIFT CARD when you spend \$6,000 +” flashed red to coincide with the repeated spoken words: “The more you spend using interest-free, the greater the value of the bonus gift card, up to \$300”.



47 The advertisement ended with the following image displayed for less than one second:



48 **Representative Advertisement 10** was televised between 14 and 19 May 2020. The spoken part of the advertisement was:

MALE SPEAKER: At Harvey Norman get 60 months interest-free and receive a bonus gift card up to the value of \$500. The more you spend on 60 months interest-free, the greater the value of the bonus gift card. Shop for laptops, TVs, fridges, ovens, lounges, beds, flooring, bath vanities and so much more. Shop in our spacious stores or online. We're practising social distancing to keep our community safe. Get 60 months interest-free and receive a bonus gift card valued at up to \$500 now at Harvey Norman. Hurry, offer ends Tuesday.

FEMALE SPEAKER: Go.

49 In the course of the advertisement, the following images were shown ephemerally, and in moving form, on the screen to coincide with the spoken words:

Harvey Norman®

Harvey Norman

60 MONTHS INTEREST FREE

NO DEPOSIT **NO INTEREST**

with 60 equal monthly payments until May 2025

OFFER ENDS TUESDAY

*Gift Cards issued by Derrin Pty Limited. Conditions apply. See in store or online for details.

\$50 Gift Card when you spend \$1,000+ \$100 Gift Card when you spend \$2,000+ \$150 Gift Card when you spend \$3,000+
\$200 Gift Card when you spend \$4,000+ \$250 Gift Card when you spend \$5,000+ \$300 Gift Card when you spend \$6,000+ \$350 Gift Card when you spend \$7,000+
\$400 Gift Card when you spend \$8,000+ \$450 Gift Card when you spend \$9,000+ \$500 Gift Card when you spend \$10,000+

Harvey Norman

60 MONTHS
INTEREST FREE

PLUS

**BONUS
GIFT CARD***

UP TO \$500

on 60 Months Interest Free purchases

OFFER ENDS TUESDAY

*Gift Cards issued by Darni Pty Limited. Conditions apply. See in store or online for details.

\$50 Gift Card when you spend \$1,000+ \$100 Gift Card when you spend \$2,000+ \$150 Gift Card when you spend \$3,000+
\$200 Gift Card when you spend \$4,000+ \$250 Gift Card when you spend \$5,000+ \$300 Gift Card when you spend \$6,000+ \$350 Gift Card when you spend \$7,000+
\$400 Gift Card when you spend \$8,000+ \$450 Gift Card when you spend \$9,000+ \$500 Gift Card when you spend \$10,000+

Harvey Norman

60 MONTHS
INTEREST FREE

PLUS

**BONUS
GIFT CARD***

UP TO \$500

on 60 Months Interest Free purchases

**The more you spend on 60 months interest free,
the greater the value of the bonus gift card!**

*Gift Cards issued by Darni Pty Limited. Conditions apply. See in store or online for details.

\$50 Gift Card when you spend \$1,000+ \$100 Gift Card when you spend \$2,000+ \$150 Gift Card when you spend \$3,000+
\$200 Gift Card when you spend \$4,000+ \$250 Gift Card when you spend \$5,000+ \$300 Gift Card when you spend \$6,000+ \$350 Gift Card when you spend \$7,000+
\$400 Gift Card when you spend \$8,000+ \$450 Gift Card when you spend \$9,000+ \$500 Gift Card when you spend \$10,000+



50 In the above image, the textual graphics were shown on screen for approximately nine seconds, accompanied by footage of various goods within a Harvey Norman store.





51 The advertisement ended with a similar image used at the end of Representative Advertisement 9:



52 **Representative Advertisement 11** was televised between 1 and 17 April 2021. The spoken part of the advertisement was:

MALE SPEAKER: Australian made for Australian homes, now at Harvey Norman. Snuggle into the L' Avenue 80 per cent duck down and feather queen quilt, just \$279. Style it up with the Australian made Jia upholstered queen bed, only \$1399, available in a selection of size and fabric options. Enjoy five-zone micro-pocket coil support

with the Sleepmaker Alaska queen mattress. Two feels, one great price: \$1699. Buy on 60 months interest-free and receive a bonus gift card. Now at Harvey Norman.

FEMALE SPEAKER: Go.

53 The first 24 seconds of the advertisement contained still images of various Harvey Norman bedding products to coincide with the spoken words.

54 Towards the end of the advertisement, the following images appeared:

Harvey Norman

60 MONTHS
INTEREST FREE

NO DEPOSIT **NO INTEREST**
with 60 equal monthly payments

*Gift Cards issued by Darni Pty Limited. Conditions apply. See in store or online for details.
\$50 Gift Card when you spend \$1,000+ \$100 Gift Card when you spend \$2,000+ \$150 Gift Card when you spend \$3,000+
\$200 Gift Card when you spend \$4,000+ \$250 Gift Card when you spend \$5,000+ \$300 Gift Card when you spend \$6,000+
\$350 Gift Card when you spend \$7,000+ \$400 Gift Card when you spend \$8,000+ \$450 Gift Card when you spend \$9,000+ \$500 Gift Card when you spend \$10,000+
Minimum financed amount \$1000. Approved applicants only. Interest applies if you do not comply with terms & conditions. Fees, charges, conditions & exclusions apply.
See website for details. Credit is provided by Latitude Finance Australia (ABN 42 008 583 588). Australian Credit Licence 392145.

Harvey Norman

60 MONTHS
INTEREST FREE

PLUS

BONUS GIFT CARD **UP TO \$500**
on 60 Months Interest Free purchases

*Gift Cards issued by Darni Pty Limited. Conditions apply. See in store or online for details.
\$50 Gift Card when you spend \$1,000+ \$100 Gift Card when you spend \$2,000+ \$150 Gift Card when you spend \$3,000+
\$200 Gift Card when you spend \$4,000+ \$250 Gift Card when you spend \$5,000+ \$300 Gift Card when you spend \$6,000+
\$350 Gift Card when you spend \$7,000+ \$400 Gift Card when you spend \$8,000+ \$450 Gift Card when you spend \$9,000+ \$500 Gift Card when you spend \$10,000+
Minimum financed amount \$1000. Approved applicants only. Interest applies if you do not comply with terms & conditions. Fees, charges, conditions & exclusions apply.
See website for details. Credit is provided by Latitude Finance Australia (ABN 42 008 583 588). Australian Credit Licence 392145.

55 Once again, the advertisement ended with a similar image used at the end of Representative Advertisement 9:



56 Each advertisement was 30 seconds in duration. Except for the word “go”, the spoken words in each advertisement were delivered in (what appears to have been) the same male voice used in the radio advertisements over the same musical background. The words were spoken at a moderate pace in the same “upbeat tone”.

The involvement of officers/employees of Latitude and Harvey Norman in the conduct

57 In the relevant period, Bradley Symmons held the position within Latitude of General Manager Retail Australia, Harvey Norman. He reported to Paul Varro who was a director of Latitude and Latitude Financial Services Australia Holding Pty Ltd. In the relevant period before June 2020, Mr Varro held the position of Executive General Manager, Latitude Pay and Insurance. In the relevant period after June 2020, he held the position of Chief Commercial Officer. Mr Varro reported to Ahmed Fahour, Latitude’s Chief Executive Officer and also a director of Latitude Financial Services Australia Holdings Pty Ltd.

58 In the relevant period, James Monahan held the position within Latitude of Program Leader Commercial, Harvey Norman. He reported to Mr Symmons.

59 The evidence establishes that Latitude was involved in developing and approving the content of advertisements placed by Harvey Norman for the promotions involving Latitude and the GO

Mastercard. This included signing off on the disclaimers and disclosures made in the advertisements to which I have referred, based on Latitude's advertising and brand guidelines. Mr Symmons was the person carrying out this task, although from time to time Mr Monahan undertook this role (e.g., when Mr Symmons was absent). Mr Monahan also carried out six-monthly audits of the advertising campaigns to check that they had been signed-off in accordance with Latitude's guidelines.

60 Although there was no formal process to do so, Mr Symmons kept an eye out (and ear out) for Harvey Norman advertisements in respect of promotions involving Latitude. He would, for example, make copies of newspaper advertisements and share these with others within Latitude, including Mr Varro.

61 Mr Symmons was the "main interface" with Harvey Norman. He would make recommendations to Harvey Norman about the interest-free promotions it should run, based on Harvey Norman's previous advertising campaigns and what Harvey Norman's competitors were currently doing in the market. He would provide the pricing for these recommendations.

62 The key elements of these recommendations were the length of the interest-free period; the type of promotion (e.g., interest-free with equal instalment repayments, interest-free with minimum repayments, or interest-free with deferred repayments); the customer's minimum spend associated with the promotion; and the cost of the promotion (i.e., the merchant service fee and what Latitude was going to charge the Harvey Norman franchisees).

63 The evidence includes recommendations made by Mr Symmons on 17 March 2020 (for April and May 2020) and on 30 April 2020 (for May and June 2020). The recommendations were sent to Chris Mentis. Mr Mentis was the Chief Financial Officer, the Company Secretary, and an Executive Director of Harvey Norman. Mr Mentis reported to Kay (known as Katie) Page, the Chief Executive Officer of Harvey Norman.

64 The recommendations made on 17 March 2020 covered the promotion advertised in Representative Advertisement 1 and Representative Advertisement 7. The recommendations made on 30 April 2020 covered the promotion advertised in Representative Advertisement 10.

65 Typically, Mr Mentis and Ms Page would meet to discuss Latitude's recommendations with a view to putting those recommendations to Harvey Norman franchisees for adoption. Mr Mentis was one of the people within Harvey Norman who approved whether a particular

advertisement offering an interest-free promotion was published. On occasion, Ms Page was involved in giving that approval.

66 From time to time, and without the intervention of Latitude, Mr Mentis and Ms Page would meet and decide on interest-free promotions to be recommended to Harvey Norman franchisees, including the particulars of the promotion. The factors informing those decisions included the current market conditions; the interest-free offerings of competitors; the costs of the promotion to franchisees; and the impact of any existing restrictions placed on Harvey Norman stores due to the Covid-19 pandemic (different jurisdictions had different lockdown laws affecting store openings, the engagement with customers, and the ability to effect product deliveries).

67 Once a decision was made, Mr Mentis or Ms Page (or both) advised representatives of Generic Publications (which functioned as Harvey Norman's inhouse advertising agency with a focus on advertising production) of the upcoming interest-free promotion and provided them with details that generally consisted of the promotional period; the number of applicable interest-free months (e.g., 60 months interest-free); whether the promotion would or would not require a deposit or instalment payments (and, if so, the amount of the deposit and instalment payments); the minimum purchase price for the promotion; the goods to which the promotion applied; the goods that were excluded from the promotion; the dollar amount of any gift card; and whether the promotion would be advertised.

68 Generic Publications would then prepare the advertising materials, which typically included terms and conditions, posters for stores, print advertisements (including catalogues and newspaper advertisements), scripts and graphics for television and radio advertisements, and memoranda to franchisees containing details of the recommended promotion.

69 Templates were used to create these materials. The range of materials produced were substantially similar for every interest-free promotion. The materials generally did not change from promotion to promotion, other than in respect of the particulars of the interest-free promotion.

70 Once the materials were prepared, they were given to Daniel Child (the Chief Operating Officer of Generic Publications prior to 1 March 2021) for review, and then to Mr Mentis for approval.

71 Once approved, materials pertaining to the print advertisements (other than the memoranda to franchisees) were sent to Mr Symmons for review and comment. Latitude typically provided its approval for the print advertisements subject to the correction of minor typographical errors. After this review and certain other administrative steps, the print advertisements were published. Publication was on Ms Page's direction.

72 Generic Publications liaised with DMC Digital Pty Limited (**DMC**), a production house, for the creation of television advertisements.

73 After DMC created the advertisements, they would be submitted to Generic Publications for approval. Kristie Gee (the Head of Television and Radio at Generic Publications, who reported to Ms Page) would give the advertisements to Mr Mentis for review and approval. The terms of the offer in the advertisements were, like the newspaper advertisements, based on templates approved by Latitude. Mr Symmons was involved in this process from time to time.

74 Sometimes, Ms Page was also involved in approving television advertisements. An email from Ms Gee to Mr Mentis and Mr Symmons on 25 March 2020 states:

Hi Chris and Brad

Katie has approved the attached radio & TV scripts to start on air tomorrow with the IF & Bonus gift card offer.

Can you please approve from a compliant POV

Thanks

75 On 12 May 2020, Ms Gee sent an email to Mr Mentis, stating:

Hi Chris

Please find attached script for approval for the Corporate campaign this weekend.

I also wanted to run past you the graphics promoting the offer. I have attached 3 examples of how we can show it on TV.

Having the full suite as per the press ad below will look very confusing on TV so I just wanted to advertise the key elements. Happy to email to Katie for her approval if you think that is best.

Looking forward to hearing from you.

If possible I would love approval prior to 11am today so we can produce the commercial in time for on air date

Thank you

76 Another email on the same day from Ms Gee to Mr Mentis’s personal assistant, Valerie Salame, refers to the fact that Ms Gee had spoken to Ms Page and that Ms Page had “approved the graphics”.

77 Ms Page gave instructions to Ms Gee about booking television campaigns involving the promotions. This was usually done by telephone or via WhatsApp.

78 Scripts for radio advertisements were prepared by Generic Publications once television advertisements had been finalised. Those Voice Over Guys (a firm) recorded and mixed the advertisements.

79 As with the television campaigns, Ms Page issued instructions to Ms Gee regarding the booking of radio campaigns.

80 ASIC submits that the Court should find that Ms Page and Mr Mentis were “intimately involved in all aspects of the advertising” and that the process was “micro-managed” by Ms Page. It is not clear to me what the word “intimately” adds to the findings I have made. Further, I am not satisfied that Ms Page “micro-managed” the process by which the newspaper, television, and radio advertisements were devised, created, and published or broadcast. On Harvey Norman’s part, these campaigns were undertaken under the overall direction and control of Ms Page with significant management involvement from Mr Mentis, Mr Anderson, Mr Childs, and Ms Gee, as I have described, along with Martin Anderson (General Manger of Generic Publication until June 2021).

81 Before departing from these findings, it is necessary to address a submission made by ASIC in closing that there is evidence that the defendants deliberately sought to minimise the “credit card aspect” of the GO Mastercard in material promoting it.

82 It is important to appreciate that this submission was advanced in circumstances where ASIC has not alleged in its concise statement that Latitude or Harvey Norman deliberately engaged in misleading or deceptive conduct or deliberately made false representations, or acted with any other particular state of mind. It is also important to appreciate that this submission was advanced in respect of activities that went beyond the publication or broadcasting of the newspaper, radio, and television advertisements that advertised the promotion.

83 In the course of the hearing, there was significant debate about the admissibility of many documents that ASIC wished to tender. I was prepared to admit some documents on the limited

basis that they showed the involvement of Ms Page in the advertising campaign of which the representative advertisements formed part. They were not admitted for any wider purpose, and certainly not for the purpose of attempting to establish that the defendants deliberately sought to minimise the credit card aspect of the GO Mastercard in material promoting it. What is more, conduct outside the publication or broadcast of the advertisements advertising the promotion is outside the case that ASIC has brought. I therefore make no findings on such matters.

THE STRUCTURE OF ASIC'S CASE

84 ASIC's case is structured around what it contends was the "dominant message" or "general thrust" of all the newspaper, radio, and television advertisements advertising the promotion—namely, that a payment method was available for purchasing selected goods at Harvey Norman stores that comprised 60 equal monthly repayments on no deposit and interest-free terms.

85 There are two main branches to ASIC's case, and a number of subsidiary branches. The two main branches are the **payment method case** (or, as ASIC also called it, the **Advertised Payment Method case**) and the **fees and charges case**.

86 As to the payment method case, ASIC alleges that the dominant message conveyed the impression, to reasonable consumers, that the material terms of the payment method were only those to which I have referred at [84] above. ASIC alleges that this was misleading because an essential precondition to acquiring the goods pursuant to the payment method was that the consumer: (a) have, or apply for and be approved for, an eligible credit card issued by Latitude; and (b) use that credit card, or the account linked to that credit card, to purchase the goods from Harvey Norman stores.

87 ASIC alleges that this was misleading because the "essential nature" of the offered arrangement was "masked". As ASIC puts it in the concise statement:

16. ... The GO Mastercard brings into existence a continuing credit contract, which contemplates multiple advances of credit (including through cash advances) and permits Latitude to change contractual terms over time. Fees and charges apply for the right to hold and use the GO Mastercard, including an establishment fee and/or a monthly account service fee, and (in certain circumstances) late payment fees, payment handling fees, fees on international transactions, paper statement fees, cash advance fees and interest. Latitude also discloses information about a GO Mastercard cardholder to credit reporting bodies, including repayment history and any repayment defaults, such that late payments or non-payments may affect a consumer's capacity to secure finance in future.

88 In its closing submissions, ASIC referred to this part of its case as the **Advertised Payment Method – Complete Offer Case**. It based this aspect of its case on the theory that, absent disclosure of the essential precondition, referred to in [86] above, consumers reading, seeing, or hearing the advertisements (depending on the medium in question) were led into the mistaken belief that the “dominant message” was a complete statement of the advertised payment method for purchasing Harvey Norman Goods (a defined term): *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* [2010] HCA 31; 241 CLR 357 (*Miller*) at [23].

89 ASIC alleges, alternatively, that the dominant message did not disclose the essential precondition to which I have referred, which was, in all the circumstances, an important qualifying fact. In closing submissions, ASIC referred to this part of its case as the **Advertised Payment Method – Non-Disclosure Case**. It based this aspect of its case on the theory that conduct involving the non-disclosure of an important qualifying fact—which consumers would reasonably expect to have been disclosed by the person engaging in the conduct—renders the conduct misleading or deceptive: *Miller* at [19].

90 ASIC alleges, further, that the advertisements represented that the material terms of the arrangement were only those stated by the “dominant message”. According to ASIC, this representation was false or misleading for the reasons stated above. In closing submissions, ASIC referred to this as the **Advertised Payment Method – Complete Offer Representation**.

91 ASIC contends that the Advertised Payment Method – Complete Offer Case, and the Advertised Payment Method – Non-Disclosure case, each lead to contraventions of ss 12DA(1) and 12DF(1) of the ASIC Act and that the Advertised Payment Method – Complete Offer Representation leads to contraventions of ss 12DB(1)(a) and (i) of the ASIC Act.

92 As to the fees and charges case, ASIC alleges that the “dominant message” conveyed, to reasonable consumers, the impression that a consumer taking up the payment method to buy Harvey Norman Goods would only be liable to pay the price of those goods by way of 60 equal monthly payments or, alternatively, that any fees or charges would be relatively insubstantial.

93 ASIC alleges that this was misleading because, in addition to the payments referred to in the “dominant message”, the consumer was also required to pay (in respect of cards issued before 16 March 2021) an establishment fee of \$25.00 and a monthly account service fee of \$5.95 and (since 16 March 2021) a monthly account service fee of \$8.95.

94 In closing submissions, ASIC referred to this as the **Fees and Charges Case**. It appears to be based on the same theory as the Advertised Payment Method – Complete Offer Case.

95 ASIC alleges, alternatively, that the dominant message did not disclose, or adequately disclose the important qualifying fact that “the consumer would be required to pay at least the establishment fee and/or the monthly account service fees in addition to the 60 equal monthly payments”.

96 In closing submissions, ASIC referred to this as the **Fees and Charges – Non-Disclosure Case**. It appears to be based on the same theory as the Advertised Payment Method – Non-Disclosure Case.

97 ASIC alleges, further, that the advertisements represented that a consumer taking up the payment method to buy Harvey Norman Goods would only be liable to pay the retail price of those goods by way of 60 equal monthly payments, or alternatively that any fees or charges in connection with the payment method would be relatively insubstantial. ASIC alleges that this was false or misleading because the consumer would also be required to pay the establishment fee and/or the monthly account service fees to which I have referred. In closing submissions, ASIC referred to this as the **Fees and Charges Representation**.

98 ASIC contends that the Fees and Charges Case, and the Fees and Charges – Non-Disclosure Case, each lead to contraventions of s 12DA(1) of the ASIC Act and that the Fees and Charges Representation leads to contraventions of ss 12DB(1)(a), (g), and (i) of the ASIC Act.

99 The structure of ASIC’s case is complicated—perhaps unnecessarily so. This is probably because the pleader has endeavoured to be as thorough and as comprehensive as possible in describing the legal attributes of the impugned conduct. But, whatever the intent, the case suffers from over-analysis. Despite their distinct doctrinal underpinnings, the six cases described by ASIC are no more than different ways at looking at the same representational conduct with the same question in mind: what did the advertisements convey about paying for the goods?

100 If the advertisements conveyed to ordinary and reasonable consumers, even if not to all ordinary and reasonable consumers, that they could buy eligible goods from Harvey Norman stores on the payment terms stated in the “dominant message”, and that these were the material terms of the financial arrangement in contemplation, then the alleged contraventions will have

been made out because, in fact, to take advantage of the promotion, consumers were required to enter into a substantially different financial arrangement—namely, a continuing credit contract with Latitude that was linked to a credit card (the GO Mastercard), whether or not they wanted a credit card (let alone a GO Mastercard), which required them to pay an establishment fee and monthly account service fees for amounts determined by Latitude from time to time in respect of that linked account. ASIC’s overall case is no more complicated than that.

LATITUDE’S PROVISION OF FINANCE

101 In the relevant period, holders of a GO Mastercard, issued by Latitude, had ongoing access to a range of 0% interest payment plans at Harvey Norman stores and other retailers in Australia. One of these plans required equal monthly payments to be made on time and in full. This was the plan promoted in the representative advertisements.

102 In order to obtain a GO Mastercard, consumers were required to establish a GO Mastercard account with Latitude under the terms of a credit contract. The terms of the contract were contained in the GO Mastercard Conditions of Use, and Financial Tables issued by Latitude from time to time.

103 The account could be established at a supplier’s premises (such as at a Harvey Norman store). Before 16 March 2021, consumers were required to pay an establishment fee of \$25.00. Once the account was established, Latitude issued the account holder with a “traditional” plastic credit card and PIN for use on that account. Provision existed for the issue of additional cards and for additional cardholders to operate on the account.

104 Under the GO Mastercard Conditions of Use, the account holder became bound by the credit contract when that person (or any additional cardholder) used the account (in described ways) or activated the card. In other words, even though account holders were required to have a GO Mastercard (and could not opt-out from receiving the credit card), they could operate their account without activating, and therefore without using, the card itself.

105 This meant that the account holder only needed to use the account, not the credit card, to take advantage of the plan promoted in the advertisements. However, using the account (including for a 0% interest payment plan) meant that monthly account service fees were incurred. These were fees referable to the servicing of the linked credit card account that had been established. Before 16 March 2021, account holders were charged a monthly account service fee of \$5.95 when the account closing balance one day before the statement date was \$10.00 or more. On

and from 16 March 2021, the monthly account service fee was \$8.95 per month. Since early 2023, the fee has been \$9.95 per month.

106 If the account holder chose to activate the card, it could be used to obtain credit from Latitude for a variety of purposes: to pay for all or part of the price of goods and services; for cash advances; for balance transfers; and for BPAY payments. Other fees and charges were payable when the GO Mastercard was used in these ways.

107 In the present case, the finance provided by Latitude in respect of the Harvey Norman promotion was not a one-off loan but a continuing credit facility.

THE EVIDENCE

Lay and consumer evidence

108 Apart from a large number of documentary tenders, ASIC relies on the following affidavit evidence:

- (a) Alicia Lam made 20 July 2023;
- (b) Anaise Rose Cottrell made 28 November 2023 (parts only admitted into evidence); and
- (c) various affidavits by consumers (Brian Rodney Harris made 5 July 2023; David John Hill made 5 July 2023; David George North made 6 July 2023; and Simone Jane Jenkins made 6 July 2023), which are summarised in the next section of these reasons (the **consumer affidavits**).

109 Ms Lam is an analyst in ASIC's Enforcement Data and Analytics Team. Ms Lam's affidavit and accompanying exhibit includes analysis she conducted of data provided by Latitude pursuant to a notice given under s 19 of the ASIC Act and through discovery.

110 Ms Cottrell is a lawyer at ASIC. Only paragraphs 16 to 18 of Ms Cottrell's affidavit were read, in which she provided evidence as to ASIC's storage and identification of documents obtained from Latitude and Harvey Norman.

111 Latitude relies on the following affidavit evidence: (a) Blake Anthony Smith made 24 October 2023; and (b) Andrew John Whitley made 25 October 2023.

112 Mr Smith is a Program Leader at Latitude Financial Services. Mr Smith has previously worked as an account manager responsible for the training, monitoring and supervising of a range of

Harvey Norman stores. Mr Smith provided evidence as to the training conducted with Harvey Norman franchisees and salespeople regarding Latitude’s Sales Merchant Portal (an online portal which allowed merchants to process new applications for Latitude products, including the Go Mastercard).

113 Mr Whitley is Latitude’s Senior Manager of Remediation and Regulation Analytics. Mr Whitley’s affidavit and accompanying exhibit included an analysis spreadsheet derived from data concerning the GO Mastercard.

The consumer affidavits

Mr Harris

114 Mr Harris gave evidence of purchasing a television set and PlayStation4 (PS4) in July 2020 from a Harvey Norman store at Noarlunga in South Australia after seeing the promotion advertised in a Harvey Norman catalogue and in multiple radio advertisements. (It should be stressed that ASIC’s case does not include advertisements in catalogues.)

115 The promotion was attractive to Mr Harris because he wanted to purchase the television set and PS4 interest-free; he did not want to make any upfront payments; and he wanted the advertised gift card. He said:

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

116 At this time, Mr Harris thought he would be borrowing money from Harvey Norman. He did not recall seeing or hearing anything about a finance company, GO Mastercard, a credit card, or any fees. He assumed that the financing was provided by Harvey Norman itself, not a finance company. He was not aware that he needed to sign up, and be approved, for a credit card to take advantage of the offer. He said that, at that time, he did not need a new credit card and was not intending to sign up for a new credit card.

117 Mr Harris attended the Noarlunga store on 19 July 2020. His first purchase was the television set (the PS4 was only available in a different sales department). He gave evidence of the following exchange:

22. ... I said, "I would like to do 60 months interest free". The TV salesperson asked, "Have you signed up with Latitude Finance?". I said in response, "No I don't know anything about that". At that time, I didn't know what "Latitude Finance" was. The TV salesperson responded and said words to the effect of "Latitude Finance is a credit card company". I assumed that "Latitude Finance" was the company that provided the finance. At the end of our conversation, the TV Salesperson told me I could sign-up for the 60 month interest free offer in-store right then.

118 Mr Harris said that the salesperson completed the application for him by typing details into a computer. Mr Harris said that he was not given any paperwork at the time, and did not sign anything. He was told that the application would take about one hour to approve.

119 Mr Harris said that, at this time, he still thought that he was applying for an interest-free loan that required him to make equal monthly repayments, and that no deposit was required. He was not told about the repayments he would need to make, although he assumed that they would be "the purchase price divided by 60". He was not told that there was a \$25 establishment fee or any other fees associated with the offer.

120 Mr Harris said that, about one hour later (after he had left the store to have lunch with his son), he received a text message from Latitude to the effect that his application had been approved and that he could pick up the items he had selected from the Harvey Norman store.

121 Mr Harris returned to the Noarlunga store that day to collect the television and purchase the PS4. He wanted to bundle the PS4 purchase with his television set purchase on the 60 months interest-free offer. He saw a different salesperson. This salesperson told Mr Harris that he could not bundle his purchase of the PS4 with his purchase of the television set under the 60 months interest-free offer. He could, however, purchase the PS4 for a 33 month interest-free period. He accepted that offer. He then asked the PS4 salesperson about the gift card. He was told that he was not eligible for the gift card because he had purchased the television set and the PS4 separately from two different franchisees in the store.

122 Mr Harris said:

31. ... When I left the store, my understanding was that I had signed up to a contract for 60 months interest free to pay off the price of the TV and a contract for 33 months interest free to pay off the PS4. I assumed that if I paid off the

price of those items within those interest free periods, that those prices were all that I owed.

123 Sometime after, Mr Harris received a letter from Latitude that included a “Financial Table”. The letter stated that Mr Harris would be charged fees in relation to his account, including a \$25 establishment fee and a \$5.95 monthly account fee. Mr Harris said that he was surprised. He said that he sent an email to Latitude complaining about the monthly service fee because this had not been explained to him upfront.

124 On receiving this correspondence, Mr Harris realised that, when he had purchased the television set and the PS4, he had been approved for a credit card with a \$10,000 credit limit.

125 Mr Harris received a GO Mastercard credit card in another letter. He said that, at the time he received the credit card, he did not know that it could be used for everyday purchases. He subsequently activated the card.

126 Approximately one month later, Mr Harris received, by email, a GO Mastercard statement. The statement said that a minimum monthly repayment of \$36.59 was required. It also said that he might like to pay \$66.54 to reduce further interest.

127 Subsequently, Mr Harris purchased a washing machine from Harvey Norman using the GO Mastercard.

Mr Hill

128 Mr Hill gave evidence of purchasing a laptop computer from a Harvey Norman store at Goulburn in June 2021 after seeing multiple advertisements for the 60 months interest-free promotion on television. Mr Hill said that between May and June 2021 he saw approximately five such advertisements each week.

129 Mr Hill’s recollection of the advertisements was (in his words):

- (a) The 60-month interest free offer was displayed in large font. The font was large enough for me to read it clearly. I noticed that there was fine print displayed, but I could not make out the small font displayed on the TV screen. It was also not displayed on the screen long enough for me to make adjustments (such as moving closer to the screen) to allow me to read it, so I did not read it.
- (b) The 60-month interest free offer appeared fairly early during the advertisement and I noticed that it was displayed for quite a while during the advertisement.
- (c) There was a \$1,000 minimum purchase requirement in order to qualify for the interest free offer.

- (d) That if you spent \$1,000 you would receive a \$100 Harvey Norman gift card, with increased amounts up to a \$1,000 Harvey Norman gift card for spending \$10,000.
- (e) There was a male voiceover speaking during the advertisement. I recall that the voiceover said words to the effect of, “60 months interest free”, “every \$1,000, \$100 in store credit”, “rush in now”, “spend the minimum and then you can get 60 months interest free” and “60 months equal repayments”.

130 Mr Hill said that he recalled seeing the word “Latitude” in the advertisements which, he said, was “displayed in the bottom corner of the advertisement in small font”. From this he understood that the money to purchase the goods at Harvey Norman would be borrowed from Latitude, instead of Harvey Norman. However, at that time, he did not think that Latitude was providing a credit card. He said that he did not recall the advertisements mentioning the requirement to obtain a credit card to access the interest-free offer.

131 Mr Hill said:

- 15. I understood from the Harvey Norman advertisements that I would be able to pay my purchase of the laptop off over a 60-month period without being charged any interest as long as I was approved to borrow the funds, and that no fees would be charged. I did not know that I would need to sign up for a GO Mastercard credit card offered through Latitude to access the interest free offer. At that time, I was not expecting to be charged any fees to access the interest free offer because I did not see any reference to Latitude or Harvey Norman charging any fees to access the offer in the Harvey Norman advertisements.

132 Mr Hill also said:

- 17. ... I understood from the Harvey Norman advertisements that I had five years to pay off the purchase price of any products I was to buy, and that no interest would be charged. This arrangement was better for me than taking out a loan directly from a bank or getting another credit card. My existing credit card with St George was maxed out at the time. I needed a laptop for work and saw the advertisements and thought that the 60 month interest free offer was an easy way to purchase the laptop without having to pay any money upfront.

133 Mr Hill attended the Goulburn store on about 5 June 2021. After choosing the computer he wanted to buy, he told the salesperson that he wanted to make the purchase “on the 60-months interest-free loan”. The purchase price of the computer was \$2,381 less a small discount which Mr Hill was able to negotiate.

134 Mr Hill said:

- 24. After telling the Salesperson that I wanted to purchase the laptop on the 60-month interest free offer, the Salesperson completed an application in relation to the interest free offer. At no stage during the application process did the Salesperson tell me that I was applying for a credit card, and at no stage did

I believe I was applying for a credit card. I was not given any details about the application or any written information about the interest free offer. At that time, I understood from the Harvey Norman advertising that I was completing an application for a one off interest free loan to allow me to purchase the laptop. The application was completed by the Salesperson at a desk near the laptop section. I remember the Salesperson told me that he was undertaking a reference and financial check, and he asked me questions about my income and expenses. I answered the questions he asked me to the best of my abilities and he appeared to include that information in the application. To the best of my recollection, I did not give the Salesperson any documents or show him any information on my phone to verify the answers I provided to him.

135 Mr Hill said that although he could not remember what the salesperson said about the loan amount he could apply for, he (Mr Hill) remembered asking for a limit of \$2,500 and being told by the salesperson at the end of the application process that this limit had been approved.

136 Mr Hill then said:

27. At no stage during the application process did the Salesperson tell me that he would do a credit card assessment or a credit check for the purpose of making a credit card application on my behalf. I was not told by the Salesperson that I was required to apply for, and be approved for, a GO Mastercard in order to take advantage of the interest free offer, or that I was applying for a GO Mastercard credit card that could be used in stores other than Harvey Norman that had a maximum credit limit of \$2,500. At no stage did the Salesperson tell me that I would be charged a monthly account service fee or any other fees.

137 Mr Hill said that he remembered signing a document while at the store, but he did not remember what it was. He said he only glanced at it and did not read it. He said that “it just seemed like general contract paperwork that I did not understand because of its legal jargon”. He said that he did not appreciate that it was a contract for a credit card. He thought he had signed up for an interest-free loan. He did not intend to sign up for a credit card and had no need for one.

138 On 10 June 2021, Mr Hill received an email from “Latitude GO Mastercard” informing him that his “Latitude GO Mastercard is on the way”. He later received a letter from Latitude enclosing the plastic card. Mr Hill said that he was surprised because he “did not know what it was for”, although he thought it was connected with the purchase of his computer at the Harvey Norman store.

139 When Mr Hill received his first statement, he saw that he was being charged an \$8.95 monthly account fee, which he was not expecting because he had not been told about it. Mr Hill thought that Latitude was “sneaky” for charging fees attached to the interest-free offer and that, as a recurring amount, the \$8.95 monthly account-keeping fee was “a bit steep” because over the 60 months interest-free period, he would be charged \$550 in monthly fees. Mr Hill said:

34. ... I then realised that the laptop, including the additional fees charged by Latitude, would cost me almost \$3,000 if I repaid the minimum amount over the 60-month interest free period. I thought that was a bit rich.

140 The first statement that Mr Hill received from Latitude confirmed that the purchase price for his computer was \$2,381. It listed the purchase as:

Harvey Nrm Goulburn Compu

60 instalments & 0%

Monthly instalment required of \$39.69

(Emphasis in original.)

141 Although the statement said that Mr Hill's monthly instalment was \$39.69, it also said that the minimum monthly payment he was required to make "to reduce future interest" was \$48.64. It is apparent that the sum of \$48.64 included the amount of the monthly account service fee.

142 Mr Hill activated the credit card and made subsequent purchases with it.

143 In December 2021, Mr Hill decided to purchase a tablet computer at the Goulburn Harvey Norman store using the 60 months interest-free offer. He thought that he could use his GO Mastercard for that purpose and increased his credit limit to \$3,200 after contacting Latitude.

144 The tablet computer that Mr Hill wanted could be purchased at a discounted price. However, when Mr Hill told the salesperson that he wanted to use the 60 months interest-free offer, he was informed that the discounted price could only be obtained if he paid cash or used a credit card. As it was important to Mr Hill to have the discounted price, he decided to use his GO Mastercard, and the sale was processed accordingly.

145 Mr Hill's evidence as to his reason for using the GO Mastercard for this purchase was that: (a) he did not understand that the GO Mastercard was a credit card; (b) he did not know that the GO Mastercard could be used for purchasing items from Harvey Norman otherwise than on interest-free terms; and (c) he did not understand that he would be charged interest if he used the GO Mastercard to purchase the tablet computer, "in the way that the [salesperson] processed it".

146 When Mr Hill received his monthly account statement from Latitude in March 2022, he saw that he had been charged interest on the tablet computer purchase as well as the monthly account fee. He said:

42. ... It was at this point that it clicked that I had signed up for a "real"

Mastercard, by which I mean a general use credit card. Before this, I thought Latitude gave me a token Mastercard for the interest free loan only. I didn't feel that best about having another general use credit card where I would be charged interest, so I increased the monthly repayments I was making. I wanted to pay the balance of the amount owing to Latitude as quickly as possible and get the whole episode out of the way. I did not know what the applicable interest rate was for purchases made not on interest free terms.

147 Mr Hill also used his GO Mastercard on 5 April 2023 to pay for car repairs. He said that he knew that he would be charged interest on this purchase.

Mr North

148 Mr North gave evidence of purchasing a television set from a Harvey Norman store at Campbelltown in December 2020 after seeing a number of different Harvey Norman advertisements on television advertising the 60 months interest-free promotion.

149 Mr North's recollection of the advertisements was (in his words):

- (a) The offer was for 60 months interest free.
- (b) The words "60 months interest free" appeared in large font towards the end of the advertisement in white font in a red box. From seeing this, my impression was that this was the "key sell" of the promotion. To the best of my recollection, the 60 months interest free offer was displayed at the end of the advertisement, after the images of the products being advertised.
- (c) There was writing that said words to the effect that you had to spend a minimum of \$1,000 to access the interest free offer. This writing was smaller than the "60 months interest free". I considered that this was not as prominent, but it was not in fine print.
- (d) There were images of certain products that Harvey Norman was advertising, similar to the images of products that are advertised in Harvey Norman catalogues that I have received in the mail ...
- (e) At the bottom of the advertisement, there were words to the effect of "terms and conditions apply" and fine print in small writing, but I was unable to read it in the time it was shown on the screen. I typically did not pay much attention to the fine print in TV advertisements.
- (f) There was a male voiceover speaking during the advertisement. The voiceover was talking about the 60-month interest free offer. I do not recall the specific details of what the man said in the voiceover.
- (g) I did not see any reference to fees in the advertisements.
- (h) I do not remember there being any reference to a credit card or GO Mastercard.

150 At this time, Mr North had also heard radio advertisements and seen catalogues advertising the same promotion.

151 Mr North said:

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

152 Mr North assumed that the offer was being financed by a third party, not Harvey Norman. He made this assumption based on his work in the financial services industry (Mr North is the managing director of his own insurance broking business which has 15 employees) and his understanding that retail businesses can outsource financing to a credit provider. He understood that if he failed to make a required payment under the offer, he would be charged interest on the amount of the purchase.

153 Mr North attended the Harvey Norman store at Campbelltown on 13 December 2020 with his wife. His reason for going there on that occasion was to purchase a television set on interest-free terms without an upfront payment. While at the store, he saw signage promoting the 60 months interest-free offer.

154 Mr North negotiated the purchase of a television set at a discounted price (it was floor stock), and then told the salesperson that he wanted to take advantage of the 60 months interest-free offer. Further negotiations ensued because Mr North was told that the store could not do that price “with the interest-free scenario”. Mr North then negotiated a smaller discount, with which he was happy at the time.

155 Mr North’s evidence was that he was unsure of the actual interest-free period he had negotiated. As to this, he said:

25. ... At the time, I understood that I was purchasing the TV on 60 month interest free terms, but the length of the promotion for the TV that I purchased may have been less. The precise length of the interest free promotion did not concern me, as I intended to pay off the purchase price of the TV within 12 months.

156 Mr North explained the application process that then ensued while he was at the store. He said that he had understood from the advertisements that he was applying for an interest-free loan that required him to make equal monthly repayments, that no deposit was required, and no fees

would be charged. He said that he did not know that he was, in fact, applying for a credit card, and he did not know that he needed to apply, and be approved, for a credit card in order to take advantage of the interest-free offer.

157 Mr North gave evidence of the salesperson completing the application on a computer in the store and asking Mr North questions about his financial circumstances. It appears that the approval was given promptly. The salesperson informed Mr North that there were “some contracts” to sign, which Mr North did. After this, the salesperson gave him “a lot of paperwork”, including receipts and a booklet. Mr North said:

32. ... There was a tonne of pages of fine print. I did not read the paperwork, but I understood that I was entering into a contract in relation to the purchase of the TV on interest free terms. I did not read the documents in the store or at home. My circumstances allowed my wife and I to pay off the purchase price of the TV within 12 months. My plan was to pay it off quickly so I wouldn't get caught out by interest charges on the purchase price of the TV.

33. The entire application process took around 45 minutes and by the end of the application process, I understood that I had signed up for an interest free loan, but I did not understand I had signed up for a credit card.

34. ...The Salesperson did not mention a monthly account keeping fee, payment processing fee or any other fees associated with the interest free purchase. I do not recall talking to the Salesperson about a credit limit.

...

36. When I left the Campbelltown store, my understanding was that I had signed up for an interest free loan and I had to make regular repayments to pay the purchase price of the TV off within the designated timeframe, otherwise I would get charged interest. It was based on this understanding that I purchased the TV from Harvey Norman and I would not have purchased it from Harvey Norman if [it] was not for the interest free offer.

158 On 17 December 2020, Mr North received an email from Latitude informing him that his GO Mastercard was “on its way”. Mr North said that it was when he saw the word “Mastercard” that he realised that he had signed up for a credit card when purchasing the television set from Harvey Norman, even though he had no need for a further credit card and had not intended to sign up for one.

159 Mr North said:

38. ... I was not happy about having signed up for a credit card because at that time I was not interested in owning another credit card. I was more interested in reducing debt instead of applying for credit. I remember being confused about the difference between GO Latitude and a GO Mastercard, and I did not understand that a credit card was involved until around this time. I later

received a letter from Latitude enclosing a GO Mastercard credit card.

160 After Mr North received his GO Mastercard in the mail, he understood it could be used where Mastercard was accepted. However, he did not activate the card, despite receiving an email from Latitude inviting him to do so.

161 On 5 January 2021, Mr North registered with the GO Mastercard Online Service Centre. Shortly after that, he received his first statement. On receiving the statement, he realised that he had purchased the television set using a 33 months interest-free promotion, not a 60 months interest-free promotion. This was not of particular concern to him.

162 However, when Mr North received his second statement in February 2021, he was surprised to discover that he was being charged a monthly account fee and a \$0.95 handling fee for every repayment he made using BPAY. Mr North said:

45. ...That was a surprise to me as these fees were not explained to me by the Salesperson at the Campbelltown Harvey Norman store. I couldn't believe I was being charged to make repayments. My wife and I had already both been making weekly repayments toward the outstanding amount on the GO Mastercard credit card via BPAY. By that time, I had been charged about \$20 in fees. The processing fee was high and unexpected. My reaction was along the lines of "what? That's a rip off". I thought the fees, and in particular the handling fee, were outrageous. Upon discovering these charges, I sent an email to my wife on 16 February 2021 outlining the additional payments I calculated that we would have to make as a result of these charges. ...

163 Mr North said that he also thought the monthly fee was substantial because monthly fees were not charged on his other credit cards. He said that, had he known about the fees charged in connection with the interest-free purchase beforehand, he would have taken more time to consider whether to take up the offer.

164 After repaying the amount of the loan, Mr North cancelled the credit card. He said:

51. Based on my experience in purchasing my TV from Harvey Norman on interest free terms, in my opinion, the process of taking up the "interest free offer" was not transparent because I did not know that I had to apply, and be approved, for a credit card and had in fact applied for a credit card until around the time I received the email from Latitude on 17 December 2022.

52. I definitely will not take up another interest free offer if a credit card process is involved.

165 Mr North also gave evidence about the promotional material he received from Latitude in 2022.

Ms Jenkins

166 Ms Jenkins gave evidence of purchasing kitchen appliances from a Harvey Norman store at Bundall in February 2020 after seeing a Harvey Norman advertisement in the Sunday Telegraph advertising the 60 months interest-free promotion.

167 Ms Jenkins’s recollection of the advertisement was (in her words):

- (a) It was a full page of advertising;
- (b) The phrase “60 Months Interest Free” was in large font across the top of the page with an asterisk, and was in a larger font than any other wording in the advertisement. I recall that this statement grabbed my attention and was the first thing I saw when I looked at the advertisement;
- (c) It included statements in speech bubbles at the top of the advertisement, which said words to the effect of “buy now pay later”;
- (d) It contained information in fine print across the bottom of the advertisement. While I cannot remember exactly what the fine print said, I recall that this information included statements to the effect of, “not Apple products”, “see in store” or “conditions apply” and I also can recall a reference to the interest percentage if payment was not made;
- (e) It included various specials that were on offer, for example, I recall seeing 9 or 10 washing machines for sale.

168 Ms Jenkins read the “fine print” at the bottom of the advertisement to check whether the promotion applied only to the goods included in the advertisement. She said that the “fine print” was only one or two sentences long. She satisfied herself that the promotion applied to all the products sold at Harvey Norman. The nature of the “fine print” to which Ms Jenkins referred is not apparent. Given that the “fine print” was only “one or two sentences”, it is unlikely that it was the shortened terms, the varied shortened terms, or the extended terms. In any event, Ms Jenkins’s reading of the “fine print” did not, apparently, alert her to anything about the financial arrangement being promoted.

169 Ms Jenkins said:

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

170 Ms Jenkins assumed that a third party would be involved in providing finance for the purchase price based on her previous experience with another retailer many years ago when she

purchased furniture under an interest-free promotion. Under that interest-free promotion, Ms Jenkins paid monthly instalments and a monthly account-keeping fee.

171 Ms Jenkins did not think that the Harvey Norman interest-free offer involved her having to sign up, and be approved, for a credit card and, although she thought that a monthly account-keeping fee might be involved, she had not thought that an account-keeping fee would have to be paid “on top of the minimum required monthly payment”. She thought that any such fee was already incorporated in the monthly payments she would be required to make.

172 Ms Jenkins and her husband attended the Harvey Norman store at Bundall on 2 February 2020, about two weeks after she saw the advertisement. After selecting the items she wanted to purchase, she presented herself to a salesperson at an island bench which had a computer workstation. She informed the salesperson that she wanted to purchase the items “with the interest-free option”. The salesperson informed Ms Jenkins that she needed “some documents” before that could be done.

173 The salesperson obtained financial information from Ms Jenkins and entered details into the computer. While still in the presence of the salesperson, Ms Jenkins received a telephone call from another person who asked her further questions. Ms Jenkins assumed that this was “some kind of credit check”. Ms Jenkins also supplied the salesperson with copies of her payslips electronically. Ms Jenkins said that, after receiving the telephone call, the salesperson told her that she would receive a link via email or a text confirming when her application was approved.

174 At no stage in this process was Ms Jenkins told that she was applying for a credit card. Ms Jenkins said:

26. My understanding was that I was applying for a 60 months interest free loan for the price or amount that we were to spend on the kitchen appliances we had selected. From seeing the advertisement in the Sunday Telegraph, this was what I understood the 60 months interest free offer to involve.

175 The following day, Ms Jenkins received an email or text that informed her that she had been approved for a GO Mastercard with a credit limit of \$10,000. She said that it was only at this point that she realised that she had signed up for a credit card:

31. I was very surprised when I read the information contained in the communication from Latitude and saw that the GO Mastercard credit card had a \$10,000 limit. Up until that point, I thought I was borrowing the amount of the purchases, being approximately \$8,000, as part of an interest free loan. Prior to receiving this communication I was also unaware that the interest free

offer involved Latitude.

176 On 7 February 2020, Ms Jenkins received an email telling her that her credit card was “on the way”. The email said that she was a GO Platinum Mastercard cardholder. The card arrived a few days later in the mail. Ms Jenkins started to use the card for everyday expenses.

177 When Ms Jenkins received her first statement from Latitude, she noticed that she had been charged an establishment fee of \$25.00 and a monthly account service fee of \$5.95. Ms Jenkins noticed that, in subsequent statements, she had been charged a payment handling fee of \$0.95 for payments she had made using BPAY. Ms Jenkins said that she did not recall seeing anything in the Harvey Norman advertisement about paying monthly, or any other, fees. She had assumed that a monthly account-keeping fee would be part of the minimum payment she was required to make each month, not a payment on top of the minimum required monthly payment.

178 Ms Jenkins’s monthly account service fee has increased from \$5.95 to \$8.95, and then from \$8.95 to \$9.95. She estimates that she has been charged \$450 in monthly account fees, BPAY fees and late payment fees since receiving the GO Mastercard. She said that having to pay these fees has made it difficult for her to make her monthly repayments.

179 Ms Jenkins explained that she did not realise that the 60 months interest-free offer only applied to purchases for items purchased at Harvey Norman. She thought that she was getting 60 months interest-free on all purchases up to her credit limit of \$10,000.

Ruling on evidence

180 The defendants objected to those parts of the consumer affidavits that went beyond the deponents’ identification and understanding of the advertisements they had seen or heard. The basis of the objection was relevance, given that the hearing before the Court was on the question of liability, not on relief. The defendants accepted, at least in a general sense, that those parts of the affidavits to which they objected may be relevant to the question of relief should findings of contravention be made.

181 The defendants initially addressed their objection by reference to Mr Hill’s affidavit. They objected to paragraphs 20 to 46 of the affidavit, which concerned the matters I have broadly summarised at [133] to [147] above.

182 ASIC pressed these paragraphs, submitting that: (a) paragraphs 20 to 29 were relevant to Mr Hill’s understanding of the advertisements, and demonstrated the persistence of, or subsequent changes in, his understanding; and (b) paragraphs 30 to 46 were relevant to the question of consumer harm, and that a witness should not be required to give evidence twice (at a liability hearing and then at a hearing on relief).

183 ASIC developed its submissions by reference, firstly, to matters of principle.

184 ASIC submitted that, at the liability phase of a civil penalty proceeding, it is relevant to make findings as to whether the contraventions occurred and, if so, the circumstances in which they occurred, including the gravity of the contravening conduct. Based on cases dealing with disciplinary hearings, ASIC submitted that splitting the hearing of civil penalty proceedings to deal with questions of contravention and then questions of relief is driven by the need to afford procedural fairness to defendants. Defendants need to know what the Court has found about the gravity of contravening conduct so that they are armed with knowledge to make submissions about the appropriate relief to be granted.

185 ASIC’s submissions commenced with the proposition that the civil penalty proceedings have a protective purpose in promoting the public interest in compliance: *The Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [55]. It referred to *Forge v Australian Securities and Investments Commission* [2004] NSWCA 448; 52 ACSR 1 which confirmed that, in civil penalty proceedings involving the contravention of corporations legislation, there should be a two-stage process in which the question of contravention and the question of relief (penalty) are determined separately. The hearing on relief (penalty) is directed to the contravention(s) actually found, and the defendant is afforded the right to elicit evidence and make submissions on penalty, based on the precept that “the punishment must fit the crime”: see at [412] – [425]. This, ASIC argued, required findings to have been made, at the first stage of the process, as to the “gravity of the misconduct” and, hence, the circumstances of the offending.

186 In that connection, ASIC relied on the following observation of the Court of Appeal in *Council of the New South Wales Bar Association v EFA (a pseudonym)* [2021] NSWCA 339; 106 NSWLR 383 at [44] in respect of disciplinary proceedings:

44. As is usual in disciplinary proceedings in the Tribunal, the hearing was conducted in two stages. The first is directed to factual determination of the allegations made, and to the proper characterisation of the conduct in question

(professional misconduct, unsatisfactory professional conduct, or neither). The second stage (which only occurs if a finding of professional misconduct or unsatisfactory professional conduct is made) is concerned with consequential order, and, particularly, what (if any) orders ought to be made ...

187 ASIC placed particular reliance on the words “the proper characterisation of the conduct in question” in the above quote as supporting its argument. However, it is clear that, here, the Court of Appeal was directing attention to the need for the defendant to know, before the second stage, the precise conduct that had been found under the *Legal Profession Uniform Law 2014* (NSW)—namely, professional misconduct or unsatisfactory professional conduct, in much the same way as a defendant in civil penalty proceedings needs to know the precise statutory contravention that has been found. The consideration of what, if any, remedy should be imposed generally requires knowledge of the conduct upon which the remedy is to be based: *King v Health Care Complaints Commission* [2011] NSWCA 353 at [202] – [205].

188 ASIC also called in aid the principle of finality, with reference to *Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission* [2022] FCAFC 170; 295 FCR 106 (*Mayfair*). In that case, at [194] the Full Court accepted the approach in *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2005] FCA 1847; 224 ALR 467 at [6] that, at a penalty hearing, it would not be appropriate to allow evidence to be adduced that raises matters relating to liability that had not been raised at the hearing on liability. The Full Court preferred this approach over that adopted in *Australian Securities and Investments Commission v Forge* (2007) NSWSC 1489 where it was held (at [35]) that evidence cannot be adduced at a penalty hearing to impugn the findings of fact on which declarations of contravention are based.

189 After addressing matters of principle, ASIC then turned to Mr North’s affidavit. The reason for this was that, under the trial timetable, Mr North was to be cross-examined imminently by video link. For that purpose, the defendants needed to know which parts of Mr North’s affidavit were to be admitted into evidence.

190 In this connection, the defendants objected to paragraphs 18 to 60 of Mr North’s affidavit which concerned the matters I have broadly summarised at [153] – [165] above.

191 ASIC pressed these paragraphs, submitting that: (a) paragraphs 18 to 39 were relevant to Mr North’s understanding of the advertisements he had seen, and demonstrated the persistence of, or subsequent changes in, his understanding; (b) paragraphs 48, 51 and 52 were relevant to Mr North being misled; (c) paragraphs 40 to 60 were relevant to the question of consumer harm,

and that a witness should not be required to give evidence twice (at a liability hearing and then at a hearing on relief); and (d) paragraphs 53 to 59 addressed the marketing benefits that Latitude derived from its advertising conduct.

192 In developing its submissions, ASIC drew attention to paragraph 16(f) of Harvey Norman's amended concise response, which responded to paragraph 16 of the concise statement (part of which is quoted at [87] above):

... consumers were well aware that they would be obtaining a credit facility (being the GO Mastercard, as defined in paragraph 5 of the Amended Concise Statement), or utilising an existing credit facility (being the GO Mastercard, as defined in paragraph 5 of the Amended Concise Statement), and be required to pay fees or charges in respect of that facility before entering into any transaction with any Franchisee pursuant to the advertised offers the subject of these proceedings, including because that was made plain in the application process required to take up any such offer, being the process identified in paragraph 6 above.

193 Amongst other things, paragraph 6 of Harvey Norman's amended concise response set out the application procedure for a customer at a Harvey Norman store who did not hold a GO Mastercard but who wished to take advantage of the promotion.

194 Therefore, although the defendants based their objection on the fact that anything beyond the deponents' identification and understanding of the advertisements they had seen or heard was not relevant to the question then before the Court, at least Harvey Norman's defence relied, in part, on the application procedure undertaken at a Harvey Norman store as being, in some way, exculpatory. The consumer affidavits were prepared and filed on the basis that it was necessary to address this issue. In response, Latitude prepared and filed Mr Smith's affidavit which, as I have said, dealt, in part, with the training of Harvey Norman franchisees and salespeople to process in-store applications for the GO Mastercard. As ASIC put it in oral submissions, "this issue has been put squarely in front and centre".

195 That said, it should be noted that, in its reply statement, ASIC said that any representation made to consumers at the point of sale or at the time of the application process was irrelevant to whether the defendants contravened the ASIC Act as alleged. To this extent, ASIC's pleaded case coincided with the defendants' evidentiary objection.

196 ASIC also submitted that, as the deponents had been required for cross-examination, fairness required that they be cross-examined on their affidavits generally, not some selected part of their affidavits. Furthermore, it would be wasteful of the Court's resources and inconvenient

to the deponents not to take their cross-examination on the whole of their affidavits (Mr North was giving his evidence by video link from South Africa; Ms Jenkins was giving her evidence by video link from Bali; Mr Hill had travelled from South Australia).

197 ASIC advanced other submissions based on its reasonable expectation case, including that: (a) credit cards are “dangerous”; (b) consumers have an “aversion” to credit cards; and (c) the defendants’ conduct lured consumers into a “marketing web” which they did not understand. ASIC submitted that all these matters were “centrally relevant to the liability proceedings”. However, the submissions in (a) and (b) went beyond the case that ASIC had pleaded in its concise statement.

198 ASIC also argued that there is no “bright dividing line” between evidence that is relevant on the question of liability and evidence that is relevant on the question of relief.

199 After hearing the parties’ oral submissions, I ruled that paragraphs 18 to 60 of Mr North’s affidavit should be admitted. At the time, I said that I did not accept that the evidence in these paragraphs was irrelevant or that the scope of the evidence on the question of contravention was as limited as the defendants would have it. I said that I would provide written reasons for this ruling when delivering these reasons.

200 The present case is not an appropriate vehicle to make definitive pronouncements about what evidence can or should be adduced at a hearing on liability and what evidence can or should be adduced at a hearing on relief. Even so, at a liability hearing it is both appropriate and orthodox to adduce evidence of the facts and circumstances surrounding the impugned conduct. A failure to do so may place a party in jeopardy who seeks, at a later stage, to adduce evidence directed to qualifying the nature of the contravening conduct, having regard to the approach preferred by the Full Court in *Mayfair*.

201 All parties accepted that the conduct involved in making the instore applications to take advantage of the promotion could not alter the objective character and meaning of the representative advertisements. In my view, it is, nevertheless, relevant to know that the deponents of the consumer affidavits continued to be affected by the understandings they had of the advertisements they saw or heard, notwithstanding that instore process. Such was the power of the advertisements on those understandings.

202 This was the primary basis on which I admitted the paragraphs of Mr North’s affidavit to which objection had been taken. His understanding of the television advertisements and radio advertisements he saw and heard (as well as the catalogue advertisements which he considered to be to similar effect) remained with him and were the reason why he went to the Campbelltown Harvey Norman store to buy a television set. He still maintained his understanding of the promotion based on the advertisements even after completing his instore application. His “misunderstanding” of the true position was not transient or fleeting. He was not disabused until he received an email from Latitude informing him that his GO Mastercard was “on its way”. Even then, he was not aware of the fees associated with the account he had established until he received his second statement from Latitude in February 2021 (he made his purchase from the Campbelltown Harvey Norman store in December 2020).

203 Harvey Norman chose to rely on the instore application process as being relevant to the conduct alleged against it. It was not for ASIC to second-guess why Harvey Norman wished to rely on that process or what Harvey Norman might seek to make of it at a liability hearing. It was appropriate for ASIC to address it by evidence. Without these matters being addressed in the evidence at the liability hearing, the Court may have come to the erroneous view that, in fact, Mr North’s understanding was merely transient or fleeting because of the intervention of the instore application process and that, for that reason, the impact of the defendants’ conduct on him was relatively minimal. If such a finding were to have been made, ASIC would have lost the opportunity to adduce evidence to the contrary at a subsequent hearing on relief.

204 I accept that there are other parts of Mr North’s affidavit that are not relevant to the question of liability but only on the question of relief. I refer, in particular, to paragraphs 53 to 60 of his affidavit which concern the marketing materials he received from Latitude. One option was not to admit these paragraphs at the liability hearing. But there was little to commend that option. Mr North was available to be cross-examined on all issues and I formed the view that it was not appropriate, let alone efficient, for him to be cross-examined twice.

205 Having announced my ruling in summary form, the parties treated it as a ruling that applied to all the consumer affidavits. The defendants elected not to cross-examine the deponents. They nevertheless took issue with the probative value of those affidavits, contending that the deponents were not representative of ordinary and reasonable consumers in the relevant class.

Other consumer evidence

206 ASIC contends that Latitude's own documents and research reveal that some Harvey Norman customers were not aware that they had signed up for a credit card account even after they had completed the GO Mastercard application process.

207 In this connection, ASIC refers to items in Latitude's KYI (i.e., Know Your Intermediary) Forum Presentations for 11 June 2020, 9 July 2020, and 10 September 2020. The presentations for 11 June 2020 and 10 September 2020 covered a range of retailers (intermediaries) and recorded two instances where Harvey Norman customers had complained that they were unaware that they had applied for a credit card.

208 The data in the 9 July 2020 presentation, which also covered a range of retailers, revealed that approximately one-fifth of Latitude's customers who had signed up for a GO Mastercard, and completed a survey, had done so not realising that they were applying for a credit card or that fees and charges would be applied.

209 ASIC also refers to responses to questions in surveys that Latitude had conducted which, taken by themselves, indicate that some of its customers were unaware that they were applying for a credit card.

210 The information and data referred to in the preceding paragraphs suffer from two fatal deficiencies.

211 First, none of it is linked to the promotion or any advertisements dealing with the promotion, let alone the representative advertisements.

212 Secondly, and in any event, apart from the two instances of complaints referred to in [207] above, the data aggregates the instore experiences of customers of numerous stores, not just Harvey Norman stores.

213 Because of these deficiencies, this evidence is of no assistance in determining the question before me.

214 ASIC also relies on an analysis of data provided by Latitude pursuant to another notice given under s 19 of the ASIC Act and through discovery. The analysis was carried out by Ms Lam. This evidence is directed, principally, to the substantiality aspect of ASIC's fees and charges case.

215 Ms Lam’s analysis includes a spreadsheet of fees and charges that Latitude charged to consumers during the relevant period who purchased goods for at least \$1,000 from a Harvey Norman store under the promotion (the **results spreadsheet**). The total amount of the fees and charges was approximately \$5 million. More than half this amount was for establishment fees and monthly account service fees.

216 The results spreadsheet also includes an estimate of fees and charges that Latitude will charge to consumers, who made their purchases during the relevant period over the period of a 60 months’ contract. Ms Lam estimates that consumers will be charged monthly account service fees totalling \$18,758,238 and establishment fees totalling \$739,900.

217 Using these totals, Ms Lam estimates that on average, consumers will pay an amount for the establishment fee and monthly account service fees that is more than 15% of the price for which the goods were purchased. Where the price of the goods was \$1,000, this amount will be more than 50% of the purchase price.

218 ASIC relies on the further information provided by Latitude pursuant to the same notice given under s 19 of the ASIC Act for, amongst other things:

All complaints relating to the GO Mastercard extracted into an Excel spreadsheet from Latitude’s Accord database.

219 In the notice, the “GO Mastercard” was defined as:

... the GO Mastercard issued by Latitude in association with any Interest Free Promotion by Harvey Norman, Domayne and Joyce Mayne.

220 The “Interest Free Promotion” was, in turn, defined as:

... the interest free offer available to approved Go (sic) Mastercard customers at Harvey Norman, Domayne and Joyce Mayne.

221 A number of these complaints were about establishment fees and monthly account service fees. But, plainly, they included complaints from customers who were not Harvey Norman customers.

222 ASIC also relies on a report prepared for Latitude entitled “Latitude Financial Services – Future of Interest Free”, which concerns dormant customers of the GO Mastercard and the GEM Mastercard. The object of the report, which was based on survey responses, was to explain why these customers were “disengaged and no longer actively spending” with these credit cards. The report recorded that, of the 22% of consumers who did not “value their credit card”,

67% (of those who answered the question) thought that the fees and charges for the two credit cards were “too high”. In relation to the GO Mastercard, 41% of the surveyed customers said that the monthly account service fee was the “least acceptable” fee; 5% said that the account establishment fee was the “least acceptable”.

Expert evidence

- 223 Latitude relies on an expert report prepared by Michael Ebstein.
- 224 Mr Ebstein was employed by Australia and New Zealand Banking Group Limited (ANZ) in 1988 as Chief Manager, Marketing in the bank’s Electronic Network Services division. His role was to develop plans to stimulate the introduction of the bank’s fledgling eftpos (electronic funds transfer at point of sale) network in Australia.
- 225 In late 1989, he was the Chief Manager, Planning and Development in the bank’s ANZ Cards division and, in around 1996, he became the General Manager, Marketing of the ANZ Global Payments division. In this role, his primary focus was on developing and marketing credit card products. This required him to have not only an intimate understanding of the credit card market but also an understanding of other available payment products and personal lending products.
- 226 From about 1990 to 1999, Mr Ebstein was a member of Visa’s Asia-Pacific Product Advisers Committee and its International Product Advisers Committee.
- 227 Mr Ebstein left the bank in late 1999 and established a business called MWE Consulting. There are two main aspects to this business: (a) writing a monthly report for subscribers in the Australian and New Zealand credit card markets entitled “Australian and New Zealand Card Reports”; and (b) undertaking consultancy work in relation to credit cards.
- 228 Mr Ebstein was requested by Latitude’s solicitors to prepare a report on the main features of the consumer finance market in Australia in the period 1 January 2020 to 11 August 2021. This report was admitted into evidence: Exhibit 1. Mr Ebstein’s evidence was directed to the state of knowledge of ordinary and reasonable consumers of credit products in Australia.
- 229 Mr Ebstein was the only witness who was cross-examined.

ASIC'S SUBMISSIONS

The payment method case

230 ASIC submits that the representative advertisements not only conveyed (to ordinary and reasonable consumers) the impression that the material terms of the financial arrangement to be provided in connection with the promotion were only those stated in the “dominant message”, they also impliedly represented this to be the case.

The newspaper advertisements

231 ASIC submits that the newspaper advertisements should be approached on the basis that many readers may not study them closely. Many would only absorb the “general thrust” of the advertisement. ASIC emphasises that first impressions are important and that if information is to correct or qualify the “general thrust”, it must be sufficiently clear and prominent.

232 ASIC submits that, in the representative newspaper advertisements, “heavy emphasis” was placed on the banner statements. ASIC submits that ordinary and reasonable consumers would understand these statements as being “the universe of material credit terms” and the “consequent financial consequences of the transaction” contemplated by the promoted offer, which ASIC summarises as:

... the consumer will have to make 60 equal monthly repayments, will not incur interest until the specified date, will not have to pay anything up front for the goods, and has to purchase goods of \$1,000 or more in value to access the offer.

233 ASIC submits further that, to the extent that consumers would expect there to be a cost for the deferred payment for the goods, the cost was implicitly provided for in the “dominant message”; reasonable consumers would conclude from this message that, although the 60 monthly payments are interest-free, interest charges will apply *after* the 60 months period. As ASIC puts it, “that is the quid pro quo of the bargain”. ASIC also submits that the purchase of the goods themselves was part of the quid pro quo, at least in the sense that the payment method was being promoted “precisely to incentivise the purchase of [the] goods” from Harvey Norman stores.

234 ASIC submits that nothing in the representative newspaper advertisements corrected the “dominant message”. It submits that credit cards were “an unexpected part of the deal and should have been called out”. ASIC submits further that, although it is clear from the advertisements that “some kind of finance was on offer”—which, as I have said, ASIC likens

to a one-off loan—the advertisements masked what was really being offered, which was a continuing credit facility.

235 ASIC submits that the statements in tightly-packed text and very small lettering—the shortened terms, the varied shortened terms, and the extended terms—lacked sufficient clarity to correct the misleading impression of the “dominant message”. ASIC submits that this was particularly so when a “bundled credit card can be an undesirable aspect of the offer”.

236 ASIC draws attention to the fact that the shortened terms and varied shortened terms did not state, directly, that consumers would have to sign up for a GO Mastercard to take advantage of the promotion. It also submits that this requirement could not be inferred from the disclosures that were made. The words “Approved applicants only” gave no indication of what the approval was for. The words “Fees & charges apply” gave no indication of the type of arrangement to which the fees and charges would apply. The statement “Credit is provided by Latitude Finance Australia” gave no indication that the financing arrangement involved a credit card.

237 ASIC notes that the extended terms did state that the promoted offer was “Available to approved Go Mastercard customers” and that “This notice is given under the GO MasterCard Conditions of Use, which specify all other conditions for this offer”. ASIC submits that these statements were not in the form of a “mandatory pre-condition”; the consumer was still left to “join the dots”. The statements did not adequately notify reasonable consumers that they would need to have, or would need to apply and be approved for, an eligible Latitude-issued credit card in order to take up the offer. ASIC submits that, in any event, the statements were in “miniscule” writing and “hidden away”. They were not sufficiently prominent to dispel the “dominant message” and consumers would not expect material terms and conditions to be “hidden away”.

238 ASIC submits that even though the representative newspaper advertisements contained “fine print” and asterisks, these elements of the advertisements did not indicate that there was “much more to the offer”, as Latitude contends. ASIC submits that ordinary and reasonable consumers would not expect material terms and conditions to be hidden away, especially when the prominent aspects of the advertisements set out what appeared to be the universe of the credit terms.

The radio and television advertisements

239 ASIC submits that the representative radio and television advertisements were ephemeral and transient communications. There was no “going back for a second, more careful review”. Therefore, the “dominant impression” of the advertisements was particularly important. In this submission, ASIC appears to equate the “dominant impression” with the “dominant message”.

240 ASIC submits that the radio advertisements repeatedly emphasised the interest-free aspect of the promotion, which involved 60 equal monthly payments. Representative Advertisement 6 and Representative Advertisement 7 also stated that no deposit was required. ASIC submits that these elements of the advertisements were conveyed in “an excited, engaging tone” and appeared to “inform the consumer of the material credit terms”. In contrast, the statements that the offer was for “approved applicants only” and that “fees and exclusions apply” were “hurriedly spoken, as if a throwaway comment”. These statements were “the radio equivalent of fine print” and were not sufficiently prominent to dispel the “dominant message”. No information was provided as to what the applicant would be “approved” for, and the reference to “fees and exclusions” was very general.

241 With respect to the representative television advertisements, ASIC submits that the “dominant message” of the newspaper advertisements was heightened in the television advertisements as the banner statements were displayed and emphasised by the voiceover.

242 ASIC submits that the “fine print” appearing underneath the banner statements was insufficiently prominent to dispel the “dominant message”—even more so than the “fine print” in the newspaper advertisements because the statements in the television advertisements only remained on screen for a very short time, during which the viewer’s attention was drawn to more prominent aspects of the visual presentation.

Reasonable expectation

243 As I have noted, ASIC submits that the failure to disclose information may constitute misleading conduct if, viewed objectively, there is a reasonable expectation that the information, if it exists, will be disclosed.

244 ASIC submits, in effect, that if (as it did) the advertised payment method involved the acquisition of a credit card, then consumers had a reasonable expectation that this fact would

have been disclosed to them. This fact was not disclosed in the representative advertisements. Therefore, the publication of the advertisements constituted misleading or deceptive conduct.

245 ASIC bases its case on reasonable expectation on three matters. The first matter is the nature of credit cards. As to this matter, ASIC submits that there is great variation in the level of financial literacy in the Australian community. It submits that, nevertheless, financial decisions are always important ones and that, when making financial commitments, consumers expect that they will have the true nature of the financial commitments made plain to them.

246 Continuing in this vein, ASIC submits that consumers would reasonably expect to be told if they were signing up to a long-term continuing credit facility —such as the GO Mastercard— which exposed them to an establishment fee, a monthly account service fee, and interest at the end of any interest-free period. They were not told this fact. ASIC submits that the fees payable in respect of the GO Mastercard were substantial when assessed against the Harvey Norman goods purchased using the payment method. It submits that there was a general expectation among consumers that such financial burdens be “called out”.

247 More generally, ASIC submits that credit cards are “a serious financial commitment” and give rise to risks for those taking them up. That is why unsolicited credit cards are banned: see s 12DL of the ASIC Act.

248 The second matter on which ASIC bases its reasonable expectation case is that the GO Mastercard cannot be separated from the GO Mastercard account. Consumers were provided with a physical card in the post shortly after being approved for a GO Mastercard account. It makes no difference, ASIC submits, that consumers were not required to activate the GO Mastercard, because consumers could not opt out from receiving the GO Mastercard, and Latitude “persistently” encouraged account holders to activate their credit card through multiple communication mediums.

249 The third matter on which ASIC relies is that credit cards not only present financial risks for consumers; they have features which are undesirable for consumers.

250 According to ASIC, one such feature is that when a bank assesses an application for a home loan, the full amount of a cardholder’s credit limit is treated as a liability. Another undesirable feature is that all applications for a GO Mastercard result in a credit check which is then listed on a consumer’s credit report, regardless of whether the application for the credit card is

approved. ASIC submits that the type and amount of credit applied for, the type and amount of credit received, and the number of credit enquiries made, can impact on a consumer's credit score.

251 ASIC refers to Latitude's expert, Mr Ebstein, who explained that there was a trend towards a more prudent use of payment cards, in particular a very substantial shift in the selection and use of debit cards rather than credit cards.

252 ASIC also relies on the evidence of the consumer witnesses to the effect that, when they made their applications in respect of the promotion, they were not intending to sign up for a credit card for which, in fact, they had no present use. ASIC contends that the views of these witnesses illustrate the trend to which Mr Ebstein referred.

253 ASIC refers to other evidence that many consumers who participated in the promotion used their GO Mastercard for other purchases and thereby entered into a long-term credit arrangement with Latitude. ASIC argues that these consumers may have done so even though this may not have been what they had originally wanted or intended to do.

The fees and charges case

254 ASIC's fees and charges case is also based on its "dominant message" thesis. However, it advances alternative contentions, which ASIC expressed in closing submissions as follows:

144. The impression that consumers taking up the payment method would only be liable to pay the price of the Harvey Norman Goods by way of 60 equal monthly instalments or alternatively that any fees or charges would be relatively insubstantial is inherent in the fact that the dominant message conveyed to reasonable consumers the impression that the material terms of the arrangement to be provided in connection with the payment method were **only** those stated in the dominant message, and the dominant message did not refer to consumers being liable to pay any other fees or charges.

145. The Advertisements did contain very limited reference to fees and charges being payable, outside the dominant message. But they did not dispel the dominant message since it is most likely that there were not read or heard at all, an even if they were, they did not sufficiently counteract the dominant message.

(Emphasis in original.)

255 It will be apparent that the primary contention advanced by ASIC is that the representative advertisements conveyed the impression, or implicitly represented, that a consumer taking up the promotion would only be liable to pay the price of the goods by way of 60 equal monthly

payments. They did not convey the impression, or represent, that fees or charges would also be payable. The alternative contention is that the advertisements did convey the impression, or implicitly represent, that, on taking up the promotion, only “relatively insubstantial” fees or charges would be payable.

256 Properly understood, the second contention stands outside, and is inconsistent with, the “dominant message” thesis. It is, however, directed to the defendants’ contention that a reasonable consumer would expect there to be some fees or charges for the arrangement. Furthermore, implicit in the second contention is the related contention that the establishment fee and the monthly account service fees in respect of the GO Mastercard account were not “relatively insubstantial”.

The newspaper advertisements

257 ASIC notes that all the representative newspapers advertisements stated that “Fees & charges apply” as an element of Statement D. In addition, the shortened terms included the statements “Conditions, fees and charges apply” and “Refer to product websites for conditions, fees and charges”. The varied shortened terms stated that “Conditions, fees, and charges apply”. The extended terms stated that “A \$25.00 Establishment Fee applies to new approved applicants. Monthly account service fee of \$5.95 per month applies” and “Refer to product website for conditions, fees and charges”.

258 ASIC submits that these qualifications were insufficient to erase the misleading impression created by the “dominant message”. In each advertisement, the statement “Fees & charges apply” was printed in very small lettering—ASIC said “in non-descript font”— and did not form any part of the “general thrust” of the advertisement. ASIC submits, further, that the “dominant message” was a consistent part of a widespread advertising blitz that was reinforced by repetition.

259 As to the shortened terms, the varied shortened terms, and the extended terms, ASIC submits that the qualifications were in such small print that many would not be able to read them. In all likelihood, others who could read the qualifications would not have been bothered to do so “given how densely the text was packed”. ASIC submits that reading the qualifications “would have taken incredible concentration”.

260 During oral closing submissions, Senior Counsel for ASIC advanced a submission to the effect that a significant number of consumers would not understand the terms of the “dominant

message” to be any different than a “buy now pay later” (BNPL) arrangement. In his report, Mr Ebstein described BNPL as follows:

27 Over the last seven years, BNPL products have established a position as a retail payment method akin to the lay-buy system, except that the goods and services are immediately available to the purchaser. Users have typically been skewed to the under 40 years of age demographic. In the report “Consumer Payment Behaviour in Australia” published in June 2023, the RBA indicated that over 40% of 18-39 year olds had used a BNPL service in the last year compared to 10% of those aged 65 and over. The BNPL facility is typically linked to a credit or debit card account from which the regular instalments following a purchase are sourced. Unlike the credit card approval process, BNPL was not regulated under the *National Consumer Credit Protection Act 2009* and customers who applied for a BNPL facility did not typically undergo the same creditworthiness approval process.

(Footnotes omitted.)

261 ASIC’s submission was:

MS SHARP: ... We say a significant portion of consumers will not understand the difference between buy now pay later and instalment interest free because all they will think is they’re not paying interest. So that’s the first point. They won’t reflect on, “Is this a regulated credit product? Is it not a regulated credit product?” What they will think is, “if I don’t pay on time, I will get whammed with some sort of fee.” That’s what we say at least a significant proportion of the consumers would think. But if they do confuse these two products, which are actually different, one thing they will also confuse is whether there’s an upfront fee – an establishment fee – because Mr Ebstein said there ordinarily is not an upfront fee with buy now pay later...

262 With regard to the second contention, concerning “relatively insubstantial” fees or charges, ASIC submits that if the qualifications to which I have referred had any effect in qualifying the “dominant message”, their “low prominence” would have been taken as indicating their low monetary value. Further, the “dominant message” carried with it “an inherent charge”, which ASIC explains as the interest that would be payable after the expiry of the 60 months interest-free period.

263 ASIC also points to Mr Ebstein’s evidence in cross-examination that establishment fees for credit cards are very rare and that there is great variation in the amount of account-keeping fees, whether those fees be monthly or annual fees. ASIC submits that, given these facts, it could hardly be expected that a reasonable consumer would understand that the promotion involved the payment of an establishment fee or monthly fee of any substantial quantum. ASIC contends that this submission accords with the analysis accepted in *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 (*viagogo*) at [113] that, in online

ticket purchases for “live events”, ordinary and reasonable consumers expect to pay a small handling fee in addition to the ticket price itself, but not a substantial one.

264 ASIC submits that the fees and charges applicable to those who took up the offer were substantial. In opening its case, ASIC provided the example of a consumer who, during the relevant period, but after 16 March 2021, purchased a refrigerator from a Harvey Norman store with a retail price of \$1,000 using the payment method. If that consumer paid the 60 monthly instalments on time, he or she would pay a minimum total of \$1,537 over the period (with \$537 being the component for monthly account service fees, assuming a constant fee of \$8.95 per month, noting that the monthly account service fees on the GO Mastercard have been \$9.95 since early 2023).

265 ASIC also relies on Ms Lam’s analyses ([214] – [217] above) and the evidence of consumer complaints (see [207] and [218] – [221] above).

The radio and television advertisements

266 ASIC contends that the same analysis applies to the representative radio and television advertisements.

267 With regard to the radio advertisements, ASIC submits that the words “fees and exclusions apply” were spoken in a manner that “purposefully de-emphasised” the statement. It submits that only the most attentive listener would listen to the speaker and that this reference to fees and exclusions was incapable of dispelling the “dominant message”.

268 With regard to the television advertisements, ASIC once again submits that the “dominant message” of the newspaper advertisements was heightened in the television advertisements where the banner statements were presented visually and emphasised by the voiceover. The disclaimer that “Fees, charges, conditions & exclusions apply” only appeared in small text for a short time, during which the viewer’s attention was distracted by the other visual content. ASIC submits that it was difficult to conceive how a viewer would be able to read and digest the disclaimer in those circumstances. It points to the fact that both Mr Hill and Mr North had given evidence of their inability to read this part of the advertisements they saw. Similarly to the radio advertisements, ASIC contends that the reference to fees and exclusions was incapable of dispelling the “dominant message”.

Reasonable expectation

269 ASIC submits that the advertisements did not disclose, or adequately disclose, the important qualifying fact that consumers would expect to be disclosed—namely that, in addition to the 60 equal monthly payments, they would be required to pay at least the establishment fee (for those who signed up prior to 16 March 2021) and the monthly account service fee, which were substantial.

Other submissions

270 ASIC submits that the consumer evidence given by Mr Harris, Mr Hill, Mr North, and Ms Jenkins was of “great assistance” and “entirely consistent” with the submissions it advances as to the conclusion that ordinary and reasonable consumers would draw from the advertisements.

271 ASIC submits that, although these deponents had different understandings of what was being offered by the promotion, their evidence was consistent about the “essential issue”:

175. ... they were wholly unaware of the essential nature of the arrangement of the offer being promoted, which was that they needed to obtain a GO Mastercard to take advantage of the promotion. They were also wholly unaware of ... either the existence or the [substantiality] of the fees which they would become liable to pay.

272 As I have noted, ASIC also contends that Latitude’s own documents and research reveal that some customers were not aware that they had signed up for a credit card account even after they had completed the GO Mastercard application process. However, I give no weight to this evidence for the reasons given at [210] – [213] and [218] – [222].

273 ASIC submits that Mr Ebstein’s evidence is corroborative of its case on reasonable expectation. It relies on Mr Ebstein’s acceptance in cross-examination that, in the relevant period, there were a very large number of credit card issuers in Australia, as well as large variations in card features, benefits, fees, and charges. ASIC said that this fact is consistent with the contention that differences between credit cards and their features are hard to assess. ASIC submits that this was “a factor suggesting there was a reasonable expectation of disclosure in the Advertisements that a credit card was part of the arrangement”.

274 ASIC also relies on Mr Ebstein’s acceptance in cross-examination that the 60 months interest-free period was different to standard credit terms (for which the norm is 55 days); that the payment plan under the 60 months interest-free promotion (equal monthly payments based

on the purchase price) was different to repayments under a credit card (payments on all purchases using the card); and that only a “minority” of credit cards (Mr Ebstein said 0.7%) offered interest-free promotions. ASIC submits that:

... the GO Mastercard is a bespoke product, about which the reasonable consumer could not be expected to have any prior knowledge of or expectation about. The reasonable consumer would not, therefore, have any knowledge about the material terms of the offer, apart from what they were being told by the dominant message of the Advertisement itself.

275 Finally, based on *Commercial Union Insurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 (*Ferrcom*) at 418 – 419, ASIC submits that an inference should be drawn that Mr Ebstein could not have given evidence that assisted Latitude in respect of the substantiality of the establishment fee and monthly account service fees associated with the GO Mastercard. I discuss this submission in more detail at [499] – [506] below.

LATITUDE’S SUBMISSIONS

276 At the outset it should be noted that Latitude accepts that if the Court were against it on the meaning conveyed by the advertisements, and satisfied of the reasonable expectation of disclosure that ASIC alleges (other than in respect of ASIC’s case based on the alleged substantiality of the establishment fee and monthly account service fees), then it does not dispute that “the various other relevant elements of liability to be determined at this stage of the hearing will have been satisfied”.

277 In other words, Latitude does not contest the attribution of its liability or that the publication and broadcasting of the representative advertisements was conduct in relation to financial services, namely a credit facility or dealing in a credit facility: see ss 12BAA(7)(k), 12BAB(1)(b), 12BAB(1AA), 12BAB(7)(a) – (b), and 121BAB(8) of the ASIC Act and reg 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

The “dominant message” analysis

278 Latitude commenced its submissions by criticising ASIC’s reliance on a “dominant message” analysis. It submits that the Court should not find that the representative advertisements conveyed the “dominant message” that ASIC alleges. This is for three reasons.

279 First, Latitude submits that, at the threshold, a “dominant message” analysis is inappropriate given the nature of the advertisements, which do not convey one, single message. Latitude

submits that there are multiple, differing messages competing for attention in each representative advertisement.

280 With reference to Representative Advertisement 1, Latitude points to (what it describes as): (a) basic brand messaging (i.e., the brand “Harvey Norman”); (b) the 60 months interest-free messaging; (c) the bonus gift card messaging; (d) the COVID safe messaging; (e) the 15% off messaging; and (f) the message that various products were for purchase, some on sale. Latitude submits that this means that one cannot articulate a “dominant message” that captures all these competing messages.

281 Latitude advances similar submissions with respect to the other representative advertisements. In respect of Representative Advertisement 8 (a radio advertisement) and Representative Advertisement 11 (a television advertisement), Latitude submits that the 60 months interest-free offering is “not at all prominent, let alone the dominant message of the advertisement”.

282 Secondly, Latitude submits that a “dominant message” analysis only applies where the dominant message is, itself, a false message: *Novartis Pharmaceuticals Australia Pty Ltd v Bayer Australia Ltd* [2015] FCA 35; 322 ALR 621 (*Novartis*) at [225]. Here, Latitude draws a distinction between the “dominant message” and the “impressions” that ASIC alleges (which were different in substance to the “dominant message”). It submits that only the latter (the “impressions”), not the former (the “dominant message”), are alleged by ASIC to be false, misleading, or deceptive.

283 Latitude distinguishes *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 (*TPG*) (at first instance, *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] FCA 1254)—on which ASIC places much reliance—as such a case. As Latitude put it in opening:

22. The “dominant message” approach is a mode of analysis of advertisements which seeks, as the first step in determining the overall meaning conveyed to the reasonable consumer, to identify what the general thrust of the advertisement is. This approach accepts that advertisers use strategies which emphasise certain messages at the expense of other information, such that (depending on the rest of the advertisement) a reasonable consumer may take in only this general thrust. Inherent in the approach is the concept that there is one dominant (i.e., overwhelming) message and that, if that dominant message is itself misleading, it needs to be sufficiently strongly counteracted by other material to avoid the advertisement as a whole being false, misleading or deceptive. Thus, where a strong dominant message is misleading in itself, a contradiction buried in the fine print will not generally suffice.

(Footnotes omitted.)

284 Latitude submits that ASIC’s case of attempting to distinguish the “dominant message” from the “impressions” is “at odds” with the High Court in *TPG*, in which the “dominant message” was “clearly described as being one and the same as the ‘thrust’ or impression”.

285 Latitude argues that ASIC could have relied on the alleged “impressions” as the “dominant message”, but has not done so. It submits that, as ASIC has not alleged that the “dominant message” was false, misleading, or deceptive, its case is “caught in knots” because of its insistence on this mode of analysis.

286 Thirdly, Latitude submits that, even if a “dominant message” approach is found to be appropriate, “ASIC’s dominant message” should not be found to have been conveyed. This is because of the competing differing messages in each representative advertisement, and that the critical terms of that “dominant message”—specifically, ASIC’s use of the words “payment method” and “repayment”—were not used in the representative advertisements. Latitude submits that the representative advertisements said nothing about a payment method, let alone repayments. In opening, Latitude said:

104. ...The basic message about interest-free terms was silent as to how the finance would be provided, or the form the finance would take. That is understandable, given that the nature of what was being offered (finance) was complex.

Inference to be drawn from Mr Ebstein’s report

287 Based on the data presented in Mr Ebstein’s reports, Latitude submits that the Court should draw a number of inferences as to the state of knowledge of the ordinary and reasonable consumer in Australia in respect of consumer finance. Latitude argues that these inferences should be drawn based on the widespread use by Australians of “lending products” and the “practical reality” that credit generally comes with a cost of some kind, which Latitude says, is “the stuff of the ordinary reasonable consumer’s everyday experience”.

288 First, Latitude submits that the Court should infer that the ordinary and reasonable consumer is familiar with personal credit and its features, and is aware that it will be accompanied by terms and conditions. For this purpose, personal credit includes: (a) credit card accounts; (b) charge card accounts; (c) store card accounts; (d) BNPL; (e) personal overdrafts; (f) personal loans; and (g) motor vehicle financing.

289 Secondly, Latitude submits that all personal credit comes with a cost of some kind, whether in the form of interest or fees. Latitude submits that the Court should infer that the ordinary and reasonable consumer knows and expects that there will be, or may be, a cost to borrow money, particularly over a period of five years.

290 Thirdly, and relatedly, Latitude submits that the Court should infer that the ordinary and reasonable consumer expects that the cost of consumer finance would be, or might be, a cost borne by the consumer, particularly in respect of finance over five years.

291 As I have noted, ASIC advances a “quid pro quo” argument to the effect that, reasonable consumers would conclude from the “dominant message” that, although the 60 monthly payments are interest-free, interest charges would apply after the 60 months period.

292 Latitude contends that this argument is “nonsensical” because it was not reasonable for a consumer to think that this would be the only “cost”. Latitude submits that it is hard to understand why the ordinary and reasonable consumer would assume that the cost of five years’ finance was nothing. It submits that ASIC did not explain why this would be so, especially since Mr Ebstein was not aware of any such product.

293 Latitude also submits that it was not sensible to think that the purchase of the goods themselves was part of the quid pro quo: see [233] above. Consumers know that Harvey Norman sells goods without finance. According to Latitude, it would be unreasonable to think those goods could be purchased for the very same price at no additional cost with the benefit of finance being provided over five years, and with the additional benefit of a gift card. Especially, Latitude submits, when the goods were being sold at a discounted price, as was the case in many of the representative advertisements.

294 Nevertheless, when making submissions with respect to ASIC’s consumer evidence, Latitude says that it is “entirely expected” and “unremarkable” that the deponents of the consumer affidavits would not understand how the finance was to be facilitated or that it came with a credit card. Latitude says this is because it is uncontentious that the representative advertisements were “silent on that detail”. The question, Latitude submits, is what effect, if any, that silence had on the meaning of the advertisements.

The payment method case

295 Latitude submits that no reasonable consumer would understand from any of the representative advertisements that the only material terms of the offer were 60 equal monthly payments without a deposit and without paying interest. It advances several reasons.

296 First, Latitude submits that the advertisements did not use the words “only” “material” terms in relation to a “payment method” (being the words used by ASIC to describe the impression conveyed by the “dominant message”). It submits that there is no reason why a reasonable consumer would infer such words.

297 Relatedly, Latitude questions what “material” means in ASIC’s formulation of the alleged impression. It submits that if “material” means relevant to taking up the offer, no reasonable consumer would understand the advertisements to have conveyed that meaning because of “the large volume, or clear existence, of fine print”. Latitude explains:

Even if the reasonable consumer might not have read or absorbed the detail of the fine print, its prominence clearly conveyed that there were other material terms (why else would that text be included in the advertisement?). Similarly, the use of an asterisk and footnote particularly adjacent to the words “60 months interest free” indicate there is more to the offer than the headline.

298 Secondly, Latitude submits that if 60 equal monthly payments without a deposit and without paying interest were the only material terms, it would mean that commercial finance was being offered for five years with no material return to the financier—as Latitude puts it, “a charitable free lunch which no reasonable consumer, sceptical of advertisements in general and knowing of advertisers’ tendency to exaggerate, would understand the offer to involve”. Latitude submits that the words “Minimum financed amount \$1000”, which appear in the newspaper advertisements as part of Statement C, would make consumers aware that a form of finance was being offered. In support of this submission, Latitude points to the fact that three of ASIC’s consumer witnesses, Ms Jenkins, Mr Hill, and Mr North, assumed that finance was being offered by a third party.

299 This submission is an iteration of Latitude’s submission that ordinary and reasonable consumers are exposed to commercial lending and know that there is always a cost associated with finance:

The reasonable consumer would understand when reading, watching or listening to the advertisements that there would be something payable in addition to the 60 equal monthly payment, because there would be some cost to be paid to the financier in

return for the finance that was being offered. That must mean the alleged impression on ASIC's payment method case is not made out. Whatever "material" terms means, the fact that there was some other cost payable for the finance would be one material term, and that would be apparent to the reasonable consumer.

300 Thirdly, Latitude submits that, even if he or she did not "absorb" the "fine print", the ordinary and reasonable consumer would know of its existence and, in the case of the representative newspaper advertisements, would notice the words "Fees and charges apply" (part of Statement D).

301 Fourthly, Latitude submits that the ordinary and reasonable consumer would not take the words "60 monthly payments" as necessarily meaning a one-off loan. It submits that the advertisements were "fundamentally silent" on the form of finance being offered and how that finance was accessible and could be used. Latitude submits that there is no reason why a reasonable consumer would "leap into the unspecified" and infer that what was being offered was a one-off loan or infer that a continuing form of credit was necessarily excluded. It is not apparent, Latitude argues, why finance by way of continuing credit needs to be express in advertisements, but finance by way of a one-off loan does not.

302 Latitude submits that:

The basic message conveyed, concerning the interest-free aspect, was a truthful statement that did not canvass how the finance would be facilitated. It was apparent there were qualifications, explanation and conditions attached and there would be a cost to the consumer for finance. In those circumstances, there is no sensible reason why a reasonable consumer would form the secondary impression ASIC alleges on its payment method case.

303 Latitude advanced each of these reasons when opening its case. By the time of closing submissions, it developed another argument based on the proposition that the words used in the advertisements stated "a limited negative proposition"—no interest would be payable. Latitude argues that a reasonable consumer would not "infer or assume" from the limited negative proposition the "positive absolute proposition" in ASIC's articulation of the impression conveyed by the advertisements, which would be contrary to the ordinary and reasonable consumer's own knowledge and expectations. Latitude submits:

All the words "interest free" rule out is interest. Those words do not represent to consumers that all costs are ruled out as they do not equate to a holistic statement as to an all-inclusive price.

304 Latitude submits there was no positive representation that the only material terms were those identified by ASIC, relying on the example that the representative advertisements were silent

as to what kind of finance was being offered. Latitude submits that, if there was no false message in the first place, there was no need for the advertisements to make sufficiently prominent that the offer involved the establishment of a revolving credit account.

305 Latitude also calls in aid the fact that part of the promoted offer was the bonus gift card. Latitude uses this not only to contend that there was not a single “dominant message”, but also to argue that the offer of the bonus gift card was part of the “messaging” of the advertisements that informed the meaning conveyed by the advertisements. Latitude submits that from the “complexities and prominent conditionality and terms of the bonus gift card”, the reasonable consumer would understand that there were terms, conditions, and complexities to what was being advertised, which supplemented consumer expectations about the costs of personal finance. In short, according to Latitude, ASIC’s “dominant message” case is an oversimplification of what the advertisements conveyed, and the ordinary and reasonable consumer would understand that the advertisements did not convey “only” the material terms.

306 In response to ASIC’s submission that ordinary and reasonable consumers would not expect material terms and conditions to be “hidden away”, Latitude advances a series of rhetorical questions: Why would terms and conditions be included in any advertisement at all unless they might be material? Why could a consumer expect to have all “material” terms emblazoned in equal font and colour as some other terms? How could such an expectation be met in the world of advertising? Latitude contends that, in assessing whether the “dominant message” represented that its content was the universe of material terms, it cannot be correct that no weight can be given to the existence of the “fine print”. However, Latitude accepted that:

If ASIC establishes its alleged payment method impression, that the alleged dominant message contained “the universe of credit terms” then the existence of the fine print will not save Latitude. That is clear.

307 Latitude submits that the “fine print” aspect of the radio advertisements made clear that material terms and conditions existed, even though this part of the advertisements was spoken faster than the rest of the advertisement. Even if (to use ASIC’s description) listeners considered this to be “the boring part” of the advertisement, they would nevertheless think that this was, or might be, “materially relevant to the offer being advertised”.

Reasonable expectation

308 As I have recorded, one of the matters ASIC relies on to support its case based on reasonable expectation is that credit cards not only present financial risks for consumers; they have features

which are undesirable for consumers. In responding to this submission, Latitude seeks to “put to bed” what it sees to be a contention by ASIC that consumers have an aversion to credit cards.

309 During the hearing, ASIC sought to tender documents which it advanced as proving that consumers have an aversion to credit cards. To say that consumers have an aversion to credit cards is to say that they have a dislike of credit cards or an antipathy towards them. I rejected the tender on that basis because consumer aversion to credit cards was not referred to in the concise statement as part of ASIC’s case.

310 However, contrary to Latitude’s submission, I do not consider ASIC’s submission that credit cards present financial risks or have undesirable features to be equivalent to a submission that consumers have an aversion to credit cards. I accept that ASIC’s submission falls within its concise statement, having regard to paragraph 16 thereof, which was directed to its payment method case. That paragraph refers to undesirable features of the GO Mastercard:

16. ... Fees and charges apply for the right to hold and use the GO Mastercard, including an establishment fee and/or a monthly account service fee, and (in certain circumstances) late payment fees, payment handling fees, fees on international transactions, paper statement fees, cash advance fees and interest. Latitude also discloses information about a GO Mastercard cardholder to credit reporting bodies, including repayment history and any repayments defaults, such as late payments or non-payments may affect a consumer’s capacity to secure finance in future.

311 Latitude submits that, regardless, ASIC cannot claim support from Mr Ebstein’s evidence (as ASIC seeks to do). Although Mr Ebstein gave evidence that there was a trend towards a more prudent use of payment cards, in particular a very substantial shift in the selection and use of debit cards rather than credit cards, his evidence, taken overall, confirms that there remains a prolific use of credit cards, with a desire to use such cards responsibly.

312 Turning more directly to ASIC’s case, Latitude submits that there is no basis in fact for ASIC’s reasonable expectation contention. There was no conduct by Latitude which created an obligation to “expressly refer to the optional credit card”.

313 Latitude refers specifically to two matters in this regard. First, it argues that a consumer had to apply for and be approved for a credit limit that he or she could reasonably be expected to service (as it was the subject of an application governed by the *National Credit Code*). Secondly, there was no obligation on the consumer to use, or even activate, the GO Mastercard.

314 Latitude submits that a credit facility involving “the additional right (but not the obligation) to use a general purpose credit card” is not attended with such risk or inherent danger or disadvantage that it needs to be brought to the attention of the consumer. There was no inherent danger or disadvantage here because regulated credit was involved.

315 Latitude submits that:

141. ... the population of potentially vulnerable users was very much reduced by the implementation of responsible lending practices. The provision of credit to such persons reflects the policy judgment embodied in the regulated credit regime. Viewed from another perspective, there is no reason to think that the GO Mastercard account gave access to credit to people who otherwise could not have accessed it through other credit providers. Once regulated credit cards are allowed, to be made available to a given population of consumers, there is no inherent problem in affording the same group of people the option of a credit card. There is certainly no basis to require advertisers to disclose that option when the advertisement – the “conduct” – is otherwise silent on how the finance will be delivered.

316 Latitude advances the complementary submission:

142. ... It must be that on ASIC’s credit card case there would have been no misleading conduct if the advertisements had disclosed that, subject to credit approval, consumers would be provided with a credit card that they could optionally activate or throw in the bin.

317 Latitude submits that ASIC’s case on reasonable expectation cannot be sustained simply because a credit card may be risky for some. As Latitude puts it:

57. ... the fact that some individuals may misuse credit is no more relevant than that some people may misuse a bonus set of steak knives.

318 Latitude submits that ASIC’s submissions about consumers confusing the promotion with BNPL are also outside the case disclosed in its concise statement. Latitude submits that there is no evidence of such confusion. Further, even if there was such confusion, this does not explain why there would be the expectation of disclosure to which ASIC refers.

319 Latitude also submits that there is no basis in law for ASIC’s reasonable expectation case. It submits:

146. ... The law of misleading and deceptive conduct does not go so far as to require disclosure of the option of a credit card when Latitude was wholly silent as to how the finance would be facilitated. The statutory prohibition on misleading or deceptive conduct has not been extended to lead to the imposition of a requirement to volunteer information in commercial dealings. ... There is no reason of principle, and certainly no textual foundation in the word “conduct”, to take a different approach to consumer transactions. ASIC’s proposition that

there was an obligation to disclose, arising purely from the possibility that the optional product, that was not mentioned, may be risky to some consumers, is not consistent with the text of the provisions.

320 In response to ASIC’s submission that the advertisements focussed on “attractive aspects” at the expense of “less attractive aspects”, Latitude submits that this is “par for the course when it comes to advertising”. It argues, further, that ASIC does not define what it means by “unattractive”; something that “is unattractive to one customer, may be attractive to another”. Further, Latitude submits that there is no legal requirement to “call out” unattractive features or the “financial burdens” associated with the arrangement.

321 Lastly, Latitude submits that ASIC’s case about an expectation to disclose sounds a fundamental change on how advertisements could lawfully be published:

151. ... it would set a standard whereby even when there is no falsity in what is stated in the bold large letters, there is an obligation to articulate all the other “material” terms of the offer with similar prominence. The statute would cease to be a prohibition on misleading conduct, and instead transform into a charter for informed consumer choice. That is work the language of the provision simply cannot do.

The fees and charges case

322 Latitude’s submissions in respect of the fees and charges case proceeded along the same lines as its submissions in respect of the payments case, particularly in relation to ASIC’s primary contention that the advertisements conveyed the impression, or represented, that a consumer taking up the payment method would only be liable to pay the price of the goods by way of 60 equal monthly payments. Latitude’s answer is that the reasonable consumer would appreciate that the advertisements were offering a form of finance and understand that such finance generally comes with some costs. That being so, “the ordinary reasonable consumer would not form either alternative of ASIC’s alleged impression about fees and charges”. What is more, the words “fees and charges” were expressly included in all the advertisements.

323 With regard to ASIC’s submission equating the terms of the “dominant message” with BNPL, Latitude submits that this alleged confusion is not referred to in the concise statement and there is no support for such confusion in the evidence. It points to the fact that Ms Jenkins did have “a starting assumption of some cost and potentially some fee”, arising from her previous experience with another retailer. I note, however, that, Ms Jenkins was clear that she did not think that there would be an account-keeping fee “on top of the minimum required monthly

payment”. Her thoughts were that any such fee would have been part of the minimum monthly payment that she would be required to pay.

324 With regard to ASIC’s alternative formulation of the fees and charges case, Latitude submits that nothing in the advertisements conveyed the impression that any fees or charges would be “relatively insubstantial”.

325 Further, Latitude criticises (what it sees as) the imprecision of ASIC’s case in this regard. It queries what the appropriate yardstick for insubstantiality would be. It argues that ASIC’s submissions refer to a number of differing and alternative yardsticks, none of which are appropriate.

326 As to ASIC’s reliance on *viagogo*, Latitude submits that the advertisements in the present case are distinguishable in that they make no positive and exhaustive statement about price. Further, the yardstick provided in *viagogo* was the purchase price of the ticket itself (the conduct in question was occurring at the point of sale). Here, Latitude submits, the advertisements were published well in advance of the point of sale of the goods that the consumer might purchase, such that the price of the goods themselves cannot function as a yardstick to address substantiality. Indeed, because the price of the goods that a consumer might purchase from Harvey Norman pursuant to the promotion would vary over a very large range, there is no constant against which the question of substantiality can sensibly be gauged.

327 Finally, Latitude submits that no adverse inference should be drawn against it simply because it did not adduce evidence from Mr Ebstein as to whether its establishment fee and monthly account service fees in respect of the GO Mastercard account were substantial.

Reasonable expectation

328 Latitude correctly observes that ASIC’s closing submissions on its reasonable expectation case in relation to fees and charges are “very faint”. Latitude submits that “the law on silence” does not require an advertiser to make fees or charges “prominent” if its representations are otherwise not misleading or deceptive in relation to fees or charges.

329 Latitude submits that ASIC has not pointed to anything in its (Latitude’s) conduct that gave rise to an expectation that it would disclose the existence of fees or charges. There is nothing unusual about charging a fee as part of the cost of credit. That said, Latitude points to the fact that the representative advertisements did refer to “fees” in any event.

The consumer and other evidence

330 Contrary to ASIC’s submission that the consumer evidence in this case was of great assistance, Latitude submits that, in fact, that evidence was of “minimal probative value”.

331 Latitude submits that Mr Harris, Mr Hill, Mr North, and Ms Jenkins are not reasonable consumers:

66. It is apparent that the deponents do not always have the attributes of the reasonable consumer or think in a way consistent with a reasonable consumer as recognised at law. For instance Mr Harris is colour blind and, like Mr North, had already decided to purchase goods at the time of the advertisements. Mr Hill claims not to have understood the GO Mastercard was a credit card even after activating it and using it. Assuming that understanding to be true, *prima facie*, it cannot be within the parameters of the reasonable consumer. Equally, Ms Jenkins asserts when she was using her GO Mastercard as a credit card for “everyday purchases” or “bills” she thought she would get “60 months interest free on all purchases”. Ms Jenkins “still” does not understand the management of payments and did not complete a financial hardship application, despite being aware of it because “I found the process too confusing”. Again, assuming all that to be true, it is inconsistent, in various ways, with the permitted range of people encompassed by the concept of the reasonable consumer at law.

332 Latitude also submits that the frailty of memory is such that the Court could have no confidence in the accuracy of their asserted impressions of advertisements seen years ago. Relatedly, Latitude draws attention to the fact that some of these witnesses referred to advertising material that is not part of ASIC’s case (e.g., Mr Harris’s reference to a catalogue and Ms Jenkins’s reference to a “lift out”).

333 Latitude submits, further, that aspects of this evidence support its case rather than ASIC’s case. In this regard, Latitude relies on Mr Hill’s evidence that, from a television advertisement, he understood that Latitude would be providing finance. It also relies on Mr North’s evidence that he wanted to pay off his debt within 12 months to avoid interest charges, and Ms Jenkins’s evidence that she read the “fine print” of the advertisement she saw and was aware that conditions applied. Latitude advances submissions criticising ASIC’s reliance on Latitude’s own documents and research that revealed that some customers were not aware that they had signed up for a credit card account even after they had completed the GO Mastercard application process. I have already stated that I give no weight to this evidence. I will not endeavour to summarise Latitude’s criticisms other than to note that they extend beyond the matters to which I have referred.

334 Latitude also criticises ASIC’s reliance on evidence to show consumer dissatisfaction with the establishment fee and the monthly account service fees. Latitude submits that this evidence cannot logically show whether the advertisements conveyed the meaning that ASIC alleges. Latitude also submits that this evidence can have no bearing on whether the fees in question were “relatively substantial”. As Latitude puts it:

The fact that after the event some consumers may have complained or preferred lower fees does not indicate those fees were relatively substantial. All that demonstrates is some consumers wished for a deal more favourable to them.

HARVEY NORMAN’S SUBMISSIONS

335 Similarly to Latitude, Harvey Norman accepts that if the advertisements conveyed the “meanings” for which ASIC contends (other than with respect to the substantiality of fees or charges) then they were misleading or deceptive or false. Harvey Norman contends that the advertisements would not be misleading or deceptive or false if they merely conveyed that any fees or charges would be relatively insubstantial. It also does not contest the attribution of its liability or that the publication and broadcasting of the representative advertisements was conduct in relation to financial services.

336 Harvey Norman relies, substantially, on Latitude’s submissions. It does, however, raise some separate contentions.

The dominant message analysis

337 Harvey Norman said that it did not propose to “descend deeply into a debate about the use of the so-called dominant message line of authority”. It accepts that, “in the real world”, statements in newspaper, radio, and television advertisements may be given perfunctory attention by “a reasonable member of the public”. While it accepts that it is appropriate to determine whether an advertisement has a general thrust or dominant message, it stresses that it is not correct that every advertisement conveys a dominant message. It submits that what is conveyed by a communication is always fact specific.

338 Harvey Norman submits that ASIC has propounded a case in which there was a “dominant message” and just one “dominant message”, and that all the representative advertisements carried that message. It described this as an “all or nothing case”. It contends that if the Court should find that any one of the representative advertisements did not carry the alleged “dominant message” then ASIC’s case fails in its entirety.

339 Harvey Norman submits that the Court should conclude that none of the representative advertisements conveyed a dominant message. However, if there was a dominant message, it was no more than that Harvey Norman stores are a good place to buy home and electrical goods because they have attractive prices. Harvey Norman submits that the “dominant message” that ASIC alleges is not conveyed by any of the representative advertisements.

340 In this connection, Harvey Norman refers, particularly, to Representative Advertisement 8 (a radio advertisement) in which, Harvey Norman says, the “main emphasis is on the attractive prices available for home and electrical goods”. Harvey Norman submits that the “dominant message” for which ASIC contends is “an adjunct to the more important message about the attractive prices”.

341 Harvey Norman submits that a similar point can be made about Representative Advertisement 4 (a newspaper advertisement). It submits that, in this advertisement, “what dominates” is the advertised products and their prices, which are given prominence. It contends that, although the 60 months interest-free offer appears at the top of the advertisement, “the television screens displaying appealing wildlife, particularly the colourful hummingbird” are the features that “catch the eye” of the reader giving perfunctory attention to the advertisement. Harvey Norman submits that the advertisement is principally about selling televisions at Harvey Norman and that, if there is a dominant message, it concerns the attractive prices for televisions at Harvey Norman stores.

The payment method case

342 Harvey Norman submits that the Court should not accept that the message that Harvey Norman goods could be purchased by a payment method that involved 60 equal monthly repayments on no deposit and interest-free terms carried with it “the false representation that the statement was complete and there were no other material terms”.

343 This is because a consumer who gave a representative advertisement only perfunctory attention could not reasonably conclude that the only terms were those conveyed by the alleged “dominant message”. Harvey Norman submits that such a person should be taken as having appreciated that they have only absorbed the general thrust or dominant message and that there may be, or was likely to be, “more that has not been absorbed”.

344 Harvey Norman also submits that ASIC’s reasonable expectation case should not be accepted. Harvey Norman submits that a reasonable consumer may correctly understand that a payment

method was available for purchasing Harvey Norman goods that involved 60 equal monthly repayments on no deposit and interest-free terms. They would not, however, reasonably expect that conditions—such as, that they would have to apply and be approved for an eligible credit card and pay fees and charges in relation to the account so established—would be “disclosed with the same prominence as the advertising about the payment method”. Rather, they would reasonably expect that “there may be conditions which could be sought and obtained before otherwise acting in response to the advertisements if they wished to do so”.

The consumer and other evidence

345 Similarly to Latitude, Harvey Norman submits that the evidence of the individual consumers is irrelevant and unpersuasive.

346 Harvey Norman submits that the main problem with the evidence is that the deponents’ remarks and observations are directed to unspecified advertisements (including, in Mr Harris’s case, in a catalogue and, in Ms Jenkins’s case, in a “lift out” in a separate section of the newspaper) that were not only ephemeral or transient, but had been seen, viewed or heard several years before they provided evidence. It submits that the inability of each deponent to identify the precise advertisement or advertisements to which they were responding is understandable. That fact, however, undermined the utility of their evidence.

347 Harvey Norman analysed each deponent’s evidence. It pointed to aspects of each deponent’s account which, in Harvey Norman’s submission, did not assist ASIC’s case.

THE LAW

Relevant statutory provisions

348 Section 12DA(1) of the ASIC Act provides:

12DA Misleading or deceptive conduct

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

...

349 Section 12DF(1) provides:

12DF Certain misleading conduct in relation to financial services

- (1) A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their

purpose or the quantity of any financial services.

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

...

350 Section 12DB(1) relevantly provides:

12DB False or misleading representations

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

(a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

...

(g) make a false or misleading representation with respect to the price of services; or

...

(i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED); or

...

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

...

351 Section 12GH(2) provides:

12GH Conduct by directors, employees or agents

...

(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken, for the purposes of this Division, to have been engaged in also by the body corporate.

Relevant case law

352 In *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8; 408 ALR 195, the High Court noted (at [81]) that determining whether a person has contravened the

proscription of s 18 of the Australian Consumer Law (Sch 2 to the *Competition and Consumer Act 2010* (Cth)) (which is analogous to s 12DA of the ASIC Act) involves four steps: (1) identifying with precision the allegedly contravening conduct; (2) considering whether the identified conduct was in “trade or commerce”; (3) considering the meaning conveyed by the conduct; and (4) determining whether, in light of that meaning, the conduct was misleading or deceptive or likely to mislead or deceive.

353 Their Honours said that the third step considers the meaning that the conduct conveyed to its intended audience. Where the conduct amounts to a representation, it is necessary to determine whether the alleged representation is established by the evidence: see at [81].

354 After noting that each step involves “quintessential question[s] of fact”, their Honours said:

82 The third and fourth steps require the court to characterise, as an objective matter, the conduct viewed as a whole and its notional effects, judged by reference to its context, on the state of mind of the relevant person or class of persons. That context includes the immediate context — relevantly, all the words in the document or other communication and the manner in which those words are conveyed, not just a word or phrase in isolation — and the broader context of the relevant surrounding facts and circumstances. It has been said that “[m]uch more often than not, the simpler the description of the conduct that is said to be misleading or deceptive or likely to be so, the easier it will be to focus upon whether that conduct has the requisite character”. That said, the description of the conduct alleged and identified at the first step should be sufficiently comprehensive to expose the complaint, because it is that conduct that will ultimately, as a whole, be determined to be or not to be misleading or deceptive.

83 Where the conduct was directed to the public or part of the public, the third and fourth steps must be undertaken by reference to the effect or likely effect of the conduct on the ordinary and reasonable members of the relevant class of persons. The relevant class of persons may be defined according to the nature of the conduct, by geographical distribution, age or some other common attribute, habit or interest. It is necessary to isolate an ordinary and reasonable “representative member” (or members) of that class, to objectively attribute characteristics and knowledge to that hypothetical person (or persons), and to consider the effect or likely effect of the conduct on their state of mind. This hypothetical construct “avoids using the very ignorant or the very knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful”. The construct allows for a range of reasonable reactions to the conduct by the ordinary and reasonable member (or members) of the class.

(Footnotes omitted.)

355 The last statement—that the construct allows for a range of reasonable reactions by ordinary and reasonable members of the class—is important. It recognises that the test of reasonableness

does not necessarily postulate only one reasonable response to the conduct in question. As stated by Dowsett J in *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90; 49 ACSR 369 at [24]:

24. ... Frequently, different persons, acting reasonably, will respond in different ways to the same objective circumstances. The test of reasonableness involves the recognition of the boundaries within which reasonable responses will fall, not the identification of a finite number of acceptable reasonable responses.

356 There is, therefore, “scope for diversity of responses both within the same medium and across different media”: *Comite Interprofessionnel du Vin de Champagne v Powell* [2015] FCA 1110; 330 ALR 67 at [171].

357 It is well-accepted that an advertisement that is published to the world is not selective as to its readers, viewers, or listeners. It might be (or be likely to be) misleading or deceptive to some even though it might not be (or not be likely to be) misleading or deceptive to others who are more wary: *Annand & Thompson Pty Ltd v Trade Practices Commission* (1979) 40 FLR 165 at 176; *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 49 – 50; *Telstra Corporation Limited v Cable & Wireless Optus Ltd* [2001] FCA 1478 at [21] – [25].

358 If the advertisement is (or is likely to be) misleading or deceptive to some ordinary and reasonable consumers, then that will be enough to bring the conduct within the statutory proscription. It is not necessary for the Court to quantify those who have, or are likely to have, that response: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; 278 FCR 450 at [23]; *Trivago N.V. v Australian Competition and Consumer Commission* [2020] FCAFC 185; 384 ALR 496 at [190] – [193].

359 Therefore, determining whether given conduct is misleading or deceptive, or likely to mislead or deceive, is a matter for judicial estimation that takes into account the range of reasonable responses to the conduct that is in question.

360 Here, ordinary and reasonable consumers are the class of persons who are purchasers of home and electrical goods, such as those advertised in the representative advertisements. This class has no special attributes or capacities beyond the ability to read and understand, or hear and understand, the ordinary language in which the representative advertisements were expressed. Where, in these reasons I refer to ordinary and reasonable consumers in the context of the representative advertisements, I mean ordinary and reasonable consumers in this class.

361 The context in which the impugned conduct occurs is important. In *TPG*, the majority in the High Court emphasised (at [47]) that, unlike conduct that occurs in the calm of a showroom to which consumers have come with a substantial purchase in mind (*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; 149 CLR 191), consumers who are subjected to advertisements that are part of a multi-media campaign—“an unbidden intrusion on the consciousness of the target audience” that “will not always be welcome”—cannot be expected to pay close attention to them, such as the scrutiny that takes place on advertisements in the context of legal proceedings. The attention given by ordinary and reasonable consumers to such advertisements may well be “perfunctory”.

362 This does not mean, however, that such consumers are not taking reasonable care of their own interests. Even though intentionally misleading or deceptive conduct might not be involved in such a campaign, the advertiser cannot escape the consequences of how it has chosen to express an advertisement—such as by placing emphasis on parts of the advertisement that are calculated to be attractive to consumers, while relegating other, less attractive parts to “relative obscurity” (*TPG* at [51] – [52]), where ordinary and reasonable consumers are unlikely to have regard to them: *Australian Competition and Consumer Commission v Harvey Norman Holdings Limited* [2011] FCA 1407 at [37]. The “disclaimer cases” are a subset of this kind of conduct: see the cases collected in *RB (Hygiene Home) Australia Pty Ltd v Procter & Gamble Australia Pty Limited (No 2)* [2023] FCA 1491 at [154] – [161]. I mention this point because the representative newspaper advertisements, in particular, use devices of the kind referred to in the “disclaimer” cases.

363 Latitude advances a number of submissions about the attributes of the hypothetical reasonable consumer. It submits that the public is accustomed to the kind of exaggeration that might take place in advertising. It relies on Bennett J’s remark to that effect in *Australian Competition and Consumer Commission v Global One Mobile Entertainment Limited* [2011] FCA 393 at [51]. Her Honour’s remark, in turn, was based on Lockhart J’s observation in *Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 37 ALR 161 at 164 – 165 that the public is accustomed to the puffing of products in advertising. However, there is nothing in the present case which suggests that any of the statements in the representative advertisements are examples of exaggeration or puffery.

364 Similarly, borrowing an observation made by Gyles J in *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2004] FCA 987; 208 ALR 459 (*Telstra*) at [52],

Latitude submits that it can be taken that the reasonable consumer has “a reasonable level of scepticism as to claims made in advertising generally”. However, Gyles J’s observation should not be elevated beyond the limited context in which it was made. Although his Honour did address his remarks to “advertising generally”, it is clear that the chief object of his Honour’s attention was the offering, in commerce, of “free” goods (in that case, mobile telephones) in circumstances where it would be understood that the recommended retail price of the goods was of some significant value. His Honour’s statement can be seen, therefore, as directed to circumstances where there would be a trigger for consumer scepticism. I do not understand his Honour to have expressed a principle of general application that all consumers view all advertising sceptically. As Allsop CJ cautioned in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2014] FCA 634; 317 ALR 73 at [160], courts should be astute and careful not to permit consumers to be misled on the basis that everyone takes advertising with a pinch of salt.

365 In the present case, there is no offer of free goods. Latitude’s submission appears to be related to its other submission, based on Mr Ebstein’s evidence on the nature of consumer credit in Australia, that the Court should infer that ordinary and reasonable consumers know and expect that there will be, or at least may be, a cost to borrow money, particularly over a period of five years, that will be borne by the consumer.

366 I will return to this submission in more detail below. At present, I simply note that, in the respects in which they are relevant to this case, the representative advertisements, on their face, were directed to how the purchase price for goods could be paid, not to how money can be borrowed.

CONSIDERATION

A preliminary observation

367 It is important to bear in mind that the question before me is what the representative advertisements would have conveyed to ordinary and reasonable consumers, in the relevant class, in the relevant period, in relation to the promotion.

368 The debate between the parties about whether that question is appropriately answered by a so-called “dominant message” analysis is a distraction. I accept that the representative advertisements conveyed different messages on different subjects. I also accept that it is not possible to single out a particular message as having been the “dominant” message. But this

does not diminish the significance of the way in which the promotion was advertised. The promotion was a prominent and attention-grabbing feature of each representative advertisement, regardless of whether it was “dominant”.

369 I understand ASIC’s use of the expression “dominant message” in its concise statement, and throughout its submissions, to be directed, specifically, to the way in which the promotion was expressed visually, textually, and aurally in the advertisements. The defendants did not labour under any misapprehension about ASIC’s case in this regard. Whether, as ASIC would have it, that particular message was “dominant” in each representative advertisement over other advertised messages on other subjects or whether there was some other message on a different subject that was “dominant”—as Harvey Norman would have it, that its stores are a good place to buy home and electrical goods at attractive prices—is neither here nor there.

370 In advancing its “dominant message” analysis, ASIC placed significant emphasis on *TPG* in the High Court and at first instance as closely similar to the present case. While that case (both on appeal, including before the Full Court, and at first instance) is undoubtedly informative as to the application of the relevant principles, I do not regard it as closely similar to the present case, although it has some similarities in that the case was dealing with the meaning of advertisements that were part of a multi-media advertising campaign.

371 In any event, I bear in mind Gyles J’s cautionary observation in *Telstra* (at [50]):

50. I have considered the decisions in other cases, particularly the discussion in the recent cases of *Singtel Optus Pty Ltd v Telstra Corporation Ltd* [2004] FCA 859; BC200404165; *Australian Competition and Consumer Commission v Commonwealth Bank of Australia* [2003] FCA 1129; BC200306147, and *Medical Benefits Fund of Australia v Cassidy* (2003) 205 ALR 402 in which other relevant authorities are reviewed. However, while resolution of the issue might be assisted by seeing how others had viewed similar situations, it is a mistake to elevate statements in other cases concerning other facts into principles of law to be applied. Reading the numerous cases in this field makes it perfectly apparent that individual judges vary considerably in their assessments of the effect of advertising. Some take a robust view and credit consumers with a fair amount of cynicism about advertisements and a fair amount of ability to make their own judgments. Others are convinced of the power of advertisements and are protective of the consumer. Neither side is right or wrong — it is a matter of opinion.

...

372 To similar effect is the general observation of the Court of Appeal in *South West Helicopters Pty Ltd v Stephenson (No 2)* [2018] NSWCA 99; 98 NSWLR 96 at [48] that the tendency to

extract from cases statements that are responsive to the particular circumstances of those cases, and to elevate them into freestanding statements of principle, is wrong.

373 However, before departing from this topic, I should record that I do not accept the defendants' submission that the "dominant message" alleged by ASIC was, in any event, true—which meant, according to the defendants, that ASIC's "dominant message" analysis failed. For the reasons that follow, I am satisfied that, gauged objectively against the reactions of ordinary and reasonable consumers, this message was, at the very least, misleading or deceptive.

Analysis of the representative advertisements

The newspaper advertisements

Representative Advertisement 1

374 Starting with ASIC's payment method case, I am satisfied that ordinary and reasonable consumers who saw Representative Advertisement 1 would have included those who understood the advertisement to mean that they could purchase eligible goods from a Harvey Norman store at the advertised price of the goods, without paying a deposit, provided they paid that price by 60 equal monthly payments. They would have understood the words "Minimum financed amount \$1000" to mean that the instalment offer only applied where the price of the goods was \$1,000 or more.

375 I am satisfied that such consumers would have understood that, provided they paid the 60 equal monthly payments, they would not be charged interest in respect of their purchases. I am also satisfied that such consumers would have understood that, provided they paid the 60 equal monthly payments, they would not be required to make any other payment in respect of their purchases or undertake any other financial commitment beyond the payment of the equal monthly instalments.

376 I reach this finding because of the prominence of Statement A, Statement B, and Statement C, in combination, throughout the advertisement; the clear meaning of those statements; and the absence of any appropriate qualification to them.

377 In this latter connection, I am satisfied that ordinary and reasonable consumers would have included those who would not have been cognisant of Statement D given the small lettering in which it appears. For many, it would have been effectively eclipsed by the prominence given to the banner statements.

378 I am also satisfied that ordinary and reasonable consumers would have included those who did see the small lettering of Statement D, but who immediately dismissed it in the reasonable expectation that, because it was in such small lettering, it must have been addressing subsidiary or unrelated matters that did not meaningfully qualify the banner statements.

379 I am satisfied that ordinary and reasonable consumers would also have included those who did see and read Statement D. However, such consumers would have included those who would not have been alerted to the prospect that there was any material qualification to the banner statements. The statement “Approved applicants only” makes no such qualification. Nor does the statement “Interest applies if you do not comply with terms and conditions”, because the assumption underlying the banner statements is that the consumer is complying with the terms and conditions by paying the 60 equal monthly payments.

380 The statement “Fees and charges apply”, which is also part of Statement D, is, largely, uninformative—in fact, cryptic. It does not identify what the fees and charges are, or how or when they “apply”. The lack of prominence given to this part of Statement D, even if read, would not have dispelled for many ordinary and reasonable consumers the clear and inviting message of the banner statements. For many, it is likely that this part of Statement D would have been taken as relevant only to occasions of non-compliance, in much the same way as the companion statement “Interest applies if you do not comply with terms and conditions”. I do not accept that ordinary and reasonable consumers would have thought that the fees and charges were those that applied to a continuing credit contract linked to a credit card.

381 On close inspection, Statement A in the advertisement is qualified by an asterisk and the numeral 1, as “*1”. I am satisfied that ordinary and reasonable consumers would have included those who would have been oblivious to that device. For many reasonable but casual readers—those giving perfunctory attention to the advertisement—its depiction would not have been conspicuous.

382 I am also satisfied that ordinary and reasonable consumers would have included those who did see the “*1” device, but who would not have been sufficiently directed by it to the bottom of the last page of the four-page advertisement, where the shortened terms appear. For such consumers, the device would not have made them any more informed about Statement A.

383 Turning to the shortened terms, I am satisfied that ordinary and reasonable consumers responding to the advertisement would have included those who did not even get to the last

page. They would have been captured by the earlier statements in the advertisement—in particular the banner statements—and oblivious to the existence of the shortened terms.

384 I am satisfied that there would have been ordinary and reasonable consumers who saw the shortened terms at the bottom of the last page of the advertisement as a block of very fine print, but who would not have engaged with it. A determination not to engage with the shortened terms, in the form in which they were presented in the advertisement, is within the range of reasonable responses. The shortened terms are presented as a mass of barely legible, and not readily digestible, material. This is an example of an advertisement selecting some words for emphasis (the banner statements) and relegating the balance to relative obscurity: *TPG* at 51. Ordinary and reasonable consumers are not expected to undertake works of supererogation to prospect for information that might falsify that which is otherwise clearly and prominently stated in the advertisement.

385 I doubt that there would have been many consumers who read the shortened terms intently. For those who would have been motivated to do so, they would not have been alerted to the prospect that there was any material qualification to the banner statements. Much of the “fine print” has nothing to do with the financial terms of the proposed offer. The shortened terms include the statement “Conditions, fees and charges apply”. This statement, like the words “Fees and charges apply”, in Statement D, is uninformative. It does not identify what the conditions, fees and charges are, or how or when they “apply”. Once again, the lack of prominence of this statement within the shortened terms, and within the advertisement as a whole, would not have dispelled for many ordinary and reasonable consumers the clear and inviting message of the banner statements themselves.

386 Moreover, the shortened terms also include the statement “Refer to product websites for conditions, fees and charges”. This statement is made after a series of statements that exclude certain products and brands from the promotion. Because of the repetition of the words “conditions, fees and charges” in each statement, there would have been ordinary and reasonable consumers who would have perceived an apparent link between the statement “Conditions, fees and charges apply” and “Refer to product websites for conditions, fees and charges”. The direction given to consumers to refer to product websites (i.e., not Harvey Norman’s website) reveals nothing about a qualification to the banner statements messaged in a Harvey Norman advertisement.

387 The shortened terms include the statement “Credit is provided by Latitude Finance Australia (ABN 42 008 583 588)”. The relevance of this statement to consumers reading these terms is not apparent. It does not necessarily denote that finance would be provided directly to the consumer by Latitude. In any event, it does not qualify the banner statements.

388 I am satisfied that there was no statement in Representative Advertisement 1 that directly and materially qualified the banner statements. However, the truth of the matter is that, contrary to what was stated in the advertisement, consumers could not simply purchase eligible goods from a Harvey Norman store at the advertised price of those goods on no deposit terms, provided they paid the price by 60 equal monthly payments. Purchase on those terms, and those terms alone, was not available. Rather, consumers who wished to make such a purchase had to enter into a fundamentally different financial arrangement than the one promoted—namely, a continuing credit contract with Latitude that was linked to a credit card (the GO Mastercard), whether or not they wanted a credit card (let alone a GO Mastercard), which required them to pay an establishment fee and ongoing monthly account service fees in respect of that linked account.

389 Plainly, Representative Advertisement 1 did not disclose that financial arrangement. The non-disclosure was not trivial. As ASIC’s example demonstrates, if a consumer making a \$1,000 eligible purchase were to pay the 60 monthly instalments on time, he or she would pay a minimum total of \$1,537 over the period (with \$537 being the component for account-keeping fees, assuming a constant fee of \$8.95 per month). Obviously, the amount of that component in relation to the purchase price of the goods will vary depending on the price, but that it is not an answer to the point that ASIC makes.

390 Furthermore, it is not to the point that consumers were not required to activate, let alone use, the GO Mastercard. The point is that a continuing credit contract with a linked credit card that was subject to the payment of an establishment fee and ongoing monthly account service fees was not advertised. What was advertised was a simple arrangement whereby the purchase price of the goods could be paid over 60 months by equal monthly payments without paying interest and a deposit.

391 For these reasons, I am satisfied that Representative Advertisement 1 was misleading or deceptive, or likely to mislead or deceive, and that Latitude and Harvey Norman contravened s 12DA(1) of the ASIC Act. I am also satisfied that Latitude and Harvey Norman engaged in

conduct that was liable to mislead the public as to the nature or characteristics of the financial services offered, in contravention of s 12DF(1) of the ASIC Act.

392 This result is reached regardless of whether the assessment is carried out: (a) on the theory that consumers were, or were likely to have been, misled or deceived into the mistaken belief that the banner statements constituted a complete statement of the method of paying for the goods; or (b) on the theory that the advertisement did not disclose an important qualifying fact that consumers would reasonably have expected to have been disclosed in the circumstances.

393 As to the former theory, the advertisement's statement of the payment method was presented as a complete statement. In truth, it was far from complete. The advertisement promoted one of Latitude's 0% interest payment plans that was available to holders of a GO Mastercard, but failed to disclose the necessity of establishing and maintaining a GO Mastercard account.

394 As to the latter theory, I accept that consumers would have had a reasonable expectation that they would have been informed of the necessity of establishing and maintaining a GO Mastercard account, not because (as ASIC contends) credit cards are "risky", but because, for ordinary and reasonable consumers, entering a financial arrangement for the purchase of goods of \$1,000 or more is not a trivial matter. Ordinary and reasonable consumers have a real and legitimate interest in knowing the fundamental terms and conditions of the arrangement they are being invited to enter, so that they know the financial responsibilities they must undertake. Their interest in that regard is matched by a corresponding and commensurate expectation that the person extending the invitation will inform them of those fundamental terms and conditions. The position is no more complicated than that.

395 Absent a direct statement that qualified the banner statements, I am also satisfied that Representative Advertisement 1 represented impliedly, through omission, that the material terms of the payment method were only those contained in those statements. That representation was plainly false.

396 I note that there is no dispute that, if such a representation were to have been made, it was one in connection with the supply or possible supply of financial services or in connection with the promotion by any means of the supply or use of financial services, namely, a credit facility or dealing in a credit facility.

397 In these circumstances, I am satisfied that the representation was: (a) a false or misleading
representation that the financial services offered were of a particular standard, quality, value or
grade, and (b) a false or misleading representation concerning the existence, exclusion or effect
of any condition, warranty, guarantee, right or remedy, and that Latitude and Harvey Norman
each contravened s 12DB(1)(a) and s 12DB(1)(i) of the ASIC Act, respectively.

398 I turn now to ASIC's fees and charges case in respect of Representative Advertisement 1. As
I have noted, ASIC advances alternative contentions. The primary contention was that the
advertisements conveyed the impression, or represented, that a consumer taking up the
payment method would only be liable to pay the price of the goods by way of 60 equal monthly
payments. On ASIC's case, the advertisements did not convey the impression, or represent,
that fees or charges would be payable.

399 I do not accept this aspect of ASIC's case in its entirety.

400 As I have explained, I am satisfied that ordinary and reasonable consumers who read
Representative Advertisement 1 would have included: (a) those who would not have been
cognisant of Statement D or, if they saw it, would simply have dismissed it; (b) those who
would have been oblivious to the “*1” device or insufficiently directed by it to the shortened
terms; (c) those who were captured by the earlier presentation of the banner statements and
never got to the back page of the advertisement; and (d) those who saw the shortened terms on
the back page of the advertisement but, justifiably, did not engage with them.

401 For those ordinary and reasonable consumers, Representative Advertisement 1 did convey the
impression, or represent, contrary to the true position, that a consumer taking up the promotion
would only be liable to pay the price of the goods by way of 60 equal monthly payments. To
this extent, I accept ASIC's fees and charges case.

402 However, as I have also explained, I am satisfied that ordinary and reasonable consumers who
read Representative Advertisement 1 would also have included: (a) those who did see and read
Statement D; and (b) those who did see and read the shortened terms. Those who did see and
read Statement D or the shortened terms would have known that fees and charges applied.
However, many of these consumers would have understood that fees and charges only applied
in circumstances where there had been non-compliance in making the 60 equal monthly
payments; otherwise fees and charges would *not* apply. To this extent, I also accept ASIC's
fees and charges case.

403 On these findings, I am satisfied that Representative Advertisement 1 was misleading or
deceptive, or likely to mislead or deceive, and that Latitude and Harvey Norman contravened
s 12DA(1) of the ASIC Act. However, this contravention arises as an aspect of the
contravention I have already found of the same provision.

404 Once again, this result is reached regardless of whether the assessment is carried out: (a) on
the theory that consumers were, or were likely to have been, misled or deceived into the
mistaken belief that their liability to pay the price of the goods by way of 60 equal monthly
payments was a complete statement of their liability provided they complied with that
arrangement; or (b) on the theory that the advertisement did not disclose an important
qualifying fact that consumers would reasonably have expected to have been disclosed in the
circumstances.

405 I am also satisfied that Representative Advertisement 1 impliedly represented that the extent
of the consumer's liability in taking up the payment method to buy Harvey Norman goods was
to pay the price of the goods by 60 equal monthly payments, provided the consumer complied
with that arrangement. The advertisement was silent on the need for consumers, in taking up
the payment method, to pay an establishment fee (when applicable) and ongoing monthly
account service fees in respect of a continuing credit account with Latitude that was linked to
a GO Mastercard.

406 To that extent, Representative Advertisement 1 made a representation that was: (a) a false or
misleading representation that the financial services offered were of a particular standard,
quality, value or grade, and that Latitude and Harvey Norman contravened s 12DB(1)(a) of the
ASIC Act; and (b) a false or misleading representation concerning the existence, exclusion or
effect of any condition, warranty, guarantee, right or remedy, and that, as a result, Latitude and
Harvey Norman contravened s 12DB(1)(i) of the ASIC Act. However, once again, these
contraventions arise as an aspect of the contraventions I have already found of these provisions.

407 Further, as the representation concerned the price of financial services, I am satisfied that
Representative Advertisement 1 made a representation that was false or misleading with
respect to the price of services and that, as a result, Latitude and Harvey Norman contravened
s 12DB(1)(g).

408 I am not satisfied that ASIC has established its alternative contention that Representative
Advertisement 1 made a representation that fees or charges applicable to the promotion would

be “relatively insubstantial”. I do not see any basis for such a finding. In these circumstances, it is not necessary for me to address ASIC’s submissions on the substantiality of fees and charges associated with the GO Mastercard. I should record, nevertheless, that I do not consider that this question is informed by the quantum of the amounts that Latitude has charged, over time, in respect of establishment fees or monthly account service fees.

Other newspaper representative advertisements

409 I reach the same conclusions on contravention in respect of the other representative newspaper advertisements for the same, or for substantially the same, reasons. Unless stated below, the findings I have made concerning the meaning received by ordinary and reasonable consumers in respect of Representative Advertisement 1, and my reasoning that leads to those findings, apply equally to the other representative newspaper advertisements. There are, however, some differences in the other advertisements that I should address. I will only address those that are material to my analysis.

410 Representative Advertisement 2 is a simpler advertisement than Representative Advertisement 1 in that the advertisement was confined, spatially, to the bottom section of one page. The findings I have made at [382] – [383] with respect to Representative Advertisement 1 do not apply to this advertisement. Also, as I have noted, this advertisement did not contain images of goods that could be purchased. However, none of these matters affect my conclusion that the same contraventions have taken place with respect to this advertisement.

411 Representative Advertisement 3 was similar to Representative Advertisement 1 in that it was a multi-page advertisement. The banner statements were made twice, whereas in Representative Advertisement 1 the banner statements were made three times. Nothing turns on that difference. In Representative Advertisement 3, two versions of the shortened terms appear, but, once again, nothing turns on that matter.

412 The findings I have made at [382] – [383] with respect to Representative Advertisement 1 do not apply to the banner statements made on page 2 of Representative Advertisement 3, although they do apply to the banner statements made on page 1. As with Representative Advertisement 2, this does not affect my conclusion that the same contraventions have taken place with respect to this advertisement.

413 Representative Advertisement 4 was a two-page advertisement. As I have noted, it contained the varied shortened terms, which appeared at the bottom of, and across, the two pages. Like

the shortened terms, much of the fine print has nothing to do with the financial terms of the proposed offer.

414 As with Representative Advertisement 2 and Representative Advertisement 3, the findings I have made at [382] – [383] do not apply to Representative Advertisement 4, but this does not affect my conclusion that the contraventions I have found with respect to Representative Advertisement 1 have also taken place with respect to this advertisement.

415 Unlike the shortened terms, the varied shortened terms in Representative Advertisement 4 do not contain the statement “Refer to product websites for conditions, fees and charges”. Therefore, the finding I have made at [386] does not apply, but this also does not affect my conclusion that the contraventions I have found with respect to Representative Advertisement 1 have taken place with respect to Representative Advertisement 4.

416 The varied shortened terms are different to the shortened terms in that the varied shortened terms include the statement “Visit harveynorman.com.au or see in store for details”. This statement is preceded by the words “Excludes brands and other products that are offered for sale under agency agreement with Harvey Norman franchises”. This difference is inconsequential. The direction to visit the Harvey Norman website would be taken as to providing information on excluded products.

417 The varied shortened terms also include the statement “If there is an outstanding balance after the interest-free period ends in [date], interest will be charged at 25.90%”. If anything, the inclusion of these words would likely have reinforced, for some ordinary and reasonable consumers, that the statement “Conditions, fees and charges apply” was a reference to circumstances that apply should the price for the goods not be paid by 60 equal monthly payments.

418 Representative Advertisement 5 was a one-page advertisement. The findings I have made at [382] – [383] do not apply.

419 Representative Advertisement 5 contains the extended terms, which appear at the bottom of the advertisement. Those consumers who read the extended terms intently would have been provided with a large amount of information. Like the shortened terms and the varied shortened terms, much of the “fine print” has nothing to do with the financial terms of the proposed offer. However, buried within the information were the following statements:

- (a) “Available to approved Latitude Go Mastercard customers on transactions made between 01/03/21 and 15/03/21 where the amount financed is \$1000 or more. ...”
- (b) “This notice is given under the Latitude GO Mastercard Condition of Use, which specify all other conditions for this offer. ...”
- (c) “A \$25.00 Establishment Fee applies to new approved applicants. Account Service fee of \$5.95 per month applies. ...” and
- (d) “Credit provided by Latitude Finance Australia ...”

420 Consumers who read this information would have been informed that there was something more involved in the promoted payment method than simply paying the purchase price for the goods by 60 equal monthly instalments. They would have known that: (a) the offer was associated with a GO Mastercard issued by Latitude; (b) they needed to be an approved GO Mastercard customer; (c) the conditions of the offer included the GO Mastercard conditions of use; and (d) they were liable to pay an establishment fee and a monthly account service fee, as stated.

421 However, this does not gainsay my conclusions on contravention. As with the other representative newspaper advertisements, I am satisfied that there would have been consumers who would have seen the block of very fine print of Representative Advertisement 5 at the bottom of the page, but not engaged with it. For the reasons I have given in respect of the shortened terms in Representative Advertisement 1, a determination not to engage with the extended terms is within the range of responses of ordinary and reasonable consumers to the advertisement.

Radio advertisements

Representative Advertisement 6

422 Starting with ASIC’s payment method case, I am satisfied that ordinary and reasonable consumers who heard Representative Advertisement 6 would have included those who understood the advertisement to have the meaning explained in [374] – [375] above. I reach this finding because of the repeated statement “60 months interest-free” with the complementary statement “No deposit, no interest with 60 equal monthly payments”.

423 I am satisfied that there was no statement in Representative Advertisement 6 that directly and materially qualified this message. As I have noted, some words in the advertisement were spoken more softly and delivered at a rapid pace, as an aside. Ordinary and reasonable consumers who heard Representative Advertisement 6 would have included those whose attention was not arrested by this part of the advertisement, given the pace and tone in which the words were spoken. Ordinary and reasonable consumers would also have included those who noticed the pace and tone in which the words were spoken but who would not have placed significance on them as an intended qualification of the repeated, vibrant message to which I have referred.

424 I accept that some consumers would have heard this part of the advertisement and noticed that the words “Fees and exclusions” were spoken after the words “Interest applies if you do not comply with terms and conditions”. For many, this part of the advertisement would not have been taken as referring to circumstances of non-compliance with the payment method.

425 In any event, the words “Fees and exclusions” are uninformative. They do not alert the listener that a financial arrangement other than “No deposit, no interest with 60 equal monthly payments” is in contemplation. The words “Fees and exclusions” would not have conveyed to ordinary and reasonable consumers the fundamentally different arrangement that required them to enter into a continuing credit contract with Latitude that was linked to the GO Mastercard and which required them to pay an establishment fee and ongoing monthly account service fees in respect of the linked account.

426 For these reasons, I am satisfied that Representative Advertisement 6 was misleading or deceptive, or likely to mislead or deceive and that Latitude and Harvey Norman contravened s 12DA(1) of the ASIC Act. I am also satisfied that Latitude and Harvey Norman engaged in conduct that was liable to mislead the public as to the nature or characteristics of the financial services offered, in contravention of s 12DF(1) of the ASIC Act.

427 As with the representative newspapers advertisements, this result is reached regardless of whether the assessment is carried out: (a) on the theory that consumers were, or were likely to have been, misled or deceived into the mistaken belief that the statement “No deposit, no interest with 60 equal monthly payments” constituted a complete statement of the method of paying for the goods; or (b) on the theory that the advertisement did not disclose an important

qualifying fact that consumers would reasonably have expected to have been disclosed in the circumstances.

428 I am also satisfied that Representative Advertisement 6 represented impliedly, through omission, that the material terms of the payment method were “No deposit, no interest with 60 equal monthly payments”. This was: (a) a false or misleading representation that the financial services offered were of a particular standard, quality, value or grade, and (b) a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, and that Latitude and Harvey Norman each contravened s 12DB(1)(a) and s 12DB(1)(i) of the ASIC Act, respectively.

429 As to ASIC’s fees and charges case, I am satisfied, for the reasons given above, that ordinary and reasonable consumers hearing Representative Advertisement 6 would have included those who understood the advertisement to represent that, apart from the obligation to pay the purchase price by 60 equal monthly payments, there were no fees or charges associated with the promotion, or that fees or charges only applied where the obligation to pay the purchase price by 60 equal monthly payments was not complied with.

430 To this extent, I accept ASIC’s fees and charges case. I am satisfied, therefore, that Representative Advertisement 6 was misleading or deceptive, or likely to mislead or deceive, in this regard and that Latitude and Harvey Norman contravened s 12DA(1). However, this contravention arises as an aspect of the contravention I have already found of the same provision.

431 Once again, this result is reached regardless of whether the assessment is carried out: (a) on the theory that consumers were, or were likely to have been, misled or deceived into the mistaken belief that their liability to pay the price of the goods by way of 60 equal monthly payments was a complete statement of their liability provided they complied with that arrangement; or (b) on the theory that the advertisement did not disclose an important qualifying fact that consumers would reasonably have expected to have been disclosed in the circumstances.

432 Similarly, I am satisfied that Representative Advertisement 6 impliedly represented that the extent of the consumer’s liability in taking up the payment method to buy Harvey Norman goods was to pay the price of the goods by 60 equal monthly payments, provided the consumer complied with that arrangement.

433 To that extent, Representative Advertisement 6 made a representation that was: (a) a false or misleading representation that the financial services offered were of a particular standard, quality, value or grade; and (b) a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, and that, as a result, Latitude and Harvey Norman contravened s 12DB(1)(a) and s 12DB(1)(i) of the ASIC Act, respectively. However, once again, these contraventions arise as an aspect of the contraventions I have already found of these provisions.

434 Further, as the representation concerned the price of financial services, I am satisfied that Representative Advertisement 6 made a representation that was a false or misleading representation with respect to the price of services and that Latitude and Harvey Norman contravened s 12DB(1)(g).

435 I am not satisfied that Representative Advertisement 6 made a representation that fees or charges applicable to the promotion would be “relatively insubstantial”. I am not satisfied, therefore, that ASIC has established its alternative fees and charges case.

Other radio representative advertisements

436 I reach the same conclusions on contravention in respect of the other representative radio advertisements for the same, or substantially the same, reasons. The findings I have made concerning the meaning received by ordinary and reasonable consumers in respect of Representative Advertisement 6 apply equally to the other representative radio advertisements. There are some differences in the other radio advertisements.

437 Representative Advertisement 7 includes the statements “buy with 60 months interest-free ...” and “No deposit, no interest, with 60 equal monthly payments...”. Representative Advertisement 8 includes the statement “Purchase with 60 months interest-free” and “60 equal monthly payments”. Unlike Representative Advertisement 6, neither Representative Advertisement 7 nor Representative Advertisement 8 repeats “60 months interest-free”. However, overall, Representative Advertisement 7 delivers the same message as Representative Advertisement 6 as to the payment method by which goods could be purchased.

438 I am satisfied that Representative Advertisement 8 also delivers the same message. Although the advertisement does not make an explicit statement that no deposit is required, it refers to payment being made by 60 equal monthly instalments. This implies that no deposit is required, just the payment of monthly instalments.

Television advertisements

Representative Advertisement 9

439 Starting with ASIC’s payment method case, I am satisfied that ordinary and reasonable consumers who watched Representative Advertisement 9 would have included those who understood the advertisement to have the meaning explained in [374] – [375] above.

440 The representative television advertisements have some of the visual elements of the representative newspaper advertisements. Representative Advertisement 9 prominently features the banner statements (except for the statement “Minimum financed about \$1000”, although this statement appears in small print below the graphics) at the commencement of the advertisement and at the end. The graphic that contains these statements is moving, as is a graphic concerning the bonus gift card that is part of the promotion.

441 These graphics are attention-grabbing by themselves. However, the effect is augmented by the voiceover which contains the statements “Get 60 months interest-free now at Harvey Norman and receive a bonus gift”; “The more you spend using interest-free, the greater the value of the bonus gift card, up to \$300” (which is repeated); and “Get 60 months interest-free and receive a bonus gift card”.

442 Beneath the graphics, and throughout the advertisement, the following words appear in small print:

Credit provided by Latitude Finance Australia ABN 42 008 583 588 Credit licence 392145.

Minimum financed amount \$1000. Approved applicants only. Interest applies if you do not comply with terms & conditions.

Fees, charges, conditions & exclusions apply. See website for details.

443 From time to time these statements are preceded by:

*Gift Cards are issued by Derni Pty Limited. Conditions apply. See in store or online for details.

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

445 Other ordinary and reasonable consumers would have been aware that some writing appeared beneath the main graphics. However, many of these consumers would not have been able to read any or all of this writing without pausing the advertisement to allow for study. Pausing Representative Advertisement 9 would not have been the normal mode of watching such an advertisement.

446 For those viewers who were able to read the statements under the graphics, the findings I have made at [379] – [380] apply equally to Representative Advertisement 9. (I note that, in Representative Advertisement 9 the statements included the words “Fees, charges, conditions and exclusions apply”, not simply “Fees and charges apply”. Nothing turns on this.)

447 Representative Advertisement 9 ends with a screenshot that includes an image of a GO Mastercard along with an American Express logo, a logo that shows Harvey Norman to be an Official Partner of Paralympics Australia, and a logo for Latitude Pay. The screenshot is fleeting. I am not satisfied that ordinary and reasonable consumers would have any particular understanding of the screenshot.

448 I am satisfied that there was no statement in Representative Advertisement 9 that directly and materially qualified the meaning explained at [374] – [375] above. Representative Advertisement 9 did not disclose the fundamentally different financial arrangement that required consumers to enter into a continuing credit contract with Latitude that was linked to a GO Mastercard and required them to pay an establishment fee (when applicable) and ongoing monthly account service fees in respect of that linked account.

449 For these reasons, I am satisfied that Representative Advertisement 9 was misleading or deceptive, or likely to mislead or deceive and that Latitude and Harvey Norman contravened s 12DA(1) of the ASIC Act. I am also satisfied that Latitude and Harvey Norman engaged in conduct that was liable to mislead the public as to the nature or characteristics of the financial services offered, in contravention of s 12DF(1) of the ASIC Act.

450 As with the representative newspaper advertisements and the representative radio advertisements, this result is reached regardless of whether the assessment is carried out: (a) on the theory that consumers were, or were likely to have been, misled or deceived into the mistaken belief that the banner statements, and the related voiceover, constituted a complete statement of the method of paying for the goods; or (b) on the theory that the advertisement did

not disclose an important qualifying fact that consumers would reasonably have expected to have been disclosed in the circumstances.

451 I am also satisfied that Representative Advertisement 9 represented impliedly, through omission, that the material terms of the payment method were those, and only those, contained in the banner statements and the voiceover. This was: (a) a false or misleading representation that the financial services offered were of a particular standard, quality, value or grade, and (b) a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, and that, as a result, Latitude and Harvey Norman each contravened s 12DB(1)(a) and s 12DB(1)(i) of the ASIC Act, respectively.

452 As to ASIC's fees and charges case, I am satisfied, for the reasons given above, that ordinary and reasonable consumers viewing Representative Advertisement 9 would have included those who understood the advertisement to represent that, apart from the obligation to pay the purchase price by 60 equal monthly payments, there were no other fees or charges associated with the promotion, or that fees or charges only applied where the obligation to pay the purchase price by 60 equal monthly payments was not complied with.

453 To this extent, I accept ASIC's fees and charges case. I am satisfied, therefore, that Representative Advertisement 9 was misleading or deceptive, or likely to mislead or deceive, in this regard and that Latitude and Harvey Norman contravened s 12DA(1). However, this contravention arises as an aspect of the contravention I have already found of the same provision.

454 Once again, this result is reached regardless of whether the assessment is carried out: (a) on the theory that consumers were, or were likely to have been, misled or deceived into the mistaken belief that their liability to pay the price of the goods by way of 60 equal monthly payments was a complete statement of their liability provided they complied with that arrangement; or (b) on the theory that the advertisement did not disclose an important qualifying fact that consumers would reasonably have expected to have been disclosed in the circumstances.

455 Similarly, I am satisfied that Representative Advertisement 9 impliedly represented that the extent of the consumer's liability in taking up the payment method to buy Harvey Norman goods was to pay the price of the goods by 60 equal monthly payments, provided the consumer complied with that arrangement.

456 To that extent, Representative Advertisement 9 made a representation that was: (a) a false or misleading representation that the financial services offered were of a particular standard, quality, value or grade; and (b) a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, and that, as a result, Latitude and Harvey Norman contravened s 12DB(1)(a) and s 12DB(1)(i) of the ASIC Act, respectively. However, once again, these contraventions arise as an aspect of the contraventions I have already found of these provisions.

457 Further, as the representation concerned the price of financial services, I am satisfied that Representative Advertisement 9 made a representation that was false or misleading with respect to the price of services and that, as a result, Latitude and Harvey Norman contravened s 12DB(1)(g).

458 I am not satisfied that Representative Advertisement 9 made a representation that fees or charges applicable to the promotion would be “relatively insubstantial”. I am not satisfied, therefore, that ASIC has established its alternative fees and charges case.

Other television representative advertisements

459 I reach the same conclusions on contravention in respect of the other representative television advertisements for the same, or substantially the same, reasons. The findings I have made concerning the meaning received by ordinary and reasonable consumers in respect of Representative Advertisement 9 apply equally to the other representative television advertisements. There are, however, some differences in the other representative television advertisements which I will mention.

460 Representative Advertisement 10 includes attention-grabbing graphics that are similar to the graphics in Representative Advertisement 9. Once again, the effect is augmented by the voiceover which contains the statements “At Harvey Norman get 60 months interest-free and receive a bonus gift card up to the value of \$500” (which is repeated) and “The more you spend on 60 months interest-free, the greater the value of the bonus gift card”.

461 From time to time the following words appear in small print under the graphics containing the banner statements and the reference to the gift card:

Minimum financed amount \$1000. Approved applicants only. Interest applies if you do not comply with terms and conditions.

Fees, charges, conditions & exclusions apply. See website for details.

462 However, at other times different text appears that refers to the value of the bonus gift card.
463 Nothing turns on these differences.

464 Representative Advertisement 11 is different to Representative Advertisement 9 and Representative Advertisement 10 in that reference to the 60 months interest-free promotion occurs at the end of the advertisement. It contains the banner statements (except for the statement “Minimum financed about \$1000”, although this statement appears in small print below the graphics). Statement B and Statement C are quickly replaced by a banner referring to the bonus gift card, leaving Statement A in place. With respect to the payment method, the voiceover refers only to “Buy on 60 months interest-free and receive a bonus gift card”.

465 It is fair to say that the reference in Representative Advertisement 11 to the payment method is more limited than in Representative Advertisement 9 and Representative Advertisement 10. However, the message described in [374] – [375] is clear. Text appears below the banner statements that contains a mass of detail, largely directed to the value of the bonus gift card. The text nevertheless concludes with a statement in substantially similar terms to that quoted at [461] above. However, as with Representative Advertisement 9 and Representative Advertisement 10, I am satisfied that many ordinary and reasonable consumers would be oblivious to this text or, if not oblivious to it, unable to read it when the advertisement is shown in real time. Even if they could read it, the findings I have made at [379] – [380] apply equally, as they do for Representative Advertisement 10.

General findings

466 The parties’ submissions were repetitious. They also advanced a plethora of arguments and counter-arguments that tended to move the case from its epicentre. While I have summarised (at some length and largely in words of the parties’ own choosing) the main arguments that were advanced, I do not consider it to be necessary to analyse, in these reasons, everything the parties have said in support of their respective cases. I will, however, address some major themes of their submissions.

Familiarity with personal credit

467 As I have noted, Latitude (and Harvey Norman by adoption) submits that the Court should infer that ordinary and reasonable consumers are familiar with personal credit and its features: see [288] above. Latitude also submits that all personal credit comes with a cost of some kind,

whether in the form of interest or fees, and that the Court should infer that ordinary and reasonable consumers know and expect that there will be, or may be, a cost to borrow money, particularly over a period of five years, and that the cost would be, or might be, borne by the consumer himself or herself: see [289] – [290] above.

468 The purpose of advancing these submissions was to address the issue of consumer expectations—specifically, to advance the contention that ordinary and reasonable consumers are aware that a provider of finance sets terms and conditions that accompany an offer of finance and that they will expect to pay some kind of fee or charge. According to Latitude, they would know that, in the context of the representative advertisements, “there is no such thing as a free lunch, let alone charity”.

469 In short, the defendants contend that, notwithstanding the way in which the promotion was expressed in each representative advertisement, ordinary and reasonable consumers would have known, inevitably, that there would have been additional terms and conditions that imposed a cost on them.

470 The first of these submissions—familiarity with personal credit and its features—is of limited utility. I accept that ordinary and reasonable consumers, in the main, have some familiarity with personal credit and its features but, beyond that high level acceptance, the evidence does not enable me to make a more informed finding as to the nature and extent of that familiarity.

471 The second submission—cost—is more direct. I accept that ordinary and reasonable consumers, in the main, know that borrowing money comes at a cost which they must bear, generally in the form of interest. I do not accept, however, that that knowledge leads to a finding that ordinary and reasonable consumers would have understood the representative advertisements as meaning that there were payment terms different to, or that qualified, say, the banner statements in the representative newspaper advertisements.

472 Whilst the promotion can be intellectualised as a method of borrowing money, I do not accept that all ordinary and reasonable consumers would think that, by paying the nominated purchase price for the goods by instalments, they were “borrowing” money for that purpose. Even though ASIC submits that the promotion “looked like a one-off loan” or that “some kind of finance was on offer”, I am satisfied that ordinary and reasonable consumers would have included those who thought that they were doing no more than paying the purchase price for the goods they wished to buy on an instalment basis that Harvey Norman was prepared to

accept to entice consumers to purchase from Harvey Norman stores (one aspect of ASIC’s quid pro quo argument).

473 I am not persuaded that the understanding expressed by: (a) Mr Hill about borrowing money from Latitude (see [130] above); (b) Ms Jenkins about an account-keeping fee being incorporated into the amount of the monthly payments (see [171] above); (c) Mr North about the offer was being financed by a third-party (see [152] above); or (d) Mr Harris about taking out a 60 months interest-free loan (see [119] above) were understandings that would have been shared commonly by all ordinary and reasonable consumers.

474 Mr Hill’s understanding was based on seeing the word “Latitude” in the television advertisement he saw “displayed in the bottom corner of the advertisement in small font”. As I have said, I am satisfied that ordinary and reasonable consumers would have included those who would not have been cognisant of the written statements deployed in the representative television advertisements or who would not have been able to read those statements.

475 Ms Jenkins’s understanding was based purely on her previous experience with another retailer many years beforehand and had nothing to do with the advertisements she saw.

476 Mr North’s understanding was based on an assumption he made based on his work in the finance service industry. Like Ms Jenkins’s understanding, this had nothing to do with the advertisements that he saw.

477 Mr Harris’s understanding was not explained in his affidavit.

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

479 I accept, therefore, ASIC’s submission that ordinary and reasonable consumers would have included those who had no knowledge of the type of arrangement promoted in the representative advertisements. They would not have had any “starting assumptions”. The

position would have been different had Latitude and Harvey Norman promoted the GO Mastercard overtly. But they did not. In effect, they actively advertised a promotion that happened to be available only to the holder of a GO Mastercard without promoting the GO Mastercard itself.

480 The defendants' argument falls well short of the mark. In any event, it is not enough that some ordinary and reasonable consumers might have thought that the promotion came at some additional cost, when other ordinary and reasonable consumers would have had the contrary understanding to which I have referred at [374] – [375]. Moreover, unless the consumer happened to have read the extended terms intently (which only appeared in Representative Advertisement 5), he or she could not possibly have known that the cost was, in fact: (a) a continuing credit contract with Latitude that was (b) linked to a GO Mastercard which (c) required the consumer to pay an establishment fee (when applicable) and monthly account service fees for amounts determined by Latitude from time to time in respect of the linked account.

481 Therefore, the defendants' submissions on this topic do not lead me to any conclusion that is different to the conclusions I have expressed above.

Cumulative effect

482 ASIC advances its case on the basis that the representative advertisements were “part of a high-volume, far-reaching, multi-media, national advertising campaign with a vast geographical dissemination across Australia” and that “the breadth of the campaign meant that the Advertisements would have been heard or seen by millions of people in Australia, and likely on multiple occasions”.

483 According to ASIC, this meant that the “dominant message” was repeated in “thousands” of advertisements as part of a concerted advertising blitz and “reinforced” in the minds of consumers. It also meant that, because ordinary and reasonable consumers would have been repeatedly subjected to the advertisements in a variety of forms, they would have stopped paying attention to the advertisements beyond the “dominant message”. Ordinary and reasonable consumers would have been so familiar with the advertisements they would have “tuned out” to all aspects of them other than the “dominant message”.

484 The cumulative effect of advertising appears to have been taken into account in some cases of misleading or deceptive conduct (ASIC relies on *TPG* at first instance at [36] and *Australian*

Competition and Consumer Commission v Telstra Corporation Limited [2007] FCA 1904; 244 ALR 470 at [128]). Precisely how it was taken into account in those cases is not clear. It does not appear, for example, that the Court was persuaded that the impugned advertisements were only misleading or deceptive, or likely to be so, because of the effect of other or different advertisements. Moreover, “reinforcing” an advertisement cannot make it more misleading or deceptive than it already is.

485 ASIC’s submission must be treated with some care. It hides a number of unexplored issues. For example, it appears that the promotion was advertised not just by newspaper, radio, and television advertising, but by other means (e.g., Mr Harris saw the promotion advertised in a catalogue). The other forms of advertising (whatever they may have been) are not in evidence. The Court should not speculate on what those advertisements would, or would not, have conveyed, let alone assume that all advertisements would have had some or any “reinforcing” effect. Also, because Harvey Norman’s advertising in the relevant period was not limited to advertisements featuring the promotion, it is not possible to come to any clear view of what, if anything, the “reinforcing” effect (if it existed) was. I readily accept that the promotion was advertised on many occasions, but this really says nothing of substance about whether the representative advertisements, themselves, were misleading or deceptive, or likely to be so, or whether they made false, misleading, or deceptive representations.

486 Importantly, ASIC has not advanced a case that the representative advertisements were misleading or deceptive, or likely to be so, or conveyed false, misleading, or deceptive representations, only because they were accompanied by other forms of conduct, including other advertising.

487 The only sound basis on which the present question before the Court can be approached is by considering each representative advertisement on its own, divorced from the influence of other advertising. I have analysed each representative advertisement accordingly.

All or nothing case?

488 As I have noted, Harvey Norman submits that ASIC has propounded an “all or nothing case”, such that if the Court found that any one of the representative advertisements did not carry the alleged “dominant message” then ASIC’s case fails in its entirety.

489 I have already commented that the debate between the parties on the appropriateness of a “dominant message” analysis is a distraction. I do not accept that ASIC’s case succeeds or

fails on that mode of analysis. Further, I do not accept that the fate of ASIC’s case depends on an “all or nothing” proposition.

490 In any event, the issue that Harvey Norman raises is academic. Eleven different advertisements have been placed before me as representative advertisements for consideration. I am satisfied that each representative advertisement has led to contraventions of the ASIC Act.

Consumer evidence

491 I am satisfied that the evidence of the consumer witnesses is relevant to the question that is before me. However, contrary to ASIC’s submission, I do not consider this evidence to be of “great assistance”. I would have reached the conclusions I have expressed above independently of it.

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

493 ASIC adduced other consumer evidence that was of no assistance in determining the question before me. I have already discussed this evidence and will not repeat the comments I have made.

494 As I have noted, some of this evidence was directed to the substantiality of the establishment fee and monthly account service fees associated with the GO Mastercard. I have not accepted that case. I should nevertheless record that I do not accept that the amount of the revenue earned by Latitude from the establishment fees or the monthly account service fees provides any yardstick by which to gauge the substantiality of such fees for the consumer.

Inferences

495 ASIC has invited the Court to draw inferences against Harvey Norman on the basis of the rule in *Jones v Dunkel* (1959) 101 CLR 298 (*Jones v Dunkel*). As explained in *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361 at [63]:

63 The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the

uncalled evidence would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn. These principles have been extended from instances where a witness has not been called at all to instances where a witness has been called but not questioned on particular topics. Where counsel for a party has refrained from asking a witness whom that party has called particular questions on an issue, the court will be less likely to draw inferences favourable to that party from other evidence in relation to that issue. That problem did not arise here. The plaintiff's counsel did ask the plaintiff relevant questions.

(Footnotes omitted.)

496 Importantly, the rule in *Jones v Dunkel* permits an inference to be drawn that the uncalled evidence would not have assisted a party, not that the uncalled evidence would have been adverse to that party.

497 ASIC submits that, as Harvey Norman did not call Ms Page and Mr Mentis to give evidence, the Court should more readily find, consistently with its case, that Ms Page and Mr Mentis directly controlled—indeed, “micromanaged”—the process which led to the publication of the advertisements and were responsible for the dissemination and content of those advertisements.

498 I have already made a number of findings at [57] – [83] above in respect of the involvement of officers and employees of Latitude and Harvey Norman in relation to the preparation and publication of newspaper, radio, and television advertisements in respect of the promotion. As I have stated at [80], I am not satisfied that Ms Page “micromanaged” the process by which the newspaper, television, and radio advertisements were devised, created, and published or broadcast. However, I have found that, within Harvey Norman these advertising campaigns were undertaken under the overall direction and control of Ms Page with significant management involvement from Mr Mentis and other senior employees within Harvey Norman. I regard those findings as fully supported by the evidence, including the information provided by Ms Page and Mr Mentis in examinations conducted by ASIC. In light of that evidence, I see no reason why it was incumbent on Harvey Norman to call Ms Page and Mr Mentis as witnesses. There is no occasion for drawing the inferences that ASIC seeks against Harvey Norman.

499 The inference addressed in *Ferrcom* at 418 – 419 is drawn from the rule in *Jones v Dunkel*. As I have noted, ASIC submits that a *Ferrcom* inference should be drawn that Mr Ebstein could

not have given evidence that assisted Latitude in respect of the substantiality of the establishment fees and monthly account service fees associated with the GO Mastercard.

500 As I have not accepted ASIC’s alternative contention in its fees and charges case that the representative advertisements made a representation that fees or charges applicable to the promotion would be “relatively insubstantial”, this question does not need to be determined. Even so, it is beset with difficulties.

501 First, ASIC has not identified the precise inference that should be drawn. In its submissions, it said that Mr Ebstein:

223. ... was not asked a question and did not opine on the directly relevant question of whether the establishment and monthly account keeping fees for the GO Mastercard [were] substantial.

502 To be clear, this was not the “directly relevant question”. The directly relevant question, based on the concise statement, was whether the fees or charges were “relatively insubstantial”. This immediately begs the question: relative to what? The concise statement answers this question by reference to the purchase price of the goods—specifically, the sum of \$1,000. It does not address the question by reference to any other sum or, more importantly, by reference to the fees and charges applicable to consumer credit in the relevant period.

503 In these circumstances, Mr Ebstein could not have given admissible opinion evidence in respect of the particular yardstick chosen in the concise statement. The question whether \$537 (the total amount of the monthly account service fees over 60 months nominated in the concise statement) is “relatively insubstantial” compared to the purchase price of \$1,000 calls for no more than the exercise of ordinary judgment, not an opinion substantially based on specialised knowledge.

504 In its submissions, ASIC advances other yardsticks based on Ms Lam’s analyses. Leaving aside whether these yardsticks appropriately inform the relative question in any event, none of them call for an expression of expert opinion. The same applies to the expressions of consumer dissatisfaction with establishment fees and monthly account service fees on which ASIC relies.

505 Secondly, Mr Ebstein did give evidence, based on his specialised knowledge, of the amount of account-keeping and other fees that were payable in respect of “a typical credit card”.

506 In addition, the defendants submit that a *Ferrcom* inference is not available in the case of expert testimony. Given the other difficulties to which I have referred, and the fact that the question

of substantiality does not even arise on my findings, it is not necessary for me to address this question of principle, and it is not appropriate that I do so.

DISPOSITION

507 ASIC has established the alleged contraventions. It is appropriate that declarations of contravention be made accordingly. Further, the parties should consult with a view to agreeing on the steps that should now be taken to prepare the case for a hearing on the other relief that is sought. The parties should bring in agreed draft orders or, if agreement cannot be reached, competing draft orders, by 4.00 pm on 28 October 2024.

I certify that the preceding five hundred and seven (507) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates.

Associate:



Dated: 18 October 2024

SCHEDULE A

Representative Advertisement 1

Harvey Norman[®]

60 MONTHS
INTEREST FREE^{*1}

NO DEPOSIT **NO INTEREST**
with 60 equal monthly payments until April 2025. Minimum financed amount \$1000.
Offer ends 28/04/25. Apply in stores only. Available for in-store and selected online purchases. Approved applicants only. Fees & charges apply. Interest applies if you do not comply with terms and conditions.

PLUS BONUS GIFT CARD^{*2}
up to \$300 on 60 Months Interest Free^{*1} purchases

\$50 GIFT CARD when you spend \$1,000+	\$100 GIFT CARD when you spend \$2,000+	\$150 GIFT CARD when you spend \$3,000+	\$200 GIFT CARD when you spend \$4,000+	\$250 GIFT CARD when you spend \$5,000+	\$300 GIFT CARD when you spend \$6,000+
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- INTEREST FREE OFFER ENDS TUESDAY -

Harvey Norman[®] is available in store, online and over the phone to help with the essentials for daily life.

STORES OPEN ACROSS THE COUNTRY

*1 *2 See back page for Interest Free and Gift Card terms and conditions.

V1 - ADV 1022 (2024)

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Harvey Norman®

Harvey Norman® has always taken pride in being the place where customers can 'Shop with Confidence', and in the current climate, that's more important than ever.

- Harvey Norman® stores are spacious and open during this time. Stores are practicing social distancing and have increased cleaning measures to help keep everyone safe.
- Options are available to allow you to plan your shop from home with contactless delivery and Click & Collect options available.
- Your home essentials are covered - fridges, washing machines, air purifiers, food preparation and cooking appliances, laptops, home office accessories, networking, headphones, mattresses and mattress protectors, pillows, sofa beds and much more.

Let's help each other stay safe!

SHOP SMART



- » Utilise the website
- » Call ahead
- » Click & Collect
- » Delivery options
- » Contactless deliveries
- » Payment options

SHOP SAFE



- » Minimise the number of people shopping
- » Maintain social distancing
- » Practice good hygiene
- » Increased cleaning measures in stores
- » Work together and stay safe

SHOP WITH CONFIDENCE



ONLINE



MOBILE



LOCAL STORE

60 MONTHS INTEREST FREE¹

NO DEPOSIT NO INTEREST
with 60 equal monthly payments until April 2025.
Minimum financed amount \$1000.

Offer ends 28/04/23. Apply in store online. Available for in store and selected online purchases.
Approved applicants only. Fees & charges apply. Interest applies if you do not comply with terms and conditions.

PLUS BONUS GIFT CARD²

up to \$300 on 60 Months Interest Free¹ purchases

- INTEREST FREE OFFER ENDS TUESDAY -

15% OFF³

Microsoft Surface PRO 7, PRO X & LAPTOP 3

Ends 25/04/23. Terms and conditions apply. Excludes Surface Pen, Surface Studio and already advertised items. Discount off normal list price. Not in conjunction with any other offer. Accessories sold separately.



HP 145 Laptop.
AMD A4 processor, 4GB RAM, 128GB SSD, AMD Radeon R3 graphics, 14" HD screen, Windows 10 S.



HP Pavilion 15-C Laptop.
10th Generation Intel Core™ i7 processor, 16GB RAM, 512GB SSD, 4GB NVIDIA graphics, 15.6" Full HD screen, Windows 10.



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\$299

HP OfficeJet Pro Premier Colour Inkjet Multi-Function. 10800



INCLUDES UP TO 4 YEARS OF INK⁴

IDEAL FOR THE HOME OFFICE
\$498

Canon PIXMA ENDURANCE G3600 Colour Ink Tank Multi-Function. 52000



\$18
Logitech M185 Wireless Mouse.⁵



\$29
Jabra BT2045 Bluetooth Headset.⁶



\$69
JBL T110BT Bluetooth Wireless In-Ear Headphones.⁷



\$399
Sony WH-1000XM3 Premium Noise-Cancelling Wireless Headphones.⁸



\$348
Samsung Galaxy Tab-A 10.1" 32GB Wi-Fi - Black.⁹

Harvey Norman

STORES OPEN ACROSS THE COUNTRY

Harvey Norman CLICK & COLLECT

See in-store products from Harvey Norman Online for same day pick-up terms & conditions apply.

Victoria, Colorado, Colorado Springs, Core Inside, Intel Inside Logo, Intel Atom, Intel Atom Inside, Intel Core, Intel Inside, Intel Inside Logo, Intel vPro, iSeries, iSeries Inside, Pentium, Pentium Inside, vPro Inside, Xeon, Xeon Phi, Xeon Phi Inside, and Intel Optane are trademarks of Intel Corporation or its subsidiaries in the U.S. and/or other countries. ¹, ², ³, ⁴, ⁵ See back page for terms and conditions. 433298_F02_SAW

Harvey Norman®

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CALL 1800 303 241

ISSN 1079-4170



60 MONTHS INTEREST FREE¹

NO DEPOSIT **NO INTEREST**

with 60 equal monthly payments until April 2025. Minimum financed amount \$1000.

Offer ends 28/04/20. Apply in store/online. Available for in-store and selected online purchases. Approved applicants only. Fees & charges apply. Interest applies if you do not comply with terms and conditions.

PLUS

BONUS GIFT CARD²

up to \$300 on 60 Months Interest Free¹ purchases

\$50 GIFT CARD
when you spend \$1,000+

\$100 GIFT CARD
when you spend \$2,000+

\$150 GIFT CARD
when you spend \$3,000+

\$200 GIFT CARD
when you spend \$4,000+

\$250 GIFT CARD
when you spend \$5,000+

\$300 GIFT CARD
when you spend \$6,000+

- INTEREST FREE OFFER ENDS TUESDAY -

STORES OPEN ACROSS THE COUNTRY

VISIT HARVEYNORMAN.COM.AU OR CALL **1300 464 278** FOR YOUR LOCAL STORE.

OPEN 7 DAYS • CITY CROSS RUNDLE MALL 8168 8800 (Technology & Small Appliances only) • **GEPPS CROSS** 8342 8868 • **MANILDRA** 8375 7777 • **MUNDOO PARA** 8254 0700
• **NOARLUNGA** 8324 5100 • **MT. BARKER HOMEWARE CENTRE** 8393 0900 • **MT. GAMBIER** 8726 6100 • **PORT LINCOLN** 8483 7700 • **WHYALLA** 8415 6100 • **WOODVILLE** 8466 0700



Buy in-store products from
Harvey Norman Online*
for same day pick up*
*Terms & conditions apply.

Ends 28/04/20. Harvey Norman® stores are operated by independent franchisees. The products in this advertisement may not be on display or available at all Harvey Norman complexes. If you wish to view these products in person, you should ring 1300 464 278 before attending any complex to check to see if a franchisee at that complex has these products in store. Accessories shown are not included. *Available online and in selected stores. †Calls may vary between stores. †1. 60 Months Interest Free - No Deposit. No interest with 60 equal Monthly Payments until April 2025. Approved applicants only. Conditions, fees and charges apply. Minimum amount financed \$1000 on transactions made between 23/04/20 and 28/04/20. Interest applies if you do not comply with terms and conditions. (Excludes mobile phones, gaming consoles, gift cards, digital cameras and lenses, hot water system supply & installation, Octopus music/large services, Microsoft Surface Studio, Apple, Miele and Harvey Norman Customer Direct products. Excludes brands and other products that are offered for sale under agency agreements with Harvey Norman franchisees. Refer to product website for card tiers, fees and charges. Credit is provided by Latitude Finance Australia (AFSL 42 008 583 588, Australian Credit Licence 392 165. †2. Applicable Gift Card value is based on the purchase price of the Eligible Purchase: spend \$1,000 or more and receive a \$50 Gift Card; spend \$2,000 or more and receive a \$100 Gift Card; spend \$3,000 or more and receive a \$150 Gift Card; spend \$4,000 or more and receive a \$200 Gift Card; spend \$5,000 or more and receive a \$250 Gift Card; spend \$6,000 or more and receive a \$300 Gift Card. The Eligible Customer will receive the Gift Card when they take delivery of their purchased products. Gift Cards are issued by Darnley Pty Ltd and expire 36 months from the date of issue. See in store or online for full terms and conditions. †3. Discounts are off the normal (sticker) prices. Terms and conditions apply, see in store for details. †4. Bonus is by redemption from the supplier. Various postage and handling fees may be applicable in order to receive the bonus and are dependent on the supplier's offer. Terms and conditions apply, see in store for full details.

Representative Advertisement 2

60 MONTHS INTEREST FREE**

NO DEPOSIT NO INTEREST
with 60 equal monthly payments until January 2026.
Minimum financed amount \$1000.
Offer ends 31/01/21. Apply in store/online. Available for in-store and selected online purchases. Approved applicants only. Fees & charges apply. Interest applies if you do not comply with terms and conditions.



SHOP with CONFIDENCE
on Quality, Value & Service
Ends 31/01/21. Harvey Norman® stores are operated by independent franchisees.

PLUS BONUS GIFT CARD UP TO \$500
on Interest Free** purchases

*1. 60 Months Interest Free - No Deposit, No Interest with 60 Equal Monthly Payments until January 2026. Approved applicants only. Conditions, fees and charges apply. Minimum amount financed \$1000 on transactions made between 01/01/21 and 31/01/21. Interest applies if you do not comply with terms and conditions. Excludes mobile phones, gaming consoles, gift cards, digital cameras and lenses, hot water system supply & installation, Onscreen installation services, Microsoft Surface Studio, Apple, Miele and Harvey Norman Customer Direct products. Excludes brands and other products that are offered for sale under agency agreements with Harvey Norman franchisees. Refer to product websites for conditions, fees and charges. Credit is provided by Latitude Finance Australia (ABN 42 008 583 988). Australian Credit Licence 392145.
*2. Applicable Gift Card value is based on the purchase price of the Eligible Purchase: spend \$1,000 or more and receive a \$50 Gift Card; spend \$2,000 or more and receive a \$100 Gift Card; spend \$3,000 or more and receive a \$150 Gift Card; spend \$4,000 or more and receive a \$200 Gift Card; spend \$5,000 or more and receive a \$250 Gift Card; spend \$6,000 or more and receive a \$300 Gift Card; spend \$7,000 or more and receive a \$350 Gift Card; spend \$8,000 or more and receive a \$400 Gift Card; spend \$9,000 or more and receive a \$450 Gift Card; spend \$10,000 or more and receive a \$500 Gift Card. The Eligible Customer will receive the Gift Card when they take delivery of their purchased products. Gift Cards are issued by Dermi Pty Ltd and expire 36 months from the date of issue. See in store or online for full terms and conditions.

Representative Advertisement 3



60 MONTHS INTEREST FREE**

NO DEPOSIT NO INTEREST
with 60 equal monthly payments until February 2026. Minimum financed amount \$1000.
Offer ends 28/02/21. Apply in store/online. Available for in-store and selected online purchases. Approved applicants only. Fees & charges apply. Interest applies if you do not comply with terms and conditions.

PLUS BONUS GIFT CARD UP TO \$500
on Interest Free** purchases

\$50 GIFT CARD <small>when you spend \$1,000+</small>	\$150 GIFT CARD <small>when you spend \$3,000+</small>	\$250 GIFT CARD <small>when you spend \$5,000+</small>	\$350 GIFT CARD <small>when you spend \$7,000+</small>	\$450 GIFT CARD <small>when you spend \$9,000+</small>
\$100 GIFT CARD <small>when you spend \$2,000+</small>	\$200 GIFT CARD <small>when you spend \$4,000+</small>	\$300 GIFT CARD <small>when you spend \$6,000+</small>	\$400 GIFT CARD <small>when you spend \$8,000+</small>	\$500 GIFT CARD <small>when you spend \$10,000+</small>



- ELECTRICAL
- COMPUTERS
- FURNITURE
- BEDDING
- FLOORING

 SHOP SMART |
  SHOP SAFE |
  ONLINE |
  MOBILE |
  LOCAL STORE

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SAMSUNG

Galaxy S21+ 5G 128GB.



SAVE \$1549 On this phone when you sign up to an eligible **OPTUS SIM ONLY PLAN**.

<h1>\$0</h1> <p>Upfront When you sign up to a new Optus \$85/mth SIM Only plan for 24 months*</p> <p><small>Min. cost \$2,049 including device and plan. Ends 28th February 2021. N/A with other offers. Offer available in store only. New services only.</small></p>	<h1>\$85</h1> <p>/mth over 24 months</p>	<p>150GB DATA Extra data \$10/1GB</p>
		<p>UNLIMITED STANDARD NATIONAL TALK & TEXT</p>

OR **\$1549^{ea} Outright** Galaxy S21+ 5G⁹⁹ 128GB⁹⁹

Yes OPTUS

*\$6 plan eligibility required. Content available by limit to selected operators. Contact your participating operator for details. ⁹⁹In store only. Plus device must be purchased at the same time. (Limit of 1 per plan, max 5 per person). Not available to Telstra and Optus. Select carriers, incentives and rate plans (if applicable) are excluded. Plan cancellation fees apply. Status Fee (if applicable) applies. Full T&Cs available at www.harveynorman.com.au. ©2021. All rights reserved. Optus is a registered trademark of Optus Networks Limited.

VISIT HARVEYNORMAN.COM.AU OR CALL 1300 464 278 FOR YOUR LOCAL STORE.

- BROADMEADOWS (261 2010) • CHADSTONE (567 5666) • CHURCHSIDE PARK (722 4403) • DANDENONG (871 3223) • FRANKSTON (876 6400)
- FOUNTAIN GATE (876 6777) • HOPPERS CROSSING (874 0010) • MARIYATHONG (924 7020) • HARVEY NORMAN @ DONMAYNE BY MELBOURNE (866 4303)
- MOORABBIN (929 3400) • MORNINGTON (392 2518) • NUNAWADING (933 1203) • PRESTON (929 3303) • RICHMOND (841 4100) • SPRINGVALE HOME MAKER CENTRE (958 8000)
- SUNSHINE (9234 6000) • TAYLORS LAKE (Opposite Watergardens Town Centre 9489 6300) • THOMASTOWN (9463 4777)

*Carroll/Excell only.



Ends 28/02/21. Harvey Norman stores are operated by independent franchisees. The goods described in this advertisement may not be on display or available at each Harvey Norman Centre, store or Department, 'available in store only'. Please call 1300 464 278 before attending a Harvey Norman Centre pick up to confirm whether a franchisee at that centre has the goods on display/available. *Available online and in selected stores. **Colours may vary between stores. †. \$6 Monthly Interest Fee - No Deposit. No interest with 0 Equal Monthly Payments until February 2016. Approved application only. Conditions, fees and charges apply. Minimum amount financed \$1,000 on transactions made between 01/02/21 and 28/02/21. Interest applies if you do not complete with terms and conditions. Excludes mobile phones, gaming consoles, gift cards, digital content and leases, hot water systems supply & installation, Optus installation services, Microsoft Surface Studio, Apple, Microsoft and Harvey Norman Customer Direct products. Excludes brands and other products that are offered for sale under ongoing agreements with Harvey Norman franchisees. Refers to products with no conditions, fees or charges. Credit is provided by Latitude Finance Australia (BNB 420031 563 2930) Australian Credit License 509145. ††. Applicable Gift Card value is based on the purchase price of the eligible purchase: spend \$1,000 or more and receive a \$100 Gift Card; spend \$2,000 or more and receive a \$200 Gift Card; spend \$3,000 or more and receive a \$300 Gift Card; spend \$4,000 or more and receive a \$400 Gift Card; spend \$5,000 or more and receive a \$500 Gift Card; spend \$6,000 or more and receive a \$600 Gift Card; spend \$7,000 or more and receive a \$700 Gift Card; spend \$8,000 or more and receive a \$800 Gift Card; spend \$9,000 or more and receive a \$900 Gift Card; spend \$10,000 or more and receive a \$1,000 Gift Card. The Eligible Customer will receive the Gift Card when they take delivery of their purchased products. Gift Cards are issued by Gem Pty Ltd and expire 18 months from the date of issue. See in-store or online for full terms and conditions.

Representative Advertisement 4

60 MONTHS INTEREST FREE*

NO DEPOSIT

NO INTEREST

with 60 equal monthly payments until March 2026.
Minimum financed amount \$1000.

Offer ends 31/03/21. Apply in store online. Available for in-store and selected online purchases. Approved applicants only. Fees & charges apply. Interest applies if you do not comply with terms and conditions.

SAVE \$200

\$1795

LG 75" 4K UHD⁺ LED LCD Smart Television. 75NKP0T1

LG UHD TV AI ThinQ[™]

75"



\$1295

Samsung 65" 8 Series 4K UHD⁺ LED LCD Smart Television. UA65TU8000W

SAMSUNG

SAVE \$200

\$1295

Hisense 65" Q7 4K UHD⁺ ULED Smart Television. 65Q7

Hisense

\$1395

Sonos Arc Soundbar. ACCURATE

SONOS

\$995

JBL 5.1-Channel Soundbar with Wireless Subwoofer. JBLBAR1000S

JBL

Harvey Norman[®]

Harvey Norman

CLICK & COLLECT

Buy in stock products from Harvey Norman Online* for same day pick up*. *Terms & conditions apply.

Ends 31/03/21. Harvey Norman stores are operated by independent franchisees. The products in this advertisement may not be on display or available at all Harvey Norman complexes. If you wish to view these products in person, you should ring 1300 GO HARVEY (1300 464 276) before spending any money to check to see if a franchisee in that region has these products in store. Accessories shown are not included. *\$1000 High Definition not broadcast on free-to-air TV in Australia. **Colour may vary between stores. *1. 60 Month Interest Free - No Deposit, No Interest with 60 Equal Monthly Payments until March 2026. Approved applicants only. Conditions, fees and charges apply. Minimum amount financed \$1000 on transactions made between 16/03/21 and 31/03/21. Interest applies if you do not comply with terms and conditions. If there is an outstanding balance after the interest free period ends in March 2026, interest will be charged at 25.90%. Excludes mobile phones, gaming consoles, gift cards, digital cameras and lenses, hot water system supply & installation, Octopus installation services, Microsoft Surface Studio, Apple, Mac and

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

115

PLUS BONUS GIFT CARD UP TO \$500 on Interest Free* purchases

\$50 GIFT CARD when you spend \$1,000+	\$100 GIFT CARD when you spend \$2,000+	\$150 GIFT CARD when you spend \$3,000+	\$200 GIFT CARD when you spend \$4,000+	\$250 GIFT CARD when you spend \$5,000+	\$300 GIFT CARD when you spend \$6,000+	\$350 GIFT CARD when you spend \$7,000+	\$400 GIFT CARD when you spend \$8,000+	\$450 GIFT CARD when you spend \$9,000+	\$500 GIFT CARD when you spend \$10,000+
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\$895 Hisense 55" S8 4K UHD* LED LCD Smart Television. 55S8

Hisense



SAVE \$110
\$985 LG 55" 4K UHD* LED LCD Smart Television. 55UR73091C LG UHD TV™



\$695 Hisense 50" S8 4K UHD* LED LCD Smart Television. 50S8

Hisense



SAVE \$80
\$715 LG 43" 4K UHD* LED LCD Smart Television. 43UR73091C LG UHD TV™



\$795 Samsung 32" The Frame 4K UHD* QLED Smart Television. QM32T5700WFX

SAMSUNG



\$395 TCL 32" S615 HD LED LCD Smart Television. 32S615

TCL



\$595 Sonos Beam.* BEAM101/BLK SONOS



\$275 JBL 2.0-Channel All-in-One Soundbar. JBLBAR2.1K/JBLK

JBL

- VISIT HARVEYNORMAN.COM.AU OR CALL **1300 464 278** FOR YOUR LOCAL STORE. Harvey Norman® stores are operated by independent franchisees.
- | | | | |
|---|--|---|---|
| <p>METROPOLITAN</p> <ul style="list-style-type: none"> • BRIDGEMeadOWS • CHADSTONE* • CHURCHSIDE PARK • DANDENONG • FRANKSTON • FOUNTAIN GATE • HOPPERS CROSSING • HURVEYBOWNG | <ul style="list-style-type: none"> • HARVEY NORMAN @ DOMAYNE QV MELBOURNE* • MOORABBIN • MORNINGTON* • NUMAWADING • PRESTON • RICHMOND* • SPRINGVALE HOMEMAKER CENTRE • SUNSHINE • TAYLORS LAKES • THOMASTOWN | <p>REGIONAL</p> <ul style="list-style-type: none"> • ARARAT • BAINSDALE* • BALLARAT • BENDIGO • ECHUCA • GEELONG (CITY) • HAMILTON* • HORSHAM • MILDURA • MDC* • MORWELL • SALE • SHEPPARTON | <ul style="list-style-type: none"> • SWAN HILL • TRARALGON • WANGARATTA* • WARRAGUL* • WARRNAMBOOL • WAURN PONDS • WONTHAGGI* <p>*Compare Electrical only.</p> |
|---|--|---|---|

Harvey Norman Customer Direct products. Excludes brands and other products that are offered for sale under agency agreements with Harvey Norman franchisees. Visit harveynorman.com.au or see in store for details. Credit is provided by Latitude Finance Australia (AFN 42 038 583 588). Australian Credit License 292740. *2. Applicable Gift Card value is based on the purchase price of the Eligible Purchase. Spend \$1,000 or more and receive a \$50 Gift Card, spend \$2,000 or more and receive a \$100 Gift Card, spend \$3,000 or more and receive a \$150 Gift Card, spend \$4,000 or more and receive a \$200 Gift Card, spend \$5,000 or more and receive a \$250 Gift Card, spend \$6,000 or more and receive a \$300 Gift Card, spend \$7,000 or more and receive a \$350 Gift Card, spend \$8,000 or more and receive a \$400 Gift Card, spend \$9,000 or more and receive a \$450 Gift Card, spend \$10,000 or more and receive a \$500 Gift Card. The Eligible Customer will receive the Gift Card when they take delivery of their purchased products. Gift Cards are issued by Diners Pty Ltd and expire 36 months from the date of issue. See in store or online for full terms and conditions.

Representative Advertisement 5

Harvey Norman®

60 MONTHS INTEREST FREE*

NO DEPOSIT NO INTEREST
with 60 equal monthly payments until March 2026. Minimum financed amount \$1000.

PLUS **BONUS GIFT CARD UP TO \$500** on Interest Free** purchases

A solution for everyone



SAVE \$200**
\$899

HP 155 Laptop,**
10th Generation Intel® Core™ i5 processor, 8GB RAM, 512GB SSD, Intel® UHD Graphics, 15.4" Full HD screen, spinnable



GREAT DEAL
\$636

ASUS Vivobook TP401 2-in-1 Laptop,**
Intel® Pentium® processor, 4GB RAM, 128GB eMMC storage, Intel® UHD Graphics, 14" Full HD touchscreen, silver



SAVE \$220**
\$777

Lenovo IdeaPad Slim 3 QV Laptop,**
10th Generation Intel® Core™ i3 processor, 8GB RAM, 256GB SSD, Intel® UHD Graphics, 14" Full HD screen, platinum



SAVE \$110**
\$888

Lenovo Flex 5 2-in-1 Laptop,**
10th Generation Intel® Core™ i3 processor, 8GB RAM, 256GB SSD, Intel® UHD Graphics, 14" Full HD touchscreen, charcoal



SAVE \$300**
\$1298

Acer Swift 3 Laptop,**
11th Generation Intel® Core™ i7 processor, 8GB RAM, 512GB SSD, Intel® Iris™ Xe Graphics, 14" Full HD screen, midnight blue

SHOP SMART | **SHOP SAFE** | **ONLINE** | **MOBILE** | **LOCAL STORE**

harveynorman.com.au or call **1300 464 278** for your local store.

click & collect
Click & collect available at participating Harvey Norman stores. See store locator for details.