

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Firstmac Limited

[2024] FCA 737

File number(s): QUD 467 of 2022

Judgment of: **DOWNES J**

Date of judgment: 10 July 2024

Catchwords: **CORPORATIONS** – alleged contraventions of s994E(3) of the *Corporations Act 2001* (Cth) concerning design and distribution obligations relating to financial products for retail clients – meaning of “reasonable steps” – meaning of “would have resulted in, or would have been reasonably likely to have resulted in...” – whether reasonable steps must be antecedent to retail product distribution conduct – whether distributor of financial product failed to take reasonable steps within meaning of ss994E(3) and 994E(5) of the *Corporations Act 2001* (Cth)

Words & phrases: “*reasonably likely*”

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) s 33  
*Corporations Act 2001* (Cth) ss 761A, 761G, 912C, 961L, 963F, 994A, 994B, 994E  
*Evidence Act 1995* (Cth) s 140(2)  
*Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth) Sch 1  
*Corporations Regulations 2001* (Cth) reg 7.1.19(2)

Cases cited: *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297; [2011] FCAFC 151  
*Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317; [2003] FCA 1525  
*Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 290  
*Australian Securities and Investments Commission v Diversa Trustees Limited* [2023] FCA 1267  
*Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291; [2011] FCA 717

*Australian Securities and Investments Commission v R M Capital Pty Ltd* [2024] FCA 151  
*Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 2)* (2021) 156 ACSR 371; [2021] FCA 877  
*Briginshaw v Briginshaw* (1938) 60 CLR 336  
*Construction, Forestry, Maritime, Mining and Energy Union v Mechanical Maintenance Solutions Pty Ltd* (2022) 289 FCR 508; [2022] FCAFC 15  
*Department of Agriculture & Rural Affairs v Binnie* [1989] VR 836  
*Re Fenwick* (2009) 76 NSWLR 22; [2009] NSWSC 530  
*Re The Will of Bridget* [2018] NSWSC 1509  
*Seven Network Ltd v News Ltd* (2009) 182 FCR 160; [2009] FCAFC 166  
*Sheen v Fields Pty Ltd* (1984) 58 ALJR 93  
*Sportsbet Pty Ltd v State of New South Wales (No 9)* [2010] FCA 31  
*Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367

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Solicitor for the Defendant: King & Wood Mallesons

## ORDERS

QUD 467 of 2022

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

**AND:**                         **FIRSTMAC LIMITED (ACN 094 145 963)**  
Defendant

**ORDER MADE BY: DOWNES J**

**DATE OF ORDER: 10 JULY 2024**

### **THE COURT ORDERS THAT:**

1. The parties are to confer and prepare short minutes of order which reflect these reasons and which contain directions as to the further conduct of this proceeding, and provide these to the associate to Downes J by 4.00 pm on Wednesday, 17 July 2024.
2. If the parties are unable to agree on a form of order as referred to in Order 1, each party prepare their own version of a draft order and provide this to the associate to Downes J by 4.00 pm on Wednesday, 17 July 2024.
3. The proceeding be listed for a case management hearing at 9.30 am on Friday, 19 July 2024.

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

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## DOWNES J:

### 1. SYNOPSIS

- 1 The Australian Securities and Investments Commission (**ASIC**) alleges that, during the period 5 October 2021 to on or about 9 September 2022 (the **relevant period**), the defendant (**Firstmac**) contravened s 994E(3) of the *Corporations Act 2001* (Cth) concerning design and distribution requirements relating to financial products for retail clients (**DDO**).
- 2 Under the DDO, the issuer of a financial product must make a ‘target market determination’ or **TMD** prior to the financial product being offered to consumers. A TMD must describe the class of retail clients that comprises the target market. The TMD must be such that it would be reasonable to conclude that, if the product was to be issued or sold in a regulated sale to a retail client in the target market, it would likely be consistent with the likely objectives, financial situation and needs of the retail client. There is then a separate obligation on distributors of the financial product to take reasonable steps that would, or would be reasonably likely to, result in their ‘retail product distribution conduct’ being consistent with the TMD. ‘Retail product distribution conduct’ includes, relevantly, giving a product disclosure statement or **PDS** to a retail client.

3 Firstmac is a non-bank lender, primarily offering finance loans including car loans and home  
loans, and it seeks to differentiate itself from other larger lenders in the market by its relatively  
smaller scale. This is demonstrated by the fact that Firstmac does not maintain a branch  
network typified by others lenders in the market.

4 During the relevant period, Firstmac distributed two term deposit products: the Business Term  
Deposit and the Stow It Term Deposit (together described in these reasons as the **Firstmac  
Term Deposit**). While both are retail financial products, only a sole proprietor, partnership,  
company or trust was eligible for a Business Term Deposit, whereas individuals were eligible  
for the Stow It Term Deposit. These term deposits were issued by BNK Banking Corporation  
Limited trading as Goldfields Money.

5 TMDs were prepared by BNK Banking Corporation Limited (as issuer of the product) for the  
Firstmac Term Deposit products (together described as the **TD TMD**), which defined the target  
market for these products as retail customers who need an account with a number of key  
attributes, namely:

- (1) the ability to deposit and invest funds for a fixed term;
- (2) the ability to earn interest on deposited funds;
- (3) the ability to earn a fixed interest rate for a fixed term;
- (4) no access to money during the fixed term subject to a seven day cooling off period from  
the account opening date;
- (5) the requirement to deposit a minimum of \$5,000;
- (6) the ability to roll their funds into a new term deposit for an agreed fixed term post the  
maturity date.

6 Firstmac was also the distributor, manager and promoter of the retail product known as **High  
Livez** during the relevant period. The product is a unit trust (managed investment scheme)  
which is issued by Perpetual Trust Services Limited (**Perpetual**) as the responsible entity of  
the trust.

7 Perpetual prepared the TMD for High Livez (**High Livez TMD**). The High Livez TMD  
described the target market by means of including and excluding retail clients with particular  
“Consumer Attributes” based on their objectives, intentions, financial situation and needs. In  
relation to objectives, it excluded consumers who held a “Capital Guaranteed” investment

objective (**capital guaranteed objective**) and consumers whose “Investment timeframe” was “Short ( $\leq 2$  years)” (**short investment timeframe objective**).

8 In particular:

- (1) the consumer attribute of “capital guaranteed” under the heading “Consumer’s investment objective” is shaded red. “Capital guaranteed” is defined in the High Livez TMD as “The consumer seeks a guarantee or protection against capital loss whilst still seeking the potential for capital growth (typically gained through a derivative arrangement). The consumer would likely understand the complexities, conditions and risks that are associated with such products”; and
- (2) the consumer attribute of “Short ( $\leq 2$  years)” under the heading “Investment timeframe” is shaded red. “Short ( $\leq 2$  years)” is defined in the High Livez TMD as “The consumer has a short investment timeframe and may wish to redeem within two years”.

9 Under the heading “Investment products and diversification” in the “Description of target market” section, the High Livez TMD provides:

A consumer (or class of consumer) may intend to hold a product as part of a diversified portfolio (typically with an intended product use of satellite/small allocation or core component). In such circumstances, the product should be assessed against the consumer's attributes for the relevant portion of the portfolio, rather than the consumer's portfolio as a whole. For example, a consumer may seek to construct a conservative portfolio with a satellite/small allocation to growth assets. In this case, it may be likely that a product with a High or Very High risk/return profile is consistent with the consumer’s objectives for that allocation notwithstanding that the risk/return profile of the consumer as a whole is Low or Medium. In making this assessment, distributors should consider all features of a product (including its key attributes).

10 High Livez was and remains a relatively small part of Firstmac’s business. As at 9 September 2022, there were 436 investors in High Livez and approximately \$66 million in funds under management. Further, only a small number of staff worked in connection with the fund, being Mr David Gratton (General Manager of Sales and Operations during the relevant period, now director of Firstmac), Mr James Austin (Chief Financial Officer), Ms Celia Powell (Senior Legal Counsel), Ms Adria Cunningham (Audit and Compliance Manager), Mr Elvin Singh (Acquisition Manager), Ms Kerry Dean (also known as Ms Scutt) (Customer Relations Manager) and Ms Aimee Gorman (Lending Manager).

11 There were two PDSs in force for High Livez during the relevant period – the 9 April 2019 PDS (**2019 PDS**) and the 29 November 2021 PDS (**2021 PDS**).

12 In this proceeding, the premise of ASIC’s case is that Firstmac engaged in retail product distribution conduct by giving certain documents relating to High Livez (including its PDS) to retail clients who held (or had held) Firstmac Term Deposits (**TD Holders**) on 870 occasions (**Distribution Conduct**) and failed to take reasonable steps that would have resulted in, or would have been likely to have resulted in, the Distribution Conduct being consistent with the High Livez TMD.

13 The Distribution Conduct occurred in the context of Firstmac engaging in an admitted cross-selling strategy of marketing High Livez to TD Holders.

14 The facts underlying the Distribution Conduct are not in dispute. It was comprised of Firstmac sending:

- (1) an email in substantially the same form which attached the Firstmac Term Deposit PDS; a High Livez application form; the 2019 or 2021 PDS; an information sheet which explained the performance of the High Livez fund in the relevant month, or the month before, the email was sent; and a **TD Maturity Instructions Form** to TD Holders whose term deposits were nearing maturity (described as the **High Livez Documents**); and
- (2) a hard copy letter enclosing a copy of the 2021 PDS and a High Livez information sheet by post to Australian resident TD Holders, regardless of the maturity date of their term deposits, on or around 29 August 2022 (described as the **High Livez Information**); (together, the **High Livez Material**).

15 The TD Maturity Instructions Form provided options for TD Holders to either invest in a new Firstmac Term Deposit, close their existing Term Deposit and transfer the funds to a different bank account, or “[i]nvest in High Livez”.

16 ASIC alleges that there were 817 TD Holders who were recipients of the Distribution Conduct. However, as Firstmac submits, 37 of those TD Holders were not retail clients within the meaning of s 761A of the *Corporations Act* because the evidence established that their investment amount was equal to or exceeded \$500,000: see s 761G(7)(a) of the *Corporations Act* and reg 7.1.19(2) of the *Corporations Regulations 2001* (Cth). Accordingly, to the extent that the High Livez Material was sent to those 37 clients, that did not constitute retail product distribution conduct within the meaning of s 994A(1) of the *Corporations Act*.



17 In support of its case, ASIC relies on the following differences between the Firstmac Term Deposits and High Livez:

- (1) Firstmac Term Deposits were ‘capital guaranteed’ by the Commonwealth government up to \$250,000. By contrast, any capital invested in High Livez was not guaranteed (by the Commonwealth or by anyone else) and the unit price was subject to volatility;
- (2) Firstmac only offered term deposits with periods of two years or less. By contrast, the recommended minimum investment timeframe for High Livez was three to five years.

18 ASIC’s case is that there was a likelihood (that is, a real and not remote chance) that some of the TD Holders may have held either or both a capital guaranteed objective and a short investment timeframe objective because they held a product (being the Firstmac Term Deposit) which had the features referred to above, with the consequence that they were outside the target market for High Livez as described in the High Livez TMD.

19 Pursuant to an Order dated 14 February 2023, I ordered by consent that the question of liability be heard and determined separately and in advance of any other question. The only issue which therefore arises for determination at this stage is whether Firstmac contravened s 994E(3).

20 As s 994E(3) is a civil penalty provision, I am required to reach a “state of satisfaction or actual persuasion, on the balance of probabilities, while taking into account the seriousness of the allegations and the consequences which will follow if the contraventions are established”, being a standard which is set out in s 140(2) of the *Evidence Act 1995* (Cth) and which is the statutory expression of the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336: see *Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 290 at [37] (Cheeseman J).

21 For the following reasons, I am satisfied to the required standard that Firstmac contravened s 994E(3) of the *Corporations Act*.

22 On that basis, I will direct the parties to confer and prepare short minutes of order which reflect these reasons, and which contain directions as to the further conduct of this proceeding. Each party should have leave to appeal and, to the extent necessary, leave to cross-appeal.

## 2. CONSTRUCTION OF SECTION 994E

23 On 5 April 2019, Part 7.8A of the *Corporations Act* was inserted into the *Corporations Act* by Sch 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product*

*Intervention Powers*) Act 2019 (Cth), and commenced on 5 October 2021. Another amendment which was made by Sch 1 was the addition of s 760A(aa), being an additional “main object” of Chapter 7, namely: “the provision of suitable financial products to consumers of financial products”.

## 2.1 Statutory text

24 Part 7.8A of the *Corporations Act* is entitled “Design and distribution requirements relating to financial products for retail clients”.

25 Pursuant to s 994B(1)(b), a person must make a TMD for a financial product if under Pt 7.9, the person is required to prepare a PDS for the product. The TMD must be prepared before any person engages in retail product distribution conduct in relation to the product: s 994B(2)(a). Section 994B(5)(b) requires the TMD to “describe the class of retail clients that comprises the target market (within the ordinary meaning of the term) for the product”.

26 During the relevant period, s 994E(3) of the *Corporations Act* provided as follows:

If:

- (a) a target market determination for a financial product has been made; and
- (b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients; and
- (c) a regulated person engages in retail product distribution conduct in relation to the product; and
- (d) the regulated person failed to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the retail product distribution conduct being consistent with the determination;

the regulated person contravenes this subsection unless the retail product distribution conduct is excluded conduct.

27 In the present case, it is common ground that:

- (1) a TMD for High Livez (a financial product) was made;
- (2) High Livez was offered for acquisition by issue to 780 retail clients (being the 817 clients as alleged by ASIC minus 37 who I have found were not retail clients);
- (3) Firstmac was a regulated person during the relevant period;
- (4) by engaging in the Distribution Conduct, Firstmac engaged in retail product distribution conduct in relation to the product (as defined in s 994A(1));
- (5) the Distribution Conduct is not “excluded conduct” (as defined in s 994A(1)).

28 The battleground in this case concerned whether Firstmac failed to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the Distribution Conduct being consistent with the High Livez TMD within the meaning of s 994E(3)(d). As to this, the parties were at odds as to the proper construction of that provision.

29 The statute itself provides some indicators as to the manner in which s 994E(3)(d) should be construed.

30 Section 994E(4) provided:

A regulated person is not taken to have failed to take reasonable steps for the purpose of paragraph (3)(d) merely because a retail client who is not in the target market for the product acquires the product.

31 Section 994E(5) provided:

Without limiting subsections (1) and (3), reasonable steps in relation to a person are steps that, in the circumstances, the person is reasonably able to take that will, or are reasonably likely to, result in retail product distribution conduct in relation to the financial product being consistent with the target market determination for the product, taking into account all relevant matters, including:

- (a) the likelihood of any such conduct being inconsistent with the determination; and
- (b) the nature and degree of harm that might result from an issue or regulated sale of the financial product:
  - (i) to retail clients who are not in the target market; or
  - (ii) that is inconsistent with the determination; and
- (c) what the person knows, or ought reasonably to know, about:
  - (i) the matters referred to in paragraphs (a) and (b); and
  - (ii) ways of eliminating or minimising the likelihood and the harm; and
- (d) the availability and suitability of ways to eliminate or minimise the likelihood and the harm.

(Emphasis omitted.)

32 Finally, s 994E(6) relevantly provided that:

A regulated person is not taken to have failed to take reasonable steps for the purpose of paragraph (3)(d) if the person engages in retail product distribution conduct that:

- (a) relates to a particular retail client; and
- (b) relates to a particular financial product; and
- (c) is necessary to implement personal advice given to the client in relation to the product.

## 2.2 Meaning of “would have resulted in, or would have been reasonably likely to have resulted in...”

33 Section 994E(3)(d) requires the regulated person to take reasonable steps “that would have resulted in, or would have been reasonably likely to have resulted in,” the retail product distribution conduct being consistent with the TMD. There are therefore two components to this expression which are separated by the word “or”.

34 Firstmac submits that the provision postulates two alternatives and that the concept of “reasonably likely to have resulted in” imports a probabilistic assessment such that there was a “real and not remote chance” that the Distribution Conduct was consistent with the High Livez TMD.

35 ASIC submits that Firstmac’s construction ignores and does not give meaning and effect to the words “would have resulted in”. However, if ASIC’s construction is adopted, the addition of the words “or would have been reasonably likely to have resulted in” add little to the practical scope of the section, and for that reason, this submission does not provide a proper basis to reject Firstmac’s construction.

36 ASIC next submits that the first component of this expression (“would have resulted in”) refers to reasonable steps that, if taken, would inevitably result in consistency with the TMD and that the second component refers to reasonable steps that would be “reasonably likely” to have that effect, being something less than an inevitability. It submits that the words “reasonably likely” recognise and accommodate that the task of assessing the effect that reasonable steps would have had, if they had been taken, is an imprecise exercise, and it will not always be possible to demonstrate that particular steps, had they been taken, would definitely have had the effect of achieving consistency with the TMD.

37 ASIC summarises its position as follows:

In this way, ASIC submits that the two components should be read together and regarded as constituent elements of a compound conception. They are not two alternative standards which a distributor can satisfy by meeting the lesser of the two. Taken together, the words refer to steps that, if taken, would either definitely achieve consistency with the TMD or be reasonably likely to have that effect.

(Footnote omitted.)

38 The reference to “compound conception” by ASIC is derived from the use of that phrase by Buchanan J in *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297; [2011] FCAFC 151, which is relied upon by ASIC.

39 In *Metcash*, the Court was considering the proper construction of s 50 of the *Competition and Consumer Act 2010* (Cth) which relevantly provided:

- (1) A corporation must not directly or indirectly:
  - (a) acquire shares in the capital of a body corporate; or
  - (b) acquire any assets of a person;if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

40 At [40] of *Metcash*, Buchanan J stated:

In some (but not all) of the cases to which I shall turn shortly the perceived (but in my view non-existent) tension between the two ways of expressing the test has led to the conclusion that the first must be established on the balance of probabilities and (as a result) the second by reference to some lesser standard, often referred to as the “real chance” test. In my respectful view, that is an error of analysis and an incorrect approach to the issue of construction. The first limb of the test allows a prediction of probable (therefore likely) consequence, without account being taken of, or allowance needed for, other contingencies. The second limb concentrates on the quality of the circumstances, and the *probable* consequence, without permitting falsification of that probability by proof of the actual occurrence of some inherently less probable result. In other words, establishing a *probable* consequence will suffice, even if in fact it did not occur. In the leading case on the issue, that is what happened. Both limbs of the test, as found for example in s 50, in my view require the same standard of proof (balance of probabilities) and they should probably be regarded as constituent elements of a compound conception. As a matter of ordinary language I see no tension or inconsistency between them. As a matter of ordinary language I see no adequate foundation for concluding that the second limb of such a test imports and applies, at any stage of the process, a departure from the ordinary civil standard of proof on the balance of probabilities.

(Emphasis original.)

41 However, as Buchanan J recognised at [41], the “authorities against [his view] are the more influential”. Those authorities support the adoption of a construction of the second component of the relevant expression in s 994E(3)(d) in terms of a “real or not remote chance or possibility”, being the construction advanced by Firstmac: see, e.g.; *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 27 ALR 367 at 380–382 (Deane J) which was cited with approval in *Sheen v Fields Pty Ltd* (1984) 58 ALJR 93 at 95 (Gibbs CJ, with whom Mason, Wilson and Dawson JJ agreed); *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317; [2003] FCA 1525 at [347]–[348] (French J); see also *Seven Network Ltd v News Ltd* (2009) 182 FCR 160; [2009] FCAFC 166 at [746]–[751] (Dowsett and Lander JJ).

42 Further, the decision of *Metcash* is of limited assistance and can be distinguished because the provision in that case did not include the word “reasonably” before the word “likely”. This is an important distinction which has been recognised by other courts, none of which have treated expressions of this kind as being a compound conception, rather than two alternatives.

43 In *Department of Agriculture & Rural Affairs v Binnie* [1989] VR 836, the Victorian Court of Appeal considered the meaning of the phrase “would, or would be reasonably likely to”, as used in s 31(1)(e) of the *Freedom of Information Act 1982* (Vic). In that case, Young CJ (agreeing with Marks J) observed at page 837 that the qualifying adverb “reasonably” in the expression “reasonably likely” required “likely” to be given “a meaning less definite than probable”. At page 842 of that decision, Marks J, with whom Young CJ and Teague J agreed, stated that:

The relevant expression here is “reasonably likely” which has some analogy to “fair probability”. It suggests the mathematical approach; the word “reasonably” being a qualification of “likely”, alternatively, a measure in colloquial language of the “likelihood”.

The expression “reasonably likely” is substantially idiomatic, its meaning not necessarily unlocked by close dissection. In its ordinary use, it speaks of a chance of an event occurring or not occurring which is real – not fanciful or remote. It does not refer to a chance which is more likely than not to occur, that is, one which is “odds on”, or where between nil and certainty it should be placed. A chance which in common parlance is described as “reasonable” is one that is “fair”, “sufficient” or “worth noting”.

44 In *Re Fenwick* (2009) 76 NSWLR 22; [2009] NSWSC 530, Palmer J considered the meaning of “reasonably likely” in s 22 of the *Succession Act 2006* (NSW). At [151]–[152], Palmer J discussed the meaning of “reasonably likely”:

“Reasonably” can, of course, mean “in accordance with reason”, as in the phrase “acting reasonably in all the circumstances”. It can also be used to lessen the intensity of an adjective. For example, if I were asked: “Is this action necessary”, the answer “it is necessary” would be stronger than “it is reasonably necessary”. The second answer conveys that there is some latitude, or margin of judgment, available whereas the first answer does not.

In the same way, if the Court were required to find whether a certain result is “likely” for the purposes of s 22(b), it would have to make its judgment in a “yes or no” or “black or white” fashion. However, if the Court were asked whether the result is “reasonably likely”, it does not have to be persuaded of likelihood to the same degree. It may answer “yes” if it considers that there is a fairly good chance that the result is likely. Alternatively, it may answer “yes” if it recognises that other reasonable people could regard the result as likely, even if the Court itself would differ. Thus “reasonably likely” can mean “a fairly good chance that it is likely” or “some reasonable people could think that it is likely” or “some reasonable people could think that there is a fairly good chance that it is likely”. Such are the nuances of the English language.

45 In the context of that legislation, Palmer J decided that “reasonably likely” meant “a fairly good chance”: see, for example, [166].

46 In *Re The Will of Bridget* [2018] NSWSC 1509, Hallen J also considered the proper construction of the *Succession Act 2006* (NSW), and stated at [103]:

...The degree of satisfaction that the phrase “reasonably likely” contemplates is difficult to discern. The phrase has a different connotation from the single word “likely”. The qualifying adverb “reasonably” requires that the word “likely” be given a meaning less definite than “probable”. It is that word (“reasonably”) which governs the standard of likelihood. It lessens the intensity of the word “likely”. In other words, quantitative guidance is suggested by the word “reasonably” whilst the word “likely” requires a qualitative judgment.

47 At [108], Hallen J concluded that:

...Thus, it seems, what is required is to establish the chance of an event occurring (the proposed Will is one that is, or would have been reasonably likely to have been made, by the incapable person, if he, or she, had testamentary capacity) that is above mere possibility, but not so high as to be more likely than not. In other words, more is required than mere assertion, suspicion, or conjecture. A mere possible, or potential, reflection of the incapacitated person’s intentions is not enough.

48 The construction posited by Firstmac is aligned with these authorities, and ASIC did not explain why the reasoning in these authorities ought not be applied to the provision in this case. It follows that, applying the approach taken in these authorities, which (with respect) I accept to be correct, I consider that, to find a contravention by Firstmac of s 994E(3) of the *Corporations Act*, I must be satisfied to the *Briginshaw* standard that Firstmac failed to take reasonable steps that either would have resulted in, *or* would have been reasonably likely to have resulted in (i.e. there was a real and not remote chance), the Distribution Conduct being consistent with the High Livez TMD.

### 2.3 Meaning of “reasonable steps”

49 Section 994E(5) identifies that what constitutes “reasonable steps” for the purposes of s 994E(3)(d) requires a consideration of “all relevant matters” *including* those identified in s 994E(5)(a)–(d).

50 While there are no authorities considering s 994E(3), there are several other provisions in the *Corporations Act* which contain a “reasonable steps” obligation, some of which have been the subject of judicial consideration, such as ss 961L and 963F. Consistently with the statutory requirement to consider all relevant matters, these authorities indicate that the inquiry is not a

narrow one. Some guidance is therefore provided by statements made in these authorities, which I accept would also apply to the obligation in s 994E(5). These are as follows:

- (1) what is encompassed by taking all “reasonable steps” will differ depending on the entity, the complexity of the entity’s business and the procedures within the entity: see *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291; [2011] FCA 717 at [162] (Middleton J);
- (2) it is necessary to undertake a holistic analysis, considering the full framework of the entity’s contracts, policies and procedures: see *Australian Securities and Investments Commission v Diversa Trustees Limited* [2023] FCA 1267 at [375] (Button J);
- (3) the reasonable steps obligation does not require a person to “find and to take the optimal steps”: see *Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 2)* (2021) 156 ACSR 371; [2021] FCA 877 at [392] (Moshinsky J);
- (4) the provision is not expressed as an obligation to take *all* reasonable steps, and nor does it require identification and performance of either the universe of possible reasonable steps, or the ‘one true path’ that must be followed: see *Australian Securities and Investments Commission v R M Capital Pty Ltd* [2024] FCA 151 at [73] (Jackson J);
- (5) positing steps that could have been taken, but were not taken, can be helpful. It is an obvious way of testing the reasonableness of what was (and was not) done. But the focus of the inquiry must always be on whether the steps that were taken in their totality were reasonable: see *R M Capital* at [80].

51 Whether the requirement to take ‘reasonable steps’ has been met is to be determined objectively by reference to the standard of behaviour expected of a reasonable person in the regulated person’s position that is (or was) proposing to engage in the relevant retail product distribution conduct regarding the same product, and is (or was) subject to the same legal obligations.

52 In making its determination regarding ‘reasonable steps’, the Court is to take into account all relevant matters, including those prescribed by s 994E(5). By reference to that section, “reasonable steps” are steps that the relevant person “is reasonably able to take” and that are directed at a particular result – namely they “*will, or are reasonably likely to, result in retail product distribution conduct in relation to the financial product being consistent with the target market determination for the product*” (emphasis added).



53 To the extent that the reasonable steps must be “reasonably likely to result in retail product distribution conduct in relation to the financial product being consistent with the target market determination for the product”, the reasonable steps must result in a real, not fanciful or remote, chance that the distribution conduct will be consistent with the target market determination.

54 Section 994E does not impose any express temporal limitations on matters which might be regarded as relevant for the purposes of deciding whether the “reasonable steps” obligation in s 994E(3)(d) has been met. However, the selection by Parliament of the words “*would have resulted in*” and “*would have been reasonably likely to have resulted in*” in s 994E(3)(d) are forward-looking. Similarly, the words used in s 994E(5), which refers to steps that the person “is reasonably able to take that *will*, or are *reasonably likely to*”, are also forward-looking and precede the reference to the desired result, being the retail product distribution conduct being consistent with the TMD.

55 Thus, the focus of these provisions is primarily forward-looking, and concerns whether the regulated person had (at the relevant time) put in place adequate systems, policies, practices, and procedures – including a process of oversight and supervision – to address identified or reasonably identifiable risks of retail product distribution conduct which was inconsistent with the TMD.

56 Applying that reasoning and relevantly to this case, there is a contravention if the distributor gives a PDS to a retail client without first taking reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the giving of the PDS being consistent with the TMD. In other words, the relevant reasonable step must be antecedent to the retail product distribution conduct itself (in this case, the giving of the PDS) and not be taken concurrently with or after that conduct. That is because, if the step is concurrent with or occurs after the retail product distribution conduct, it can have no bearing on the likelihood that the conduct will be consistent with the TMD (which is the focus of s 994E(3)(d)) because the conduct itself will have taken place.

57 It follows that, contrary to Firstmac’s submissions, the nature of the retail product distribution conduct itself (such as the content of disclosures in the PDS and material which accompanies it) cannot be reasonable steps within the meaning of s 994E(3)(d), and nor are they relevant matters to be taken into account within the meaning of s 994E(5). Further, systems, policies, practices or procedures that a regulated person puts in place prior to the occurrence of the retail product distribution conduct are not relevant matters within s 994E(5) where an action taken

under or pursuant to those systems, policies, practices or procedures will only be taken after the retail product distribution conduct occurs.

58 While steps which are concurrent with, or which occur after the retail product distribution conduct, could have an impact upon the likelihood of a person who falls outside the target market *acquiring* the financial product, that is not what s 994E(3)(d) and s 994E(5) are concerned with. Rather, these provisions are concerned with pre-conduct steps which impact upon the likelihood of the retail product distribution conduct being consistent with the TMD.

### 3. INVESTMENT OBJECTIVES OF TD HOLDERS

59 The likelihood of TD Holders being in the target market within the High Livez TMD was a central issue in the trial, the answer to which turned on an assessment of the likely investment objectives of the TD Holders.

#### 3.1 Characterisation of ASIC's case

60 Firstmac submits that ASIC's case starts with an assumption that TD Holders *in fact held* a capital guaranteed objective and a short investment timeframe objective because they held a product (i.e. a Firstmac Term Deposit) which had these two features. It further describes ASIC's case as follows:

In contrast, High Livez was not a product which offered a capital guarantee and had a medium investment timeframe. Accordingly, so the reasoning goes, because High Livez differed from the Firstmac Term Deposit in these two respects, it may be inferred there was a real chance that Firstmac TD Holders were outside the target market for High Livez and marketing High Livez to the Firstmac TD Holders would be, or would be reasonably likely to be inconsistent with, the TMD for High Livez...

61 Having described ASIC's case in this way, Firstmac then submits that:

[T]he predicate of ASIC's case that there was a real and not remote chance that the Firstmac TD Holders the subject of the Distribution Conduct held a capital guaranteed objective and/or a short term investment timeframe objective has not been made good, particularly having regard to the standard of proof required in civil penalty proceedings...

62 Firstmac submits that, when I consider ASIC's case as a whole, this is the case which ASIC is propounding (and which, according to Firstmac, it failed to prove).

63 However, I disagree with this characterisation of ASIC's case. Rather, ASIC's case was that the TD Holders held or *may have held* either or both a capital guaranteed objective and a short investment timeframe objective because they held a product (i.e. a Firstmac Term Deposit) which had these two key features.

64 That this is ASIC’s case is apparent from, for example, [55], [168(d)], [172(b)] of ASIC’s closing submissions, [2] of ASIC’s closing submissions in reply, as well as [13] and [14] of ASIC’s Concise Statement (both original and amended) and [13(e)(iii)] of the Amended Statement of Claim. It is also the case which ASIC opened: T9/4–8; T16/30–34; T17/3–8. It is also the basis upon which ASIC instructed its expert, Mr Peter Whyntie: see [5.1.20] and [5.1.21] of the letter of instructions dated 29 March 2023.

### 3.2 Firstmac’s case

65 Firstmac accepts that there was a chance that some TD Holders held a capital guaranteed objective or a short investment timeframe objective but submits that the evidence established that that chance did not rise above a possibility.

### 3.3 Consideration

66 Investments in all Firstmac Term Deposits were ‘capital guaranteed’ by the Australian Government up to \$250,000 per account. Capital invested in a Firstmac Term Deposit did not fluctuate in value, and TD Holders received the full amount of capital invested at maturity plus any return. Capital invested in High Livez, on the other hand, did not have a capital guarantee (of any kind), and the unit price of High Livez was subject to volatility. This had the consequence that unitholders may suffer a loss or gain in capital on exit from the fund.

67 Firstmac marketed Firstmac Term Deposits by reference to, amongst other things, the availability of the Australian Government guarantee, and it did so because it considered that feature would be of interest to term deposit holders. Further, at all relevant times, Firstmac did not offer a Firstmac Term Deposit with a term greater than two years unless an investor requested a longer term and that was agreed to by Firstmac, whereas the recommended investment timeframe for High Livez was three to five years.

68 It is common ground that from about 2012, Firstmac adopted a cross-selling strategy of marketing and distributing investments in High Livez to TD Holders. It is also common ground that the recipients of the Distribution Conduct were, at all relevant times, TD Holders. It follows that these recipients were investors in a financial product (namely, Firstmac Term Deposits) which had two ‘key’ characteristics – namely, a capital guarantee and a short investment timeframe.

69 That a group of customers invests in a particular financial *product* which has certain characteristics does not mean that all such customers will necessarily have particular

investment *objectives* which are aligned with those characteristics. They might or might not have those objectives, depending on the circumstances. For example, they might have an investment in a financial product as part of a diverse portfolio, each segment of which reflects different objectives for that segment. Further, an investor's objectives can change over time (including between the commencement date and the end date of the term associated with a term deposit). Mr Austin agreed: T370/40–44.

70 This conclusion accords with the evidence adduced at trial.

71 The TD TMD contained no reference to a “key consumer attribute” of the target market being a capital guaranteed objective or a short investment timeframe objective. If TD Holders as a market had such investment objectives, one would have expected to see that identified in those TMDs.

72 Mr Whyntie (ASIC's expert) was shown the TD TMD for the Stow It Term Deposit and agreed that what the TD TMD exposed was that, just because features such as a fixed term or a government guarantee might be attributes of the financial product, it does not necessarily follow that they will be objectives of the target market for that product: T99/14–19.

73 Further, Ms Dean said this about the TD Holders (T163/43–44):

...just because they have a term deposit with a government guarantee does not mean that they want a government guarantee. It's just a part of that product.

74 Ms Dean also agreed that just because a TD Holder held a term deposit did not mean that they had a short term investment objective: T164/25–28. She also did not know what percentage would or would not have such an objective: T164/35–38.

75 Notwithstanding this, there was evidence that *some* of the TD Holders *may have* held a capital guaranteed objective or a short investment timeframe objective, which proposition was accepted by Ms Dean under cross-examination (who had more direct dealings with these investors than any other person within Firstmac, including Mr Austin and Mr Gratton, and which dealings occurred over many years) as well as by Ms Cunningham and Mr Austin.

76 While Ms Cunningham accepted that there was a chance that recipients of the High Livez Documents were outside the target market (such as at T259/41), she balked at accepting that there was a “real chance”. It appears that she considered that the word “real” was superlative: T259/46. When senior counsel for ASIC further cross-examined Ms Cunningham, it was explained to her that “real chance” equated to “it's possible”: T263/10–13.

77 Although Mr Austin gave evidence that “the capital guarantee is a feature of the product (i.e. Firstmac Term Deposit) [but] it doesn’t mean that that’s the objective of the person who holds it” (T361/31–33), he accepted there is a “likelihood” that “some” of the TD Holders would have a capital guaranteed objective but disagreed that many would have that objective (T349/20–21; T362/36–41). Mr Austin also gave evidence that it is likely that some TD Holders have a capital guaranteed investment objective, but it did not follow that all of them did (T362/27–29).

78 During closing submissions, I raised with Mr Dick SC who appeared for Firstmac that I did not understand the difference between a real chance (ASIC’s term) or a possibility (Firstmac’s term). He could not explain the difference, noting instead that it was a matter for ASIC.

79 When I asked senior counsel for ASIC to explain what was meant by “real chance”, Mr Harding SC agreed with my description of “realistic chance” and further submitted, “It’s not fanciful or far-fetched. You know, it’s a real possibility – a real chance. I mean, I think we can ... equate them”.

80 Although much ink was spilt on this debate, it is therefore apparent that the position of both parties is that there was a real possibility that some of the TD Holders who were the recipients of the Distribution Conduct may have held either or both a capital guaranteed objective and a short investment timeframe objective.

81 This position appears to be the correct one, as it is consistent with the evidence of Firstmac’s witnesses who were familiar with the characteristics of their customers (as referred to above and in more detail in section 5.1 below).

### **3.4 Conclusion**

82 For these reasons, there is a real chance (that is, a real possibility) that some of the TD Holders who were the recipients of the Distribution Conduct may have held either or both a capital guaranteed objective and a short investment timeframe objective and were therefore outside of the target market for High Livez.

## 4. ASIC'S FIRST LEVEL CASE

### 4.1 The pleaded allegations

83 By [23] and [24] of the Amended Statement of Claim, ASIC pleads a list of processes and procedures which it alleges that Firstmac “ought to have taken prior to the Distribution Conduct”. In summary, these alleged reasonable steps were that Firstmac ought to have:

- (1) considered which of the consumer’s investment objectives and consumer’s intended timeframes in the TMD which the TD Holders were likely to have held;
- (2) come to the conclusion that the TD Holders may have been consumers with a capital guaranteed investment objective and held an investment with a “Short ( $\leq 2$  years)” intended investment timeframe and that an investment in High Livez may not have been appropriate to this objective and timeframe, such that there was a likelihood that they were outside the target market for High Livez as described in the High Livez TMD;
- (3) recognised and come to the conclusion that it either did not have information about TD Holders to contradict such conclusions or, if it did have such information, had not considered and analysed the information to determine whether it contradicted such conclusions;
- (4) not given the PDS to any TD Holder unless and until Firstmac had already:
  - (a) obtained information from the relevant TD Holder to the effect that they did not, then, hold a capital guaranteed objective or a short investment timeframe objective; or
  - (b) directly communicated to the relevant TD Holder that, generally, the High Livez product was unlikely to be appropriate for investors with a capital guaranteed objective or a short investment timeframe objective, and did so explicitly and in a manner that was reasonably likely to come to the attention of, and be understood by, the TD Holder;
- (5) prepared and implemented a written “**DDO Policy**” specific to or incorporating the cross-selling strategy of High Livez which listed the steps outlined in subparagraphs (1) to (4) above and required Firstmac to engage in retail product distribution conduct which was consistent with the DDO Policy;
- (6) prepared and implemented a written marketing and distribution strategy for High Livez;

- (7) identified relevant staff to be instructed and trained in the operation of that policy and instructed and trained them;
- (8) prepared and provided to relevant staff written mandatory support materials which:
  - (a) would include sales scripts for inbound and outbound calls with guidance on their use and which would incorporate mandatory questions, warnings and disclosures, checklists or operating guidelines, customer call centre procedures, customer complaint management procedures and processes, and a statement of governance and compliance responsibilities for each level of relevant staff involved in the distribution of High Livez;
  - (b) would be consistent with the DDO and the DDO Policy;
  - (c) would require relevant staff, in communications with potential investors, to ascertain from those potential investors their consumer attributes; and/or inform consumers that generally the High Livez product was unlikely to be appropriate for investors with a capital guaranteed objective or a short investment timeframe objective;
- (9) identified which staff members ought to be instructed and trained in the operation of the written DDO Policy; and
- (10) instructed and trained relevant staff members in the operation of the DDO Policy.

#### **4.2 Mr Whyntie's expert evidence**

84 In support of its first level case, ASIC relied upon the expert evidence of Mr Whyntie, who provided two reports (a report dated 29 September 2023 and a supplementary report dated 23 October 2023). Mr Whyntie has a degree in economics and extensive experience in the design, implementation and management of compliance frameworks and arrangements for (*inter alia*) the distribution of financial products. Mr Whyntie has no legal qualifications.

85 For the following reasons, Mr Whyntie's evidence concerning ASIC's first level case is of limited assistance.

86 By his first report, Mr Whyntie addressed this question:

During the Relevant Period, what steps *could* Firstmac have taken that would have resulted in, or would have been reasonably likely to have resulted in, the PDS being given to Firstmac Term Deposit Holders who were in the target market for High Livez?

(Emphasis added.)

87 That is, Mr Whyntie was not asked to opine as to the steps which *ought to have been taken* by Firstmac, but the steps which *could* have been taken by it that would have resulted in, or would have been reasonably likely to have resulted in, the PDS being given to TD Holders who were in the target market for High Livez (and this is the question which he proceeded to answer).

88 However, this question differs from the case pleaded by ASIC at [23] and [24] of the Amended Statement of Claim wherein the steps outlined in [23] are pleaded as being steps which (*inter alia*) Firstmac ought to have taken. Further, Mr Whyntie was not asked the relevant question by reference to the words used in s 994E(3)(d) of the *Corporations Act*, and nor was he instructed to adopt ASIC's construction of that section (including its contentions at trial as to the meaning of "that would have resulted in, or would have been reasonably likely to have resulted in" as constituent elements of a compound conception). Indeed, the manner in which Mr Whyntie construed the phrase "would have resulted in, or would have been reasonably likely to have resulted in" is not apparent from the first report and so is unknown. Further, at paragraph 49 of the first report, he refers to Firstmac "giving effect to the requirements of the DDO" but without identifying his understanding of those requirements. The same observation can be made about paragraphs 50 and 69 of the first report (for example) where Mr Whyntie expresses opinions relating to compliance with the DDO.

89 Mr Whyntie's first report identified steps which, in his opinion, Firstmac "could have taken". However, he does not provide reasons for the identification of some of these steps, which are often expressed in general terms in the first report, and nor does he explain why, in his view, such steps "would have resulted in, or would have been reasonably likely to have resulted in, the PDS being given to Firstmac Term Deposit Holders who were in the target market for High Livez". For example, no reasons are provided for the steps identified in paragraphs 9(a)(ii)–(iv), 9(b), 21, 22, 36, 37 and 49 of the first report, and paragraph 20 refers to a compliance risk assessment which could have been conducted and implemented to identify (*inter alia*) "reasonable measures to ensure that no TD holder would be provided with the High Livez PDS prior to Firstmac having explicitly ascertained that the TD holder was within the target market" (emphasis added). However, the reasonable measures are not identified by Mr Whyntie.

90 Mr Whyntie was instructed to assume that "[t]here was a likelihood that the 817 Firstmac Term Deposit Holders who receive the PDS included retail clients who were outside the target market for High Livez". However, what was meant by "likelihood" was not explained in the



instructions and it might be that Mr Whyntie understood “likelihood” to mean something more probable than a “realistic possibility”, which was the case advanced by ASIC in closing submissions. Indeed, Mr Whyntie refers to “reasonable likelihood” at paragraph 28 of the first report, which is a different concept which potentially connotes a higher probability than “realistic possibility”: *cf Sportsbet Pty Ltd v State of New South Wales (No 9)* [2010] FCA 31 at [4] (Perram J). The instructed assumption infects the balance of Mr Whyntie’s opinions because the degree of likelihood that TD Holders were outside the target market for High Livez affects the likelihood of the Distribution Conduct being inconsistent with the High Livez TMD, which informs the question of what reasonable steps Firstmac ought to have taken to comply with s 994E(3): see s 994E(5)(a).

91 On 22 September 2023, Mr Whyntie was briefed with pleadings filed in this proceeding, along with certain particulars provided by ASIC, and asked (*inter alia*) whether the steps pleaded in [23] of the Statement of Claim dated 14 June 2023 were likely or reasonably likely to achieve compliance with the DDO with respect to High Livez. Mr Whyntie’s responses to this question in the first report are (with respect) difficult to follow, because his report tends to focus more on whether there is any evidence in the materials briefed to him as to whether a specific step was followed, and whether that step was one which Firstmac could have taken. Although Mr Whyntie concludes at paragraph 96 of his first report that the pleaded steps were steps which, if they had been followed by Firstmac, were likely or reasonably likely to have achieved compliance with the DDO, it is not apparent from the first report what Mr Whyntie regarded as being required to achieve “compliance with the DDO” as this was not explained to him in the letters of instruction, and he did not expose his understanding of the statutory obligations imposed by the DDO.

92 Finally, despite being briefed with Firstmac’s affidavit evidence, Mr Whyntie’s second report did not address that evidence, nor indicate whether that evidence changed any of the opinions which he had expressed in his first report, and nor was any further supplementary report prepared. As such, his reports are based on material which is more limited than the body of evidence that was adduced at trial, which affects the utility of the opinions expressed in them.

### **4.3 Conclusion on first level case**

93 Leaving aside the evidence of Mr Whyntie, upon which I place little weight, ASIC submits that the steps in [23] of the Amended Statement of Claim are “evidently reasonable”, Firstmac was reasonably able to take them at all relevant times and they are not burdensome. ASIC also

relies upon evidence which shows that Firstmac did take some of these steps after the relevant period.

94 However, as Firstmac submits, the question in this case is whether, having regard to all relevant circumstances, Firstmac failed to take steps that would have resulted in, or would have been reasonably likely to have resulted in, the Distribution Conduct being consistent with the TMD for High Livez. The issue of whether there has been compliance with s 944E(3) is not determined by reference to identification of all of the possible steps which could have been taken by Firstmac and then a conclusion; rather, the statutory provision requires an inquiry into what Firstmac in fact did. That is because there is not one true path that must be followed in order to comply with s 994E(3), and the fact that one reasonable path is chosen over others need not result in a conclusion that all reasonable steps were not taken: see, by analogy, *Construction, Forestry, Maritime, Mining and Energy Union v Mechanical Maintenance Solutions Pty Ltd* (2022) 289 FCR 508; [2022] FCAFC 15 at [169] (O’Callaghan and Wheelahan JJ). Further, s 994E(3) is not expressed as an obligation to take *all* reasonable steps.

95 For this reason, I will address the steps which Firstmac alleges that it took in its defence of both the first and second level cases and assess whether there has been compliance by reference to such steps. Such an approach is expedient in any event because Firstmac asserts that the steps which it took included some of the steps which form part of ASIC’s first level case, and so the two cases overlap.

## 5. ASIC’S SECOND LEVEL CASE

96 By [25] of the Amended Statement of Claim, ASIC pleads that Firstmac did not take “any steps that would have resulted in, or would have been reasonably likely to have resulted in, retail product distribution conduct (as defined in sec. 994A) in relation to High Livez being consistent with the TMD” and “accordingly, Firstmac failed to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, retail product distribution conduct (as defined in sec. 994A) in relation to High Livez being consistent with the TMD”.

97 By its Defence, including in response to the first level case, Firstmac advances a positive case that it did take such steps. Those steps were as follows (in summary):

- (1) There was consideration and discussion by Mr Austin, Mr Gration and Ms Cunningham as to whether TD Holders fell within the target market for High Livez.

- (2) Mr Austin, Mr Gration and Ms Cunningham educated themselves about the requirements of the DDO.
- (3) Firstmac had in place an Investment Specialist (Ms Dean) who understood both the Firstmac Term Deposit and High Livez products very well and whose role was to speak to existing and prospective customers about the TD and High Livez products. If a customer raised the capital or government guarantee or investment timeframe on the calls, Ms Dean explained that there was no government guarantee and that the minimum recommended timeframe was 3–5 years, and had scripts available to her which contained the related relevant disclosures. Ms Dean also had her own speaking notes.
- (4) Firstmac had in place an existing system for marketing approvals for the High Livez marketing prior to the Distribution Conduct, which included approval by relevant personnel together with Firstmac’s Senior Legal Counsel (Ms Powell) who was also versed in the requirements of the DDO. There was an update to the High Livez marketing strategy document during the relevant period (July 2022) which made reference to the TMD for High Livez.
- (5) Firstmac had in place an existing Complaints Policy to deal with any complaints by, for example, recipients of the Distribution Conduct.
- (6) There were very clear disclosures in the High Livez Material and the Firstmac website, including multiple statements that the High Livez product was not capital guaranteed and that it had a recommended 3–5 year investment timeframe. The 2021 PDS and information sheet specifically referred to the High Livez TMD which was available on the Firstmac website from 13 October 2021. The 2019 PDS and 2021 PDS, information sheet and High Livez TMD informed investors about the key features of High Livez, mirroring the consumer attributes identified in the High Livez TMD. The High Livez Material contained contact information for the Investment Specialist (Ms Dean).
- (7) In October 2021, Firstmac’s Audit and Compliance Manager (Ms Cunningham) prepared and utilised a PDDO Policy;
- (8) Firstmac required investors in High Livez to warrant and acknowledge that they had read and understood the terms of the High Livez PDS and that there was no guarantee of repayment of capital from the Trust before investing.

## **5.1 Consideration by Firstmac of whether TD Holders fell within target market**

98 ASIC alleges that Firstmac (as part of its first level case) ought to have considered which of the “consumer’s investment objectives” in the High Livez TMD that the TD Holders were likely to have held by reference to the information which was known or ought to have been known to Firstmac, and formed the view that there was a real possibility (or real chance) that TD Holders were outside the target market for High Livez.

99 The consideration of the likelihood of TD Holders falling within the target market for High Livez is an important first step in aiming to ensure that the Distribution Conduct was consistent with the TMD. Firstmac did not submit otherwise but instead advanced a positive case that such an assessment was undertaken.

100 As to this, there was no serious dispute that members of Firstmac’s Executive (Mr Austin and Mr Gration), as well as Firstmac’s Audit and Compliance Manager (Ms Cunningham) considered the target market for High Livez as set out in the High Livez TMD and considered whether the TD Holders fell within that target market.

101 Firstmac submits that Mr Austin and Mr Gration made an assessment that TD Holders likely fell within the target market for High Livez and that, while each of them acknowledged at the time they undertook this assessment that there would be TD Holders with either or both a capital guaranteed objective and a short investment timeframe objective, the risk of those TD Holders having such objectives did not rise above a possibility.

102 Mr Austin has worked in the financial services industry in finance, treasury and securitisation roles for over 33 years. His evidence in chief was that he formed the view that TD Holders were likely to be in the target market for High Livez but that (contrary to ASIC’s case) he also considered that some TD Holders may fall outside of that target market. His reasons for reaching those views were explained in his affidavit sworn on 15 December 2023. Mr Austin also states that he formed the conclusion that Firstmac’s existing measures were sufficient to ensure that any individuals outside the target market for High Livez would be made aware of this fact, and that he had a discussion with Mr Gration who shared the same view.

103 Mr Gration, who has worked in the financial services industry in legal, compliance and operational roles for over 33 years and been involved in the distribution of High Livez for approximately 10 years, stated in his affidavit that he formed the view that TD Holders were

likely to be in the target market for High Livez. His reasons for reaching that view were explained in his affidavit sworn on 21 December 2023.

104 Ms Cunningham also stated that she concluded that TD Holders were likely to be in the target market for High Livez. Her reasons for reaching that view were explained in her affidavit sworn on 20 December 2023.

105 Neither Mr Gration nor Ms Cunningham stated in terms that they recognised during this assessment that there was a possibility that there would be TD Holders with either or both a capital guaranteed objective and a short investment timeframe objective and who therefore fell outside the target market for High Livez. Having said that, both Mr Gration and Ms Cunningham (and, indeed, Mr Austin) took into account at the relevant time what they understood to be the ways in which any TD Holders who did not fall within the target market would be protected from making an unsuitable investment in High Livez (being one which meant they fell outside the target market for that financial product), such as the ability to speak to Ms Dean, the disclosures in the High Livez PDS, and the High Livez TMD being available on the Firstmac website. While not an express acknowledgment of the kind referred to in Firstmac's submission, this evidence shows that there was implicit recognition by Mr Gration (and Ms Cunningham) that there was a real possibility that some of the TD Holders may not fall within the target market for High Livez. Otherwise, they would not have been concerned about safeguards.

106 For these reasons, Firstmac undertook the first of the reasonable steps alleged by it.

## **5.2 Evidence of Firstmac's witnesses**

107 The following evidence given by Firstmac's witnesses is relevant for the purposes of considering the remainder of the reasonable steps which Firstmac alleges that it took.

### ***5.2.1 The evidence of Ms Dean***

108 The following matters were the subject of evidence in Ms Dean's first affidavit affirmed 15 December 2023.

109 Ms Dean held the role of Investment Specialist between around 2014/2015 and 2023. In that role, Ms Dean was the primary point of contact for Firstmac's customers relating to investments in High Livez and Firstmac Term Deposits. In particular, Ms Dean's day-to-day tasks during the relevant period involved (*inter alia*) communicating with prospective and existing Firstmac

customers via telephone and email, and processing and assisting with applications for High Livez and Firstmac Term Deposits.

110 Ms Dean was assisted by Ms Gorman, who worked part time. Ms Gorman occasionally assisted Ms Dean with calls with customers on High Livez when Ms Dean was not available. As Ms Gorman was not as experienced as Ms Dean, if the customer required information “beyond the basics”, Ms Gorman booked an appointment for the customer to speak with Ms Dean. During the relevant period, any calls about High Livez were directed to come through to Ms Dean or Ms Gorman. If a call went through to the Customer Care team, they were required to transfer the call to Ms Dean or book an appointment for the customer to speak with Ms Dean if the customer wished to speak about High Livez.

111 Most of the time, Ms Dean spoke to Ms Cunningham about any questions that she had about High Livez.

112 When speaking to customers, Ms Dean had written scripts which were available to her and which had been approved by Ms Cunningham. These scripts provided answers to questions that customers might ask about High Livez. It was Ms Dean’s evidence that she did not follow the scripts “word for word” because she knew the content of the material in the script and had been speaking to customers about High Livez for approximately six years by the start of the relevant period.

113 For the purposes of speaking to customers about High Livez, Ms Dean prepared a document which contained her speaking notes. Those speaking notes included the following statements:

- (1) High Livez is a managed investment fund and has been operating at Firstmac for over 11 years. The bond “we invest in” is called a Prime RMBS bond (Residential Mortgage-Backed Security);
- (2) the underlying asset of the bond is Australian residential home loans; there are no overseas properties, commercial properties or development properties. RMBS bonds have been issued in Australia for over 35 years. The investment is considered relatively low risk and sits just above term deposits in terms of risk. The High Livez fund does not have the government guarantee that term deposits have;
- (3) the investment is a month to month investment. However, we do recommend a 3–5 year investment horizon. The investor does not need to choose a term to invest. The

investment will continue to roll over at the end of each month until the client sends in a full redemption request.

114 While Ms Dean did not read out all of the information in her speaking notes on every call, she used the information where she considered it was appropriate or was prompted based on something the customer said.

115 Whilst a person had the ability to invest in High Livez by filling in the application form and returning it without speaking to Ms Dean, this was (in Ms Dean's experience) rare, particularly with customers who held a Firstmac Term Deposit.

116 At [38] of her first affidavit, Ms Dean gave the following evidence about her general practice in relation to TD Holders whose term deposits were due to mature:

... [D]uring the Relevant Period, my general practice was to call customers who held Firstmac Term Deposits which were due to mature. I would receive a notification on Trax of this which prompted me to make these calls. I made these calls so that I could ask what the customer wanted to do at the maturity of their Firstmac Term Deposit. I made these calls approximately 7 days prior to the maturity date of the Firstmac Term Deposit to give the customer notice of the upcoming maturity and allow sufficient time for them to decide what they wanted to do with their investment. I treated each customer individually and provided the information that they requested on these calls.

117 Under cross-examination, Ms Dean gave the following evidence:

- (1) if customers asked Ms Dean to tell them about the High Livez fund – if they said “can you give me some information about the fund” – it would be more likely that she would talk about the government guarantee: T159/14–16;
- (2) if the customer asked if there was a government guarantee, then Ms Dean would tell them, or if they just wanted information on the High Livez fund, then she would tell them that High Livez did not have a government guarantee: T160/27–30;
- (3) Ms Dean agreed that the answers she had given in relation to the government guarantee were also true in relation to the short investment timeframe;
- (4) Ms Dean only told the TD Holder about the capital guarantee if it was relevant to something they had asked in the call, or if they wanted a general spiel about High Livez: T167/29–35.

118 Ms Dean also gave evidence that it was her practice to send out emails to TD Holders at around the time of maturity of their Firstmac Term Deposits, and that this continued after DDO was

introduced. Ms Dean also agreed that attached to the emails were, amongst other things, the TD Maturity Instructions Form and a High Livez PDS.

119 Importantly, Ms Dean gave evidence that, *notwithstanding what she had stated in her affidavit about her general practice*, “there was a point where we stopped calling customers, and it was just the email, I think because we had a huge amount of term deposit maturities”: T165/41–42. For that reason and contrary to Firstmac’s submission, it was not Ms Dean’s practice during the relevant period to call TD Holders approximately seven days before their investment matured to obtain instructions in relation to what they wanted to do with the investment on maturity.

120 Ms Dean recalled that this point was before the DDO commenced, with the consequence that she did not speak to every TD Holder prior to sending out the emails. Ms Dean agreed that if she could not reach the TD Holder on the telephone, she would send them the email anyway, and that she did not consider it to be a requirement of her job to speak to every TD Holder to whom an email was sent before the email was sent. She also agreed that she did not always speak to TD Holders about High Livez prior to sending them the email. Ms Dean accepted that it was only sometimes, or from time to time, that she spoke about High Livez to TD Holders whose term deposit was maturing. Ms Dean’s evidence was that she was not under any direction or instruction to ensure that she had spoken to the TD Holders before the email went out.

121 Ms Dean then gave this evidence in response to questions asked by senior counsel for ASIC:

It’s true, isn’t it, that you sent the emails during the relevant period to the maturing term deposit holders regardless of whether you had spoken to the customer or not?---Yes.

Regardless of whether you had had a substantive discussion with the customer about High Livez or not?---Yes.

Regardless of whether you had told them that High Livez did not have a capital guarantee and a recommended investment timeframe – and had a recommended investment timeframe of three to five years?---Yes.

Regardless of whether or not you knew whether they had a capital guarantee investment objective or not?---Yes.

Regardless of whether you knew that they had a short-term investment time frame of less than two years or not?---Yes.

Or less than three years - - -?---Yes.

- - - or not, and you didn’t regard it as part of your role to establish any of – or to establish those matters?---No, because the reason for sending the email was sending



the term deposit maturity form so that the customer could send back their instructions. Yes, it also included the High Livez information, but the reason for sending the email was giving them the form to fill in to give us the instructions for the term deposit. So that's why it would go out to every customer.

And part of the reason of including, in the maturity form, the High Livez option was part of the upselling strategy that you've referred to before, wasn't it?---Yes.

122 Ms Dean also agreed that, at the time that she sent the emails to maturing TD Holders, she had not been given any training in the DDO, and nobody at Firstmac had talked to her about what was required of her with the introduction of the DDO or the High Livez TMD: T180/11–18. Ms Dean's evidence was that she was not asked to change any of her practices as they related to High Livez in preparation for the introduction of the DDO, and that she did not do so. Ms Dean agreed that it was not part of her role, as far as she understood it, to obtain from the customer information as to whether they did or did not fall within the target market as defined in the High Livez TMD, and it was never communicated to her that this was part of her role.

123 Ms Dean agreed that she sent the High Livez PDS to expiring TD Holders even if, in a discussion with them, it seemed to Ms Dean that they wanted a product with a government guarantee, and even if they had an investment timeframe of less than three years, or less than two years, or less than one year: T181/19–28.

124 Ms Dean agreed that the High Livez PDS was sent to maturing TD Holders even if, in a telephone call with her, they had told her that they were not interested in High Livez. She agreed that she just sent the email to all maturing TD Holders without distinction: T181/34–39.

### ***5.2.2 The evidence of Ms Cunningham***

125 At trial, Ms Cunningham agreed that there was a risk that the potential High Livez investor may not be told during the call with Ms Dean that High Livez did not have a capital guarantee, or that High Livez had a recommended investment horizon of three to five years. Ms Cunningham also agreed that whether they were told about one or both of those features would depend upon the questions they asked, and so there was a risk that if they did not ask the right questions, they would not be told about those matters. She agreed that that was true even if the prospective investor had a capital guaranteed investment objective or a short term investment horizon of (say) less than two years.

126 Ms Cunningham accepted under cross-examination that Ms Dean would send emails to TD Holders whose term deposit was due to expire as part of a deliberate strategy to target them and encourage them to convert their term deposit holdings into High Livez. She also accepted

that she knew that Ms Dean would send those emails even if she had not been able to speak to the TD Holder beforehand, and there was no requirement communicated to Ms Dean that, prior to sending the emails, she should monitor or assess whether the recipient of any of the emails was or was not in the target market for High Livez: T254/17–31.

127 Ms Cunningham agreed that there was no requirement communicated to Ms Dean to ensure that, before an investor received one of these emails, they were told explicitly that High Livez is unlikely to be appropriate for an investor with a capital guaranteed objective or short investment timeframe objective. Ms Cunningham considered that that would only be the case if that came up in the conversation beforehand: T257/3–8. Ms Cunningham was aware that even if the customer had disclosed that they had a capital guaranteed objective, it was Ms Dean’s practice to send out the email anyway, although Ms Cunningham then appeared to speculate that Ms Dean may have, in different scenarios, slightly amended the attachments that were sent depending on the nature of the conversation: T259/19–32.

### ***5.2.3 The evidence of Mr Austin***

128 According to his affidavit, it was Mr Austin’s understanding that Ms Dean would speak to investors prior to them investing in High Livez.

129 Under cross-examination, Mr Austin gave evidence that when Ms Dean spoke to customers, she did not follow the script, which is what was expected and was the understanding of the executive: T323/33–35; see also T322/1–2. Mr Austin also gave evidence that the script formed part of the framework which constituted the reasonable steps for the purposes of complying with the DDO: T340/20–21; T341/8–9.

130 Importantly, Mr Austin gave evidence that, if Firstmac knew that a TD Holder had a capital guaranteed objective, “we would not send them a PDS”: T367/31–37. He also agreed that High Livez was not suitable for a capital guarantee investor: T369/33–35.

131 Mr Austin also gave this evidence:

... Well, given your role as having oversight and being responsible for compliance, you would presumably know, wouldn’t you, that when Ms Dean sent out the emails to maturing Firstmac term deposit holders, she sent them out regardless of whether she had spoken to them on the phone or not?---Yes. Because that then triggered a phone call.

And are you saying that you were aware of that fact - - -?---Yes.

- - - back in October 2021?---Yes.

And you are also aware, I want to suggest to you, that Ms Dean would send out the PDS regardless of whether the topic of capital guarantee or short investment horizon had come up?---As to whether the PDS was sent or not, she would send a – a maturity form with some information. She would speak to the customer. I – I would suggest that the PDS was only sent if there was interest from the customer on that call. I believe that’s the case.

So if I told you that was wrong, and she sent it out in all cases, are you saying that the Firstmac – well, that was something of which you were unaware?---Yes. I don’t think that was the step that she followed.

132 In November 2022 (which was after the relevant period), the script used by Ms Dean was updated to include the following ‘knock out’ questions (and corresponding responses):

1. Are you seeking an investment which has a capital guarantee or attracts the government guarantee?
  - a. If the answer is yes, state that High Livez would not be suitable for the investor
2. Would your investment in High Livez make up more than 75% of your investable assets?
  - a. If the answer is yes, state that High Livez would not be suitable for the investor

133 In May 2023, the script was further updated to also include additional ‘knock out’ questions as follows:

1. Are you seeking an investment which has a capital guarantee or attracts the government guarantee?
  - a. If the answer is yes, state that unfortunately we cannot accept their application for the fund, due to the target market determination for the fund.
2. Would your investment in High Livez make up more than 75% of your investable assets?
  - a. If the answer is yes, state that unfortunately we cannot accept their application for the fund, due to the target market determination for the fund.
3. Are you seeking to invest less than 2 years?
  - a. If the answer is yes, state that unfortunately we cannot accept their application for the fund, due to the target market determination for the fund.
4. What is your risk appetite - low, medium, high or very high?
  - a. If the answer is high or very high, state that unfortunately we cannot accept their application for the fund, due to the target market determination for the fund.

5. Will you seek to withdraw money on a daily or weekly basis from the fund?
  - a. If the answer is yes, state that unfortunately we cannot accept their application for the fund, due to the target market determination for the fund.

134 The May 2023 update to the script required the user to record the answers to each of the ‘knock-out’ questions in the history note of the call, which I understand to be a reference to the notes which are taken on Firstmac’s computer system in relation to that customer.

135 Mr Austin agreed that, when he made these amendments to the scripts, they were important matters that had to be communicated to potential High Livez investors, irrespective of whether that potential investor had asked a question about whether High Livez had a capital guarantee or short investment timeframe: T324/8–16. Mr Austin also accepted that it was a reasonable step, as he understood it, to include these ‘knock out’ questions in the revised scripts: T324/18–19.

136 Mr Austin also agreed that Firstmac’s reasonable steps obligation required it to identify whether a targeted Firstmac TD Holder held a capital guaranteed objective or a short investment timeframe objective if they wanted to target that investor: T378/11–13.

137 Mr Austin accepted that Ms Dean was not trained in DDO and would not have been aware of the High Livez TMD: T350/35–40.

138 Mr Austin gave evidence that, in the context of a small group of people dealing with a particular financial product (as was the case in Firstmac), “what’s important for the customer-facing person is that they are implementing and following the practices that the executives have established, and that’s how we can achieve compliance with our TMD. [For] Kerry Dean, whether she knows the construction of the DDO might be of marginal benefit, but it really doesn’t go to the effectiveness of what she does day-to-day”: T350/47 to T351/5.

#### ***5.2.4 The evidence of Mr Gration***

139 By his affidavit, Mr Gration deposed that Ms Dean spoke to “almost every customer” who had submitted an application to invest in High Livez.

140 In its Written Statement Required Under Section 912C Notice dated 25 November 2022 (**Written Statement**), Firstmac gave this answer to the following question posed by ASIC:

- 7 Was there a requirement for Kerry Scutt (nee Dean) to contact an individual via phone prior to the individual investing in High Livez?**

Firstmac considers that there was a requirement for Ms Scutt to speak to an individual via telephone prior to that individual investing in High Livez. However, Firstmac now understands that, although Ms Scutt did contact the vast majority of individuals via phone prior to the individual investing in High Livez, and cannot recall a specific instance where this did not occur, Ms Scutt did not consider it to be a requirement. Firstmac became aware of this when making enquiries with Ms Scutt on receipt of this notice. Ms Scutt is mistaken in this view.

Firstmac has since conducted a training session with Ms Scutt and confirmed with Ms Scutt that it is a requirement to speak to every individual prior to them investing in High Livez. Compliance with this requirement will be monitored by Ms Scutt's manager.

(Emphasis original.)

141 When taken to this answer, Mr Gration indicated that Ms Dean was mistaken in her view that it was not a requirement to speak to an individual via telephone prior to that individual investing in High Livez.

142 By his affidavit, Mr Gration deposed that he “was confident that [Ms Dean] was aware of the capital guarantee and investment timeframe features of High Livez and able to explain those features to customers” and that he was “also aware that a sales script was available to [Ms Dean] and her assistant to use as a guide for conducting calls” which contained “information regarding the capital guarantee and investment timeframe aspects of High Livez”.

143 Under cross-examination, Mr Gration said that the script is one of the reasonable steps that he took in the implementation of the DDO in determining whether TD Holders were in the target market: T407/33–36. When he was asked whether he was aware that Ms Dean was not using the approved scripts for almost all of the relevant period, Mr Gration said that he had been made aware that she was not using the scripts (in that she was not meticulously reading from them), but for specifically what period, he was not aware: T408/32–40.

144 The Written Statement gave these answers to the following questions posed by ASIC:

- 8 In relation to paragraph 7 above, if such a requirement existed:**
  - 8.1 identify when the requirement was introduced and whether it is ongoing;**
  - 8.2 if the requirement was recorded in writing, identify:**
    - 8.2.1 any books or records that record the requirement;**
    - 8.2.2 when those books or records were created;**
    - 8.2.3 who was responsible for creating them;**
  - 8.3 if the requirement was not recorded in writing, identify:**

**8.3.1 who was responsible for creating the requirement; and**

**8.3.2 how was the requirement conveyed to Ms Scutt.**

**8.4 as part of the requirement, was Ms Scutt required to inform Firstmac Term Deposit holders of the following attributes of High Lives [sic]: that there was no government guarantee; and the minimum investment timeframe was three to five years.**

- 8.1 The requirement has been in place since Ms Scutt commenced her current role in February 2015 and is ongoing.
- 8.2 The requirement is recorded in writing by the scripts that were provided to Ms Scutt. While the scripts do not explicitly state that every customer must be called, the existence of the scripts and the requirement to discuss the information in the script with customers evidences the requirement that customers be spoken to. The scripts were originally created by Mr Andrew Dear, a financial planner employed by Firstmac in 2012.
- 8.3 Not applicable as the requirement was recorded in writing – see 8.2 above.
- 8.4 Firstmac understands that Ms Scutt was required to inform all prospective investors in High Livez (whether they were term deposit holders or not) that there was no government guarantee, and of the minimum recommended investment timeframe in High Livez. These matters were dealt with in Ms Scutt’s script, and Firstmac understood that Ms Scutt ensured these items were mentioned on every call with prospective investors. However, Firstmac now understands that, although Ms Scutt did inform some individuals to whom she spoke of these matters, she did not consider this to be a requirement in all cases. Ms Scutt is mistaken in this view.

Firstmac became aware of this when making enquiries with Ms Scutt on receipt of this notice. Firstmac has since conducted a training session with Ms Scutt and confirmed with Ms Scutt that it is a requirement to mention these items to every prospective investor in High Livez. Compliance with this requirement will be monitored by Ms Scutt’s manager.

(Emphasis original.)

145 When asked if Ms Dean’s failure to raise on calls with TD Holders the issue of whether they held a capital guaranteed objective or short investment timeframe objective was a systemic failure in her training and instruction, Mr Gration answered that the training “could have been better”, but he would not describe it as a systemic failure. Mr Gration also agreed that, in terms of Ms Cunningham monitoring whether Ms Dean was complying with the disclosure requirements in relation to capital guaranteed objectives and short investment timeframe objectives, it would have been a simple matter for Ms Cunningham to listen to the calls which Ms Dean had with customers in her audit and compliance function: T411/45 to T412/9.

146 As to the issue of sending a High Livez PDS to a TD Holder who had told Ms Dean that the government guarantee was important to them, or that they were not interested in investing for

more than a short investment timeframe, Mr Gratian initially agreed that it was possible that that had occurred, but then there was this exchange:

Well, it wasn't part of Firstmac's systems and processes during the relevant period to prevent the sending of the PDS to a term deposit holder in those instances, was it?---If a customer had made that statement to Kerry, and as I mentioned, and you also mentioned, every call was recorded. Every customer transaction, activity, job, was in the system, and there was an opportunity for Kerry to make notes in that system with regard to those sorts of comments. And I also believe that Kerry had – had such a good hold of customer information, that she would retain that.

I don't think that answered my question, Mr Gratian. My question was, it was not part of Firstmac's systems or processes to prevent the sending of the PDS to a term deposit holder where Ms Dean had actually found out that they either had a capital guarantee objective or a short investment time frame.?---Well, Ms Dean was operating a number of those systems and processes. So she certainly had the ability to do exactly what you're describing.

Yes, so - - -?---So there wasn't any system trigger, if that's what you're asking.

Well, let's just be clear. If a term deposit customer had told her that they were interested in a capital guarantee objective, it was not part of Firstmac's systems or processes to stop the email going out without the PDS attached?---Well, part of the Firstmac systems and processes were being conducted by Kerry, and it certainly was Firstmac's system and process that we didn't deliver any material across the entire business to any prospective customer that they specifically told us not to deliver.

Right. So - - -?---However, there was not, that I'm aware of, a button or a trigger in the – built into the system itself to prevent that from happening.

...

And it was your understanding, was it, that if a customer had expressed the view that they held a capital guarantee objective or a short investment time frame or were just not interested in High Livez, your understanding was the PDS would not be sent to them, is that right?---My understanding is that Kerry, being the very qualified, experienced and successful operator that she is, would not intentionally send a document of any type to a customer who had said that they didn't want to receive it, as part of her process, as part of her good customer service.

Well, I think you answered part of my question, Mr Gratian [sic]. Let's focus again on this. Is it your understanding of Firstmac's systems and processes that Ms Dean should not send a PDS to someone who had expressed to her that they held a capital guarantee objective or a short investment time frame?---My expectation of Kerry is if they had expressed that view to her, that she would not send them High Livez information.

147 By his affidavit, Mr Gratian deposed that, by reference to emails which were sent to TD Holders whose term deposits were nearing maturity, “I am aware that these types of emails have been sent to customers who held Firstmac Term Deposits which were nearing maturity for a number of years prior to the introduction of DDO, and Ms [Dean's] practice was to speak to these customers to obtain instructions from them at maturity”.

148 Mr Gration gave evidence under cross-examination that it was important that Firstmac call the TD Holders upon the maturity of their term deposit, which was also an opportunity to introduce High Livez. He said that he understood that this had been going on since at least about November 2016: T432/8–17.

149 Mr Gration also agreed that TD Holders should have been asked about their investment timeframe before they transferred into High Livez, saying:

They certainly should have been – and this is going back to the script. That same – the investment time frame is mentioned in the script, and it’s the role of the salesperson to provide an overview of the product and hit the key messages in a call of this nature.

150 He also said he would regard that as essential and important, and he agreed that it was essential not only in relation to the investment timeframe but also the capital guarantee, saying “[t]hat’s why the script is there. That’s why the PDS is there. That’s why those steps leading up to the investment are there”: T436/5–20.

151 As to the manner in which communications with customers were able to be recorded and retained by those within Firstmac, Mr Gration gave this evidence:

Okay. And you would agree, wouldn’t you, that a reason for having a written product governance framework setting out the steps to be taken to comply with the DDO is so that Firstmac staff could readily refer to it before engaging in retail product distribution conduct. Would you agree with that?--I made the comment earlier that everything we did was on the system. There was nothing off system. So all documentation, including scripts, for example, were available on the system. So – and everything was – every communication, every interaction was captured by the system. And something I wanted to add was that, you know, when Kerry sent email she didn’t send them from her email account. She sent them from the system, and at the time of opening that system, she had an opportunity to review any hot messages that were on the system – that were always on the front page of the system, and if there had been a hot message in there that said “Capital guarantee required”, she would have seen that at the time of interacting with that customer.

152 His evidence continued:

It can be, including, would you agree, if a customer has previously said that they hold a capital guarantee objective or a short investment time frame?--Well, if they had said that, Kerry has the opportunity to record that on the system, including, as I say, as a what are they called – for a hot note – which is a front and centre note that she would see whenever she opened that customer’s account, to do anything with that customer, which is what’s required. It’s all on the system. So when Kerry was sending her – sending an email, she didn’t go to her email account. She went to the customer’s system account, and had a summary of the information of the customer in front of her, including the hot message.

[Is] what you’re telling me is, if a customer had said, “I have a capital guarantee objective or a short investment timeframe,” that would have been recorded as - - -?--Kerry had the opportunity to record that.



So it's an opportunity?---Well, I can't say categorically that she did that ever.

I see, so in terms of ---?---That's – that was the purpose of the system.

I see - - - ? - - - and that function.

And so, in terms of – so that system, if it was implemented and used, should have prevented emails going to Firstmac term deposit holders who had expressed the view that they had a capital guarantee objective or a short investment timeframe?---That was certainly - - -

Is that right?--- - - - the way it could have operated, yes.

And when the hard copy mail-out went out, I think you just told me that kind of data was not consulted?---Well, I think you asked me, did I – did I review any data.

Okay. Yes. You didn't - - - ? - - - and I'm not aware [of] that hot message existing on any account. I'm just saying it was possible for that to happen.

I see?---I'm not saying it did, in fact, happen.

153 On the issue of a written product governance framework, Mr Gration conceded that, with the benefit of hindsight, there might have been some more documentation prepared: T423/40–41.

### 5.3 Other relevant matters

154 In these reasons, certain facts have been identified, all of which I consider to be relevant matters for the purposes of determining whether Firstmac took reasonable steps within the meaning of s 994E(3)(d). Before proceeding to assess the further steps which Firstmac took, it is necessary to identify additional background facts which are also relevant matters within the meaning of s 994E(5).

155 All of these facts are relevant matters because they impact upon the question of whether Firstmac had put in place adequate systems, policies, practices and procedures to address identified or reasonably identifiable risks of retail product distribution conduct which was inconsistent with the High Livez TMD.

156 Ms Cunningham and Mr Austin were involved, on behalf of Firstmac, in the preparation of the High Livez TMD. Mr Gration was also aware of the content of the High Livez TMD. It follows that Firstmac was aware that investors, or potential investors, who held a capital guaranteed objective and/or a short investment timeframe objective were, at all relevant times, prescribed 'red' (namely, as *not* in the target market for High Livez) in the High Livez TMD.

157 Further, Ms Cunningham, Mr Austin and Mr Gration knew (or ought to have known) that there was a realistic possibility that some TD Holders may have held a capital guaranteed objective and/or a short investment timeframe objective. That they had such knowledge is apparent from

their evidence, as referred to above, and from the fact that (in the case of Mr Austin and Mr Cunningham) they considered and discussed what they considered to be appropriate safeguards which would prevent persons who fell outside the High Livez TMD from acquiring that product.

158 Mr Austin reviewed the consultation paper issued by ASIC dated December 2019 prior to the introduction of the DDO and was aware that the purpose of the introduction of the DDO was that there were shortcomings in the existing disclosure regime, and that (to use his words) “[t]he written disclosure on its own is insufficient”: T327/15–16. Similarly, Mr Gration reviewed the consultation paper in around December 2019 and was aware of the statement in it that the introduction of the DDO recognised that the provision of mandatory information or disclosure to consumers does not necessarily result in informed consumers and often does not correlate with good consumer outcomes: T392/1–20. Notwithstanding this awareness, each of Mr Austin and Mr Gration appeared to rely upon the disclosure in the High Livez PDS as being a means by which TD Holders would be made aware that High Livez was unsuitable for them if they held a capital guaranteed objective or short investment timeframe objective, and for the purposes of compliance by Firstmac with the DDO.

159 During the relevant period:

- (1) Ms Dean was the primary point of contact for Firstmac’s customers relating to investments in High Livez and Firstmac Term Deposits;
- (2) it was only sometimes, or from time to time, that Ms Dean spoke about High Livez to TD Holders whose Firstmac Term Deposit was maturing;
- (3) Ms Dean had written scripts which were available to her and which had been approved by Ms Cunningham. These scripts provided answers to questions that customers might ask about High Livez. However, Ms Dean was not required by Firstmac to provide any information from the script to a prospective investor and, if she did use it, Ms Dean did not follow the script word for word, but relied upon her own recollection of what was in the script;
- (4) Ms Dean prepared her own speaking notes but she did not read out all of the information in her speaking notes on every call. Rather, she used the information where she considered it was appropriate or was prompted based on something the customer said;
- (5) in terms of whether Ms Dean considered it was appropriate to refer to information in her speaking notes (including about the relevant features of High Livez), Ms Dean made

- such a decision without being given any training in the DDO, including about what was required of Firstmac with the introduction of the DDO, or about the High Livez TMD;
- (6) it was not part of Ms Dean's role, as far as she understood it, to obtain from the customer information as to whether they did or did not fall within the target market as defined in the High Livez TMD, and it was never communicated to her that this was part of her role. Indeed, she never had regard to the High Livez TMD when performing her role, and was not instructed to have regard to it;
  - (7) if Ms Dean spoke to a potential investor in High Livez, she would tell them that High Livez did not have a government guarantee or about the recommended investment timeframe if they asked about either of those issues or if they wanted general information about High Livez;
  - (8) Ms Dean believed, at all relevant times, that High Livez was not suitable for investors, or potential investors, who held a capital guaranteed objective and/or a short investment timeframe objective;
  - (9) whether the potential investor was told by Ms Dean that High Livez did not have a capital guarantee, and that it had a recommended investment horizon of three to five years, would depend upon the questions they asked, and so there was a risk that if they did not ask the right questions, they would not be told about those matters;
  - (10) it was Ms Dean's practice to send out emails to TD Holders at around the time of maturity of their Firstmac Term Deposits which attached, amongst other things, the TD Maturity Instructions Form and a High Livez PDS. This was part of a deliberate strategy to target them and encourage them to convert their term deposit holdings into High Livez. Ms Dean once had, but no longer had, a practice of contacting such TD Holders by telephone before sending out these emails;
  - (11) these emails were sent to TD Holders without modification to their content or their attachments regardless of whether Ms Dean had spoken to the TD Holder or not, and even if, in a discussion with that TD Holder, Ms Dean formed the view that they wanted a product with a government guarantee, and even if they had a short term investment timeframe, or an investment timeframe of less than three years, or they had told her that they were not interested in High Livez;
  - (12) although rare, it was possible for an investor to fill in an application form for High Livez and return it without speaking to Ms Dean.

160 Firstmac (by Mr Austin and Mr Gratton) were not aware of all of the facts referred to in the previous paragraph, including when engaging in their consideration of the steps required to be undertaken by Firstmac so as to comply with s 994E(3) as referred to above. In circumstances where only a small number of people within Firstmac were involved with the High Livez financial product, this demonstrates an obvious breakdown in communication within this organisation.

161 Instead of being aware of the true facts, Firstmac's understanding of the processes and procedures being followed by Ms Dean in her interactions with prospective investors in High Livez was different. That is, Firstmac (by either or both Mr Austin and Mr Gratton) understood that:

- (1) when speaking to potential investors, Ms Dean followed the script;
- (2) during such conversations, Ms Dean was required to and did inform all prospective investors in High Livez (whether they were TD Holders or not) that there was no government guarantee, and of the minimum recommended investment timeframe in High Livez;
- (3) that High Livez was not suitable for an investor who had a capital guaranteed objective or a short term investment objective were important matters that had to be communicated to potential High Livez investors irrespective of whether that potential investor had asked a question or not about whether High Livez had a capital guarantee or short investment timeframe;
- (4) if Firstmac knew that a TD Holder had a capital guaranteed objective or a short term investment objective, the High Livez PDS would not be sent to them. It would only be sent to them if there was interest from the customer in High Livez;
- (5) Ms Dean spoke to all investors in High Livez prior to them investing in High Livez, and understood that she was required to do this.

162 At all relevant times, Ms Cunningham knew that Ms Dean sent the High Livez Documents even if she had not been able to speak with the respective customer beforehand.

163 At all relevant times from 27 July 2021, Ms Cunningham and Mr Austin knew that Firstmac needed a written policy that set out the reasonable steps Firstmac would take in distribution of High Livez pursuant to the DDO. From September to about 20 October 2021, Ms Cunningham prepared a written policy in relation to the DDO (the **PDDO**). The PDDO was not finalised

before the commencement of the DDO on 5 October 2021 and, during the relevant period, the PDDO was never distributed (to staff) within Firstmac such as (relevantly) Ms Dean.

164 The PDDO was a generic document which contained nothing more than a summary of the relevant legislative requirements. The PDDO did not:

- (1) address the application of the DDO to High Livez;
- (2) provide any substantive guidance on what reasonable steps Firstmac intended to take (or should take) to seek to ensure its retail product distribution conduct in respect of High Livez would be consistent with the High Livez TMD;
- (3) identify which specific individual(s) within Firstmac were responsible for ensuring its retail product distribution conduct in respect of High Livez would be consistent with the High Livez TMD, and what their respective responsibilities were; or
- (4) identify any reasonable steps which Firstmac ought to take to discharge its DDO obligations.

165 After the DDO came into effect and during the relevant period, Ms Dean sent 119 separate emails to TD Holders attaching the High Livez Documents. Having regard to her evidence referred to above, I infer that she did not speak to each of the recipients of the emails prior to sending these emails.

166 Ms Cunningham was responsible for training staff at Firstmac regarding any relevant regulatory changes and developments. Despite that, at all relevant times, she provided no training to any Firstmac staff in respect of the DDO or the High Livez TMD.

167 In about March 2022, ASIC commenced investigatory steps, relevantly issuing notices to Firstmac pursuant to s 33 of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 912C of the *Corporations Act*, in relation to Firstmac's compliance with the DDO. Firstmac did not send any of the emails comprising the High Livez Documents after April 2022.

168 The High Livez Information was sent on or about 29 August 2022, and comprised 751 letters (and attachments including the High Livez PDS). Ms Dean was not tasked with calling TD Holders to whom the High Livez Information was sent, either before or after it was sent, and did not do so.

169 In November 2022, Firstmac introduced (for the first time), compulsory ‘knock out’ questions into Ms Dean’s script. This included a compulsory ‘knock out’ question, to be asked (by Ms Dean) at the beginning of the call, in relation to capital guarantee or government guarantee. A further amendment to the script was made in May 2023, which added ‘knock out’ question(s) in relation to the short investment timeframe, again to be asked by Ms Dean at the beginning of the call.

170 ASIC adduced evidence, including through the cross-examination of Firstmac’s witnesses, about a range of other facts. Firstmac also adduced evidence concerning other facts. The parties make submissions about these additional facts and seek extensive findings of fact. However, unless identified in these reasons, I do not regard these additional facts (and the resolution of any factual dispute relating to such facts) as having any bearing on the relevant question of whether there has been compliance by Firstmac with s 994E(3)(d) and so I have not addressed them.

#### **5.4 Consideration of balance of alleged reasonable steps**

##### ***5.4.1 Education on DDO requirements***

171 Firstmac submits that Mr Austin, Mr Gration and Ms Cunningham informed themselves and were cognisant of the requirements of DDO, and that while there was no standalone document that described in detail such a framework, each considered that Firstmac did have a framework in place to deal with its DDO obligations in general, including in relation to its distribution of High Livez.

172 ASIC accepts that those personnel were educated in the DDO obligations at a high level, but takes issue that there was not a greater level of education among other Firstmac staff such as Ms Dean. This is addressed below.

173 As to Firstmac’s framework, the only documents which were identified by Firstmac’s witnesses as comprising written policies, frameworks or procedures which Firstmac had during the relevant period in respect of the DDO were the PDDO, the script, Ms Dean’s speaking notes, the Acquisition Strategy & Plan 2021, High Livez Marketing and Distribution Strategy (July 2022 onwards), a Customer Relation Complaints Policy & Procedures, the Firstmac website and the High Livez TMD.

174 However, none of those documents, alone or in combination, set out the reasonable steps, pursuant to the DDO, which Firstmac was going to take in respect of the distribution of High

Livez or the manner in which those steps would be implemented. In particular, for the reasons already explained, the PDDO, which was not circulated to any staff by Ms Cunningham, was wholly deficient. In circumstances where Mr Austin, Mr Gration and Ms Cunningham were aware of the requirements of the DDO, Firstmac's conduct falls far short of the standard of behaviour expected of a reasonable person in its position. Firstmac should have recognised that either Ms Dean also needed to be trained in the DDO or that she needed to be supervised and given explicit directions as to what she needed to do to ensure that the DDO was complied with by Firstmac.

175 The lack of a coherent DDO policy which was circulated to the customer-facing staff led to the breakdown in communication between the Firstmac executive and Ms Dean as to what Ms Dean was required to do, as Firstmac itself accepted in its Written Statement.

176 The combination of the lack of supervision and awareness of Ms Dean's processes, and a written internal policy within Firstmac which articulated the reasonable steps to be taken by Firstmac in order to comply with the DDO, led to the extraordinary and unsatisfactory situation where (for example) Ms Dean would send the High Livez PDS to retail clients even if she *actually knew* of facts which meant that the recipient fell outside the target market for High Livez. Firstmac's conduct therefore *increased* the risk that the High Livez PDS would be distributed to a person who fell outside the target market for High Livez.

#### **5.4.2 Firstmac's Investment Specialist**

177 Taking into account my findings above, having Ms Dean perform the role of Investment Specialist within Firstmac in the manner that she performed it was not a reasonable step for the purposes of s 994E(3)(d). That is particularly because, by the time of the commencement of the relevant period, Ms Dean had ceased her practice of calling the TD Holders prior to the imminent expiry of their term deposits. Further, even if Ms Dean did happen to speak to a TD Holder, that person was sent the High Livez PDS irrespective of whether they showed interest in that product and regardless of their expressed desire for a capital guarantee or short term investment timeframe.

#### **5.4.3 Marketing approvals**

178 Firstmac submits that, upon the commencement of the DDO, Firstmac considered its cross-selling marketing strategy with a view to confirming that it remained appropriate in light of its new obligations under the legislation. It disputes that the processes it had in place with

respect to its marketing strategy for High Livez, including that all advertising for High Livez was approved by Mr Austin, Ms Cunningham and Ms Powell, were not reasonable steps for the purposes of s 994E(3). It submits that, while it was not until halfway through the relevant period, Firstmac also implemented a Marketing and Distribution Strategy for High Livez (in July 2022) which referred to the High Livez TMD and which recorded that the “audience” for High Livez included “anyone looking at investing in [Firstmac] Term deposits”, and that a “[k]ey insight from previous experience is that it is easier to generating (sic) leads by advertising [Firstmac Term Deposits] and then cross selling them [to] High Livez”.

179 While I accept that, in general terms, a reasonable step which Firstmac took was to review its cross-selling marketing strategy, the review undertaken by Firstmac was inadequate because it did not reveal the actual manner in which Ms Dean was implementing the cross-selling strategy and nor did it identify the reasonable steps which needed to be taken by Ms Dean (or others within Firstmac) for the purposes of ensuring that Firstmac complied with s 994E(3)(d).

#### ***5.4.4 Complaints policy***

180 Having regard to my findings above as to the proper construction of ss 994E(3) and 994E(5), an event that occurs concurrently with, or after, the Distribution Conduct is not capable of being a reasonable step within the meaning of those provisions. For this reason, the existence of a Complaints Policy to deal with any complaints by, for example, recipients of the Distribution Conduct cannot constitute a reasonable step because, by the time that the complaint is made, the retail product distribution conduct has occurred.

#### ***5.4.5 Disclosures in High Livez Material (including the PDS) and website***

181 The information which appeared on the Firstmac website, including the placement of the High Livez TMD on the website, were reasonable steps taken by Firstmac within the meaning of s 994E(3)(d).

182 The High Livez TMD was issued by Perpetual on 1 September 2021 and Ms Cunningham arranged for it to appear on the Firstmac website on 30 September 2021. However, owing to technical difficulties with the links contained within the High Livez TMD, a further version (rectifying these technical difficulties) was provided to Ms Cunningham by Perpetual on 13 October 2021, and thereafter appeared on the Firstmac website.



183 Further, if one went to the Firstmac website during the relevant period, one of the frequently asked questions on the webpage for the High Livez product was “What are the benefits and risks?”. The answer which was stated on the website was as follows:

It’s considered relatively low risk. RMBS are not deposits so they are not covered by the Federal Government’s deposit guarantee. However, since the inception of the Australian RMBS market in the early 1980s, not one RMBS note has ever gone into default or failed to pay 100 per cent of principal and interest obligations in a timely manner, even during the Global Financial Crisis.

184 However, the placement of such information requires a potential investor to choose to seek that information out, and to review what it discloses, such that it cannot be concluded that placement of information on the website alone would be sufficient to meet the reasonable steps obligation imposed by s 994E(3)(d).

185 As for the disclosures in the High Livez Material, disclosures that occur concurrently with, or as part of, the Distribution Conduct (such as in the PDS or information sheet) are not capable of being reasonable steps within the meaning of s 994E(3)(d).

#### ***5.4.6 PDDO Policy prepared by Ms Cunningham***

186 The preparation of a policy which was silent as to the steps which actually needed to be taken by those within Firstmac in order to comply with the DDO, and which was not, in any event, distributed to anyone within Firstmac, is not a reasonable step within the meaning of s 994E(3)(d).

#### ***5.4.7 Requiring investors to warrant and acknowledge before signing***

187 Having regard to my findings above as to the proper construction of s 994E(5), an event that occurs concurrently with, or after, the Distribution Conduct is not capable of being a reasonable step within the meaning of s 994E(5). For this reason, the imposition of a requirement on investors in High Livez to warrant and acknowledge that they had read and understood the terms of the High Livez PDS and that there was no guarantee of repayment of capital from the Trust before investing cannot constitute a reasonable step.

#### ***5.4.8 Conclusion as to Firstmac’s positive case***

188 For these reasons and viewed as a whole, Firstmac did not have in place adequate systems, policies, practices and procedures to address identified or reasonably identifiable risks of retail product distribution conduct which was inconsistent with the High Livez TMD.

## **5.5 Matters identified by s 994E(5)**

189 Section 994E(5) identifies matters which are required to be taken into account when assessing whether reasonable steps have been taken.

### ***5.5.1 The likelihood of the Distribution Conduct being inconsistent with the High Livez TMD: s 994E(5)(a)***

190 For the reasons given above, there was a real chance (that is, a real possibility) that some of the TD Holders who were the recipients of the Distribution Conduct may have held either or both a capital guaranteed objective and a short investment timeframe objective and were therefore outside of the target market for High Livez.

191 It follows that there was a real chance (that is, a real possibility) that the Distribution Conduct would be inconsistent with the High Livez TMD.

### ***5.5.2 Nature and degree of possible harm: s 994E(5)(b)***

192 Section 994E(5)(b) provides that a relevant matter is the nature and degree of harm that might result from an issue or regulated sale of a financial product to retail clients who are not in the target market or that is inconsistent with the determination.

193 In this case, the nature and degree of harm that might result was the investment by a recipient of the Distribution Conduct in High Livez where that person held either or both a capital guaranteed objective and a short investment timeframe objective, and who, for example, experienced a reduction in their invested capital due to volatility and either did not wish to, or could not, continue with their investment in High Livez for up to three to five years in order to attempt to recoup the loss of capital.

### ***5.5.3 Knowledge of Firstmac: s 994E(5)(c)(i)***

194 The evidence adduced by Firstmac established that it knew of the matters in 5.5.1 and 5.5.2 above, and no submission was made that it did not have such knowledge. Had it not had such knowledge, then I would have concluded that it ought to have had such knowledge as part of its consideration of whether TD Holders fell within the target market for High Livez and whether, and if so, what steps needed to be taken to comply with the DDO.

### ***5.5.4 Ways to eliminate or minimise the likelihood and the harm: s 994E(5)(c)(ii) and (d)***

195 Section 994E(5)(d) refers to the availability and suitability of ways to eliminate or minimise the likelihood (as referred to in (a)) and the harm (as referred to in (b)), and s 994E(5)(c)(ii)

refers to what the person knows, or ought reasonably to know, about those ways. It is therefore convenient to address these matters together.

196 The following step is aligned with the step described in ASIC's first level case at [23(eA)(ii)] of the Amended Statement of Claim.

197 During the relevant period, Firstmac could have introduced 'knock out' questions of the kind which it did later introduce on telephone calls with customers. Such 'knock out' questions would be contained in the script and be required to be asked by any person who spoke to a potential investor in High Livez, whether that be Ms Dean, Ms Gorman or someone else. If that person indicated that they held either or both a capital guaranteed objective and a short investment timeframe objective, then the person within Firstmac who spoke to them could be required by Firstmac to record that fact in their system relating to that person (ideally, the 'hot note' referred to by Mr Gratton) and they would *not* be sent the High Livez PDS.

198 Having regard to the fact that Firstmac has now introduced such questions into the script and to its admissions in the Written Statement concerning Ms Dean's processes, Firstmac knew or ought reasonably to have known that the introduction of such 'knock out' questions was an available and suitable way of eliminating or minimising the likelihood that the High Livez PDS would be sent to a person who fell outside the target market for High Livez.

199 If Firstmac wished to engage in its cross-selling strategy, another step which could have been taken by Firstmac prior to engaging in the Distribution Conduct was to send an email to TD Holders whose term deposit was approaching maturity with explicit information of the kind referred to in the 'knock out' questions, and to invite them to call Ms Dean (for example) if they were interested in speaking to someone at Firstmac about High Livez. Ms Dean could then take the steps described above in any telephone conversation. If the TD Holder did not contact Firstmac in response to the email invitation, or if they made contact with Firstmac but answered the 'knock out' questions with the answer 'yes', then that would be recorded on the system and they would *not* be sent the High Livez PDS.

200 Alternatively, there could have been reinstatement of the practice of Ms Dean contacting TD Holders by telephone whose term deposits were due to expire. Ms Dean would then be required to take the steps described above in any telephone conversation. If the TD Holder was unable to be contacted, or if they answered the 'knock out' questions with the answer 'yes', then that would be recorded on the system and they would *not* be sent the High Livez PDS.

201 None of these steps would have been onerous for Firstmac, and it is self-evident that they were suitable and available ways to eliminate or minimise the likelihood that the High Livez PDS would be sent to a person who fell outside the target market for High Livez. For this reason, Firstmac ought reasonably to have known about such ways.

202 The following step is aligned with the step described in ASIC's first level case at [23(g)] of the Amended Statement of Claim.

203 Firstmac could have prepared *and disseminated* a written policy which articulated the relevant processes and procedures to be undertaken by identified staff for the purposes of compliance with the DDO. Such a document would have ensured that there was no breakdown in communication between Ms Dean (who had direct dealings with the customers) and the executive of the kind referred to above, and also ensured that there was a proper understanding by Ms Dean of what she was required to do (being something she did not have, according to the Written Statement).

204 That there was such a breakdown of communication within such a small working group of individuals exemplified the need for a written policy which identified the steps which needed to be taken by each person within Firstmac in order to ensure compliance by Firstmac with the DDO.

205 Again, such a step was not an onerous one, especially having regard to the small number of people who were involved in High Livez. It is self-evident that this was a suitable and available way to eliminate or minimise the likelihood that the High Livez PDS would be sent to a person who fell outside the target market for High Livez. For these reasons and because an attempt was made to formulate a written policy, Firstmac ought reasonably to have known about it.

206 The following step is aligned with the step described in ASIC's first level case at [23(i)] of the Amended Statement of Claim.

207 Ms Dean is the primary point of contact with investors and, during the relevant period, Ms Dean exercised a discretion concerning whether to inform potential investors in High Livez about the lack of government guarantee and the recommended investment timeframe. In those circumstances, Ms Dean (and probably also Ms Gorman) could have been trained in the DDO requirements and required to read and be aware of the content of the High Livez TMD. Such matters would have influenced the decisions taken by Ms Dean as to whether to inform the customers of these features of High Livez during their conversations and, provided such

conversations occurred prior to the PDS being sent to the potential investor, would have eliminated or minimised the likelihood of sending the PDS to a person who fell outside the target market for High Livez, and either eliminated or minimised the risk of harm being suffered by such a person who invests in High Livez and who loses part or all of their investment.

208 Again, it is apparent that this was a suitable and available way to eliminate or minimise the likelihood that the High Livez PDS would be sent to a person who fell outside the target market for High Livez. Mr Gratton conceded as much. For this reason, Firstmac ought reasonably to have known about it.

### **5.6 Conclusion on second level case**

209 The steps which Firstmac took were wholly inadequate to meet the statutory obligation imposed by s 994E(3)(d). Although it recognised that there was a possibility that some of the TD Holders who would be the recipients of the Distribution Conduct may have held either or both a capital guaranteed objective and a short investment timeframe objective and were therefore outside of the target market for High Livez, the steps which Firstmac took following that recognition fell far short of the standard of behaviour expected of a reasonable person in its position. This is especially when one has regard to the steps which were reasonably able to be taken by Firstmac, as referred to above, and which steps would have either eliminated or minimised the likelihood that the High Livez PDS was sent to a person who fell outside the target market for High Livez.

210 It follows that I am satisfied to the required standard that Firstmac failed to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the Distribution Conduct being consistent with the High Livez TMD.

211 For these reasons, ASIC established its second level case.

## 6. CONCLUSION AND DISPOSITION

212 For these reasons, Firstmac contravened s 994E(3) of the *Corporations Act*.

I certify that the preceding two hundred and twelve (212) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes.

Associate: 

Dated: 10 July 2024