

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v BPS Financial Pty Ltd [2024] FCA 457

File number(s): QUD 380 of 2022

Judgment of: **DOWNES J**

Date of judgment: 3 May 2024

Catchwords: **CORPORATIONS** – where respondent entered agreements with holders of Australian Financial Services Licence in relation to digital currency or crypto-asset – whether respondent was authorised representative within meaning of ss761A and 916A of the *Corporations Act 2001* (Cth) – identification of financial product and financial product advice – whether authorised representative can issue a financial product – consideration of ss761A, 910A, 911A(2)(a), 911A(2)(b) and 916A *Corporations Act 2001* (Cth)

CONSUMER LAW – where respondent published statements on website and on document on website – whether statements of fact or opinion – whether representations as to future matters – whether contraventions of ss12DA and 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth)

Words & phrases: “on behalf of”

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BB, 12DA, 12DB
Corporations Act 2001 (Cth) ss 9, 761A, 761E, 762B, 762C, 763A, 763D, 766A(1), 766B, 766C, 911A, 912A, 916A, 917B, 917E, 917F
Financial Services Reform Act 2001 (Cth)
Financial Services Reform Bill 2001 (Cth)
Explanatory Memorandum to the Financial Services Reform Bill 2001 (Cth)
Supplementary Explanatory Memorandum to the Financial Services Reform Bill 2001 (Cth)

Cases cited: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99

Australian Competition & Consumer Commission v Dateline Imports Pty Ltd [2015] FCAFC 114

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

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

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

Australian Competition and Consumer Commission v Woolworths Ltd [2019] FCA 1039

Australian Competition and Consumer Commission v Woolworths Group Ltd (2020) 281 FCR 108; [2020] FCAFC 162

Australian Securities and Investments Commission v Daly [2023] FCA 290

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (2019) 140 ACSR 561; [2019] FCA 1932

Australian Securities and Investments Commission v GetSwift Ltd [2021] FCA 1384

Australian Securities and Investments Commission v Huntley Management Ltd (2017) 122 ACSR 163; [2017] FCA 770

Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) (2018) 266 FCR 147; [2018] FCA 751

Benlist Pty Ltd v Olivetti Australia Pty Ltd (1990) ATPR 41-043

Briginshaw v Briginshaw (1938) 60 CLR 336

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592; [2004] HCA 60

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25

Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45; [2000] HCA 12

City of Botany Bay Council v Jazabas Pty Limited (2001) ATPR (Digest) 46-210; [2001] NSWCA 94

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

Energy World Corp Ltd v Maurice Hayes & Associates Pty Ltd (2007) 239 ALR 457; [2007] FCAFC 34

Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486; [2012] HCA 39

Girchow Enterprises Pty Ltd v Ultimate Franchising Group Pty Ltd [2023] FCA 420

Google Inc v Australian Competition and Consumer Commission (2013) 249 CLR 435; [2013] HCA 1
Ireland v WG Riverview Pty Ltd (2019) 101 NSWLR 658; [2019] NSWCA 307
Kraft Foods Group Brands LLC v Bega Cheese Ltd (2020) 151 IPR 369; [2020] FCAFC 65
Lin v Zheng [2023] NSWCA 174
NMFM Property Pty Ltd v Citibank Ltd (No 10) (2000) 107 FCR 270; [2000] FCA 1558
Noon v Bondi Beach Astra Retirement Village Pty Ltd (2010) 15 BPR 28,221; [2010] NSWCA 202
North East Equity Pty Ltd v Proud Nominees Pty Ltd (2010) 269 ALR 262; [2010] FCAFC 60
Pyrotek Pty Ltd v Ausco Industries Pty Ltd (1992) ATPR (Digest) 46-085
Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) (2019) 99 NSWLR 317; [2019] NSWCA 11
Sykes v Reserve Bank of Australia (1998) 88 FCR 511
Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177
R v Toohey; Ex parte Attorney-General (NT) (1980) 145 CLR 374
Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (1992) 38 FCR 1

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Counsel for the Plaintiff: Mr MT Brady KC, Mr RD Strong and Ms CA Schneider
Solicitor for the Plaintiff: Australian Securities and Investments Commission
Counsel for the Defendant: Mr M Hodge KC and Ms SM Derrington
Solicitor for the Defendant: HWL Ebsworth

ORDERS

QUD 380 of 2022

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

AND: **BPS FINANCIAL PTY LTD (ACN 604 899 381)**
Defendant

ORDER MADE BY: DOWNES J

DATE OF ORDER: 3 MAY 2024

THE COURT ORDERS THAT:

1. The parties are to confer and provide to the chambers of Downes J an agreed form of order giving effect to the reasons for judgment and proposed directions as to the further conduct of this proceeding by 4.00 pm AEST on 10 May 2024.
2. If the parties are unable to agree upon a form of order and proposed directions, the parties shall each provide their proposed draft of same to the chambers of Downes J by 4.00 pm AEST on 14 May 2024 accompanied by any written submissions not exceeding three (3) pages.

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

REASONS FOR JUDGMENT

1.	SYNOPSIS	[1]
2.	BACKGROUND	[16]
2.1	The Qoin Project	[16]
2.2	The Qoin Facility	[30]
2.2.1	<i>Qoin Wallet App</i>	[32]
2.2.2	<i>Qoin Wallet</i>	[36]
2.2.3	<i>Qoin Blockchain</i>	[49]
2.2.4	<i>Smart contracts</i>	[57]
2.2.5	<i>Qoin</i>	[60]
2.2.6	<i>Q Shop</i>	[68]
2.3	Description of Qoin Facility by BPS	[69]
2.3.1	<i>Qoin Website</i>	[69]
2.3.2	<i>White Paper</i>	[71]
2.3.3	<i>Combined Financial Services Guide and Product Disclosure Statements</i>	[78]
3.	UNLICENSED CONDUCT CASE	[84]
3.1	Overview of the parties' contentions	[84]
3.2	Identification of the financial product	[101]
3.3	Identification of the financial product advice	[113]
3.4	The arrangements with Billzy and PNI	[119]
3.4.1	<i>The First Billzy Arrangement</i>	[120]
3.4.2	<i>The PNI Arrangement</i>	[124]
3.4.3	<i>The Second Billzy Arrangement</i>	[128]
3.5	BPS's claim for exemption under section 911A(2)(a)	[129]
3.5.1	<i>Overview</i>	[129]
3.5.2	<i>Whether BPS is entitled to rely upon section 911A(2)(a)</i>	[132]
3.5.3	<i>First Billzy AR Agreement and Second Billzy AR Agreement</i>	[156]
3.5.4	<i>PNI AR Agreement</i>	[173]
3.6	BPS's claim for exemption under section 911A(2)(b)	[176]

3.6.1	<i>Overview</i>	[176]
3.6.2	<i>Construction of section 911A(2)(b)</i>	[180]
3.6.3	<i>Billzy Intermediary Agreements</i>	[190]
3.6.4	<i>PNI AR Agreement</i>	[196]
3.7	Conclusion	[205]
4.	MISLEADING CONDUCT CASE	[206]
4.1	Overview	[206]
4.2	Relevant legal principles	[219]
4.2.1	<i>The representations conveyed by the impugned statements</i>	[219]
4.2.2	<i>Representations within meaning of section 12DB</i>	[229]
	<i>Section 12DB(1)(a): “standard, quality, value or grade”</i>	[229]
	<i>Section 12DB(1)(e): “approval, performance characteristics, uses or benefits”</i>	[229]
4.2.3	<i>Representations as to future matters</i>	[232]
4.2.4	<i>Representations of fact or opinion</i>	[247]
4.3	Characteristics of the hypothetical ordinary or reasonable member of audience	[255]
4.4	Trade Representation	[263]
4.4.1	<i>Overview of the parties’ respective positions</i>	[263]
4.4.2	<i>Was the representation about a future matter?</i>	[271]
	<i>Pre-3 November 2021</i>	[272]
	<i>Post-3 November 2021</i>	[286]
4.4.3	<i>Was the representation false or misleading?</i>	[293]
	<i>Pre-3 November 2021</i>	[294]
	<i>Post-3 November 2021</i>	[310]
4.4.4	<i>Conclusion</i>	[317]
4.5	Merchant Growth Representation	[318]
4.5.1	<i>Overview of the parties’ respective positions</i>	[318]
4.5.2	<i>The representation</i>	[326]
4.5.3	<i>Was the representation about a future matter?</i>	[327]
4.5.4	<i>Was the representation false or misleading?</i>	[332]

<i>If a representation as to a future matter, were there reasonable grounds?</i>	[333]
<i>If a representation as to a present fact, was it false or misleading?</i>	[350]
4.5.5 Conclusion	[360]
4.6 Approval / Registration Representation	[361]
4.6.1 Overview of the parties' respective positions	[361]
4.6.2 The representations	[370]
<i>The approval representation</i>	[371]
<i>The registration representation</i>	[376]
4.6.3 Were the representations statements of fact or opinion?	[382]
4.6.4 Were the representations false or misleading?	[387]
4.6.5 Conclusion	[397]
4.7 Compliance Representation	[398]
4.8 Conclusion	[407]
5. CONCLUSION	[408]

DOWNES J:

1. SYNOPSIS

1 In this proceeding, the plaintiff (**ASIC**) alleges that the defendant, **BPS** Financial Pty Ltd, unlawfully carried on a financial services business without holding an Australian Financial Services Licence (**AFSL**) and that, in the course of that business, it made false and misleading representations in connection with the supply or use of a financial product.

2 These allegations arise out of conduct engaged in by **BPS** when it developed and made available to the public a system for making non-cash payments using a digital currency or crypto-asset which it named **Qoin**.

3 There are two parts to **ASIC**'s claims brought in relation to **BPS**'s conduct.

4 The first part – the **Unlicensed Conduct Case** – consists of a claim that **BPS** contravened ss 911A(1) and 911A(5B) of the *Corporations Act 2001* (Cth) by carrying on a financial services business within the meaning of Chapter 7 of the *Corporations Act* in issuing a financial product, and providing financial product advice in relation to that product, in circumstances where **BPS** did not hold an **AFSL**.

- 5 BPS claims that it was at all relevant times exempted from the requirement to hold an AFSL:
- (1) in respect of its conduct of issuing a financial product:
 - (a) by s 911A(2)(a) of the *Corporations Act*, because it issued the product as a representative of the holder of an AFSL; and/or
 - (b) by s 911A(2)(b) of the *Corporations Act*, because it issued the financial product in the implementation of an intermediary arrangement as described in that section;
 - (2) in respect of its provision of financial product advice, by s 911A(2)(a) of the *Corporations Act*, because it provided that advice as a representative of the holder of an AFSL.

6 The satisfaction or otherwise of these exemptions was the primary battleground on which the parties fought the Unlicensed Conduct Case. ASIC accepted that it bore the legal burden of proving that they did not apply.

7 The second part – the **Misleading Conduct Case** – concerns ASIC’s claims that BPS contravened ss 12DA(1) and 12DB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) by making certain statements on its website, and in a document that was published on that website.

8 ASIC alleges that the impugned statements gave rise to four false and misleading representations:

- (1) The **Trade Representation**: that a person who purchases Qoin can be confident that, if and when they wished to do so, they would be able to exchange the Qoin that they held for fiat currency or other crypto-assets through independent exchanges, when no such exchanges existed;
- (2) The **Merchant Growth Representation**: that Qoin could be used to purchase goods and services from an increasing number of merchants, when that was not the case;
- (3) The **Approval / Registration Representation**: that the Qoin NCP Product (defined below) had been officially approved and/or officially registered in the sense of having been granted some kind of official government imprimatur or having been included in some official register of financial products, when neither was the case; and

(4) The **Compliance Representation**: that the Qoin NCP Product (defined below) and/or BPS were each fully compliant with Australian financial services laws when, based on the Unlicensed Conduct Case, that was not so.

9 There was no serious dispute that BPS published the statements relied upon by ASIC. Rather, the real dispute in the Misleading Conduct Case concerns whether the statements conveyed the representations alleged and, if so, whether those representations were misleading.

10 Pursuant to an order dated 5 December 2022, the hearing proceeded on the issue of liability only, with a separate hearing to be held on any other questions.

11 Section 911A(5B) of the *Corporations Act* and s 12DB(1) of the *ASIC Act* are civil penalty provisions. Where I have reached conclusions concerning whether there has been a contravention of those provisions, I have reached 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”; 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* [2023] FCA 290 at [37]–[38] (Cheeseman J).

12 For the reasons which follow, I have concluded that ASIC succeeded on its Unlicensed Conduct Case, other than in relation to the period during which BPS was an authorised representative of **PNI** Financial Services Pty Ltd, during which period BPS was exempt from the requirement to hold an AFSL by the operation of s 911A(2)(a) of the *Corporations Act*.

13 As to the Misleading Conduct Case, I have found that BPS contravened ss 12DA(1) and 12DB of the *ASIC Act* in relation to the Trade Representation, the Merchant Growth Representation and the Approval / Registration Representation, but that BPS did not contravene the *ASIC Act* in relation to the Compliance Representation, because the latter would have been understood as conveying an expression of opinion only.

14 I will direct the parties to confer and provide orders which reflect these reasons, and which address directions relating to the further conduct of this proceeding. Unless the parties can reach agreement about any proposed costs order, it is my present view that the determination of the appropriate costs order should await the next stage of this proceeding.

15 Additionally, the parties should have leave to appeal and, if necessary, leave to cross-appeal.

2. BACKGROUND

2.1 The Qoin Project

16 The business of the Bartercard Group, known as Bartercard, commenced in 1991. It operated
as a business-to-business trading platform. Businesses which signed up as members could
trade their goods and services with each other using a notional “currency” known as **Trade
Dollars**.

17 In late 2018, two former long-term employees of the Bartercard Group, Mr Antonie Wiese and
Mr Rajesh Pathak, acquired the Bartercard Group through their own corporate interests. By
early to mid-2019, Mr Wiese, Mr Pathak and senior management of Bartercard discussed using
blockchain technology to transition the Trade Dollar concept to a digital currency. The name
applied to this intended new initiative in around August 2019 was the **Qoin Project**.

18 The Qoin Project, as proposed in 2019, was to implement some key changes from the existing
Bartercard model. First, Qoin was to include consumers as members, as well as merchants.
Second, transactions would be recorded on a distributed blockchain ledger instead of a
centralised ledger. Third, no transaction fees were to be charged. Finally, the unit of exchange
was to be labelled “Qoin” instead of “Trade Dollar”.

19 BPS is a member of the broader Bartercard Group and is the corporate vehicle through which
the Qoin Project was established and implemented.

20 The proposed Qoin Project involved the provision of a “financial product” as defined in s 763A
of the *Corporations Act* because it was a facility through which a person makes a non-cash
payment (as defined in s 763D). By implementing the proposed Qoin Project, BPS therefore
intended to carry on a financial services business in this jurisdiction and was required by
s 911A(1) of the *Corporations Act* to hold an AFSL covering the provision of the financial
services, or to bring itself within one or more of the exemptions to the requirements for BPS to
hold an AFSL in s 911A(2). This is not controversial.

21 In November 2019, Mr Wiese and Mr Pathak decided to approach an existing non-cash
payment facility AFSL holder to seek approval for BPS to be authorised under that other
holder’s AFSL to implement the Qoin Project.

22 Mr Wiese received a list of existing non-cash payment AFSL holders on 20 November 2019.
He became aware from this that **Billzy Pty Ltd** held an AFSL. Billzy was majority owned by
a longstanding Bartercard member, Mr Steven Pantic. Mr Wiese and Mr Pathak approached

Mr Pantic and told him that Bartercard had initiated the Qoin Project and required a non-cash payment facility AFSL.

23 Negotiations then ensued between Billzy and BPS. Those negotiations culminated in the execution of two documents between Billzy and BPS:

(1) a document entitled “Authorised Representative Agreement” dated 17 December 2019; and

(2) a document entitled “Intermediary Agreement” which was undated, but which the parties accept was executed on or about 17 December 2019.

24 In around October 2020, Mr Wiese was informed that Billzy had been approached for a commercial transaction with a possible consequence that Billzy may not be able to authorise BPS beyond an initial 12 month period. Mr Wiese was informed that PNI (who was also a responsible manager under Billzy’s AFSL) was also a non-cash payment facility AFSL holder, and that PNI had agreed to authorise BPS under its AFSL on materially the same commercial terms as had been agreed between BPS and Billzy.

25 BPS and PNI then entered into a document entitled “Authorised Representative Agreement” on 4 November 2020.

26 In 2021, Blockchain Investment Group Pty Ltd acquired a 65% interest in Billzy Holdings Pty Ltd, the holding company of Billzy. The arrangements with BPS then reverted back from PNI to Billzy.

27 On 1 September 2021, BPS and Billzy executed two agreements being:

(1) a document entitled “Authorised Representative Agreement”; and

(2) a document entitled “Intermediary Agreement”.

28 Each of the agreements referred to above are addressed in further detail below. There was no suggestion by ASIC that any of these agreements was a sham.

29 It is common ground that, at all material times, each of Billzy and PNI held AFSLs which covered the provision of financial services of the kind supplied by BPS, namely:

(1) general financial product advice in relation to non-cash payment products; and

- (2) dealing in a financial product by:
- (a) issuing, applying for, acquiring, varying, or disposing of non-cash payment products; and
 - (b) applying for, acquiring, varying, or disposing of non-cash payment products on behalf of another person to retail and wholesale clients.

2.2 The Qoin Facility

30 Since January 2020, BPS has developed and made available to the public a system for making and receiving non-cash payments using Qoin (which for convenience I will describe as the **Qoin Facility**).

31 The Qoin Facility has a number of elements, which allow users to transact using Qoin. These elements were explained by Mr Andrew Atkinson, Chief Technology Officer of Bartercard Global Pty Ltd, who also provides information and communication technology services to BPS. His evidence was not contradicted or challenged, and I accept it.

2.2.1 Qoin Wallet App

32 The **Qoin Wallet App** is an application specifically designed for the Qoin system. The software is owned and operated by BPS. The Qoin Wallet App can be downloaded onto compatible Apple and Android devices from Google Play and the Apple App Store. It first became available for download by members of the public in January 2020.

33 When a person first downloads the Qoin Wallet App, they are asked to complete a sign-up process which requires them to verify their email address, mobile phone number, location/country and create a password. Once this process is completed, users are then directed to a “Before We Start” screen, which contains links to terms and conditions, including the Financial Services Guide and Product Disclosure Statement. Users must check a box which states that they agree to be bound by the above documents before they can move to the next page.

34 Once a person has completed the sign-up process for the Qoin Wallet App, they can go on to create a **Qoin Wallet** (discussed below), access the **Q Shop** (discussed below) and access other features such as merchant registration.

35 Even if a person has downloaded and signed up on the Qoin Wallet App, they cannot make any
36 transactions using Qoin without first creating a Qoin Wallet. Downloading the Qoin Wallet
App does not automatically initiate or access the Qoin Wallet feature.

2.2.2 *Qoin Wallet*

36 The Qoin Wallet is a component of the Qoin Wallet App and is its own discrete software
product, integrated with the broader application. It is a separate program called (or activated)
by any part of the Qoin Wallet App which requires its functionality.

37 The Qoin Wallet was customised from a crypto-wallet product supplied by a company called
AlphaWallet. Data for the Qoin Wallet is stored on a user's device.

38 The Qoin Wallet uses an Application Programming Interface gateway to send requests to, and
receive responses from, the **Qoin Blockchain Nodes**.

39 Once a user has completed the sign-up process described above, they will be directed to the
homepage for the Qoin Wallet App, which contains four tabs at the bottom: "Browser",
"Wallet", "Transactions" and "Settings". If the user is new, then this homepage will also
contain a link with the message, "Verification Required".

40 To create a Qoin Wallet, the user must first click on the "Verification Required" message,
which will direct them through a series of steps comprising the Qoin system's "Know Your
Customer" (**KYC**) process. The KYC process was not always a part of the Qoin Wallet App
but was introduced as mandatory for Australian wallet holders in April 2022.

41 To complete the KYC process, a user must:

- (1) enter some basic information about themselves;
- (2) provide a picture of a valid Government photo ID;
- (3) provide a live photo to match their Government photo ID; and
- (4) provide their name, address, date of birth and card number;

which information is then validated.

42 Once a user has been verified by the KYC process, they will be able to create a Qoin Wallet.

43 This is done after about 30 seconds, at which time a create screen is presented which displays
a button "Create a New Wallet".

44 Once a user clicks on “Create a New Wallet”, the Qoin Wallet software generates a new public/private key pair.

45 The **public key** is the unique **Qoin Wallet address**, which becomes the identifier for the user’s newly created Qoin Wallet. It is, in effect, the equivalent of an account number and BSB for a traditional bank account. A person may provide their unique Qoin Wallet address to another user either by transcribing the string of letters and numbers comprising the public key, or by providing them with a QR code for scanning which contains that information.

46 The **private key** acts, in effect, as a secure digital password, stored on the user’s mobile device, which can be used to authorise (or “sign”) transactions using the Qoin Wallet.

47 The Qoin Wallet component of the Qoin Wallet App has the function of both viewing the balance of Qoin for a wallet address recorded on the blockchain, and the payment facility (the function to send and receive Qoin and for the transaction to be recorded). There is separate source code for each function.

48 Business operators can register as users and can accept Qoin in payment for goods and services (**Qoin Merchants**). In practice, there is no significant difference in the functionality of the Qoin Wallet App between a user who does not operate a business and Qoin Merchants because any user can list an item for sale. A prospective Qoin Merchant must provide an Australian Business Number, business turnover data, and additional “Know Your Business” information. However, the process of creating a Qoin Wallet is the same.

2.2.3 Qoin Blockchain

49 The **Qoin Blockchain** is a decentralised, distributed ledger that stores a record of all transactions using Qoin. Mr Atkinson gave evidence that one can think of the blockchain, in simple terms, as a sort of security-enhanced spreadsheet which contains constantly updated, computer-coded, transaction data.

50 A “node”, in this context, is a computer or device connected to other “nodes” in the Qoin Blockchain network, each of which hosts a copy of the entire Qoin Blockchain, validates transactions, and propagates them across the network (as well as occasionally performing other functions which are not relevant) (**Qoin Blockchain Nodes**).

51 There are a total of seven Qoin Blockchain Nodes, each owned by a different entity. For example, Node 1 is owned and operated by Blockchain Investments Pty Ltd and is located in

Australia. Node 5 is owned and operated by Bartercard Services Pty Ltd and is located in Germany.

52 Transactions are recorded on the Qoin Blockchain in the form of “blocks”, with each block containing a series of verified transactions represented as computer-coded data. These blocks are linked together in a sequential manner, forming a chain – hence the term “blockchain”. Each block also contains a reference to the preceding block, ensuring the integrity and immutability of the entire transaction history on the Qoin Blockchain.

53 For any particular transaction using Qoin, transaction data is communicated to one of the Qoin Blockchain Nodes, which then broadcasts the transaction data to all nodes on the Qoin Blockchain. On a round-robin basis a **Proposer Node** is selected. The Proposer Node aggregates the transactions broadcasted to the network during a given period into a “block” and applies a cryptographic process to the block called “hashing”. The hash for a block is linked to the information in the block in such a way that any modification to the data within a block will result in a different hash. In this way, the hash serves as a digital fingerprint of the block’s data. Each block holds its own hash, as well as a reference to the hash of the previous block in the Qoin Blockchain, thus establishing the chain’s continuity.

54 After a block has been created and hashed, the Proposer Node broadcasts the block to all of the other Qoin Blockchain Nodes. These nodes then employ a consensus algorithm, specifically Istanbul Byzantine Fault Tolerance, to collectively validate the contents of the block and its position in the Qoin Blockchain. If a block is validated, each Qoin Blockchain Node will add it to the node’s copy of the Qoin Blockchain, thereby recording the transaction.

55 There is only ever one Qoin Blockchain, comprising the ledger which is replicated across the seven Qoin Blockchain Nodes. The creation of a new Qoin Wallet allows a user to access the Qoin Blockchain (in the sense of sending commands to the blockchain), but does not otherwise affect the Qoin Blockchain itself.

56 The completion of a transaction through the Qoin Wallet involves a series of steps, namely:

- (1) Open the payment screen: Once a user has opened up the Qoin Wallet function within the Qoin Wallet App, the first step is to press the button marked “Send” on the landing page, to bring up the payment screen.
- (2) Create the transaction: To create a transaction, a user fills out the necessary information in accordance with the prompts displayed on the payment screen, being the recipient’s

Qoin Wallet address (the sender is automatically populated by the wallet), and the amount of Qoin to be “transferred”. The recipient’s Qoin Wallet address can be obtained through the proposed recipient either providing the string of numbers and letters that make up their public key, or by the scanning of the QR Code which is their public key.

- (3) Sign the transaction using the private key: To validate the transaction, the private key, stored in a secure enclave on the user’s mobile device, is utilised. This private key is safeguarded by a biometric or PIN authentication system. The user selects “Send” and is prompted to confirm a transaction by clicking “Confirm” on the payment screen and providing the required biometric data or PIN. The secure enclave is then unlocked, and the private key is used internally by the wallet software to sign the transaction. This process creates a unique hash that identifies the transaction to the Qoin Blockchain Nodes as a verified transaction.
- (4) Send the raw transaction information: Once signed, the transaction information is then sent to the Qoin Blockchain Nodes as a raw transaction.
- (5) Verify the transaction: Once received by the Qoin Blockchain Nodes, the transaction data is broadcast and validated.
- (6) Process the transaction: If the transaction is verified, it is then processed, and the state of the Qoin Blockchain is updated to reflect the “transfer” of Qoin from the sender to the recipient.
- (7) Record the transaction: The transaction details, including the transaction hash and completion time, are recorded in the user’s Qoin Wallets for future reference, and the user’s Qoin balance is updated.

2.2.4 Smart contracts

57 A **smart contract** is a computer program that runs on a blockchain node and automates the execution of predefined actions or agreements once certain conditions are met. It is essentially a self-executing contract with the terms of the agreement directly written into code, operating on the “if-then” logic principle.

58 The smart contract associated with the Qoin Blockchain (the **Qoin Smart Contract**) can be regarded as the “rule book” for the Qoin Blockchain and Qoin transactions. It is deployed on the nodes holding and processing the Qoin Blockchain and sets the rules for what transactions

can be made, by whom and under what conditions. The Qoin Wallet interacts with the Qoin Blockchain and conducts transactions in compliance with these rules.

59 The Qoin Smart Contract is responsible for:

- (1) establishing the basic building blocks of Qoin (i.e. that the currency is called “Qoin”, that it can be broken down to 18 decimal places and that there can only ever be a maximum of 10,000,000,000 Qoin);
- (2) establishing the rules for validating transaction data, such as ensuring that the transaction involves two valid Qoin Wallet addresses, the “payer’s” Qoin balance is sufficient to effect the transaction and the correct public and private keys have been provided.

2.2.5 *Qoin*

60 Qoin is the notional unit of exchange in transactions undertaken through the Qoin Wallet, and recorded on the Qoin Blockchain.

61 It is a unit of measurement, rather than a discrete thing. There is no distinct serial number or unique identifier that allows for identifying an individual Qoin. As a result, it is impossible to distinguish one Qoin from another or track their ownership individually.

62 As submitted by BPS, a user’s starting balance is 0 Qoin, and that will only increase if they acquire Qoin through transactions conducted using their Qoin Wallet (for example, transactions with other users, or by purchasing Qoin directly from BPS).

63 When a person “transacts” using Qoin, they do not actually “send” a Qoin to another person or “acquire” a Qoin from another person, even though those terms are sometimes used colloquially to explain a transaction that gives rise to a decrease or increase in a Qoin balance. Instead, the Qoin Wallet communicates with the Qoin Blockchain Nodes through the mechanisms described above to carry out a command that records a deduction of a certain amount of Qoin against the “payer’s” Qoin Wallet, and an addition of the same amount of Qoin against the “payee’s” Qoin Wallet on the Qoin Blockchain, and prompts the Qoin Wallet to decrease/increase the Qoin balances associated with each Qoin Wallet address by the amount.

64 A single “transaction” involves both the deduction of Qoin from the payer’s Qoin Wallet and the addition of Qoin to the payee’s Qoin Wallet. In this sense, a Qoin transaction does not involve the actual transfer of a thing, so much as an updating of the Qoin Blockchain to reflect

a different balance in each Qoin Wallet. The blockchain entry serves as a record of the transaction, indicating the sender, recipient and amount of Qoin involved.

65 The subdivision of a Qoin into 18 decimal places means that a transaction can involve the “transfer” of as little as 0.000000000000000001 Qoin.

66 A user’s Qoin balance, at any one time, reflects the total combined product of all of the various transactions which have been undertaken using a particular Qoin Wallet, as recorded by additions and deductions on the Qoin Blockchain.

67 Within the Qoin Wallet, a user can opt to show their Qoin balance in Qoin, Australian dollars (AUD), US dollars (USD), New Zealand dollars (NZD), UK pounds (GBP), Singapore dollars (SGD) or South African Rand (ZAR).

2.2.6 Q Shop

68 The Q Shop is an online directory in which Qoin Merchants and other users can list their services or products for sale. The Q Shop feature does not allow users to engage in Qoin transactions and it can be accessed through the Qoin Wallet App regardless of whether the user has created a Qoin Wallet.

2.3 Description of Qoin Facility by BPS

2.3.1 Qoin Website

69 In evidence are printouts of browser screenshots depicting the **Qoin Website** (the homepage of which is at <https://qoin.world>) at various points in time. The following are extracts from those screenshots, with the emphasis as it appears in the extracts:

- (1) The organisation which you know as Qoin commenced operating in October 2019 as the **Qoin Program** which consists of:
 - (a) the Qoin token (“**Qoin Token**”) that is minted and issued by the Qoin Reserve;
 - (b) the Qoin blockchain (“**Qoin Blockchain**”);
 - (c) a wallet facility that enables a user to view the Qoin balance available to the user known as the “**Qoin Wallet**”;

- (d) a related payment facility enabling a user to purchase goods and services from another user using Qoin on the Qoin Blockchain, referred to as the “**Payment Facility**” which:
 - (i) is issued by BPS Financial Limited under an Authorised Representative Agreement with PNI Financial Services Pty Ltd under AFSL Number 408735, for the purposes of the *Corporations Act 2001*; and
 - (ii) in respect of which BPS is authorised to provide general financial product advice as Authorised Representative No. 001279598 of the AFSL held by PNI; and
 - (e) Block Trade Exchange known as **BTX** by which a user may trade Qoin for AUD fiat and reciprocally. BTX is registered as a digital currency exchange provider no. 100635628 with the Australian Transaction Reports and Analysis Centre (AUSTRAC).
- (2) The world of commerce is ready to adopt a widely used reliable digital currency platform that enables shoppers or buyers to easily obtain global currency to spend at their favourite merchants in-store or online. Merchants on average have 25 to 35% capacity to engage new customers and are keen to accept global currency and reward these shoppers. Sellers continuously seek an edge on their competitors to attract new Buyers as their goods are no longer easily selling on existing marketplaces like eBay and Amazon.

Now is the time to create this new commercial digital currency built on a foundation of blockchain technology. The mission for Qoin is a commercial global currency platform that empowers millions of business owners, sellers and merchants to trade their Goods & Services with shoppers and buyers globally.

Qoin is made of three parts that will work together to create a more inclusive commerce system:

- (a) It is built on a secure, scalable and reliable blockchain
- (b) It is backed by the participating merchant's supply of goods & services in a growing merchant ecosystem designed to give it intrinsic value
- (c) The Qoin Association, tasked with evolving and expanding the ecosystem, governs it.

The Qoin currency is built on the Qoin Blockchain, intended to address a global community of buyers and sellers of goods & services. The blockchain has been built on the world's safest, robust and scalable interoperable technologies. It has been designed for millions of users to hold and transfer Qoins and hence the blockchain and wallets will be hosted in one of the world's most secure environments.

(3) **The Qoin Blockchain & Consensus Model**

We have built this blockchain system on the leading Quorum platform and Byzantine Fault Tolerant (BFT) consensus protocol to ensure an optimum balance of speed, scale and security.

...

The objective of the Qoin Blockchain is to act as a reliable distributed ledger platform for payments and rewards services, including a new global currency, which can meet the daily transactional needs of millions of buyers and sellers. Thus, we have designed a blockchain based on these three requirements:

- ✓ Fast transaction speeds, high transaction volumes, scalable for millions of accounts and a high capacity storage system
- ✓ Highly secure, to ensure safety of funds, rewards and financial data
- ✓ Governance friendly and interoperable with other tokens, chains and exchanges.

Qoin Blockchain is designed to holistically address these requirements and build on the learnings from existing projects and research.

...

The Quorum platform was designed and built over two years by the world's leading bank, JP Morgan Chase & Co, and in partnership with Microsoft to power their JPM coin. Amazon Web Services will initially host Qoin Blockchain, providing the required security and firewall protocols.

- (4) With over 30 years of success supporting small business' [sic] globally through the Bartercard brand, Qoin realised the need for global commerce to adopt a widely used, reliable digital currency platform that enables consumers to spend with their favourite merchants instore or online.
- (5) The Qoin model stands apart from other digital currencies in that the purchasing power of Qoin becomes more powerful as the merchant ecosystem grows. The more businesses that join the Qoin community, the more everyone benefits, providing a vital

boost to local economies. Qoin is represented by the goods and services of participating businesses within the ecosystem.

With the number of validated merchants in Qoin growing regularly, the result is an ecosystem where digital currency works more favourably for business owners and creates a digital currency tailor-made to sustain cashflow and make the most of their downtime. Qoin enables them to do both while offering a payment method to their customers that is fast, secure, and virtually contactless.

70 The Qoin Website also made the following statements in relation to the Qoin Wallet:

- (1) The Qoin Wallet is an Australian regulated product, registered under BPS Financial Limited ABN 99 604 899 381 as authorised representative No. 1279598 of PNI Financial Services Pty Ltd ABN 74 151 551 076 AFSL 408735.
- (2) The Australian Qoin Wallet is a regulated non cash payments product approved as Authorised Representative number 1279598 of Australian Financial Services Licence (AFSL) number 408735.
- (3) Users must only use the official Qoin wallet to access the blockchain and their transaction balance.

2.3.2 *White Paper*

71 From on or around 30 January 2020, a document called the **White Paper** appeared on the Qoin Website entitled “Qoin – Official White Paper”. Many of the sections of the most recent version of the White Paper in evidence (accessible to the public on 28 March 2022) are in the same terms as the initial version of the White Paper. Any differences from the initial version in the extracts below are marked by underline and strikethrough, with the emphasis being as it appeared in the White Paper.

72 The first version of the White Paper stated in the foreword section:

The Qoin mission is to enable a global commercial digital currency that empowers millions of Sellers to trade their goods & services with Buyers around the world.

Most businesses have some spare capacity to accept new customers. We tokenise this spare capacity in the form of the Qoin digital currency. Participating merchants in the ecosystem accept Qoin from customers as payment for their goods and services.

This White Paper describes our plans and progress made towards opening the world’s largest private merchant trading ecosystem to the public on a distributed blockchain and smart contract platform. This new cryptocurrency, backed by participating merchant’s supply of goods and services, allows innovative ways for merchants to

attract shoppers. Qoin is built on the latest Smartcoin, Tokenscript and Distributed Ledger Technology.

Simply put, Qoin is all about bringing together Buyers and Sellers through the tokenisation of the spare capacity in each business.

73 Section 2 of the same document included the following statements:

Now is the time to create this new commercial digital currency built on a foundation of blockchain technology. The mission for Qoin is a commercial global currency platform that empowers millions of business owners, sellers and merchants to trade their Goods & Services with shoppers and buyers globally. Qoin is made of three parts that will work together to create a more inclusive commerce system:

1. It is built on a secure, scalable and reliable blockchain
2. It is backed by real goods & services in a growing merchant ecosystem designed to give it intrinsic value
3. The Qoin Association, tasked with evolving and expanding the ecosystem, governs it.

The Qoin currency is built on the Qoin Blockchain, intended to address a global community of buyers and sellers of goods & services. The blockchain has been built on the world's safest, robust and scalable interoperable technologies. It has been designed for millions of users to hold and transfer Qoins and hence the blockchain and wallets will be hosted in one of the world's most secure environments. To read more see below the overview of the Qoin Blockchain or the Technical Information.

The unit of currency is named a Qoin. Qoins will be accepted with confidence backed by real goods and services in the participating merchant ecosystem, creating trust in its intrinsic value. The minting and distribution of Qoins will be administered by the Qoin Reserve with the objective of continuously expanding the merchant base and preserving the value of Qoin over time. To read more see below the Qoin Reserve.

...

To maintain the speed, scalability, stability and security required for transactions between buyers and sellers, the Association will in the future only grant access to credible independent validators to ensure a distributed and reliable blockchain. Unlike other blockchains that allow anybody, including bad actors, to operate validator nodes on their systems, Qoin Blockchain will be a Permissioned Distributed Blockchain.

(Emphasis original.)

74 In section 3, the following appeared:

The objective of the Qoin Blockchain is to act as a reliable distributed ledger platform for payments and rewards services, including a new global currency, which can meet the daily transactional needs of millions of buyers and sellers. Thus, we have designed a blockchain based on these three requirements:

- Fast transaction speeds, high transaction volumes, scalable for millions of accounts and a high-capacity storage system
- Highly secure, to ensure safety of funds, rewards and financial data

- Governance friendly and interoperable with other tokens, chains and exchanges

(Emphasis original.)

75 In section 4 of the White Paper, Qoin is described as having been “designed as a smart digital cryptocurrency that will be backed by real goods & services and complemented by a global sales initiative”. That section also states the following:

The Qoin Reserve will administer the expansion of the ecosystem through a global sales initiative, onboarding, and incentivisation of new merchants. This means that anyone who has purchased Qoins has a high degree of assurance they can utilise or spend their digital currency in the participating merchant ecosystem, or in the future trade their Qoins for fiat or cryptos with others through independent Exchanges.

As per Metcalfe’s law, the value of Qoins will be effectively linked to the size of the merchant ecosystem. This may cause fluctuations in the value of Qoins.

Access to the existing Bartercard Ecosystem of approximately 21,000 merchants and 40,000 cardholders across the United Kingdom, Australia, New Zealand and Thailand will form the nucleus as the kickstart of this project.

The blockchain only has one way to mint new Qoins for the Reserve:

- For the expansion of the merchant ecosystem and validation of all transactions, a fixed amount of Qoins equivalent to US\$7,500 per merchant will be minted to fund the sales initiative, attract, sign up, incentivise and onboard new merchants and their customers, as well as maintain the technology and node network. This fixed amount will be reviewed annually by the Reserve to consider inflationary and global economic changes.

The maximum Qoins that can ever be minted by the Reserve is capped at 10 Billion in order to create the +US\$1.0 Trillion merchant ecosystem.

An algorithm will value and adjust the Qoin price regularly based on:

- Number of merchants
- Average annual revenues of each merchant
- Average available capacity of each merchant
- Number of Qoins minted and in circulation.

76 In section 6 of the White Paper, it is stated that:

The Australian Qoin Wallet is a regulated non cash payments product approved as Authorised Representative number 1279598 of Australian Financial Services Licence (AFSL) number 494176. When the merchant ecosystem is expanded into the rest of the world, the Council will engage with country regulators and law firms to get the appropriate guidance.

77 In section 9 of the White Paper, the Qoin Wallet is described as “an Australian developed Mobile APP explicitly designed to connect to the Qoin Blockchain”. It then states: “The number one priority of the Qoin wallet is security. Both IOS and Android Qoin Wallet’s [sic]

protect your private keys with a strong seed phrase backup and protection from the secure enclave within your mobile device”.

2.3.3 Combined Financial Services Guide and Product Disclosure Statements

78 BPS issued six combined Financial Services Guides and Product Disclosure Statements (**combined FSG/PDS**) during the period December 2019 to November 2021. The combined FSG/PDS which was available to the public on 31 August 2021 is a representative sample of these documents, although all six versions contain the same or similar statements as the following.

79 At the foot of the first page, the following is stated:

This Combined FSG and PDS provides information about the payment system provided by BPS Financial Ltd (**Payment System**) to assist you in making an informed decision about this product. The Payment System is an electronic Bill Paying Service.

(Emphasis original.)

80 On page 3, the following is stated:

The Financial Services Guide (FSG) is designed to help you decide whether to use any of the services we provide. The Product Disclosure Statement (PDS) contains information you require to make an informed decision about whether or not to register for and use our Payment System and services.

81 On page 6, the following is stated:

(1) under the heading “About this PDS”:

This PDS only applies to your Australian Qoin Wallet or if you otherwise use our services in Australia.

(2) under the heading “Remuneration and commissions”:

We may also enter into arrangements to jointly provide software solutions which are integrated with our financial products and services (for example, accounting software which is integrated with our Payment System).

(3) under the heading “Our Services”:

Our services allow you to securely and conveniently make payments to Merchants and other members of the Qoin membership community. To find out more, please visit www.qoin.world[.] When you register to use our Payment System, we will open a Qoin Account in your name. Our Payment System allows you to: [make, request and receive payments and withdraw money as set out at the top of page 7 of the document].

82 The combined FSG/PDS available on 31 August 2021 uses the term Payment System extensively in parts 4, 5, 6, 7, 8 and 9. It also uses the term “Qoin Wallet” (such as, for example, on page 8 under the headings “Security” and “Payment Failure”).

83 Its glossary also contains these definitions:

- (1) “Qoin Wallet or Q Wallet” means a cryptocurrency wallet developed by BPS that connects to the Q Chain, stores a user’s cryptocurrency (such as Qoin) and allows a user to make cryptocurrency transactions.
- (2) “Q Chain” means the Qoin Blockchain.

3. UNLICENSED CONDUCT CASE

3.1 Overview of the parties’ contentions

84 Section 911A(1) of the *Corporations Act* provides that, subject to certain exemptions, “a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services”. Section 911A(5B) has the effect of rendering a contravention of s 911A(1) a contravention of a civil penalty provision.

85 The term “financial services business” was defined in s 761A (until 20 October 2023) as a business of providing “financial services” within the meaning of Part 7.1, Division 4 of the *Corporations Act*.

86 Sections 766A(1)(a) and (b) relevantly provide that a person provides a financial service if they:

- (a) provide financial product advice within the meaning of s 766B; or
- (b) deal in a financial product within the meaning of s 766C (including by issuing a financial product: s 766C(1)(b)).

87 Both of these limbs of “financial services” relate to the provision of certain services with respect to dealing in a “financial product”.

88 In the circumstances of this case, the parties agree that there was a financial product through which a person makes non-cash payments. ASIC’s primary case is that the Qoin Facility was a financial product, specifically a non-cash payment product. BPS does not dispute that the Qoin Facility (which it calls the “Qoin Project”) *included* such a financial product, but contends

that the financial product was the Qoin Wallet, which was merely a component of the overall Qoin Facility. ASIC adopts this contention in the alternative.

89 The term **Qoin NCP Product** was used by both parties to describe the financial product which BPS issued, according to their respective cases. I will also adopt that term.

90 ASIC alleges that BPS has carried on a financial services business by dealing in a financial product, and/or by providing financial product advice, the relevant financial product being, in both cases, the Qoin NCP Product.

91 ASIC also alleges that BPS has breached the requirement in s 911A(1) of the *Corporations Act* that a person who carries on a financial services business in this jurisdiction must hold an AFSL covering the provision of the financial services.

92 BPS admits that, since January 2020, it has:

- (1) carried on a business in the ordinary course of which it has issued a financial product, being the Qoin NCP Product (that is, on its case, the Qoin Wallet);
- (2) provided financial product advice in relation to the Qoin NCP Product;

and that it has not at any time held an AFSL.

93 BPS does not dispute that:

- (1) the Qoin NCP Product is a financial product which is a non-cash payment facility, which it issued;
- (2) it provided general financial product advice in relation to the Qoin NCP Product;
- (3) an offer was made in respect of the non-cash payment facility by the publication of the combined FSG/PDS;
- (4) the issuing of the Qoin NCP Product constitutes dealing in a financial product (within the meaning of Chapter 7 of the *Corporations Act*) and constitutes the provision of financial services;
- (5) the giving of general financial product advice constitutes providing financial product advice (within the meaning of Chapter 7 of the *Corporations Act*) and constitutes the provision of financial services.

94 However, BPS claims that it was at all relevant times exempt from the requirement to hold an AFSL:

- (1) in respect of its business of issuing a financial product:
 - (a) by s 911A(2)(a) of the *Corporations Act*, because it issued the Qoin NCP Product as a representative of the holder of an AFSL; and/or
 - (b) by s 911A(2)(b) of the *Corporations Act*, because it issued the Qoin NCP Product in the implementation of an intermediary arrangement as described in that section;
- (2) in respect of its provision of financial product advice, by s 911A(2)(a) of the *Corporations Act* because it provided that advice as a representative of the holder of an AFSL.

95 BPS relies upon its arrangements with two AFSL holders, Billzy and PNI, as bringing its conduct within the exemptions provided for by ss 911A(2)(a) and (b) of the *Corporations Act*.

96 These arrangements comprised:

- (1) between 18 December 2019 and 4 November 2020, the **First Billzy Arrangement**, comprising the First Billzy Authorised Representative Agreement (**First Billzy AR Agreement**) and the **First Billzy Intermediary Agreement**;
- (2) between 5 November 2020 and 30 August 2021, the **PNI Arrangement**, as recorded in the PNI Authorised Representative Agreement (**PNI AR Agreement**); and
- (3) from 1 September 2021 to the present, the **Second Billzy Arrangement**, comprising the Second Billzy Authorised Representative Agreement (**Second Billzy AR Agreement**) and the **Second Billzy Intermediary Agreement**.

97 In its closing submissions, BPS described the periods of time during which the First and Second Billzy Arrangements were in place as the **Billzy Periods**, and I will adopt the same terminology. It also described the period during which the PNI Arrangement was in place as the **PNI Period**.

98 BPS summarised its case in its closing submissions as follows and by reference to its Further Amended Defence:

- (1) BPS's position with respect to the Billzy Periods is that it:
 - (a) provided general financial product advice in relation to the Qoin Wallet as an authorised representative of Billzy, pursuant to the Billzy AR Agreements; and
 - (b) issued Qoin Wallets pursuant to an arrangement between it and Billzy, recorded in the Billzy Intermediary Agreements, under which:
 - (i) BPS, in its capacity as authorised representative of Billzy, made offers to people to arrange for the issue of Qoin Wallets pursuant to the Billzy AR Agreements; and
 - (ii) BPS, in its own capacity as product provider, issued Qoin Wallets in accordance with such offers, if they were accepted.
- (2) In so doing:
 - (a) BPS's conduct in providing general financial product advice about, and making offers to people to arrange for the issue of, Qoin Wallets fell within the exemption under s 911A(2)(a); and
 - (b) BPS's conduct in issuing Qoin Wallets fell within the exemption under s 911A(2)(b).
- (3) BPS's position is the same with respect to the PNI Period in that, during this period, it:
 - (a) provided general financial product advice in relation to the Qoin Wallet as an authorised representative of PNI, pursuant to the PNI AR Agreement; and
 - (b) issued Qoin Wallets pursuant to an arrangement between it and PNI under which:
 - (i) BPS, in its capacity as authorised representative of PNI, made offers to people to arrange for the issue of Qoin Wallets pursuant to the PNI AR Agreement; and
 - (ii) BPS, in its own capacity as product provider, issued Qoin Wallets in accordance with such offers, if they were accepted.

99 In response, ASIC contends that:

- (1) BPS is not exempt from the requirement to hold an AFSL under s 911A(2)(a) of the *Corporations Act* because it did not provide its financial services, or financial product advice, “as representative for” Billzy or PNI;
- (2) BPS is not exempt from the requirement to hold an AFSL under s 911A(2)(b) of the *Corporations Act* because:
 - (a) it did not “make offers to arrange for the issue” of the Qoin NCP Product;
 - (b) even if BPS did make offers to arrange the issue of Qoin NCP Product, it did not do so as a representative of Billzy or PNI; and
 - (c) the exemption has no application if the issuer and the authorised representative are the same person.

100 Before turning to consider the arguments raised by the parties, the following preliminary issues must be determined, namely:

- (1) What was the financial product issued by BPS?
- (2) What was the financial product advice given by BPS?
- (3) What were the precise arrangements between BPS and either Billzy or PNI?

3.2 Identification of the financial product

101 It is common ground that the Qoin NCP Product falls within the third limb of the definition of “financial product” in s 763A(1) of the *Corporations Act*, being “a facility through which, or through the acquisition of which, a person.... (c) makes non-cash payments” within the meaning of s 763D (i.e. a **non-cash payment facility**).

102 As to the meaning of “non-cash payment”, s 763D(1) provides:

a person *makes non-cash payments* if they make payments, or cause payments to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins.

(Emphasis original.)

103 As to what constitutes a “facility”, the definition of that term in s 762C provides:

facility includes:

- (a) intangible property; or
- (b) an arrangement or a term of an arrangement (including a term that is implied

by law or that is required by law to be included); or

- (c) a combination of intangible property and an arrangement or term of an arrangement.

(Emphasis original.)

104 Pursuant to s 762B of the *Corporations Act*, if a financial product is a component of a facility that also has other components, Chapter 7 of the *Corporations Act* applies only in relation to the facility to the extent it consists of the component that is the financial product.

105 By its Amended Statement of Claim, ASIC pleads that the Qoin Facility (which it ultimately pleads is the financial product) is comprised of:

- (1) Qoin Tokens (later defined as a digital token);
- (2) a distributed digital ledger implemented by blockchain technology (which it defined as the Qoin Ledger but is plainly a reference to the Qoin Blockchain);
- (3) a wallet facility;
- (4) a means of acquiring Qoin Tokens, including from BPS or an entity associated with BPS;
- (5) a means whereby business operators who hold Qoin Wallets can register as participating merchants (that is, the Qoin Merchants) in the Qoin Facility.

106 ASIC submits that these elements of the Qoin Facility “constitute a single scheme which has been implemented by BPS for a substantial purpose of enabling consumers who choose to participate in it to make payments for goods and services otherwise than by the physical delivery of cash”. It submits that, upon reading the Qoin Website, White Paper, and combined FSG/PDS as a whole, the product which is offered is the Qoin Facility as a whole of which the Qoin Wallet is but a component. Drawing on the aspect of the definition of “facility” which includes the word “arrangement”, ASIC submits that it is not the mechanism of payment that is a facility, but rather the arrangement under which a (non-cash) payment may be made. ASIC draws an analogy with a loyalty scheme and submits that ways of obtaining points and arrangements for how those points can be used are required in addition to a ledger to record them.

107 However, for the following reasons, the Qoin NCP Product is not the Qoin Facility as pleaded by ASIC.

108 First, that a financial product’s functionality requires integration with another product, facility, or thing does not necessarily mean that the other product, facility, or thing forms part of the financial product. For example, in this case, each Qoin Wallet is built on top of the Qoin Blockchain, of which there is only one and which exists separately to each Qoin Wallet. While the ability to make non-cash payments using a Qoin Wallet depends upon the existence of the Qoin Blockchain, it does not follow that the Qoin Blockchain is itself a financial product, or that it forms part of the financial product.

109 Second, the system by means of which a facility operates is not itself a financial product capable of being “issued” or “acquired” such that “dealing” in it may occur as contemplated by ss 766A(1)(b) and 766C of the *Corporations Act*. For this reason, the identification of the financial product should focus upon the point at which a person performs one of the functions identified in s 763A(1) of the *Corporations Act* (i.e. make a financial investment, manage a financial risk, or make non-cash payments) with the question then being asked: what is the direct mechanism or thing which is allowing the person to perform this function?

110 Applying that test, the relevant “financial product” in this case is the arrangement between BPS and each user which allows the user to make non-cash payments upon the issue of the Qoin Wallet. Contrary to ASIC’s submissions, the Qoin Blockchain, a means of acquiring Qoin and a means whereby business operators who hold Qoin Wallets can register as Qoin Merchants are not components of, and are not themselves, the mechanism which allows the user to make the non-cash payment. One cannot “deal” in these aspects of the system, which may be contrasted against the ability to issue Qoin Wallets.

111 This conclusion is supported by the examples given of the actions that constitute making non-cash payments as identified in s 763D of the *Corporations Act*, one of which is “making payments by means of a facility for a direct debit of a deposit account”. In terms of defining a financial product in s 763D, there is no distinction between direct debits of a deposit account whether drawn from a deposit account by a merchant account facilitated by the same financial institution, and a merchant account facilitated by another, separate financial institution. The financial product is no more than the direct debit facility; the systems with which it is integrated, and in relation to which it functions, are separate. To include those systems, which include aspects controlled by third party financial institutions, cannot be intended when one has regard to the statutory purpose of Chapter 7. As submitted by BPS, because other systems, or aspects of them, are required for non-cash payments to be made does not mean those systems

are encapsulated in the financial product. The same approach applies when considering the Qoin Wallet and the associated components of the Qoin Facility.

112 For these reasons, the Qoin NCP Product (and the financial product within the meaning of s 763A of the *Corporations Act*) is the Qoin Wallet alone.

3.3 Identification of the financial product advice

113 Section 766B(1) of the *Corporations Act* defines financial product advice as a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have such an influence.

114 By the Amended Statement of Claim, ASIC pleads 17 statements published by BPS which ASIC alleges were opinions or recommendations intended, or which could reasonably be regarded as intended, to influence a person in making a decision in relation to the Qoin NCP Product, and were therefore financial product advice.

115 Save for some minor differences as to the dates, BPS admits in its Further Amended Defence that these statements were made and that they were statements of opinion “insofar as it is alleged that the Qoin NCP Product was the Qoin Wallet”. As to the dates of publication of statements in the combined FSG/PDS on which the parties disagreed on the pleadings, the evidence established that the dates pressed by ASIC in its closing submissions are the correct ones, and BPS did not submit otherwise.

116 Further, by its closing submissions, BPS submits that:

- (1) there is no dispute that “BPS provided general financial product advice in relation to the non-cash payment facility”;
- (2) there is no dispute that “since January 2020, BPS has provided financial services by providing financial product advice, within the meaning of Chapter 7 of the *Corporations Act*”;
- (3) BPS “provided general financial product advice in relation to the Qoin Wallet as an authorised representative of Billzy, pursuant to the Billzy AR Agreements”;
- (4) BPS “provided general financial product advice in relation to the Qoin Wallet as an authorised representative of PNI, pursuant to the PNI AR Agreement”.

117 Under cross-examination, Mr Wiese was taken to each of the statements pleaded by ASIC and
accepted that they were “intended to influence persons reading the website ... white paper or
the financial services guides or the product disclosure statements ... to make a decision to
participate in the Qoin program”.

118 Given the admissions made in the Further Amended Defence, the concessions made in BPS’s
closing submissions and the evidence of Mr Wiese (which I accept), I am satisfied that the
statements pleaded by ASIC in the Amended Statement of Claim were statements of opinion
that constitute financial product advice within the meaning of s 766B(1) of the *Corporations
Act*. That is, they were statements of opinion that were intended to influence a person or
persons in making a decision in relation to a particular financial product, namely the Qoin NCP
Product.

3.4 The arrangements with Billzy and PNI

119 As the First and Second Billzy Arrangements concerned agreements in essentially identical
terms, the issues raised by them will be dealt with together.

3.4.1 The First Billzy Arrangement

120 On or around 17 December 2019, Billzy and BPS entered the First Billzy AR Agreement and
the First Billzy Intermediary Agreement.

121 The First Billzy AR Agreement relevantly provided:

- (1) Billzy Pty Ltd was the “Licensee” and BPS (being the person listed in item 3 Schedule
1 of the Agreement) was the “Company”;
- (2) by Recital B: “The Company has requested the Licensee appoint it as its Authorised
Representative and to authorise it to provide the Specified Financial Services to enable
it to promote and distribute the Product”.
- (3) by clause 1.1(a):

The Licensee appoints the Company as an Authorised Representative to
provide the Specified Financial Services. This appointment is an authorisation
for the purposes of section 916A(1) of the Corporations Act.

- (4) by clause 12.1, “Authorised Representative” “has the same meaning as it has in Section
916A(1) of the Corporations Act”.
- (5) by clause 1.1(b):

Notwithstanding any other provision of this Agreement, the Company is

strictly prohibited from providing Financial Services that are not Specified Financial Services.

- (6) by clause 12.1, that “Financial Services” “has the meaning given by Section 766A of the Corporations Act”.
- (7) by clause 12.1 and Schedule 1, Item 7, “Specified Financial Services” means:
 - (a) General Advice on non-cash payment facilities issued by the Licensee, limited to the Product.
 - (b) Dealing in non-cash payment facilities issued by the Licensee, limited to the Product.
- (8) by clause 12.1 and Schedule 1, Item 8, “Product” means:

Qoin or the Qoin Wallet is [a] digital ewallet which allows users to purchase goods and or services from merchants who use and accept the Qoin as a form of payment, which is a non-cash payment product.
- (9) by clause 12.1, that “Deal” and “Dealing”:

... has the meaning given by Section 766C(1)(a) of the Corporations Act and is limited to arranging for a Client to apply for, acquire or dispose of a Financial Product.
- (10) by clause 12.1, “Financial Product” “has the meaning given by Division 3 of Part 7.1 of the Corporations Act”.

122 The First Billzy AR Agreement also imposed various obligations upon BPS in relation to the manner in which it provided financial services under the agreements. These included obligations on the part of BPS:

- (1) under clause 3.1(d)(i), not to do any act or thing, or omit from doing any act or thing, which might detrimentally affect the reputation of Billzy, its directors, employees, or other authorised representatives;
- (2) under clause 3.1(e), to provide Billzy all information and documents reasonably requested concerning the financial services provided under the agreement;
- (3) under clause 3.1(g), not to issue any advertising, promotional or marketing material or public statements of any kind with respect to the provision of financial services without the prior written consent of Billzy;
- (4) under clause 3.1(i), to permit Billzy to monitor and supervise the provision of financial services by BPS;

- (5) under clause 3.5, to immediately notify Billzy upon becoming aware of certain matters, such as of any complaint from a client regarding the provision of financial services;
- (6) under clause 3.6, to allow all complaints to be handled and managed by Billzy, unless Billzy otherwise agrees; and
- (7) under clause 3.2(f), to clearly disclose the capacity in which it provided financial services, and Billzy’s name, contact details, and AFSL number, in all documents associated with the provision of financial services under the agreement.

123 The First Billzy Intermediary Agreement, in turn, relevantly provided:

- (1) as to the parties, Billzy was the “Licensee” and BPS was the “Issuer”;
- (2) by Recital A:

The Licensee holds an AFS licence which authorises it to arrange the issue of non-cash payment products to both retail and wholesale clients.
- (3) by Recital B:

The Issuer appoints the Licensee (and its authorised representatives) as an Intermediary to arrange the issue of the Product, which is a non-cash payment product, pursuant to the PDS. The Licensee accepts this appointment in accordance with the terms of this Agreement.
- (4) by clause 1.1, the term “Intermediary” means the role and service provided by the Licensee to the Issuer pursuant to section 911A(2)(b) of the *Corporations Act*;
- (5) by clause 1.1, the term “Product” means the “Qoin Wallet, being a non-cash payment product”;
- (6) by clause 2.1:

The Issuer appoints the Licensee (and its authorised representatives) as the Intermediary to arrange the issue of the Product pursuant to the PDS prepared in accordance with this Agreement. The Licensee accepts the appointment on the terms and conditions set out in this Agreement.
- (7) by clause 3.1(e):

The Licensee and its authorised representatives are authorised to make offers to people to arrange for the issue of the Product in accordance with the terms of the PDS.
- (8) by clause 1.1, the term “Applicant” means “a person that applies to acquire the Product” and the term “Application” means “an application to acquire the Product and includes all supporting documents, such as identification documents”;

(9) by clause 3.2(d):

The Licensee will do the following in respect of each Application:

- (i) Review the application form;
- (ii) Review the Applicant's Identity;
- (iii) Advise the Issuer if the Application can be accepted.

(10) by clause 3.3(a):

The Issuer is only permitted to accept Applications approved by the Licensee.

(11) by clause 4.2(d):

In performing its obligations under this Agreement, the Issuer must do the following:

...

- (d) Issue the Product in accordance with clause 3 and any reasonable direction of the Licensee.

3.4.2 The PNI Arrangement

124 On or around 5 November 2020, PNI and BPS entered into the PNI AR Agreement.

125 The terms of the PNI AR Agreement relevantly provided:

(1) as to the parties, PNI was the "Licensee" and BPS was the "Company";

(2) by Recital B:

The Company has requested the Licensee appoint it as its Authorised Representative and to authorise it to provide the Specified Financial Services to enable it to promote and distribute the Product.

(3) by clause 2.1(a):

The Licensee appoints the Company as an Authorised Representative to:

- (i) provide Financial Services. This appointment is an authorisation for the purposes of section 916A(1) of the Corporations Act; and
- (ii) arrange the issue of the Product pursuant to section 911A(2)(b) of the Corporations Act.

(4) by clause 1.1, the term "Authorised Representative" "has the same meaning as it has in Section 916A(1) of the Corporations Act";

(5) by clause 1.1, the term "Financial Services" "has the meaning given to that term in the Corporations Act";

(6) by clause 1.1, the term "Product" means "the Qoin Wallet, a non-cash payment product";

- (7) by clause 1.1, the term “Qoin” means “the Company’s digital currency on a blockchain network”;
- (8) by clause 1.1, the term “Qoin Wallet” means “the Company’s online platform that stores private and public keys and interacts with various blockchain to enable Clients to send and receive digital currency (such as Qoin) and monitor their digital currency balance”;
- (9) by clause 1.1 and Schedule 1, the term “Specified Financial Services” comprises:
 - (a) providing general financial product advice;
 - (b) dealing in a financial product by issuing, varying or disposing of a financial product; and
 - (c) dealing in a financial product by applying for, acquiring, varying or disposing of a financial product on behalf of another person,in respect of “deposit and payment products, limited to... non-cash payment products”;
- (10) by clause 2.1(b), the Company is strictly prohibited “from providing Financial Services that [are] not permitted under the Licensee’s AFSL”;
- (11) by clause 2.2(a)(iii), the Company acknowledges that the Licensee is not authorising the issue of any digital currency, including Qoin;
- (12) by clause 2.2(b), the Company (relevantly) confirms the terms of the AFSL are sufficient to enable the Company to promote and operate the Product;
- (13) by clause 6.1(e), “[t]he Company, in its capacity as an Authorised Representative of the Licensee, is authorised to make offers to people to arrange for the issue of the Product in accordance with the terms of the PDS and this Agreement”;
- (14) by clause 4.2(b), “[w]hen providing Financial Services under this Agreement”, the Company must “[o]nly provide the Specified Financial Services in connection with the promotion, issue and operation of the Product”;
- (15) by clause 14.2:

This Agreement embodies the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes and extinguishes all prior agreements and understandings between the parties with respect to the matters covered by this Agreement.

126 Clauses 4.1 to 4.5 of the PNI AR Agreement imposed various obligations upon BPS in relation to the manner in which it provided financial services under the agreement, similar to those imposed upon it under the First Billzy AR Agreement.

127 Unlike the First Billzy Arrangement, the PNI Arrangement was documented in a single document, rather than two. However, it is common ground that this was not intended by the parties to constitute a change to the way BPS's arrangement with the AFSL holder operated (as opposed to a change in the way in which the arrangement was documented). Notwithstanding this, the definition of "Specified Financial Services" in the PNI AR Agreement differed from the definition of "dealing" in the First Billzy AR Agreement which, for reasons explained below, is significant.

3.4.3 The Second Billzy Arrangement

128 On or around 1 September 2021, Billzy and BPS entered into the Second Billzy AR Agreement and the Second Billzy Intermediary Agreement, which are in essentially identical terms to the First Billzy AR and Intermediary Agreements.

3.5 BPS's claim for exemption under section 911A(2)(a)

3.5.1 Overview

129 Section 911A(2)(a) of the *Corporations Act* provides that a person is exempt from the requirement to hold an AFSL for a financial service they provide if:

- (a) the person provides the service as representative of a second person who carries on a financial services business and who:
 - (i) holds an Australian financial services licence that covers the provision of the service; or
 - (ii) is exempt under this subsection from the requirement to hold an Australian financial services licence that covers the provision of the service.

130 There is no suggestion in this case that the agreements relied upon by BPS did not have legal effect insofar as they governed the relationships between the parties, or that the parties did not genuinely believe themselves to be acting in accordance with those agreements and the requirements of the *Corporations Act*.

131 Further, ASIC admits that each of the First Billzy AR Agreement, the PNI AR Agreement, and the Second Billzy AR Agreement had the effect of appointing BPS as the authorised representative of Billzy/PNI within the meaning of ss 761A and 916A of the *Corporations Act*.

It is also common ground that the Billzy AR and PNI AR Agreements are valid written notices pursuant to s 916A(1) of the *Corporations Act*.

3.5.2 *Whether BPS is entitled to rely upon section 911A(2)(a)*

132 ASIC’s fundamental challenge to the three arrangements entered into by BPS is its contention that, to be an authorised representative of an AFSL holder, the authorisation must be on the basis that the financial services will be, and are, provided on behalf of the AFSL holder as its agent and that, as BPS was the issuer of the Qoin NCP Product, and the provider of the advice in relation to that product, BPS was not an authorised representative of Billzy/PNI because those financial services were not provided as the agent of Billzy/PNI.

133 Section 911A(2)(a) requires that BPS has provided the financial services “as representative of” Billzy/PNI. The term “representative” was defined in s 910A (as it was until 2023) as meaning an authorised representative of the licensee or (*inter alia*) any other person acting *on behalf of* the licensee. That definition now appears in s 9 of the *Corporations Act*.

134 An “authorised representative” was defined in s 761A (as it was until 2023; the same definition now appears in s 9) in the following terms:

authorised representative of a financial services licensee means a person authorised in accordance with section 916A or 916B to provide a financial service or financial services *on behalf of* the licensee.

(Emphasis added; original emphasis removed.)

135 Section 916A(1), which is the relevant provision in this case, provides:

A financial services licensee may give a person (the authorised representative) a written notice authorising the person, for the purposes of [Chapter 7], to provide a specified financial service or financial services *on behalf of* the licensee.

(Emphasis added; original emphasis removed.)

136 By reference to these provisions, and the use of the phrase “on behalf of” within them, ASIC submits that the statutory defining feature of the concept of “representative” and “authorised representative” is acting on behalf of the principal and that “on behalf of” means “as representative of” or “for” the relevant persons, in this case Billzy or PNI. The definition of “on behalf of” in s 9 of the *Corporations Act* states “on behalf of includes on the instructions of” (emphasis removed), which does not assist with resolving its meaning in this context.

137 ASIC submits that its interpretation is consistent with the High Court’s approach in *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374. In that case, the High Court was

required to consider the meaning of the phrase “on behalf of” in the context of the phrase “an area of land... held by, or on behalf of, Aboriginals” in s 50 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

138 The plurality observed at page 386:

The phrase “on behalf of” is, as Latham CJ observed in *R v Portus; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428 at 435, “not an expression of strict legal meaning”, it bears no single and constant significance. Instead it may be used in conjunction with a wide range of relationships, all however in some way concerned with the standing of one person as auxiliary to or representative of another person or thing.

In what is perhaps its least specific use, “on behalf of” may be applied to someone who does no more than express support for persons or for a cause, as with one who speaks on behalf of the poor or on behalf of tolerance. It may be used when speaking of an agency relationship, but also of some quite ephemeral relationships, such as that which exists between a party to litigation and the witness he calls, a witness “on behalf of” the defence... Context will always determine to which of the many possible relationships the phrase “on behalf of” is in a particular case being applied; “the context and subject matter” ... will be determinative.

139 ASIC also relies upon *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270; [2000] FCA 1558. In that case, Lindgren J considered the meaning of “on behalf of” in s 84(2) of the *Trade Practices Act 1974* (Cth). Before reaching a conclusion about this issue, his Honour referred to earlier decisions concerning the interpretation of this phrase at [1240] and [1242]:

In *R v Portus; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428 at 435, Latham CJ observed that the phrase ““on behalf of” is not an expression which has a strict legal meaning”. In *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374, in a joint judgment Stephen, Mason, Murphy and Aickin JJ said of the expression (at 386):

“...it bears no single and constant significance. Instead it may be used in conjunction with a wide range of relationships, all however in some way concerned with the standing of one person as auxiliary to or representative of another person or thing.”

The expression was considered more recently by Kirby P in the New South Wales Court of Appeal in *Citizens Airport Environment Association Inc v Maritime Services Board* (1993) 30 NSWLR 207, esp at 221-223, but as his Honour recognised, since the meaning of the expression is influenced so much by the statutory context in which it appears, authorities relating to a different statutory context afford little guidance.

...

In *Walplan Ptd Ltd v Wallace* [(1985) 8 FCR 27] Lockhart J (with whom Sweeney and Neaves JJ agreed) stated (at 37):

“The phrase ‘on behalf of’ is not one with a strict legal meaning and it is used in a wide range of relationships. The words are not used in any definitive sense

capable of general application to all circumstances which may arise and to which the subsection has application. This must depend upon the circumstances of the particular case, but some statements as to the meaning and operation of the subsection may be made. In the context of s 84(2) the phrase suggests some involvement by the person concerned with the activities of the company. The words convey a meaning similar to the phrase ‘in the course of the body corporate’s affairs or activities’... Section 84(2) refers to conduct by directors and agents of a body corporate as well as its servants. Also, the second limb of the subsection extends the corporation’s responsibility to the conduct of other persons who act at the behest of a director, agent or servant of the corporation. Hence the phrase ‘on behalf of’ casts a much wider net than conduct by servants in the course of their employment, although it includes it.”

140 Lindgren J then concluded at [1244] that:

It seems to me that an act is done “on behalf of” a corporation for the purpose of s 84(2) if either one of two conditions is satisfied: that the actor engaged in the conduct intending to do so “as representative of” or “for” the corporation, or that the actor engaged in the conduct in the course of the corporation’s business, affairs or activities. This view accords with what Kiefel J said in *Lisciandro v Official Trustee in Bankruptcy* [1995] ATPR ¶41-436 at 40,903-40,904.

141 ASIC submits that “on behalf of” in the context of ss 910A and 916A of the *Corporations Act* has the first category of meaning identified by Lindgren J in *NMFM Property* at [1244] – that is, it means “as representative of” or “for” the relevant persons, in this case Billzy or PNI. However, the reliance by ASIC on *NMFM Property* and *Toohey* (in particular) overlooks that the reasons in each of those authorities emphasise that the phrase does not have a strict legal meaning and that it may apply to a wide variety of relationships which includes, but is not confined to, an agency relationship.

142 ASIC also relies upon other decisions in which courts have construed different legislation which contained the phrase “on behalf of”. However, applying the reasoning in *NMFM Property* and *Toohey*, none of these cases cited by ASIC are of any real assistance in construing the legislation in this case.

143 Turning then to the legislation in this case (which has not been the subject of any decision on this issue), the words “on behalf of” do not appear in the relevant exemptions in s 911A(2). Further, there is nothing in s 911A(2)(a) which supports ASIC’s construction. Rather, the phrase “on behalf of” is relevant to determining whether and in what respect BPS is an authorised representative of Billzy/PNI: see s 916A.

- 144 However, the text of the legislation does not support the imposition of an additional rule that a person cannot act “as” an authorised representative of an AFSL holder in relation to a financial product if they are themselves the issuer of the financial products.
- 145 There is no distinction in the legislation between (for example) a person being authorised by an AFSL holder to provide advice about a financial product issued by the holder of the AFSL (which ASIC appears to accept is permissible under the legislation) and a person being authorised by an AFSL holder to issue a financial product (which ASIC contends is not permitted).
- 146 An “authorised representative” is defined as a person authorised in accordance with s 916A. Section 916A(1) requires that the AFSL holder give the proposed authorised representative “a written notice” which authorises the person to do certain things. Provided the things which are authorised fall within the scope of the financial services licence, there is nothing in s 916A which imposes a limitation on a person not being able to be an authorised representative of an AFSL holder if they are also the product issuer; nor does s 916A impose a limitation that an AFSL holder cannot appoint an authorised representative to engage in conduct in respect of a financial product of which the AFSL holder is not the issuer.
- 147 This conclusion finds support in the fact that s 916A(3) provides that an authorisation given under s 916A(1) is void to the extent that it purports to authorise a person to provide a financial service in a number of specific circumstances, none of which include where the proposed authorised representative will be the issuer of the relevant financial product.
- 148 The *Corporations Act* otherwise leaves the AFSL holder free to determine the circumstances in which it will be prepared to authorise a person to act on its behalf, and to determine what it requires from that authorised representative. In this way, the AFSL holder, as the person giving the written notice under s 916A, is also left to decide what an authorised representative acting “on its behalf” will look like in any given case.
- 149 In exchange for this freedom, the legislation imposes significant responsibility on AFSL holders for the conduct of any authorised representatives it does choose to appoint. For example, pursuant to s 912A(1)(ca), an AFSL holder must take reasonable steps to ensure that its representatives comply with financial services laws. A contravention of this obligation will expose the AFSL holder to civil penalties and other orders under Part 9.4B of the *Corporations Act*: see s 912A(5A) *Corporations Act*.

150 In addition, where an authorised representative is the representative of only one AFSL holder, s 917B provides that the “the licensee is responsible, as between the licensee and the client, for the conduct of the representative, *whether or not the representative’s conduct is within authority*” (emphasis added). The responsibility of the AFSL holder extends to make the licensee liable to the client in respect of any loss or damage suffered by the client as a result of the representative’s conduct: see ss 917E and 917F *Corporations Act*.

151 A conclusion that a person can only act “on behalf of” an AFSL holder if the relationship is that of principal and agent is also inconsistent with the use of the phrase “whether directly or through an agent *or other representative*” (emphasis added) in s 766C(3) of the *Corporations Act*. If the word “representative” was to be understood as synonymous with “agent”, there would be no work for the words “or other representative” in that provision to do. It follows that “representative” must mean something else. This conclusion finds support in the fact that, while the word “agent” is used on numerous occasions throughout the *Corporations Act*, it does not appear in the definitions of “authorised representative” or “representative”.

152 ASIC submits that the concept that the issuer of a financial product (in this case, BPS) can issue that product on behalf of another person contains an “impossible contradiction” which it submits arises from s 761E of the *Corporations Act*. ASIC submits that, in s 761E(4), the issuer of a financial product is defined as the person responsible for the obligations owed under the facility that is the product and that “[c]learly, in this case, that person is BPS. Equally clearly, that person is neither Billzy nor PNI”. ASIC then refers to s 761E(1) which provides that the issue of a product involves the acquisition of the product by the client from the issuer and the provision of the product by the issuer, and submits that an issuer cannot be said conformably with these provisions to have provided the product to the client on behalf of a person who is not the issuer. Accordingly, ASIC submits that it is “impossible for an issuer to issue a financial product as representative of some other person”. However, these submissions are tethered to the underlying premise that, to be a representative, a person must be the agent of the AFSL holder. As I do not accept that premise, for the reasons already explained, s 761E does not present the obstacle of the kind described by ASIC.

153 For these reasons and reading the definition of “authorised representative” together with ss 916A(1) and 911A(2)(a), the authorised representative exemption provided by s 911A(2)(a) applies:

- (1) to a person who provides a financial service;

- (2) if that person has been given a written notice by a financial services licensee authorising the person, for the purposes of Chapter 7, to provide the specified financial service on behalf of the licensee;
- (3) where the financial services licensee holds an AFSL that covers the provision of the service.

154 By each of the AR Agreements, BPS satisfies these requirements. That is because BPS was, at all material times, a person who had been given a written notice by an appropriately qualified AFSL holder authorising it to provide specified financial services on the AFSL holder's behalf. What those specified financial services in fact were is a separate question which turns on the construction of each of the AR Agreements.

155 Contrary to ASIC's submissions, the fact that the AR Agreements do not expressly use the words "on behalf of" does not matter. That is because each agreement identified itself as being "an authorisation for the purposes of section 916A(1) of the Corporations Act" and there is no required form of authorisation "for the purposes of section 916A(1) of the Corporations Act" other than one authorising the recipient to provide a specified financial service or financial services *on behalf of* the licensee.

3.5.3 First Billzy AR Agreement and Second Billzy AR Agreement

156 The fundamental obstacle for BPS in its reliance on these agreements as the basis for the exemption under s 911A(2)(a) is that they do not, by their express terms, authorise BPS to either issue the Qoin NCP Product or give general financial product advice about it.

157 The following terms of these agreements deserve special emphasis in this regard:

- (1) by clause 1.1, Billzy appoints BPS "to provide the Specified Financial Services";
- (2) "Specified Financial Services" is defined to mean general advice on, and dealing in, "non-cash payment facilities issued by the Licensee, limited to the Product";
- (3) Billzy is defined as the "Licensee";
- (4) "dealing" has the meaning given by s 766C(1)(a) of the *Corporations Act* and is limited to arranging for a Client to apply for, acquire or dispose of a Financial Product;
- (5) clause 12.1 defines "Product" to mean "the product specified in Item 8 of Schedule 1";
- (6) Item 8 of Schedule 1 identifies the Product as the "Qoin or the Qoin Wallet etc."

158 Thus, the Billzy AR Agreements identify the Specified Financial Services which BPS is authorised to provide:

- (1) by reference to a financial product issued by Billzy;
- (2) by reference to a definition of “dealing” which does not include issuing the financial product.

159 It is common ground that at the time that each of the Billzy AR Agreements was executed, it was known to both Billzy and BPS that it was BPS and not Billzy that was to be the intended issuer of the Qoin Wallet. It is also common ground that the First and Second Billzy Intermediary Agreements were entered with Billzy at or about the same time as the relevant Billzy AR Agreements.

160 BPS submits that, having regard to these facts, it is clear that something has gone wrong in the language of the Billzy AR Agreements, or the agreements are ambiguous. As to this aspect of its submissions, senior counsel for BPS submits that there was a “clear error” in the text of the agreements. BPS submits that if the Court takes the view that “issued by the Licensee” in the Specified Financial Services is limited strictly to “issued” within the meaning of the *Corporations Act*, then the outcome is absurd such that the error may be corrected as a matter of construction. BPS also submits that, if the Court takes the view that “issued by the Licensee” might mean that or might extend to a product in respect of which Licensee arranged the issue or offered to arrange the issue, then the meaning is ambiguous and a construction should be preferred that preserves the validity of the transaction.

161 On this basis, BPS submits that the *only* way to construe the Billzy AR Agreements so that each document makes sense is to construe the expression “non-cash payment facilities issued by the Licensee, limited to the Product” in the Specified Financial Services as necessarily referring to the “Product” as defined, which was a Product in respect of which Billzy had agreed to arrange for its issue.

162 As these agreements constitute appointments for the purposes of s 916A of the *Corporations Act*, they must be in writing and they must *specify* the financial service or financial services to be provided on behalf of the licensee. The specification of the services in these documents has legal significance for the purposes of marking the limits of what the authorised representative is permitted to do. For that reason, I construe the term “issued by the Licensee” as meaning “issued” within the meaning of s 761E of the *Corporations Act*. Such a construction is

consistent with other clauses of these agreements which refer to that legislation. There is no ambiguity in the use of this expression.

163 However, I do not accept that, based on this construction of “issued”, there is a “clear error” as BPS contends.

164 That is because, even if the Specified Financial Services encompassed a Product in respect of which Billzy had agreed to arrange for its issue, BPS is authorised by the Billzy AR Agreements to “deal” in that Product, and the definition of “deal” and “dealing” does not encompass either issuing the Product or arranging for its issue.

165 Indeed, the definition of “dealing” in the agreements *excludes* the issue of the Product. That is because “dealing” has the meaning given by s 766C(1) of the *Corporations Act*, which lists conduct which constitutes dealing in a financial product and which list includes “issuing a financial product”: s 766C(1)(b). However, the contractual definition then *limits* itself to categories of conduct which are captured, which limitation is a subset of the conduct in s 766C(1) and which subset does not include “issuing a financial product”. Thus, considered objectively, the parties to these agreements turned their minds to whether BPS would be authorised to issue the Product and excluded it.

166 By reference to the definition of “dealing”, BPS submits that account should be taken of the First and Second Billzy Intermediary Agreements which were entered at the same time as the Billzy AR Agreements. It refers to s 911A(2)(b) of the *Corporations Act* which it submits applies only to arrangements where (*inter alia*) an authorised representative of the AFSL holder makes offers to arrange for the issue of a financial product. It then submits that, in this context, the words “arranging for a Client to apply for, acquire, or dispose of a Financial Product” in the definition of “dealing” in the Billzy AR Agreements “ought to be understood as logically encompassing arranging for the *issue* of the Financial Product — being the final step required for a person to “acquire” the product”.

167 However, these submissions cannot be accepted. That a product is acquired by a person is only half of the process required for a product to be “issued” within the meaning of s 761E of the *Corporations Act* – it must also be provided by the issuer. Arranging for the former does not “logically encompass” arranging for the latter when the product may be (and often is) provided by someone other than the party arranging for the acquisition, especially where that party does

not otherwise have authorisation to issue the product. It may also be arranged to acquire a product from someone other than the issuer, as noted in s 761E(1).

168 For this reason and in circumstances where the contractual definition of “dealing” excludes the issue of the Product, I do not accept that the definition of “dealing” should be construed so as to include the conduct of arranging for the issue of the Product. This is especially so having regard to the requirements of s 916A of the *Corporations Act*, as referred to above.

169 It follows that the contractual definition of “deal” and “dealing” tells against the existence of the posited mistake in the description in these agreements of the Specified Financial Services.

170 For the same reasons, even if I accepted that there is a mistake in the description of the Specified Financial Services, I do not agree that the construction of Specified Financial Services which is posited by BPS is the “only” way to construe the Billzy AR Agreements. In other words, the manner of correction of the “clear error” is not readily apparent as it is required to be: see *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* (2019) 99 NSWLR 317; [2019] NSWCA 11 at [6]–[10] (Leeming JA); see also *Energy World Corp Ltd v Maurice Hayes & Associates Pty Ltd* (2007) 239 ALR 457; [2007] FCAFC 34 at [11]–[13] (Moore, Tamberlin and Gyles JJ); *Noon v Bondi Beach Astra Retirement Village Pty Ltd* (2010) 15 BPR 28,221; [2010] NSWCA 202 at [45]–[46] (Giles JA, with whom Macfarlan JA agreed).

171 BPS complains that to find that the First and Second Billzy AR Agreements ought to be construed as *not* being sufficiently broad to cover BPS’s making of offers to arrange for the issue of financial products would be to produce a commercial absurdity which defeats the objective purpose of the transaction. However, as Gibbs J (as his Honour then was) observed in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109:

If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.

172 It follows that BPS was not exempt under s 911A(2)(a) of the *Corporations Act* during the Billzy Periods by reason of the First and Second Billzy AR Agreements, in relation to both the issue of the Qoin NCP Product and the financial product advice it gave in relation to the Qoin NCP Product.

3.5.4 PNI AR Agreement

173 By the PNI AR Agreement, PNI appointed BPS as an authorised representative to provide Specified Financial Services (as defined) which was expressed to be an authorisation for the purposes of s 916A(1) of the *Corporations Act*. By Schedule 1, the Specified Financial Services encompassed both general financial product advice, and dealing in a financial product by issuing, varying or disposing of a financial product, limited to non-cash payment products (it being common ground that the Qoin NCP Product is such a product). Clause 4.2(b) imposed a restriction on BPS when providing the Financial Services under the PNI AR Agreement being that it must only provide those services “in connection with the promotion, *issue* and operation of the Product” (emphasis added).

174 By the plain terms of the PNI AR Agreement, BPS was authorised to issue the Qoin NCP Product and to give general financial product advice in relation to the Qoin NCP Product.

175 For these reasons and having regard to my earlier findings concerning the construction of the *Corporations Act*, BPS was exempt under s 911A(2)(a) of the *Corporations Act* by reason, and during the period of operation, of the PNI AR Agreement.

3.6 BPS’s claim for exemption under section 911A(2)(b)

3.6.1 Overview

176 Section 911A(2)(b) of the *Corporations Act* provides that a person is exempt from the requirement to hold an AFSL for a financial service they provide if:

the service is the issue, variation or disposal of a financial product by the person (the **product provider**) pursuant to an arrangement (an **intermediary authorisation**) between the product provider and a financial services licensee under which:

- (i) the financial services licensee, or their authorised representatives, may make offers to people to arrange for the issue, variation or disposal of financial products by the product provider; and
- (ii) the product provider is to issue, vary or dispose of financial products in accordance with such offers, if they are accepted;

provided that the offer pursuant to which the issue, variation or disposal is made was covered by the financial services licensee’s Australian financial services licence.

(Emphasis original.)

177 BPS’s position with respect to the Billzy Periods is that it issued Qoin Wallets pursuant to an arrangement between it and Billzy, recorded in the Billzy Intermediary Agreements, under which:

- (1) BPS, in its capacity as authorised representative of Billzy, made offers to people to arrange for the issue of Qoin Wallets pursuant to the Billzy AR Agreements; and
- (2) BPS, in its own capacity as product provider, issued Qoin Wallets in accordance with such offers, if they were accepted;

and, in so doing, BPS’s conduct in issuing Qoin Wallets fell within the exemption under s 911A(2)(b).

178 As for the PNI AR Agreement, BPS’s position is that it issued Qoin Wallets pursuant to an arrangement between it and PNI under which:

- (1) BPS, in its capacity as authorised representative of PNI, made offers to people to arrange for the issue of Qoin Wallets pursuant to the PNI AR Agreement; and
- (2) BPS, in its own capacity as product provider, issued Qoin Wallets in accordance with such offers, if they were accepted.

179 By its closing submissions, BPS emphasised that it was *not* acting in the capacity as the issuer of the Qoin Wallet when it made offers to arrange for the issue of the product but that it was acting in its capacity as the authorised representative of the AFSL holder.

3.6.2 Construction of section 911A(2)(b)

180 Section 911A(2)(b) of the *Corporations Act* defines the arrangement as an “intermediary authorisation”.

181 The plain language of s 911A(2)(b) contemplates that the offers in (i) will be made by someone *other than* the product provider in (ii). That is because, if the authorised representative and the product provider are the same person (even if the same person but acting in different capacities), there would not be any “arrangement” or an “intermediary authorisation”. The words “arrangement” and “intermediary” connote at least two parties being involved.

182 According to the Oxford English Dictionary (online), the word intermediary means “acting or of the nature of action between two persons” and “situated or occurring between two things (in space, time, degree or character)”. The Macquarie Dictionary (online) defines the word as “being between; intermediate” and “acting between persons, parties etc”.

183 The use by Parliament of the word “intermediary” therefore supports a construction that requires the product provider to be a separate person from the person making the offers.

184 This construction is consistent with the apparent function of s 911A(2)(b), being to permit an unlicensed issuer of financial products to engage the services of a license holder or its representatives to distribute their product. As ASIC submits, its intended operation requires that the persons making offers to arrange the issue of the product are distinct from the issuer of the product.

185 Section 911A(2)(b) was enacted as part of the *Financial Services Reform Act 2001* (Cth). In its original form, s 911A(2)(b) stated:

- (b) the service is the issue, variation or disposal of a financial product by the person and the following conditions are satisfied:
 - (i) a *second person, or an authorised representative of a second person*, offered to arrange for the issue, variation or disposal of the product for a third person;
 - (ii) the offer was covered by an Australian financial services licence held by the second person;
 - (iii) the product was issued, varied or disposed of in accordance with such an arrangement.

(Emphasis added.)

186 The Explanatory Memorandum to the Financial Services Reform Bill 2001 (Cth) stated that the exemption applies to:

product issuers who merely issue, vary or dispose of a product where a *second person* (a licensee or representative of a licensee) offers to arrange for the issue, variation or disposal of the product and the product was issued to the client, varied or disposed of in accordance with this arrangement.

(Emphasis added.)

187 The provision was subsequently rewritten into its present language, but this change did not appear to indicate an alteration in the intention expressed in this passage. As to this, the Supplementary Explanatory Memorandum to the Financial Services Reform Bill 2001 (Cth) for the Senate stated at [3.56] that the purpose of the change was to “...ensure that a licensee will be able to deal in the products of a product provider on behalf of both the provider and its own clients”.

188 For these reasons, s 911A(2)(b) is not engaged if the financial product is issued in accordance
with offers to arrange the issue which are made by the product provider in its capacity as a
representative of a financial services licensee.

189 Contrary to BPS's submissions, there is no ambiguity and nor is there a need to read additional
words into the provision to interpret the provision in this way.

3.6.3 *Billzy Intermediary Agreements*

190 The Billzy Intermediary Agreements identify Billzy as "the Licensee" and BPS as "the Issuer".
They provide in clause 2.1 that the Licensee and its authorised representatives are appointed as
the Intermediary to arrange the issue of the Product and in clause 3.1(e) that the Licensee and
its authorised representatives are authorised to make offers to people to arrange for the issue of
the product in accordance with the terms of the PDS. They define the Product as the "Qoin
Wallet, being a non-cash payment product" and Intermediary as "the role and service provided
by the Licensee to the Issuer pursuant to section 911A(2)(b) of the Corporations Act".

191 As each of these agreements was executed at the same time as one of the Billzy AR
Agreements, the appointment and authorisation in clauses 2.1 and 3.1(e) were to that extent
appointments by BPS of itself.

192 As is apparent when considering the AR Agreements and Intermediary Agreements together,
BPS alone performed the role of Intermediary, as defined in the Billzy Intermediary
Agreements, purportedly in its capacity as the authorised representative of Billzy.

193 Thus, the arrangement between Billzy and BPS was in fact that *BPS* would make offers to
arrange the issue of the product by *BPS*. For the reasons explained above, this is not an
arrangement which meets the requirements of s 911A(2)(b) of the *Corporations Act*.

194 In any event and for the reasons explained above, the Billzy AR Agreements did not authorise
BPS to make offers to arrange for the issue of a financial product.

195 For these reasons, the claim by BPS that it was exempt under s 911A(2)(b) fails in relation to
the Billzy Periods.

3.6.4 *PNI AR Agreement*

196 The PNI AR Agreement identifies PNI as the "Licensee" and BPS as the "Company". By
clause 2.1(a), it provides that PNI appoints BPS as its authorised representative (i) to provide
"Financial Services" and (ii) "arrange the issue of the Product pursuant to section 911A(2)(b)

of the Corporations Act.” The appointment under subparagraph (i), but not subparagraph (ii), is said to be an authorisation for the purposes of s 916A(1) of the *Corporations Act*.

197 The PNI AR Agreement further provides in clause 4.2(b) that BPS is only to provide the Specified Financial Services in connection with the promotion, issue and operation of the Product (as defined). In clause 1.1, it defines the Product as “the Qoin Wallet, a non-cash payment product”. By clause 1.1 and Schedule 1, the Specified Financial Services were identified (as set out above).

198 In clause 6.1(e), the PNI AR Agreement provides that BPS, in its capacity as an authorised representative of PNI, is authorised “to make offers to people to arrange for the issue of the Product in accordance with the terms of the PDS and this Agreement”.

199 However, the PNI AR Agreement does not record any arrangement under which PNI and its authorised representatives are to make offers to arrange the issue of the Qoin NCP Product. That is to say, the agreement does not appoint PNI as intermediary as contemplated by s 911A(2)(b) of the *Corporations Act*. The appointment of BPS as authorised representative to arrange the issue of its own product and authorisation to make offers to do so is not supported by any engagement of PNI by BPS to distribute the Qoin NCP Product.

200 On its face, therefore, the PNI AR Agreement does not record any arrangement or intermediary authorisation under which PNI and its authorised representatives will make offers to arrange for the issue of the Qoin NCP Product by BPS.

201 Further, and in any event, the arrangement between PNI and BPS was that *BPS* would make offers to arrange the issue of the product by *BPS*. For the reasons explained above, this is not an arrangement which meets the requirements of s 911A(2)(b) of the *Corporations Act*.

202 It follows that, contrary to BPS’s case, that arrangement is not an arrangement which meets the requirements of s 911A(2)(b) of the *Corporations Act*.

203 On 19 November 2020, PNI issued a document entitled **Letter of Authority** in which it certified that BPS was its authorised representative and set out the financial services which it said that BPS was authorised to provide. These were in the same terms as the “Specified Financial Services” in the PNI AR Agreement but did not refer to the limitation to the Product in clause 4.2(b) of the PNI AR Agreement. By its Further Amended Defence, BPS pleaded an alternative case that there was an “arrangement” between PNI and BPS conforming to s 911A(2)(b) of the *Corporations Act* which was constituted by the PNI AR Agreement, the

Letter of Authority, and an unwritten arrangement reached between Mr Wiese of BPS and Mr Benjamin Banks of PNI on or about 5 November 2020. However, such an arrangement is inconsistent with clause 14.2 of the PNI AR Agreement and, contrary to the submissions of BPS, was not supported by the evidence of these gentlemen.

204 It follows that the claim by BPS that it was exempt under s 911A(2)(b) fails in relation to the PNI AR Agreement, as does its alternative case.

3.7 Conclusion

205 At all material times since January 2020 and other than during the PNI Period, BPS has contravened ss 911A(1) and 911A(5B) of the *Corporations Act* by carrying on a financial services business within the meaning of Chapter 7 of the *Corporations Act* in issuing a financial product, and providing financial product advice in relation to that product, in circumstances where BPS did not hold an AFSL.

4. MISLEADING CONDUCT CASE

4.1 Overview

206 The Misleading Conduct Case arises from statements published by BPS on the Qoin Website, including statements contained in the White Paper document that was published on the Qoin Website. ASIC contends that by publishing the impugned statements, BPS contravened ss 12DA(1) and/or 12DB(1)(a) and (e) of the *ASIC Act*.

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

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

208 Section 12DB(1) of the *ASIC Act* relevantly provides:

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

- (a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
- ...
- (e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits ...

209 While s 12DA(1) extends to conduct which is “likely to mislead or deceive” (as distinct from conduct which *was*, in fact, misleading or deceptive), s 12DB(1) does not.

210 In this proceeding, there is no dispute that BPS published the statements on the Qoin Website. Nor is there dispute that the impugned statements were made by BPS in trade or commerce in relation to financial services, including in connection with the supply or possible supply, or the promotion of the supply or use of financial services, and that this constituted conduct in relation to “financial services” within the meaning of Part 2 of the *ASIC Act*.

211 The only question that arises for determination is whether the impugned statements gave rise to false and misleading conduct.

212 ASIC contends that, in making the representations, BPS contravened ss 12DA and 12DB of the *ASIC Act* by making false or misleading representations in connection with the supply or possible supply, or promotion of the supply or use, of the Qoin NCP Product.

213 As to the s 12DB contraventions, ASIC relies upon ss 12DB(1)(a) and 12DB(1)(e):

(1) s 12DB(1)(a): ASIC contends that, in making the Approval / Registration Representation and the Compliance Representation, BPS made false or misleading representations that the Qoin NCP Product was of a particular “standard, quality, value or grade”.

(2) s 12DB(1)(e): ASIC contends that, in making the Trade Representation and the Merchant Growth Representation, BPS made false or misleading representations with respect to the “performance characteristics, uses or benefits” of the Qoin NCP Product. ASIC also contends that, in making the Approval / Registration Representations, BPS contravened this section by making false or misleading representations with respect to the “approvals or benefits” of the Qoin NCP Product.

214 ASIC’s primary case is that each of the impugned representations the subject of this proceeding were representations of present fact, and not representations as to future matters. However, in relation to two of the impugned representations – the Merchant Growth Representation and the Trade Representation – ASIC submits in the alternative that, if those representations were (in whole or in part) in relation to future matters, the evidence does not show that BPS had reasonable grounds for making those representations.

215 By its Further Amended Defence, BPS denies that its conduct in publishing the impugned statements gave rise to the false and misleading conduct that is alleged.

216 BPS contends that both the Merchant Growth Representation and Trade Representation, if proved, are properly characterised as representations as to future matters and that it had reasonable grounds for making the representation.

217 Having regard to the defence advanced by BPS, an issue also arises in this case as to whether two of the impugned representations – the Approval / Registration Representation and the Compliance Representation – are properly characterised as representations of fact (as alleged by ASIC) or representations of opinion (as alleged by BPS). ASIC does not pursue an alternative case based on the falsity or misleading nature of any representations of opinion that BPS is found to have made.

218 There are therefore two fundamental issues which require determination:

- (1) whether the impugned statements conveyed the representations alleged by ASIC. In relation to two of the representations (the Approval / Registration Representation and the Compliance Representation), this issue brings with it a subsidiary question concerning whether the representations conveyed by the impugned statements were representations of fact or representations that BPS held a certain opinion;
- (2) whether the representations, if made, were false or misleading. This requires consideration of whether certain representations were as to future matters and, if so, whether they were made by BPS on reasonable grounds.

4.2 Relevant legal principles

4.2.1 The representations conveyed by the impugned statements

219 Although s 12DA uses the phrase “misleading or deceptive”, whereas s 12DB uses the phrase “false or misleading”, there is no material difference between the two phrases: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73; [2014] FCA 634 at [40] (Allsop CJ); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2020) 278 FCR 450; [2020] FCAFC 130 at [21] (Wigney, O’Bryan and Jackson JJ).

220 An analysis of whether conduct (including representations) was false, misleading or deceptive must start by identifying the conduct in question: *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435; [2013] HCA 1 at [89] (Hayne J).

- 221 The task of identifying the representation (or representations) conveyed by particular statements is to be approached from the perspective of the person or persons to whom the statement was directed. As was observed by the plurality in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486; [2012] HCA 39 at [36] (French CJ, Gummow, Hayne and Kiefel JJ), the court must “identify the intended audience for the impugned statements and the message or messages conveyed to that audience”.
- 222 In *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2020) 151 IPR 369; [2020] FCAFC 65 at [236] (Foster, Moshinsky and O’Bryan JJ), the Full Court summarised the applicable legal principles regarding whether conduct is misleading or deceptive or is likely to mislead or deceive. The Court observed that, in determining whether conduct is misleading or deceptive, “[t]he central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter)” citing (*inter alia*) *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 at [39] (French CJ, Crennan, Bell and Keane JJ).
- 223 Where the impugned conduct is directed to the general public, or some relevant section of the general public, it is necessary to identify the characteristics of the hypothetical “ordinary” or “reasonable” member of that section of the public, and to assess the likely effect of the conduct upon such ordinary or reasonable representees: *Kraft Foods* at [236] citing *Google Inc* at [7]; *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45; [2000] HCA 12 at [101]–[105] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). In doing so, although reactions that might be regarded as extreme or fanciful may be disregarded, the Court ought to guard against attributing to the ordinary or reasonable member of the target audience a greater level of knowledge or sophistication than is appropriate.
- 224 In all cases, in assessing the representation or representations conveyed by a statement to its intended audience, “it is necessary to examine the whole of the impugned statements to see the context”: *Forrest* at [38]. In this regard, the representation conveyed by a statement is a question of fact “to be decided by considering what [was] said and done against the background of all surrounding circumstances”: *Campomar* at [100], quoting *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202 (Deane and Fitzgerald JJ).
- 225 Where the impugned conduct relates to a statement or statements contained in a document, the presence of a disclaimer in that document has “some significance”, particularly if the document

is brief, and forms part of the overall consideration of the impugned conduct as a whole: *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; [2004] HCA 60 at [50]–[51] (Gleeson CJ, Hayne and Heydon JJ) and [152] (McHugh J). In such a case, the disclaimer is effective, not by any independent force of its own, but by actually modifying the conduct that would otherwise be false, misleading or deceptive: *Butcher* at [152]. However, cases in which a formal disclaimer will have this effect are rare: *Butcher* at [152] citing *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR 41-043 at 51,590 (Burchett J).

226 A disclaimer will only neutralise the otherwise misleading effect of the representation if it is worded unambiguously, featured prominently and communicates to the reader that the disclaimer is relevant to the (otherwise misleading) information it is seeking to qualify: see *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [83] (Keane JA, with whom Williams JA and Atkinson J agreed).

227 Finally, the presence or absence of evidence that someone was actually misled or deceived is relevant to an evaluation of the impugned conduct; but is not determinative: see *Coles Supermarkets* at [45].

4.2.2 Representations within meaning of section 12DB

Section 12DB(1)(a): “standard, quality, value or grade”

228 In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147; [2018] FCA 751 at [2325], Beach J stated:

[I]n relation to s 12DB(1)(a), the following may be said:

- (a) The term “particular” in s 12DB(1)(a) requires that the quality, standard, value or grade be indicated or certain.
- (b) Further, the term “standard” is narrower than the term “quality” and means “a definite level of excellence, attainment, wealth or the like, or a definite degree of any quality, viewed as a prescribed object of endeavour or as the measure of what is adequate for some purpose” (*Ducret v Chaudhary’s Oriental Carpet Palace Pty Ltd* (1987) 16 FCR 562 at 577; *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415 at 423).
- (c) Further, the term “quality” means “an attribute, property, special feature” or the “nature, kind or character (of something)” (*Given v CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212 at 216; 15 ALR 439 at 442). A wide meaning has been given to this term, which “extends beyond the degree or grade of excellence which a thing can be said upon physical examination to possess in comparison with others of a similar kind, and which includes the virtues, attributes, properties and special feature of the thing” (*Ducret v Chaudhary’s Oriental Carpet Palace Pty Ltd* at 577).

Section 12DB(1)(e): “approval, performance characteristics, uses or benefits”

229 As with s 12DB(1)(a), the components of s 12DB(1)(e) are to be given their ordinary meaning and are not mutually exclusive.

230 As to the ordinary meaning of this phrase, the Shorter Oxford English Dictionary (3rd edition) defines “approve” to mean (relevantly) “officially agree to or accept as satisfactory”. In this context, a representation that services have been “officially approved” or “officially registered” is, if false or misleading, apt to contravene s 12DB(1)(e).

231 As to representations concerning the “performance characteristics, uses or benefits”, these terms should be given their ordinary meaning. In *Westpac Banking Corporation (No 2)* at [2326], Beach J stated that, “in relation to s 12DB(1)(e), a broad interpretation of ‘performance characteristics’ has generally been adopted in the authorities”.

4.2.3 Representations as to future matters

232 Section 12BB of the *ASIC Act* relevantly provides:

- (1) If:
 - (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
 - (b) the person does not have reasonable grounds for making the representation;

the representation is taken, for the purposes of Subdivision D (sections 12DA to 12DN), to be ***misleading***.

- (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:

- (a) a party to the proceeding; or
- (b) any other person;

the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

(Emphasis original.)

233 Section 12BB(1) of the *ASIC Act* therefore deems a representation as to future matters to be misleading unless the representor has reasonable grounds for making the representation.

234 The term “future matter” is not defined in the *ASIC Act*. Assistance is obtained from relevant authority which has considered the meaning of “future matter” in the context of misleading conduct. In *Australian Competition and Consumer Commission v Woolworths Group Ltd* (2020) 281 FCR 108; [2020] FCAFC 162 at [125] (Foster, Wigney and Jackson JJ), the Full

Court observed that “[w]hether a statement relates to a future matter depends upon the words used and the context in which they were used”. Further, “[a] representation will only be with respect to a future matter if it is in the nature of a promise, forecast, prediction or other like statement about something that will only transpire in the future”: see *Lin v Zheng* [2023] NSWCA 174 at [34] (Payne JA, with whom Bell CJ and White JA agreed).

235 Where a party has made a representation with respect to a future matter, the application of s 12BB(1) of the *ASIC Act* gives rise to two questions of fact:

- (1) What grounds were relied upon by the representor in making the representation?
- (2) Were those grounds reasonable?

236 The interaction between these two factual inquiries was explained in *Girchow Enterprises Pty Ltd v Ultimate Franchising Group Pty Ltd* [2023] FCA 420 at [16] by Thawley J in the following terms (by reference to the analogue provision in s 4 of Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**)):

Section 4 of the ACL focusses attention on whether a person in fact *had* reasonable grounds for making a representation with respect to a future matter, not simply on whether there *were* reasonable grounds for making a representation. One way of articulating one of the intended effects of s 4 is to say that it “require[s] the representor to identify the facts or circumstances (if any) actually relied upon before turning it over to the trier of fact to decide whether they were objectively reasonable and whether they support the representation made”

(Emphasis original.)

237 Accordingly, to determine the first factual inquiry (i.e. the grounds upon which the representation was made), the representor must identify (1) some facts or circumstances; (2) existing at the time of the representation; (3) on which the representor in fact relied in making the impugned representation: *Australian Securities and Investments Commission v GetSwift Ltd* [2021] FCA 1384 at [2158] (Lee J).

238 As was explained by Mortimer J (as her Honour then was) in *Australian Competition and Consumer Commission v Woolworths Ltd* [2019] FCA 1039 at [129] (again, by reference to the analogue contained in s 4 of the ACL):

... Subsection (1) is concerned with whether the person making the representation “does not have” reasonable grounds. The only sensible way to understand that phrase is that at the time of making the representation, the representor herself or himself, or through its corporate actors, “had” — as in fact possessed — a basis which can be objectively described as reasonable, for what was represented. The text directs attention to the information which in fact provided the basis for the statements or

conduct. It does not direct attention to whether there were reasonable grounds for the making of the representation. Rather, the text focuses on whether the representor “had” such grounds.

See also *GetSwift* at [2162].

239 These observations reflect the approach taken by the Full Court in *Australian Competition & Consumer Commission v Dateline Imports Pty Ltd* [2015] FCAFC 114 (Gilmour, McKerracher and Gleeson JJ) at [182]:

A representation will not contravene s 51A and s 52(1) of the [*Trade Practices Act 1974* (Cth)] (or their subsequent legislative successors) where the representor, as objectively viewed, had reasonable grounds known to him or her to make the representation. The focus is on the reasonableness of the grounds as then known, not what may later become known.

240 In relation to the second factual inquiry required by s 12BB(1) of the *ASIC Act* (i.e. whether the grounds relied upon were reasonable), as the Full Court observed in *Dateline* at [99], the *reasonableness* of the grounds relied upon by the representor is an objective question, and is not a question as to the representor’s subjective belief in the grounds upon which it relies. In this regard, the Full Court observed at [98]–[100]:

Dateline submits that its success on the truth of the underlying representation is enough to defeat these grounds. In other words, so long as the represented fact is right, Dateline submits that the ACCC has not shown that it was misleading or deceptive for Dateline to have made the representation on incomplete or wrong reasons that it believed were correct and complete, and did not include the reasons showing it to be correct.

We do not accept this submission. It is not a question as to Dateline’s subjective belief. Rather, the representation that Dateline had reasonable grounds for making the several representations of fact is to be considered in light of the grounds which Dateline actually then knew and whether those grounds, objectively, were reasonable.

There will not be reasonable grounds for making a representation if, at the time of making [it], the representor did not have facts sufficient to induce, in the mind of a reasonable person, a basis for making the representation.

(References omitted.)

241 In undertaking both inquiries required by s 12BB(1) of the *ASIC Act*, the grounds upon which the representation was made, and whether those grounds were reasonable, must be judged as at the time the representation was made: see *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 at 513 (Heerey J); *City of Botany Bay Council v Jazabas Pty Limited* (2001) ATPR (Digest) 46-210; [2001] NSWCA 94 at [83] (Mason P, with whom Beazley JA agreed).

242 Although this “does not preclude examining evidence of later events which may throw light upon the overall probabilities” in considering whether a representation was made upon

reasonable grounds, it is “vital to guard against hindsight illusion”: *Jazabas* at [83]. As was observed by the Full Court in *Dateline* at [101]–[102]:

It matters not that it transpires, in due course, that the *fact* represented is true. That may simply be serendipitous. ...

Moreover the reasonable grounds representation is also one of fact. It is not directed to grounds which may become known but are not then known. Consumers should be protected against such conduct where, in fact, objectively assessed, there were no reasonable grounds known to the representor.

(Emphasis original.)

243 Finally, it is relevant to observe that s 12BB(2) of the *ASIC Act* is a deeming provision. A representor does not have reasonable grounds for making the representation unless “evidence is adduced to the contrary”.

244 The scope and effect of this deeming provision is clarified by ss 12BB(3) and (4) of the *ASIC Act* which provide:

- (3) To avoid doubt, subsection (2) does not:
 - (a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or
 - (b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.
- (4) Subsection (1) does not by implication limit the meaning of a reference in this Division to:
 - (a) a misleading representation; or
 - (b) a representation that is misleading in a material particular; or
 - (c) conduct that is misleading or is likely or liable to mislead;and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

245 These aspects of s 12BB of the *ASIC Act*, in particular s 12BB(3), make it clear that s 12BB does not reverse the onus of proof; it merely imposes an evidential burden on the representor to adduce sufficient evidence “to the contrary”, that is, evidence that it had reasonable grounds for making the representation: see *GetSwift* at [2149] and [2156].

246 The deeming effect of s 12BB(2) arises only when the representor fails to adduce evidence to the contrary. Once the representor discharges that evidential burden, “the matter is thereafter dealt with under subs (1), the obligation being on the applicant to establish that the representor

did not have reasonable grounds for making the representation”: *North East Equity Pty Ltd v Proud Nominees Pty Ltd* (2010) 269 ALR 262; [2010] FCAFC 60 at [33] (Sundberg, Siopis and Greenwood JJ) (in the context of the analogue provisions in s 51A of the *Trade Practices Act 1974* (Cth)).

4.2.4 Representations of fact or opinion

247 The characterisation of a representation as being one of fact or opinion was considered by the High Court in *Forrest*, which case concerned whether public statements were misleading or deceptive in contravention of s 1041H of the *Corporations Act 2001* (Cth). In *Forrest*, the plurality of the High Court observed at [33]:

...While it is to be doubted that the proposition which ASIC identified is accurately, or at least sufficiently, described as a statement of “fact”, it is ultimately unprofitable to attempt to classify the statement according to some taxonomy, no matter whether that taxonomy adopts as its relevant classes fact and opinion, fact and law, or some mixture of these classes. It is necessary instead to examine more closely and identify more precisely what it is that the impugned statements conveyed to their audience.

248 The question of whether a statement gives rise to a representation of fact or opinion is not one which can be resolved by reference to set categories. This was made plain by the plurality at [69]:

[T]hese reasons do not establish any general proposition to the effect that any public statement that Company A has made a contract with Company B necessarily conveys to its audience a message only about what the contractual document contains. That proposition is too broad. What message is conveyed to the ordinary or reasonable member of the intended audience cannot be determined without a close and careful analysis of the facts. In this, as in so many other areas, the facts of and evidence in the particular case are all important.

(Footnotes omitted.)

249 The approach taken in *Forrest* reflects the views expressed by Hill J (with whom Foster J agreed) in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1, where his Honour said at page 46:

No case will afford a guide to any other case, since it must essentially be a question of fact whether a particular formulation of words expresses merely an opinion or a statement of fact. ... It is the reader’s perception of the maker’s intention which will ordinarily be the significant matter. The question will generally be resolved by looking to the persons to whom the statement was directed and asking whether any members of that class of persons would reasonably understand the statement to be one of fact or opinion.

250 In *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* (2019) 140 ACSR 561; [2019] FCA 1932, after referring to *Forrest*, O’Byrne J said at [113]:

In an abstract sense, a wide range of statements might be characterised as opinions, not facts. This includes statements about scientific matters, where a statement may reflect a widely accepted view about a matter but, strictly speaking, the statement is one of opinion. It is equally true that, at a certain level of abstraction, every statement about the law or legal rights can be characterised as an opinion. Ultimately, though, the relevant question for the purposes of the prohibition against misleading and deceptive conduct is: what would be understood by the recipient of the communication?

251 The proper characterisation of a representation as being one of fact or of opinion is a fact-intensive inquiry. Although no case is determinative of others, some useful general considerations of broad application can be found in earlier decisions. In particular:

- (1) In *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; [2009] HCA 25 at [32], French CJ identified the key characteristic of a statement of opinion as being “a statement of ‘judgment or belief of something as probable, though not certain or established’”. The plurality in that case (Gummow, Hayne, Heydon and Kiefel JJ) at [132] found that financial projections proffered as “estimates” conveyed only that the representor believed them to be true.
- (2) In *Tobacco Institute*, Hill J (at page 47) observed that a statement of fact is one which can be measured against an objective criterion, whereas “where no objective criterion exists, so that of necessity what is said must depend on judgment or opinion, the statement will be seen... as one of opinion”.

252 However, the characterisation of a representation as fact or opinion ultimately turns on the circumstances of each case. A critical aspect of these circumstances is what would be understood by the “ordinary or reasonable audience” to whom the statement or representation is directed: *Ireland v WG Riverview Pty Ltd* (2019) 101 NSWLR 658; [2019] NSWCA 307 at [30] (Bell ACJ), citing *Campomar* at [102].

253 Accordingly, in *Pyrotek Pty Ltd v Ausco Industries Pty Ltd* (1992) ATPR (Digest) 46-085 at 52,323, French J (as his Honour then was) stated:

Whether there is a misrepresentation is a question of fact to be decided by considering what is said and done against the background of all the surrounding circumstances ... [T]hat the question involves a judgment of all the surrounding circumstances can be extended to the characterisation of conduct as misleading or deceptive generally. And among the relevant circumstances may be some attributes of the person or persons affected or likely to be affected by the conduct. This does not involve the introduction of a subjective test whereby it is sufficient for conduct to be regarded as misleading if

someone is misled by it. The question is still objective. But among the facts which may be taken into account are the knowledge or expertise of the person affected.

A statement which has the character of a statement of fact when read by an ordinary person may to another, who has relevant knowledge, be seen as an opinion involving interpretation of other data. If in the circumstances in which it is communicated, including the nature or resources of the recipient, a statement presents as a statement of opinion then it is not necessarily to be characterised as anything other than a representation that the maker of the statement holds the opinion or interpretation offered.

(Citations omitted.)

254 The identification of the ordinary or reasonable member of the target audience is therefore highly relevant to the court’s assessment of whether a representation is one of fact or opinion. As was observed by Bell ACJ (as his Honour then was) in *Ireland* at [32]:

... [o]rdinarily, the more informed the target audience regarding the subject of the impugned remarks, the more willing the court will be to construe the statements as opinions.

4.3 Characteristics of the hypothetical ordinary or reasonable member of audience

255 In this case, the relevant statements from which the impugned representations arise were made available to the public at large through their publication on the Qoin Website (including in the White Paper which was published on that website).

256 The evidence established that the target audience of both the Qoin Website and the White Paper was a broad one, encompassing both merchants (including small businesses) who were considering accepting Qoin as payment for their goods and services, as well as general consumers interested in either crypto-assets generally, or Qoin in particular, for use in everyday purchases.

257 The Qoin Website urges the reader to “Become a Qoin Consumer in 3 simple steps” described as:

- (1) Download: Download the Qoin Wallet from the Apple and Android stores
- (2) Sharing is Caring: Share and “like” Qoin on FB, Insta and Twitter
- (3) Winners are Grinners: Sell some items on the Q Shop or buy a Qoin block via the BTX exchange located inside your Qoin wallet. Or better still... Do both.

258 Because viewers of the Qoin Website are encouraged to share information about Qoin on social media, this would increase the likelihood that younger adults (say between the ages of 20 and

40 years old) are more likely to search for and review the Qoin Website, after seeing it mentioned or “liked” on social media.

259 Once on the website, they will have seen that many pages on the Qoin Website contained photographs of younger adults, with many of those adults looking at a smartphone or computer, in company or alone, with most smiling or laughing. The associated words next to the photographs referred to “benefits”, “rewards” and “the Qoin community”. Other pages on the Qoin Website, such as under the Merchant tab, also depicted young, smiling adults, such as a female florist who is depicted looking at her laptop with a smile and a barman standing with arms crossed and a big grin above the words “Real Growth Potential”. Similarly, one version of the White Paper includes photographs of younger adults including a photograph showing a group popping a sparkler and laughing, next to the words “Get the Consumer Experience”.

260 Having regard to the extracts taken from the Qoin Website and White Paper at various relevant dates and which are in evidence, and the encouragement to post about Qoin on social media, it appears that the Qoin Website and the White Paper were targeted at younger adult members of the general public, especially those in their twenties and thirties. Such persons would likely be attracted to using an app on their smartphone. Such persons would also likely be excited at the prospect of becoming part of the Qoin “community” and “ecosystem”, of being able to transact in Qoin, and buy and sell items through the Q Shop, all through their smartphone. They would also likely regard it as a benefit of the Qoin payment system that the value of the Qoin which they purchase can increase in value.

261 Members of this section of the general public are less likely to have a working knowledge of the authorised representative and licensing provisions of the *Corporations Act*. Contrary to the submissions of BPS, I do not accept that such persons would be likely to have some familiarity with cryptocurrencies or alternative forms of exchange, and nor do I accept that they would have a general understanding that this is a developing industry, subject to a level of uncertainty and change. Indeed, a person who is attracted to the Qoin Website, including through social media, is more likely to regard cryptocurrency as being “on trend”, modern and fashionable such that they should embrace its benefits ahead of the rest of the general population. As the Qoin Website urges, “Be one of the first to become a Qoin”.

262 While I accept that a proportion (but not all) of the target audience (particularly those who operate small businesses) are unlikely to be entirely unsophisticated, it is unlikely that a reasonable person in the relevant class would have read the statements published on the Qoin

Website and the White Paper, and their surrounding context, with a degree of care. I also do not agree that they would have taken the time to read the statements on the Qoin Website at their leisure. Rather, the succinct, punchy paragraphs which appear on the Qoin Website would more likely have been read by them in moments snatched between reviewing the content of their social media and news apps, doing their online shopping, and reading and drafting emails.

4.4 Trade Representation

4.4.1 Overview of the parties' respective positions

263 ASIC contends that, by publishing certain statements on the Qoin Website, including in the White Paper available on the Qoin Website, BPS represented that a person who purchases Qoin can be confident that, if and when they wish to do so, they will be able to exchange the Qoin that they hold for fiat currency or other crypto-assets through independent exchanges.

264 The Trade Representation arises from two statements published by BPS: one statement which was published prior to 3 November 2021, and an amended version of that statement which was published after 3 November 2021.

265 It is common ground between the parties that:

- (1) at all times prior to 21 November 2021, there were no independent exchanges available via which Qoin could be exchanged for either fiat currency or other crypto-assets through independent exchanges;
- (2) from 21 November 2021, it became possible to exchange Qoin for Australian fiat currency via an independent exchange known as Cryptochange.

266 The evidence adduced by BPS at trial showed that Qoin was listed on the independent Piptle exchange and was able to be exchanged for other crypto-assets, from at least July 2023. As such, at all relevant times from 21 November 2021 until July 2023, it was not possible to exchange Qoin for other crypto-assets via an independent exchange.

267 Accordingly, if the relevant statements published by BPS conveyed the Trade Representation, ASIC contends that a representation that Qoin can be exchanged for fiat currency or other crypto-assets via independent exchanges is a representation concerning the performance characteristics, uses or benefits of the Qoin NCP Product within the meaning of s 12DB(1)(e) of the *ASIC Act* and that, having regard to the facts identified above, this representation was misleading.

268 BPS admits that it published the relevant statements identified by ASIC in the manner and during the periods that ASIC alleges.

269 However, BPS denies that, in publishing those statements on the Qoin Website, BPS engaged in misleading conduct because, considered in the context in which they were published, those statements:

- (1) did not convey the representation alleged by ASIC; and
- (2) instead, conveyed only a representation as to future matters, namely that “there would, sometime in the future, be mechanisms by which a person could exchange Qoin for fiat currency or other crypto-assets through independent exchanges” and that this representation was made on reasonable grounds.

270 ASIC contends that if, contrary to ASIC’s primary case, the representation conveyed by the relevant statements comprised or included a representation as to future matters:

- (1) the representation which was conveyed was that, if and when they wished to do so, consumers who purchase Qoin will be able to exchange those Qoin for fiat currency or for other crypto-assets through independent exchanges within a reasonable period of time after purchase; and
- (2) that representation was misleading because BPS did not have reasonable grounds for making that representation at the time it was made, in reliance upon s 12BB(1).

4.4.2 Was the representation about a future matter?

271 I will address the representation conveyed by the relevant statements as they appeared prior to, and following, 3 November 2021.

Pre-3 November 2021

272 From about 30 January 2020 to 2 November 2021, BPS published the following statement (the **Trade Statement**):

The Qoin Reserve will administer the expansion of the ecosystem through a global sales initiative, onboarding, and incentivisation of new merchants. This means that anyone who has purchased Qoins has a high degree of assurance they can utilise or spend their digital currency in the participating merchant ecosystem, or trade their Qoins for fiat or cryptos with others through independent Exchanges.

273 It is common ground that the Trade Statement was published by BPS:

- (1) in the White Paper from 30 January 2020 to 2 November 2021;

(2) on the “Qoin Currency Reserve” subpage of the Qoin Website from 3 June 2020 to around 23 November 2020, and again from 15 January 2021 to 18 September 2021.

274 BPS contends that the representation conveyed by the Trade Statement was one in relation to future matters – that is, that “there would, sometime in the future, be mechanisms by which a person could exchange Qoin for fiat currency or other crypto-assets through independent exchanges”. Its particular focus was upon the first sentence of the Trade Statement, and that the White Paper and Qoin Website were generally “forward-looking”.

275 However, while the word “will” can be used to express futurity and probability such as, for example, “I will do the dishes”, it can also be used to express capability or sufficiency such as, for example, “the cup will hold water”. It can also be used to convey what *is* being done and will *continue to be done* in relation to certain conduct, such as, for example, “customers may be assured that we will keep our prices below those of our competitors”. The statement that the “Qoin Reserve *will* administer the expansion of the ecosystem” is a statement of this last kind – namely, it would have conveyed to the hypothetical reader that something *is* being done and will *continue to be done*.

276 Further, and in any event, the first sentence relates to a different topic to the second sentence. By the first sentence of the Trade Statement, the “expansion” of the Qoin “ecosystem” which BPS says the Qoin Reserve “will” administer is an expansion of the *merchant* network – through a “global sales initiative, onboarding and incentivisation of new merchants” – and not any expansion work in relation to independent exchanges.

277 Even if the “expansion” referred to in the first sentence could be understood as comprising an expansion that “will” be undertaken in relation to independent exchanges, the use of the term “expansion” is apt to convey to the ordinary or reasonable reader that there is an existing network of independent exchanges which the Qoin Reserve will seek to expand, not that there is none at all.

278 In my view, the hypothetical member of the target audience would therefore understand the second sentence of the Trade Statement to mean that, as a matter of then present fact, a person who purchases Qoin can be confident that, if and when they wish to do so, they can exchange those Qoin for fiat currency or other crypto-assets through existing independent exchanges.

279 That is because the second sentence commences by referring to anyone who *has purchased* Qoin (referring to the current status of such persons) and states that such purchasers have “a

high degree of assurance” (as in now) that they *can* (as in now) trade their Qoins for fiat or cryptos with others through independent exchanges, which conveys that such exchanges exist at present.

280 In other words, at all times prior to 3 November 2021, the hypothetical member of the target audience would have understood the Trade Statement to mean that, at the time that the statement was made, there were already in operation independent exchanges via which Qoin could be exchanged for fiat currency or other crypto-assets.

281 Contrary to BPS’s defence, there is nothing in the surrounding text or context of the statement which suggests to the hypothetical member of the intended audience that the relevant second sentence of the Trade Statement should be understood as anything other than a representation – or, to adopt the language used by BPS, an “assurance” – of present fact.

282 Such context includes the content of the White Paper and the Qoin Website which encompassed statements of existing fact as well as statements concerning future matters. For example:

(1) in the “Foreword” to the White Paper contained in section 1 of that document, the following was stated:

This White Paper describes our plans and progress made towards opening the world’s largest private merchant trading ecosystem to the public on a distributed blockchain and smart contract platform.

(Emphasis added.)

(2) consistent with this opening statement, the information contained in the White Paper included reports in relation to aspects of the Qoin “ecosystem” which had already been implemented;

(3) the Qoin Website similarly contained a mix of reporting upon past achievements, as well as future planned expansions.

283 BPS also refers to a “disclaimer” at the end of the White Paper which states that the “White Paper contains statements, forecasts and financial information which constitute progressive information”. However, in the context of the White Paper as a whole, that statement does not bear a close enough connection to the Trade Representation to affect its characterisation as a representation of present fact.

284 For these reasons, the evidence establishes and I find that, considered in the context in which it was made, at all times prior to 3 November 2021, the ordinary or reasonable member of the

target audience would have understood the Trade Statement to mean that, as a matter of then present fact, a holder of Qoin could trade their Qoin for fiat currency or other crypto-assets through independent exchanges if and when they wished to do so.

285 It follows that the Trade Statement as it appeared pre-3 November 2021 was not one in relation to future matters.

Post-3 November 2021

286 On 3 November 2021, the Trade Statement was amended as follows, with emphasis applied to highlight the words added by that amendment:

The Qoin Reserve will administer the expansion of the ecosystem through a global sales initiative, onboarding, and incentivisation of new merchants. This means that anyone who has purchased Qoins has a high degree of assurance they can utilise or spend their digital currency in the participating merchant ecosystem, or *in the future* trade their Qoins for fiat or cryptos with others through independent Exchanges.

287 From around 4 April 2022, a further amendment was made in that the word “high” was removed from the phrase, “This means that anyone who has purchased Qoins has a [high] degree of assurance they can utilise or spend their digital currency...”.

288 It is common ground that the amended Trade Statement was published by BPS:

- (1) in the White Paper from 3 November 2021 to 24 October 2022;
- (2) on the “Qoin Currency Reserve” subpage of the Qoin Website from 8 December 2021 to 1 March 2022, and again from 4 April 2022 to 24 October 2022.

289 ASIC accepts that the amendment which was made to the Trade Statement on 3 November 2021 had the effect of converting the representation in relation to the availability of independent exchanges which was conveyed by that statement from being a representation of present fact, to one in relation to future matters – i.e. that holders of Qoin would, *within a reasonable time in the future*, be able to exchange Qoin for fiat currency or other crypto-assets through independent exchanges.

290 BPS contends that it represented no more than that there would *sometime in the future* be mechanisms by which a person could exchange Qoin for fiat currency or other crypto-assets through independent exchanges.

291 Neither party made submissions, either in writing or orally, as to why its characterisation ought to be preferred.

292 There is no language in the amended Trade Statement which supports ASIC’s submission, and ASIC did not justify or explain why the ordinary or reasonable member of the target audience would understand from it that listing on an independent exchange would occur within a reasonable time in the future, or what such a person would understand the length of that reasonable time to be in this context. For these reasons, the Trade Statement represents no more than that there would *sometime in the future* be mechanisms by which a person could exchange Qoin for fiat currency or other crypto-assets through independent exchanges, as contended by BPS.

4.4.3 Was the representation false or misleading?

293 A representation that Qoin can be exchanged for fiat currency or other crypto assets via independent exchanges is a representation concerning the performance characteristics, uses or benefits of the Qoin NCP Product within the meaning of s 12DB(1)(e) of the *ASIC Act*.

Pre-3 November 2021

294 The Trade Representation as it appeared prior to amendment was false, misleading or deceptive, and likely to mislead and deceive, because, at all times prior to 3 November 2021, there were no independent exchanges available via which Qoin could be exchanged for either fiat currency or other crypto-assets with the consequence that the Trade Representation was likely to lead an ordinary or reasonable member of the relevant class into error, being the formation of an incorrect belief that there were such independent exchanges.

295 If, contrary to my findings, this version of the Trade Representation was a representation as to a future matter, the question to then be asked is – did BPS have reasonable grounds for making such a representation?

296 Given evidence has been adduced to discharge the evidentiary onus under s 12BB(2) of the *ASIC Act*, the onus lies with ASIC to show that BPS did *not* have reasonable grounds for making the representation alleged.

297 At all relevant times, Mr Wiese was the person within BPS responsible for publishing the Trade Statement (both in its original form and as amended from 3 November 2021) in the White Paper and on the Qoin Website. Indeed, it is common ground that it is Mr Wiese’s state of mind at the material times which is most relevant. However, Mr Wiese was not the only individual at BPS involved in taking steps to list Qoin on independent exchanges throughout the relevant period. That work was also being undertaken by, primarily, Mr Wiehan Venter, who was

largely responsible for developing the technology for the Qoin Wallet and reported to Mr Wiese. Mr Pathak was also involved.

298 BPS submits that, from an early stage in the development of the Qoin Project, both Mr Wiese and Mr Pathak were aware that, at the time, thousands of different crypto tokens had been listed on hundreds of different exchanges globally, such that the idea of listing on an independent exchange appeared to be a relatively common and natural goal for crypto projects. BPS submits that the idea of listing Qoin, too, on independent exchanges was “nothing new or unusual”. It submits that Mr Wiese and Mr Pathak also agreed that, given its potential benefits in increasing the attractiveness of the Qoin Project more generally, listing on independent exchanges should be a priority, and that this was reflected in the instructions given to Mr Venter in mid-2019. BPS then identifies the steps taken by Mr Wiese and others to achieve the listing of Qoin.

299 However, aspiring for a result, however conventional the aspiration, and then taking steps to achieve that result does not mean, without more, that the holder of the aspiration has reasonable grounds for a belief that the result will be achieved. This is especially as, before he started working on the Qoin Project in 2019, Mr Wiese had no prior experience working with digital currency exchanges and had never previously attempted to list a new digital currency on a digital currency exchange. Whether there were reasonable grounds requires a close examination of the evidence.

300 In his affidavit, Mr Wiese outlined the grounds that he said he relied upon in representing that purchasers or holders of Qoin would, within a reasonable timeframe in the future, be able to exchange Qoin for fiat currency or other crypto-assets via independent exchanges. Those grounds comprised:

- (1) discussions that Mr Wiese had with representatives of exchanges at a Blockchain Conference which he attended in 2019;
- (2) discussions that Mr Wiese had in the second half of 2019 with a representative of an exchange known as “MetaMorph”;
- (3) communications that Mr Wiese exchanged in May 2020 with representatives of the “National Currency Exchange Group”; and
- (4) investigations that Mr Wiese undertook with Mr Venter and Mr Pathak, and later asked Mr Venter to continue to undertake, in relation to listing on exchanges, and Mr Venter’s reports to Mr Wiese about discussions with exchange operators.

301 As to the first ground, Mr Wiese gave evidence that, at this conference, he was “informed there by at least two representatives of exchanges that they would be prepared to list our new cryptocurrency subject to meeting their minimum criteria”. In cross-examination, Mr Wiese gave evidence that, by the time he attended this conference in Malta, he was aware that each digital exchange had its own minimum criteria that needed to be met in order for a cryptocurrency to be listed on that exchange. Mr Wiese also gave evidence that, at the time he attended this conference, BPS had not yet decided upon the technological design or financial model for the Qoin Project. Mr Wiese accepted that at the time he attended the conference in Malta, he did not know if BPS’s then Qoin would be able to meet the minimum criteria for listing on any of the exchanges that he spoke with at that conference.

302 As to the second ground, in mid-2019, Mr Wiese had a discussion with a representative of MetaMorph about the possibility of listing Qoin on the MetaMorph exchange. Those initial discussions indicated that, subject to certain technological issues being resolved, it might be possible for Qoin to be listed on MetaMorph. After those initial discussions, Mr Wiese delegated the task of pursuing a possible listing on MetaMorph to Mr Venter. By late August 2019, Mr Venter’s recommendation to Mr Wiese was that BPS pursue a different exchange – the Kyber Network – as an option for listing Qoin. Thereafter, neither Mr Venter nor Mr Wiese progressed any discussions with representatives of MetaMorph about a potential listing of Qoin.

303 As to the third ground, Mr Wiese gave evidence concerning two email communications in mid-2020 with an exchange known as the “National Currency Exchange”. These two emails record that, in late July and early August 2020, a representative of the National Currency Exchange, Mr Tommy Shin, was looking to open up discussions with Mr Wiese about the possibility of listing Qoin on his “crypto to fiat” exchange. In cross-examination, Mr Wiese confirmed that BPS did not pursue a listing on the National Currency Exchange.

304 As to the fourth ground, Mr Wiese gave evidence under cross-examination that after he returned from the Blockchain Conference in Malta in May 2019, he and Mr Pathak discussed listing requirements. Mr Wiese and Mr Pathak began investigating listing requirements further in July 2019. From about August or September 2019, Mr Wiese made Mr Venter responsible for researching and analysing the listing criteria for different digital exchanges, although Mr Wiese and Mr Pathak also participated in that work until November 2019. Mr Wiese said that he asked Mr Venter to undertake this work because, although Mr Wiese was aware that each

digital exchange had its own listing requirements, Mr Wiese did not know what each of those listing requirements were. Overall, Mr Wiese's evidence was that, from about August or September 2019, Mr Venter became the person within BPS responsible for researching and attempting to identify options for listing Qoin on an exchange.

305 Mr Wiese did not give any detailed evidence about the reports that he received from Mr Venter, other than stating that, since January 2020, Mr Venter reported to him that he had had "numerous discussions with exchange operators as well as onramp and offramp providers".

306 Evidence was given by Mr Venter as follows:

- (1) in June or July 2019, he had discussions with Mr Thomas Miller who he described as being a representative of a digital currency exchange known as "MetaMorph".
- (2) early in his discussions with Mr Miller, it became clear to Mr Venter that the technological platform that BPS was, at that stage, planning on using for its crypto-asset was not compatible with the technology on which the MetaMorph exchange operated. Mr Venter raised this concern with Mr Miller during the June/July 2019 meeting and Mr Miller told him that "he was prepared to list" the digital currency then being developed by BPS on MetaMorph "if" BPS could make its digital currency capable of interfacing with MetaMorph's technology.
- (3) he had further discussions with Mr Miller in the second half of 2019. During those discussions, in response to Mr Miller's follow-up enquiries about the possibility of listing Qoin on MetaMorph, Mr Miller was told that BPS "still needed to sort out the technology". By late August 2019, Mr Venter submitted his first formal recommendation to Mr Wiese in relation to the options for listing Qoin. Mr Venter's recommendation was that BPS pursue a possible listing of Qoin on an exchange operated by the Kyber Network (i.e. not MetaMorph).
- (4) in late August 2019, he "reached out" to the Kyber Network, and to another exchange known as "Wyre", to "start a discussion as to whether they would be the right exchange for Bartercard Group". By September 2019, Mr Venter had determined that it would not be possible to list Qoin on either the Kyber Network or Wyre. At around the same time, Mr Venter "considered" an exchange known as "Airswap". There is no evidence that Mr Venter made any enquiries with Airswap about the possibility of listing Qoin on the Airswap exchange.

- (5) from about January 2020, Mr Venter experienced delays in progressing his investigations into options for listing Qoin. Mr Venter said that one of the reasons why this work was delayed was that, in 2020, Mr Miller left MetaMorph. Thereafter, MetaMorph was not one of the exchanges which Mr Venter continued to investigate in relation to the possible listing of Qoin.
- (6) by May 2021, Mr Venter had not yet identified any independent exchange suitable for listing Qoin. On 11 May 2021, Mr Venter sent Mr Wiese and Mr Atkinson an online “guide” that he had then recently come across for listing crypto-assets on an exchange known as “Coinbase”. Mr Venter’s evidence was that this document was the first “concrete published guide” that he had found for listing on a digital exchange.
- (7) after locating this guide, between September and November 2021, Mr Venter pursued enquiries in relation to possible listings with two further exchanges: “CoinsPaid”, and “Transak”. Mr Venter also had further discussions with Wyre. As to these:
 - (a) BPS did not pursue a listing on CoinsPaid because of both the cost of doing so, and issues that BPS had identified with the reputation and reliability of CoinsPaid.
 - (b) in relation to Transak and Wyre, BPS was unable to proceed with listing Qoin on those platforms because they each required Qoin to first be listed on a public directory known as “CoinMarketCap”. Mr Venter’s evidence was that, at that time, in order to be listed on CoinMarketCap, Qoin would first have to be listed on at least two other digital currency exchanges.
- (8) on 7 October 2021, Mr Venter sent emails to an organisation called “AscendEX” seeking information about an exchange operated by AscendEX called the “Whitelabel exchange”. There is no evidence that those inquiries progressed beyond Mr Venter’s initial requests for information.
- (9) on 23 November 2021, Mr Venter became aware that Qoin had been listed on Cryptochange (which is an independent exchange). In cross-examination, Mr Venter clarified that this listing of Qoin on Cryptochange was not brought about as a result of any steps that Mr Venter took; and Mr Venter was not aware that Qoin had been listed on Cryptochange until he received an email to that effect from Mr Wiese on 23 November 2021. Similarly, during cross-examination, Mr Wiese gave evidence that he had not made any attempt to list Qoin on Cryptochange before it was listed in late November 2021.

307 In summary, by early November 2021, each of the inquiries that Mr Wiese or Mr Venter had made to list Qoin on an independent exchange had resulted in the identification of various technical and commercial barriers to achieving such a listing, with nothing to indicate that any view held that such barriers could be overcome and a listing achieved was one which was based on reasonable grounds. This conclusion is supported by the fact that at no point did their inquiries progress to any substantive steps being taken to list Qoin on an independent exchange.

308 In these circumstances, at no time prior to 3 November 2021 did BPS have reasonable grounds to make the Trade Representation.

309 It follows that, if the Trade Representation as it appeared prior to 3 November 2021 was a representation as to a future matter, it was misleading.

Post-3 November 2021

310 The Trade Representation as it appeared post-3 November 2021 was one in relation to a future matter.

311 Nothing occurred between 3 November 2021 and 21 November 2021 which would sustain a finding that BPS had reasonable grounds for making the Trade Representation.

312 Indeed, the listing of Qoin on Cryptochange on 21 November 2021 came as a surprise to both Mr Wiese and Mr Venter. This unexpected listing of Qoin does not provide any basis for concluding that, prior to 21 November 2021, there were reasonable grounds for representing that Qoin would be listed on an independent exchange.

313 Coupled with my earlier findings, this has the consequence that the Trade Representation was misleading and deceptive, or likely to mislead and deceive, at all material times prior to 21 November 2021.

314 Following the listing of Qoin on Cryptochange on 21 November 2021, it was no longer misleading or deceptive for BPS to represent that Qoin could be exchanged for fiat currency through an independent exchange.

315 However, after 21 November 2021 until at least July 2023, there were no reasonable grounds for BPS to represent that there would, in the future, be independent exchanges available to exchange Qoin for other crypto-assets. The evidence of Mr Venter referred to two emails in October 2021 relating to a meeting between Mr Wiese and a representative of Piptle, including responses given to some queries raised by Piptle, but no evidence was given by Mr Wiese about

this meeting or about any communications which he had with Piptle, or that he held any belief based on these email exchanges concerning the likelihood that there would, in the future, be independent exchanges available to exchange Qoin for other crypto-assets.

316 In such circumstances, at all relevant times after 21 November 2021 until at least July 2023, by continuing to publish the Trade Statement, the representation that Qoin would be able to be exchanged for other crypto-assets via independent exchanges was misleading and deceptive, or likely to mislead and deceive.

4.4.4 Conclusion

317 For these reasons, by making the Trade Representation, BPS made a false or misleading representation about performance characteristics, uses or benefits of the Qoin NCP Product within the meaning of s 12DB(1)(e) of the *ASIC Act*. It also contravened s 12DA(1) of the *ASIC Act* by engaging in conduct in relation to the Qoin NCP Product that is misleading or deceptive, or likely to mislead or deceive.

4.5 Merchant Growth Representation

4.5.1 Overview of the parties' respective positions

318 ASIC contends that, by publishing certain statements on the Qoin Website, including in the White Paper made available on the Qoin Website, BPS represented that Qoin can be used to purchase goods and services from an increasing number of Qoin Merchants.

319 ASIC submits that, at all relevant times after 8 October 2021, the Merchant Growth Representation was false or misleading, because:

- (1) on 8 October 2021, the number of Qoin Merchants registered with BPS peaked at 38,895.
- (2) thereafter, the number of Qoin Merchants began to decline such that, by 24 October 2022, there were almost 1,000 fewer registered Qoin Merchants than 12 months earlier.

320 BPS admits that it published the impugned statements on the Qoin Website and in the White Paper during the periods alleged by ASIC and that those statements conveyed the Merchant Growth Representation. However, BPS denies that, after 8 October 2021, this representation was false or misleading. In this regard, BPS admits that, between 8 October 2021 and 24 October 2022, there was a net decline in the number of registered Qoin Merchants as alleged

by ASIC. BPS nonetheless contends that this decline was not linear “but fluctuated with new Qoin Merchants joining on some days, and existing Qoin Merchants leaving on others”.

321 Further, BPS contends that during the period from 30 January 2020 to at least 24 October 2022, the White Paper contained a statement at the end of the document to the effect that the information in the White Paper is subject to change without notice and contains statements, forecasts and financial information “which constitute progressive information” along with the following disclaimer:

[BPS] does not make any representation or warranty (whether express or implied) in relation to the reliability, accuracy or completeness of any of the information provided in this White Paper...

322 Also on that page of the document, under the subheading “Exclusion of Liabilities”, the following is stated:

Qoin Association or BPS disclaims all liability for the contents of this White Paper to the maximum extent permitted by law.

Qoin Association and BPS, its officers, employees, advisors, consultants and agents accept no liability to purchasers of Qoin or any recipient of this White Paper or any other person, including without limitation, any liability arising from fault or negligence (including gross negligence) for any loss arising from this White Paper, or its contents, omissions or otherwise arising in connection with it.

To the maximum extent permitted by the applicable law, Qoin Association or BPS will not be liable for any indirect, special, incidental, consequential, or other losses of any kind, in tort, in contract or otherwise (including but not limited to loss of revenue, income or profits, and loss of use or data), arising out of or in connection with the purchase of Qoin, or reliance on this White Paper, or any part thereof by any person.

323 BPS contends that, in this context, the representation that there was an increasing number of Qoin Merchants was neither false nor misleading.

324 Finally, BPS contends that the representation conveyed by the impugned statement is, of itself and in the surrounding context, “a prediction or forward-looking statement of opinion in respect of which [BPS] had a genuine and reasonable basis for making such representation”.

325 It is ASIC’s case that if (contrary to its primary case) the Merchant Growth Representation was one in respect of a future matter, BPS did not have reasonable grounds for making that representation, in reliance upon s 12BB(1).

4.5.2 *The representation*

326 It is common ground that between 30 January 2020 and 24 October 2022, BPS published the following statements in the White Paper and on the Qoin Website:

- (1) from 30 January 2020 to 24 October 2022, BPS published the following statement on page 6 of the White Paper, headed “Introducing Qoin”:

[Qoin] is backed by real goods & services in a *growing merchant ecosystem* designed to give it intrinsic value.

(Emphasis added.)

- (2) from 26 May 2020 to 20 September 2020, BPS published the following statement on the “Consumer” subpage of the Qoin Website under the heading “A Qoin for Everyday”:

Your Qoin can be used to purchase everyday goods and services with thousands of participating merchants around Australia *and that number is growing*.

(Emphasis added.)

- (3) from 20 September 2020 to 24 October 2022, the statement in (2) was published by BPS in an amended form, with the words “around Australia” having been removed.

- (4) from 28 May 2020, BPS published the following statement on the “Trader” subpage of the Qoin Website under the heading “Real Growth Potential”:

The basis of the potential Qoin value increase is the growing number of Qoin merchants. With zero costs to merchants and a growing customer base, *hundreds of merchants are joining the Qoin community every month*.

(Emphasis added.)

- (5) on about 19 January 2021, the statement in (4) was amended by replacing the reference to “hundreds of merchants” with “thousands of merchants”, with that statement continuing to be published in its amended form until 24 October 2022.

- (6) from 4 August 2021 to 24 October 2022, BPS published the following statement on the “About” subpage of the Qoin Website:

The more businesses that join the Qoin community, the more everyone benefits, providing a vital boost to local economies. Qoin is represented by the goods and services of participating businesses within the ecosystem. *With the number of validated merchants in Qoin growing regularly*, the result is an ecosystem where digital currency works more favourably for businessowners and creates a digital currency tailor-made to sustain cashflow and make the most of their downtime.

(Emphasis added.)

4.5.3 Was the representation about a future matter?

327 BPS submits that the Merchant Growth representation is a representation as to a future matter, not a matter of present fact, for two reasons. First, as with the Trade Statements, the Merchant Growth Statements were published in the White Paper and relevant pages of the Qoin Website which were “of an aspirational and forward-looking nature”. Second, the notion of something “growing” inherently occurs over time and is forward-looking in nature such that, properly construed, the representation that goods or services may be purchased from “an increasing number” of Qoin Merchants carries the meaning that the number will increase in the future.

328 However, as already found above, the statements in the White Paper and the Qoin Website encompassed statements of existing fact as well as statements concerning future matters. Considered in this context, the words “growing” and “joining” represent that, at the time at which each statement was made, the number of Qoin Merchants was in a *present* state of growth. The statements are framed in present, not future tense (i.e. the words “is growing” are used, as opposed to “will grow”, or “are joining”, as opposed to “will join”). None of the impugned statements resemble a promise, forecast or prediction that the number of Qoin Merchants would increase *in the future*.

329 For these reasons, these statements were apt to be understood by the ordinary or reasonable reader that the number of Qoin Merchants available to accept Qoin as payment for goods and services was, as a then matter of present fact, in a state of growth.

330 Accordingly, by publishing these statements in the White Paper and on the Qoin Website, BPS represented that Qoin could, as a matter of present fact, be used to purchase goods and services from an increasing number of Qoin Merchants.

331 It follows that the Merchant Growth Representation was not one in relation to future matters.

4.5.4 Was the representation false or misleading?

332 A representation that Qoin can be used to purchase goods from a growing merchant network is a representation concerning the performance characteristics, uses or benefits of the Qoin NCP Product.

If a representation as to a future matter, were there reasonable grounds?

333 If, contrary to my findings, the Merchant Growth Representation was a representation as to a future matter, the question to then be asked is – did BPS have reasonable grounds for making such a representation?

334 BPS submits that it did have reasonable grounds for making the representation in circumstances where:

- (1) until around October 2021, where the number of Qoin Merchants peaked, the number had grown continuously for a period of over 21 months;
- (2) the fluctuation in the number of Qoin Merchants which then occurred followed adverse publicity regarding the class action that had been commenced against BPS. This fluctuation was very small and affected only the margins, with the main Qoin Merchant base remaining stable;
- (3) despite the adverse publicity, trading in Qoin continued; and
- (4) BPS has complied with all relevant licensing requirements with respect to the Qoin Wallet.

335 BPS contends that, in light of these circumstances, BPS had reasonable grounds to expect that the total number of Qoin Merchants would resume growing once the present litigation was resolved.

336 The evidence concerning this issue was limited to aspects of the evidence given by Mr Wiese. BPS contends it is Mr Wiese's state of mind which is most relevant to this question.

337 Mr Wiese's evidence was that he either made or approved the publication of these statements on the Qoin Website and in the White Paper representing that the number of Qoin Merchants was increasing. Mr Wiese gave evidence that, in making this representation, he relied upon particular grounds and held a genuine belief in the truth of the statements at the time they were made.

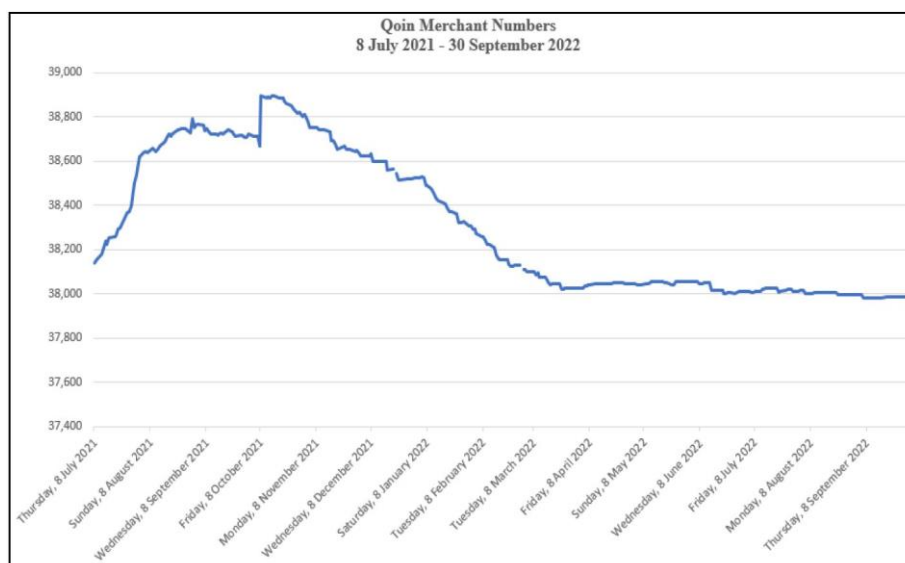
338 First, Mr Wiese gave evidence that during the period October 2021 to October 2022, the actual number of Qoin Merchants was disclosed on the Qoin Website on a daily basis. However, that this occurred does not, by itself, provide a basis for inducing in the mind of a reasonable person a belief that the Qoin Merchant numbers would increase in the future.

339 Second, Mr Wiese said that, during the period October 2021 to October 2022, “the total number of Qoin Merchants did not decrease in a linear manner but fluctuated with new Qoin Merchants joining on some days, and existing Qoin Merchants leaving on others”. It is correct to say that the decline in Qoin Merchant numbers after 8 October 2021 was not linear and, on some days, modest increases were experienced. However, the evidence also establishes that after 8 October 2021, the trend in Qoin Merchant numbers was consistently in a state of decline. In this regard:

- (1) in the first month after 8 October 2021, there was a net decrease of 144 Qoin Merchants.
- (2) in the following month, this overall decline in the Qoin Merchant numbers continued. Between 8 November 2021 and 8 December 2021, there was a net decrease of 116 Qoin Merchants.

340 In his affidavit, Mr Stephen Quinn gave evidence that, as part of his role as Group Risk manager for the Bartercard Group (which includes BPS) during the relevant period, Mr Quinn maintained a spreadsheet of merchants registered with Qoin. That spreadsheet records that on 8 October 2021, the number of Qoin Merchants peaked at 38,895 and thereafter, the number of Qoin Merchants began to decline. The data in Mr Quinn’s spreadsheet records that, between 8 October 2021 and 30 September 2022, the number of Qoin Merchants decreased from 38,895 to 37,985. Mr Wiese’s evidence was that by 24 October 2022, the number of Qoin Merchants had further declined to 37,918.

341 In its closing submissions, ASIC produced the following graph for the period from 8 July 2021 to 30 September 2022 in reliance upon the information contained in Mr Quinn’s spreadsheet:



342 As shown in this graph, this overall state of decline in the Qoin Merchant numbers was sustained for many months. Considered in that context, daily fluctuations in the Qoin Merchant numbers – including the modest daily increases which occurred sporadically – provided no basis for inducing in the mind of a reasonable person a belief that the Qoin Merchant numbers would increase in the future. Indeed, as ASIC submits, the daily volatility in the Qoin Merchant numbers upon which Mr Wiese relied would, in the mind of a reasonable person, give rise to considerable uncertainty that the Qoin Merchant numbers would increase in the future.

343 Third, Mr Wiese referred to the commencement of a class action proceeding against BPS in November 2021 and the “adverse” and “noticeable and widespread” publicity surrounding the commencement of this proceeding. This matter is insufficient to induce in the mind of a reasonable person a belief that the Qoin Merchant numbers would increase in the future because, at the time that the class action proceeding was commenced, there was no basis for knowing when that proceeding would be finalised, or what the outcome of that proceeding would be.

344 Further, widespread adverse publicity to BPS is a matter which would cause a reasonable person to believe that:

- (1) the class action and associated publicity would be likely to inflict harm upon BPS’s business and reputation; and
- (2) having regard to the apparent scale of that publicity, this harm may be likely to endure for some time.

345 For these reasons, the commencement of the class action and associated publicity relied upon by Mr Wiese are not matters which would induce a belief in the mind of a reasonable person that the Qoin Merchant numbers would increase. This is particularly so in the context of the Qoin Merchant numbers decreasing from early October 2021.

346 Fourth, Mr Wiese appeared to rely upon the transaction volume in Qoin which occurred over the 12-month period from March 2022 to March 2023, wherein “on average, 3.093 million Qoin across 6,000 transactions per month [had] been transacted”. However, evidence concerning the transaction volume during a period commencing after 8 October 2021 is not relevant to the formation of a reasonable belief as at 8 October 2021, or shortly thereafter, that the number of *Qoin Merchants* will increase. That is because the transaction volume of Qoin does not speak to the number of Qoin Merchants available in the Qoin ecosystem. Further, the

existence of commercial activity in Qoin after the representation is irrelevant to the assessment of any reasonable belief at the time of the representation. In any event, the transaction volume data relied upon by Mr Wiese shows that, after October 2021, there was a *decline* in the trading of Qoin. Between October 2021 and January 2022, Mr Wiese's evidence indicates that the total number of Qoins transacted declined from 11,645,479 to 3,436,286. Accordingly, even if it was relevant to the inquiry (which it is not), the transaction volume data relied upon by Mr Wiese would not be sufficient to induce in the mind of a reasonable person a belief that, as at 8 October 2021, there were reasonable grounds to represent that the number of Qoin Merchants would increase in the future.

347 For these reasons, if the Merchant Growth Representation was a representation as to a future matter, the grounds relied upon by Mr Wiese in making or approving that representation were not sufficient to induce in the mind of a reasonable person a belief that the number of Qoin Merchants would increase in the future.

348 In these circumstances, BPS did not have reasonable grounds to make the Merchant Growth Representation.

349 It follows that, if the Merchant Growth Representation was a representation as to a future matter, it was made without reasonable grounds, and is therefore misleading.

If a representation as to a present fact, was it false or misleading?

350 ASIC submits that the representation was false or misleading because, from 8 October 2021, the number of Qoin Merchants was in a persistent and overall state of decline.

351 BPS submits that whether the representation was false or misleading ought to be assessed by having regard to the overall trend of growth from early 2020, rather than focusing on a "snapshot in time". It submits that, against the trend of growth from early 2020, the decrease in the net number of Qoin Merchants between October 2021 and October 2022 was a *de minimis* decrease of approximately 2.5%. BPS contends that the decrease was not linear but fluctuated, with the numbers increasing on some days, decreasing on others, and remaining stable on other days. Thus, it submits that it is not accurate to say that the total number of Qoin Merchants was decreasing throughout the entire period from 8 October 2021 to 24 October 2022.

352 The evidence plainly shows that the number of Qoin Merchants was in an overall and persistent state of decline from 8 October 2021. I do not consider the margin of this decline, however

small when considered in the context of a broader timeframe, as relevant to whether the representation was false or misleading at the time the impugned statements were made. Nor do I accept that the existence of minor and sporadic increases in the number of Qoin Merchants from time to time is sufficient to overcome the overall and persistent decrease disclosed by the evidence. Although it is not accurate to say that the total number of Qoin Merchants was decreasing throughout the *entire* period following 8 October 2021, this is insufficient to overcome the false and misleading nature of a statement representing that the number was generally growing or *increasing* during this period.

353 The fact that the actual number of Qoin Merchants at any given time was displayed on the homepage of the Qoin Website (that being a different location to each of the impugned statements) does not reduce the impact of the misleading nature of the representation, because a viewer of the Qoin Website would need to be aware of the number of Qoin Merchants shown on other dates to appreciate that the number was not, in fact, growing.

354 As part of its denial that the Merchant Growth Representation was false or misleading, BPS relies upon the “Exclusion of Liabilities” statement in the White Paper set out above.

355 This exclusion statement was on the last substantive page of the White Paper (which was itself 32 pages in length) and related to statements in the White Paper, not the Qoin Website. There were no textual features in the White Paper which served to draw the exclusion statement to the attention of a reader of the Merchant Growth Representation on page 6, or to otherwise link the statements made on page 6 to the exclusion on page 29. Having regard to the characteristics of the hypothetical reader of the White Paper, such a person is unlikely to have read the exclusion statement, or to have appreciated its meaning.

356 The absence of any connection between the exclusion statement and the relevant statements published on the Qoin Website is even more apparent, as these statements appeared in a different context to the White Paper (i.e. a website not a document accessible through that website) and the text of the exclusion statement is not replicated on the Qoin Website. Indeed, the relevant impugned statements on the Qoin Website make no reference to the exclusion statement or the White Paper itself, and the subpages in which these statements appeared only refer to the White Paper insofar as they include a link to the White Paper subpage in the menu bar of each subpage.

357 When the relevant conduct is considered as a whole, the presence of the exclusion statement
on page 29 of the White Paper does not reduce the otherwise misleading effect of the relevant
statements contained on page 6 of the White Paper and on the various subpages of the Qoin
Website.

358 Having regard to the true position in relation to the state of growth of the Qoin Merchants, as
found above, the Merchant Growth Representation was likely to lead an ordinary or reasonable
member of the relevant class into error, being the formation of an incorrect belief that the
number of Qoin Merchants was growing.

359 For these reasons, it was false, misleading or deceptive, or likely to mislead or deceive, for
BPS to continue, after 8 October 2021, to make the Merchant Growth Representation.

4.5.5 Conclusion

360 For these reasons, by making the Merchant Growth Representation, BPS made a false or
misleading representation about performance characteristics, uses or benefits of the Qoin NCP
Product within the meaning of s 12DB(1)(e) of the *ASIC Act*. It also contravened s 12DA(1)
of the *ASIC Act* by engaging in conduct in relation to the Qoin NCP Product that is misleading
or deceptive, or likely to mislead or deceive.

4.6 Approval / Registration Representation

4.6.1 Overview of the parties' respective positions

361 The third category of representations arises from three statements published by BPS on the
Qoin Website and in the White Paper between 30 January 2020 and 24 October 2022. ASIC
contends that, by publishing these statements, BPS represented that the Qoin NCP Product had
been officially approved and/or officially registered in the sense of having been granted some
kind of official governmental imprimatur or having been included in some official register of
financial products.

362 BPS admits that it published the statements identified by ASIC in the form, and for the period,
which ASIC alleges. BPS also admits that these statements represented that the Qoin Wallet
was a product approved or registered in Australia. Despite this, BPS nonetheless denies that
by publishing those statements it conveyed false or misleading representations in contravention
of ss 12DA and/or 12DB of the *ASIC Act*.

363 BPS's denial of liability in response to this aspect of ASIC's claim proceeds on two bases.

364 First, BPS contends that, read in context, the impugned statements did not convey a representation that the Qoin NCP Product was “officially” approved or registered but rather conveyed representations that:

- (1) the issuing of the Qoin Wallet was “approved” in the sense that it was “issued pursuant to an authorised representative agreement which had been approved by the relevant AFSL holder, being Billzy or PNI (as applicable from time to time)”; and
- (2) the Qoin Wallet was “registered” in the sense that BPS provided financial services in relation to the Qoin Wallet pursuant to authorised representative agreements with Billzy and PNI which both expressly referred to the Qoin Wallet and were lodged with ASIC.

365 ASIC denies that the authorised representative arrangements relied upon by BPS meant that the Qoin NCP Product was approved in Australia, let alone officially approved by reason of having met the requirements of applicable Australian laws or regulations governing its features, standards, qualities, value and grades.

366 ASIC further submits that neither the PNI nor the Billzy AR Agreements were lodged with ASIC and that, even if these documents had been lodged with ASIC, ASIC submits that this would not result in the Qoin NCP Product becoming a product registered in Australia. It is common ground between the parties there that there is no official register of financial products in Australia.

367 Second, BPS contends that, in any event, the impugned statements were statements of opinion concerning a matter of law, which opinions were genuinely held by BPS and which BPS had reasonable grounds for making, in the sense that such statements could have only conveyed to a reasonable person “a view about the status of [BPS’s] compliance with the Corporations Act, and nothing further”.

368 In response to BPS’s defence, ASIC contends that, regardless of what opinions BPS held, considered in the context in which they were made, the impugned statements were representations of fact, not opinion, which, considered objectively, were false or misleading for the reasons outlined above. If the statements did convey representations of opinion (as BPS submits), then ASIC does not contend that BPS did not have a reasonable basis for making such representation.

369 Therefore, a threshold question is whether the statements conveyed representations of fact or opinion.

4.6.2 *The representations*

370 It is common ground that, between 30 January 2020 and 24 October 2022, BPS published the following three statements in the White Paper and on the Qoin Website.

The approval representation

371 From 30 January 2020 to 24 October 2022, BPS published the following paragraph in section 6 of the White Paper, headed “Regulatory Environment & Risks”:

The Qoin Association Council has thoroughly researched and investigated the risks and regulatory environment relating to cryptocurrencies, blockchains and exchanges in Australia. The same will be done for New Zealand, the United Kingdom and every country that the Merchant ecosystem is expanded into. The council has also directly engaged with ASIC, the regulator in Australia. **The Australian Qoin Wallet is a regulated non cash payments product approved as Authorised Representative number 1279598 of Australian Financial Services Licence (AFSL) number [494176 or 408735].**

(Emphasis added; original emphasis removed.)

372 Aside from changes made to the AFSL numbers, in all versions of the White Paper published after 30 January 2020, BPS included this paragraph in the terms extracted above.

373 This same statement was also published on the “Regulatory Environment Risks” subpage of the Qoin Website from 4 June 2020 to 23 November 2020, and again from 19 January 2021 to 24 October 2022.

374 BPS submits that the ordinary meaning of the relevant words conveys no more than that BPS was approved to deal in the Qoin Wallet as the authorised representative of an AFSL holder, and that to insert the word “officially” into any representation conveyed by the approval statement is to “shoehorn words into the language used which were not there”.

375 However, having regard to the context in which it appeared, this statement was apt to convey to the ordinary or reasonable reader a representation that the “approval” referred to in that statement was an official approval in the sense of comprising some form of governmental imprimatur. That is because the references in the prior sentences to the Qoin Association Council having “thoroughly researched and investigated the... regulatory environment” in Australia and having “directly engaged with ASIC” support a conclusion that the ordinary reader would understand this paragraph to be addressing the official regulatory environment relevant to the Qoin Wallet. The inclusion of the approval statement in a section of the White Paper and a subpage of the Qoin Website headed “Regulatory Environment and Risks” also supports the conclusion that, considered in its context, the ordinary or reasonable reader would

likely understand the impugned statement to convey that the Qoin Wallet had received some form of official governmental (including regulatory) approval.

The registration representation

376 From 11 January 2021 to 1 March 2022, BPS published the following statement on the homepage of the Qoin Website:

The Qoin Wallet is an Australian regulated product, registered under BPS Financial Limited ABN 99 604 899 381 as authorised representative No.1279598 of [PNI Financial Services Pty Ltd ABN 74 151 551 076 AFSL 408735 or Billzy Pty Ltd ABN 26 602 796 298 AFSL 494176].

377 On 10 March 2022 and from about 17 March 2022 to 24 October 2022, BPS published the following statement on the homepage of the Qoin Website:

The Qoin Payment System in the wallet is an Australian regulated product, registered under BPS Financial Limited ABN 99 604 899 381 as authorised representative No.1279598 of [PNI Financial Services Pty Ltd ABN 74 151 551 076 AFSL 408735 or Billzy Pty Ltd ABN 26 602 796 298 AFSL 494176].

378 Both statements describe the Qoin Payment System as being an “Australian regulated product” which is “registered”.

379 Again, ASIC contends that these statements represent that the Qoin NCP Product had been officially registered in the sense of being included in some official register of financial products. As for the approval representation, BPS denies that the word “officially” is properly inserted into the language of the relevant statements.

380 In circumstances where the ordinary or reasonable member of the target audience is not someone who is assumed to have knowledge of the authorised representative and licensing provisions of the *Corporations Act*, as I have found, the references in these statements which follow the word “registered” to various “authorised representative” and “AFSL” numbers are not (as BPS contends) apt to convey that the Qoin Wallet or “Qoin Payment System” are products registered in the sense of being issued by BPS pursuant to authorised representative agreements issued by Billzy and PNI which were (BPS says) lodged with ASIC.

381 Rather, by their terms, these statements were apt to convey to the ordinary or reasonable reader that the Qoin Wallet and / or “Qoin Payment System” are products that are “registered” in the sense of being entered upon some official register.

4.6.3 Were the representations statements of fact or opinion?

382 BPS submits that the approval and registration statements conveyed no more than that BPS considered that it was compliant with all applicable Australian laws or regulations, and that this opinion was held honestly and based on reasonable grounds.

383 BPS submits that the words “approved” and “registered” are broad terms that lack a single, clear, objective meaning, meaning that any statement that a product is “approved” or “registered” is necessarily a statement of opinion. However, I do not accept this.

384 Contrary to the defence raised by BPS, these statements convey representations of fact, and are not representations as to matters of law (in relation to BPS’s compliance with the *Corporations Act*) which, as such, comprised representations of opinions held by BPS.

385 The message conveyed by these representations to the ordinary or reasonable member of the intended audience is that, as a matter of then present and historic fact, the Qoin Wallet and / or “Qoin Payment System” was and is an approved or registered product, in the sense of having received some official governmental imprimatur or having been entered in an official register. The statements do not include any of the hallmarks of a statement of opinion. They are not qualified by the language of estimation, approximation or belief; and are not accompanied by terms which suggest an expression of judgment or evaluation by BPS as to something which is probable, but not certain: *Campbell* at [32].

386 Upon a reading of the statements and their surrounding context, an ordinary or reasonable member of the target audience would not understand the statements to mean that, in BPS’s opinion, the Qoin Wallet and / or “Qoin Payment System” complies with the *Corporations Act*. It follows that the approval and registration representations are representations of fact, not opinion.

4.6.4 Were the representations false or misleading?

387 In relation to the approval representation, BPS submits that the representation (if made) was not false or misleading because the Qoin NCP Product was issued by BPS in accordance with the authorised representative exemptions contained in s 911A(2) of the *Corporations Act*.

388 However, at best for BPS, this submission can only be of assistance to it for the period from 5 November 2020 to 1 September 2021. That is because, for reasons already given above, the authorised representative exemptions contained in s 911A(2) of the *Corporations Act* did not apply during the Billzy Periods.

389 In any event, the fact that BPS was appropriately *authorised* to issue or to arrange the issue of the Qoin NCP Product does not mean that the product itself had been officially *approved*. The concept that a representative has been authorised to issue a financial product is a different thing to a financial product being approved.

390 The facts of this case are aligned with those in *Australian Securities and Investments Commission v Huntley Management Ltd* (2017) 122 ACSR 163; [2017] FCA 770. In that case and in the context of considering an argument that it was not false or misleading to represent that a scheme which had been registered with ASIC had been “approved”, Perram J stated at [23]:

As to the matters of substance, there is no doubt, more importantly, that the statements were false. Huntley’s projects had not been approved by ASIC. It was true that the schemes were registered with ASIC but, despite Mr Jessup’s views to the contrary, I do not think that this is remotely what the word ‘approved’ conveys. Rather, *it carries with it a notion of approbation. In the field of investment, Commonwealth approbation is a significant matter suggesting an augmented degree of reliability. This is what approval means as a matter of ordinary language and I have no doubt that this was what was conveyed to the kinds of persons who visit the websites of responsible entities or who read the AFR. In that class, the Full Court says that I should include persons who are not particularly well-informed or who are possibly of less than average intelligence.*

(Emphasis added; references omitted.)

391 Applying the same reasoning to this case, the approval representation was false and misleading because there was no approval of the Qoin NCP Product (as a matter of fact), with the consequence that the approval representation was likely to lead an ordinary or reasonable member of the relevant class into error, being the formation of an incorrect belief that there was such approval.

392 As for the registration representation, BPS contends that it was not false or misleading because the Qoin Wallet was “registered” in the sense that BPS provided financial services in relation to the Qoin Wallet pursuant to “authorised representative agreements with Billzy and PNI” which were, BPS says, “lodged with ASIC”. BPS further contends that a lay person would be unlikely to turn their mind to the details of whether all applicable Australian laws or regulations had been complied with by BPS in relation to the Qoin Wallet.

393 Again, at best for BPS, this submission can only be of assistance to it for the period from 5 November 2020 to 1 September 2021. That is because, for reasons already given above, the authorised representative exemptions contained in s 911A(2) of the *Corporations Act* did not apply during the Billzy Periods.

394 Further and in any event, the Billzy AR Agreements and the PNI AR Agreement were not “lodged with ASIC”. In this regard, I rely upon and accept the unchallenged evidence of ASIC’s witness, Mr Benjamin Park. According to Mr Park, the results of a search of the relevant database:

- (1) did not locate copies of any of the AR agreements; and
- (2) contained only the following general description of the scope of BPS’s relevant authority:

Representative Details	
Name:	BPS FINANCIAL PTY LTD
AFS Representative Number:	001279598
ABN:	99 604 899 381
Commenced:	01/09/2021
Trading Name:	QOIN
Trading Name Number:	
Commenced:	01/09/2021
Classes:	Deal in a financial product/Apply for, acquire, vary or dispose of financial products on behalf of another Provide general financial product advice only Deal in a financial product/Issue, apply for, acquire, vary or dispose of a financial product
Principal Business Address:	Level 1 121 Scarborough St Southport QLD 4215

395 Further and in any event, even had the AR Agreements been registered, this does not mean that the financial products which BPS issued had been officially registered.

396 For these reasons, the registration representation was false or misleading because the Qoin NCP Product had not been registered, as a matter of fact. This has the consequence that the registration representation was likely to lead an ordinary or reasonable member of the relevant audience into error, being the formation of an incorrect belief that there was such registration.

4.6.5 Conclusion

397 For these reasons, by making the Approval / Registration Representation, BPS made a false or misleading representation with respect to the approvals or benefits of the Qoin NCP Product, or the standard, quality, value or grade of that financial product, within the meaning of ss 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*. It also contravened s 12DA(1) of the *ASIC Act* by engaging in conduct in relation to the Qoin NCP Product that is misleading or deceptive, or likely to mislead or deceive.

4.7 Compliance Representation

398 From mid-August 2021 to 24 October 2022, BPS published two statements on the Qoin Website concerning compliance with Australian financial services laws. Those statements were:

(1) under the “Legal” subpage of the Qoin Website:

Qoin is fully compliant with Australian financial services laws

...

Pursuant to expert legal advice Qoin is fully compliant with Australian financial services laws and is not a fraudulent business or scheme.

...

Be assured Qoin is fully compliant with Australian financial service laws ...

(2) on the “Frequently Asked Questions” subpage of the Qoin Website, the same statement as above save the final sentence of the extracted statement.

399 ASIC alleges that, by these statements, BPS represented that the Qoin NCP Product and/or BPS was fully compliant with Australian financial services laws and that, in circumstances where BPS was engaging in contraventions of the *Corporations Act* and of the *ASIC Act*, this representation as to compliance that BPS made was false or misleading in contravention of ss 12DA and 12DB of the *ASIC Act*.

400 BPS accepts that the representation was made, save that it says the representation conveyed was one of opinion, and not fact. BPS says that these statements represented that “in the genuinely held and reasonable opinion of [BPS]” the Qoin NCP Product and BPS were each “fully compliant within the Australia financial service laws, as the meaning of those laws was understood at the times the representations were made”.

401 For the following reasons, the Compliance Representation would have been understood by hypothetical readers as conveying an expression of opinion only, being one that was genuinely and reasonably held by BPS.

402 First, the statement that Qoin is “fully compliant” with relevant laws is qualified by the phrase “[p]ursuant to expert legal advice” which either precedes the statement about being fully compliant or appears in close proximity to it. Thus, what is being communicated to readers is not a bald assertion that Qoin is “fully compliant”, but rather a statement that it has received

legal advice which says certain things. That the conclusion expressed in that advice is an opinion flows from the ordinary meaning of the word “advice”.

403 Contrary to ASIC’s submissions, these statements are not made in “emphatic terms” which is “not qualified by express words of opinion or belief” of the kind referred to by O’Byrne J in *Dover* at [113]. The qualification is provided by the express reference to the legal advice.

404 Second, the proposition that Qoin “is fully compliant with Australian financial services laws and is not a fraudulent business or scheme” is so broad in scope that it would have been understood as inherently and necessarily involving an opinion. To use the language of Heydon J in *Forrest* at [94], the question of whether “Qoin” is fully compliant with every Australian financial services law that could conceivably apply to it “is an inherently controversial matter of professional judgment”.

405 As the hypothetical reader of these statements would have some awareness of online “scams” which fall foul of civil and criminal laws, in a way in which such a reader could not identify with precision, the average reader would understand that the statements, when read as a whole, mean that someone (being the lawyer who gave the expert legal advice) has identified the applicable laws and conducted an evaluation of the Qoin Facility by reference to those laws, resulting in the representation being made by BPS in reliance upon that advice (i.e. a statement of opinion).

406 For these reasons, the case brought by ASIC relating to the Compliance Representation fails.

4.8 Conclusion

407 BPS contravened ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act* in relation to the Trade Representation, the Merchant Growth Representation and the Approval / Registration Representation, but did not contravene the *ASIC Act* in relation to the Compliance Representation.

5. CONCLUSION

408 For the preceding reasons:

- (1) BPS contravened ss 911A(1) and 911A(5B) of the *Corporations Act* by carrying on a financial services business within the meaning of Chapter 7 of the *Corporations Act* in issuing a financial product, and providing financial product advice in relation to that product, in circumstances where BPS did not hold an AFSL, other than during the

period when it was an authorised representative of PNI, during which period BPS was exempt from the requirement to hold an AFSL by the operation of s 911A(2)(a) of the *Corporations Act*; and

- (2) BPS contravened ss 12DA(1) and 12DB of the *ASIC Act* in relation to the Trade Representation, the Merchant Growth Representation and the Approval / Registration Representation.

I certify that the preceding four hundred and eight (408) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes.

Associate:



Dated: 3 May 2024