

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Lyoness Australia Pty Limited [2015] FCA 1129

Citation: Australian Competition and Consumer Commission v
Lyoness Australia Pty Limited [2015] FCA 1129

Parties: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION v LYONESS AUSTRALIA PTY
LIMITED, LYONESS ASIA LIMITED (HONG KONG
COMPANY NUMBER 1619260), LYONESS UK
LIMITED (UK COMPANY NUMBER 06932198) and
LYONESS INTERNATIONAL AG (SWISS
COMPANY NUMBER CHE-114.950.380)**

File number: NSD 884 of 2014

Judge: **FLICK J**

Date of judgment: 23 October 2015

Catchwords: **TRADE PRACTICES** – pyramid selling – participation
payments by “some or all” of the participants – recruitment
payments – benefits “in relation to the introduction” of new
participants

TRADE PRACTICES – referral selling – receive a benefit
“in return for” the giving of names

EVIDENCE – judicial notice – disposable income of
consumers

PRACTICE AND PROCEDURE – leave to amend –
series of applications made during hearing

Legislation: *Competition and Consumer Act 2010* (Cth), s 154X, Sch 2
(*Australian Consumer Law*), ss 44, 45, 46, 49
Evidence Act 1995 (Cth), s 144
Trade Practices Act 1974 (Cth), ss 57, 65AAD

Cases cited: *Australian Communications Network Pty Ltd v Australian
Competition and Consumer Commission* [2005] FCAFC
221, (2005) 146 FCR 413
*Australian Competition and Consumer Commission v
Destiny Telecom International Inc* (1997) ATPR 41-588
*Australian Competition and Consumer Commission v
Giraffe World Australia Pty Ltd (No 2)* [1999] FCA 1161,

(1999) 95 FCR 302
Australian Competition and Consumer Commission v Golden Sphere International Inc (1998) 83 FCR 424
Australian Competition and Consumer Commission v Jutsen (No 3) [2011] FCA 1352, (2011) 206 FCR 264
Australian Competition and Consumer Commission v World Netsafe Pty Ltd [2000] FCA 1827
Australian Competition and Consumer Commission v Worldplay Services Pty Ltd [2004] FCA 1138, (2004) 210 ALR 562
Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex rel Corporate Affairs Commission (1981) 148 CLR 121
Norrie v New South Wales Registrar of Births, Deaths and Marriages [2013] NSWCA 145, (2013) 84 NSWLR 697
Owens v Repatriation Commission (1995) 59 FCR 559
Sherman as liq of Giraffe World Australia Pty Ltd (in liq) v Australian Competition and Consumer Commission [2003] NSWSC 996, (2003) 47 ACSR 505
Sherwood & Roberts-Yakima Inc v Leach 409 P 2d 160 (1965)

Corones, Pyramid selling schemes caught by the Trade Practices Act: some much needed clarification, (2001) 29 Aust Bus L Rev 348

Date of hearing:	27, 28, 29, 30 and 31 July 2015
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	220
Counsel for the Applicant:	Mr R Lancaster SC with Mr T Brennan
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondents:	Mr I M Jackman SC with Mr M Elliott and Mr D Klineberg
Solicitor for the Respondents:	Corrs Chambers Westgarth

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 884 of 2014

**BETWEEN: AUSTRALIAN COMPETITION AND CONSUMER
 COMMISSION
 Applicant**

**AND: LYONESS AUSTRALIA PTY LIMITED
 First Respondent**

**LYONESS ASIA LIMITED (HONG KONG COMPANY
NUMBER 1619260)
Second Respondent**

**LYONESS UK LIMITED (UK COMPANY NUMBER
06932198)
Third Respondent**

**LYONESS INTERNATIONAL AG (SWISS COMPANY
NUMBER CHE-114.950.380)
Fourth Respondent**

JUDGE: FLICK J

DATE OF ORDER: 23 OCTOBER 2015

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The proceeding is dismissed.
2. The Applicant is to pay the costs of the Respondents.

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

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JUDGE: **FLICK J**

DATE: **23 OCTOBER 2015**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 On 28 August 2014 the Australian Competition and Consumer Commission (the “Commission”) filed in this Court an *Originating Application* and a *Statement of Claim*.

2 There were four Respondents named in that proceeding, being:

- Lyoness Australia Pty Limited (“Lyoness Australia”);
- Lyoness Asia Limited (“Lyoness Asia”);
- Lyoness UK Limited (“Lyoness UK”); and
- Lyoness International AG (“Lyoness International”).

Of these entities, relevantly:

- Lyoness International owns and controls Lyoness Asia;
- Lyoness Asia owns and controls Lyoness Australia; and
- Lyoness UK is owned and controlled by yet another entity, namely Lyoness Europe AG.

3 The relief which is sought by the Commission against one or other of the four Respondents is founded upon alleged contraventions of the prohibitions on pyramid selling and referral selling set forth in ss 44 and 49 of the *Australian Consumer Law*, being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (the “*Competition and Consumer Act*”). Section 44 is directed at “*pyramid selling schemes*”; s 49 is directed at “*referral selling*”.

4 In support of its case, the Commission relied upon affidavits either sworn or affirmed by:

- Ms Shannon Friedman;
- Mr John Raemond Neill;
- Ms Teri Bartolo;
- Mr Trevor Deutscher; and
- Ms Margot Rylah.

None of these witnesses were called for cross-examination. But there were objections taken, for example, on the basis that one witness purported to give an account of what that witness had been told by another person not called as a witness. Not surprisingly, objection was taken if that account was sought to be relied on as proving the truth of the matters recounted to the witness. The Respondents prepared a Schedule of the objections and the bases upon which objections were made. The hearing continued without the need to resolve at the outset the merit of each objection. Care must nevertheless be taken when considering that evidence which was the subject of objection. In addition to the evidence of these witnesses and the Annexures and Exhibits to their affidavits, both the Commission and the Respondents tendered documents. Some of those documents had been produced on discovery. It became relevant to consider the description given to some of those documents in the affidavits of discovery in order properly to consider what the document purported to be. Other documents which were tendered were obtained upon the execution on 19 September 2013 of a search warrant which had been issued pursuant to s 154X of the *Competition and Consumer Act*.

5 It is concluded that the proceeding should be dismissed with costs.

PYRAMID & REFERRAL SELLING – THE LEGISLATIVE PROVISIONS

6 Commonwealth legislative provisions directed to “*pyramid selling*” schemes and “*referral selling*” were included from the outset in the *Trade Practices Act 1974* (Cth) (the “*Trade Practices Act*”).

7 The Commonwealth legislature has long formed the view that such conduct should be proscribed. The legislative provisions have been variously said to be directed to inherent “vices” and to “evils”.

8 The view has thus long been taken that “*pyramid selling*” schemes should be “stamp[ed] out”: *Australian Competition and Consumer Commission v Worldplay Services Pty Ltd* [2004] FCA 1138, (2004) 210 ALR 562 at 583 (“*Worldplay Services*”). Finn J there observed:

[94] It has, in my view, rightly been said that the apparent purpose of the pyramid selling provisions of legislation in this country is to “stamp out” such schemes: *Hawkins v Price* [2004] WASCA 95 at [15]. Given the serious losses that have been inflicted both in this country and world-wide by pyramid schemes: see Heydon, *Trade Practices Law*, Law Book Co, Sydney, at [14.10] and the notes thereto; and given the declared consumer protection object of the TP Act (see s 2), it is unsurprising that there should be such a legislative purpose. The legislation is beneficial in character and for this reason should be construed purposively ...

In *Australian Communications Network Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 221, (2005) 146 FCR 413 at 425 (“*Australian Communications Network*”) Heerey, Merkel and Siopis JJ outlined the “vice” in pyramid schemes as follows:

[43] ... the vice inherent in pyramid selling schemes is the reward that, as a matter of substance, is given directly or indirectly, for the introduction of new participants, rather than a reward based on sales or other such activities by a participant or others introduced by participants ...

Their Honours continued:

[46] The real vice inherent in pyramid selling schemes appears to be that the rewards held out are substantially for recruiting others, who in turn get their rewards substantially for recruiting still more members, and so on. If there is no underlying genuine economic activity the scheme must ultimately collapse and many people will have been induced to pay money for nothing. We see the purpose of the legislation as directed at proscribing schemes where the real or substantial rewards held out are to be derived substantially from the recruitment of new participants, as distinct from rewards for genuine sales of goods or services.

9 In respect to “*referral selling*”, Lindgren J in *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* [1999] FCA 1161, (1999) 95 FCR 302 at 311 (“*Giraffe World*”) similarly observed:

[30] The section is directed against the evil that a person might be induced to buy goods or services by an expectation that he or she will subsequently receive a rebate, commission or other benefit (after this, simply “commission”) for assisting the supplier to supply its goods or services to other consumers, when there is no assurance that the commission will in fact be received because receipt of it is subject to a contingency. The contingency is something over and above the rendering of the assistance or the doing of any other act by the consumer alone.

The objective of proscribing “*referral selling*”, it has been said, is to “*shield members of the public*”: *Sherman as liq of Giraffe World Australia Pty Ltd (in liq) v Australian Competition and Consumer Commission* [2003] NSWSC 996, (2003) 47 ACSR 505 at 511 per Barrett J. His Honour was there considering the aftermath of the orders made by Lindgren J. When considering the terms of the former s 57 of the *Trade Practices Act*, Barrett J explained the “*aim*” of the section as follows:

[12] ... The aim of s 57 is, clearly enough, to shield members of the public from attempts to persuade them to enter into transactions of a certain kind under which they will, in expectation of rebates, commissions or other benefits, assist in the introduction of prospective customers. The legislative policy works on the premise that such transactions should not be undertaken by corporations and, therefore, that people should not be put into a position in which they may effect introductions and thereby receive rebates, commissions or other benefits. In the particular circumstances considered by Lindgren J, future payment of commissions to members of Giraffe World (or a representation as to such payment) was an element of the course of conduct found to be unlawful. The illegal conduct consisted, in part, of drawing persons into introducing further potential purchasers by promise of reward. If the reward were to be given, the statutory purpose of ensuring that corporations do not, by creating an expectation of that reward, induce persons to solicit participation by others would be defeated. I am of the opinion that s 57 should be seen as impliedly precluding both the giving and the receiving of rebates, commissions and other benefits of the kind central to the success of the conduct the section makes it unlawful for corporations to undertake.

In the United States, the opposition has been such that even in the absence of legislation expressly dealing with referral selling, a scheme has been held unlawful as amounting to an illegal lottery: *Sherwood & Roberts-Yakima Inc v Leach* 409 P 2d 160 (1965). The purchaser of a fire-alarm was there told that he would not have to pay if he obtained 12 additional purchasers. If each purchaser obtained 12 additional purchasers, the market would become saturated with almost 250,000 purchasers being required by the fifth round of sale.

10 The current legislative provisions in respect to “*pyramid schemes*” are found in Pt 3, Div 3 of the *Australian Consumer Law*. That Division contains three sections – ss 44, 45 and 46. Div 5, also within Pt 3, deals with “*Other unfair practices*”, including “*referral selling*”. These provisions should be construed in a manner which promotes, rather than frustrates, the legislative intent to “*stamp out*” retail practices which properly fall within the reach of the prohibition.

11 Each of the relevant provisions within Pt 3 should be briefly but separately considered.

Pyramid selling schemes

- 12 With reference to pyramid selling in Div 3, it should be noted that no provision within that Division seeks to define the term “scheme”.
- 13 Section 45(1) of the *Australian Consumer Law* sets forth two “characteristics” of a “scheme” – but the term itself remains undefined. Nor was the term defined in the *Trade Practices Act*. With reference to the former legislative provisions, Finn J in *Worldplay Services* was content to adopt the meaning given to that term by Mason J in *Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex rel Corporate Affairs Commission* (1981) 148 CLR 121 at 129, namely that “all that the word ‘scheme’ requires is that there should be ‘some programme, or plan of action’”: [2004] FCA 1138 at [86], (2004) 210 ALR at 581. The same broad meaning of the term “scheme” should also be applied to the current s 45.
- 14 Within that context, s 44 provides as follows:

Participation in pyramid schemes

- (1) A person must not participate in a pyramid scheme.
- (2) A person must not induce, or attempt to induce, another person to participate in a pyramid scheme.
- (3) To ***participate*** in a pyramid scheme is:
 - (a) to establish or promote the scheme (whether alone or together with another person); or
 - (b) to take part in the scheme in any capacity (whether or not as an employee or agent of a person who establishes or promotes the scheme, or who otherwise takes part in the scheme).

Justice Finn in *Worldplay Services* also directed attention to the phrase common to both the predecessor provision to s 44 and s 44(3)(b) itself, namely the phrase “to take part in the scheme”. His Honour there observed:

[97] ... the question whether a person takes part in such a scheme is to be determined by reference to the nature of that person’s involvement (if any) in the actual program or enterprise that constitutes the scheme. To make that determination it will ordinarily be necessary to understand the scheme itself: how is it structured? How and by whom are its products and/or services developed and provided? How is the scheme conducted? How is it promoted? Etc. The obvious reason why such an analysis is necessary is that the definition is directed at taking part in any capacity “in the scheme”: (2004) 210 ALR at 583.

The phrase “to take part in the scheme” is also repeated in s 45(1)(a). The guidance suggested by Finn J remains equally applicable to the construction and application of that same phrase when employed in the current legislation.

- 15 Section 45 sets forth the meaning of a “pyramid scheme” as follows:

Meaning of pyramid scheme

- (1) A **pyramid scheme** is a scheme with both of the following characteristics:
 - (a) to take part in the scheme, some or all new participants must provide, to another participant or participants in the scheme, either of the following (a **participation payment**):
 - (i) a financial or non-financial benefit to, or for the benefit of, the other participant or participants;
 - (ii) a financial or non-financial benefit partly to, or for the benefit of, the other participant or participants and partly to, or for the benefit of, other persons;
 - (b) the participation payments are entirely or substantially induced by the prospect held out to new participants that they will be entitled, in relation to the introduction to the scheme of further new participants, to be provided with either of the following (a **recruitment payment**):
 - (i) a financial or non-financial benefit to, or for the benefit of, new participants;
 - (ii) a financial or non-financial benefit partly to, or for the benefit of, new participants and partly to, or for the benefit of, other persons.
- (2) A **new participant** includes a person who has applied, or been invited, to participate in the scheme.
- (3) A scheme may be a pyramid scheme:
 - (a) no matter who holds out to new participants the prospect of entitlement to recruitment payments; and
 - (b) no matter who is to make recruitment payments to new participants; and
 - (c) no matter who is to make introductions to the scheme of further new participants.
- (4) A scheme may be a pyramid scheme even if it has any or all of the following characteristics:
 - (a) the participation payments may (or must) be made after the new participants begin to take part in the scheme;
 - (b) making a participation payment is not the only requirement for taking part in the scheme;
 - (c) the holding out of the prospect of entitlement to recruitment payments does not give any new participant a legally enforceable right;
 - (d) arrangements for the scheme are not recorded in writing (whether entirely or partly);
 - (e) the scheme involves the marketing of goods or services (or both).

Section 45 had its predecessor in various manifestations in the *Trade Practices Act*, including s 65AAD. Two aspects of s 45(1)(b) should be noted.

- 16 First, the phrase “*entirely or substantially*” now appearing in s 45(1)(b) should be interpreted in the same manner as the same phrase formerly appearing in s 65AAD and as Finn J explained in *Worldplay Services*:

[108] If there is a difference between the parties as to what is signified by “substantially induced” — and it is the operative formula in this matter — that difference is one of degree.

...

...

[110] The use of the composite formula in s 65AAD recognises that there may be a number of inducements to make a participation payment, and if such be the case, their relative significance must be considered. A participation payment could, for example, be induced substantially by the s 65AAD “prospect” held out while another and lesser inducement was the use or enjoyment of the goods or services being provided. Where multiple prospects are held out, if a particular prospect is to be characterised as the substantial inducement, it must be the predominant inducement: cf *Graovac* at [11]. This said, I consider it is unlikely to be helpful to engage in further adjectival elaboration of the word “substantially” in this setting bearing in mind that what one is characterising is a reason for action: (2004) 210 ALR at 585 to 586.

See also: *Australian Competition and Consumer Commission v Jutsen (No 3)* [2011] FCA 1352 at [108], (2011) 206 FCR 264 at 289 per Nicholas J.

17 Second, the phrase “*in relation to the introduction to the scheme of further new participants*” requires there to be “*a relevant, sufficient or material connection or relationship, rather than merely a causal connection or relationship*”: *Australian Communications Network* [2005] FCAFC 221 at [29], (2005) 146 FCR at 421. There in question was whether compensation payable by the Australian Communications Network to independent representatives amounted to payments “*in relation to the introduction to the scheme of further new participants*”. In a joint judgment, Heerey, Merkel and Siopis JJ reviewed an array of reference materials, the decision at first instance of Selway J, and the decision of Finn J in *Worldplay Services*, and concluded:

[29] It follows from the foregoing that, in determining the requisite connection or relationship between the payment or benefit described as the “recruitment payment” and the introduction to the scheme of further new participants, the question is whether there is a relevant, sufficient or material connection or relationship, rather than merely a causal connection or relationship. Accordingly, we do not agree with the views expressed by Finn J in *Worldplay* at [114]–[116], and applied in the present case by Selway J, that under s 65AAD(1)(b):

- (a) “a relationship, whether direct or indirect, between the two subject matters” is sufficient; and
- (b) accordingly, the question is whether the benefits in question “are received in consequence of the introduction of new members whether or not the benefits are paid for the introduction as such or are paid as a result of the subsequent activities of the members introduced”.

Their Honours thereafter went on to consider the relevance of “*post-introduction activities*” of persons introduced to the scheme:

[33] It is clear from the text of s 65AAD(1)(b) that a payment *for* the introduction to the scheme of further new participants will be a payment *in relation to* the introduction of the new participants. Also, it is clear from the Explanatory Memorandum that it was intended that a payment that is, in substance, a payment for the introduction of new participants is an aspect of the vice or mischief aimed at by the legislative scheme. But the question of whether payments made, for example, under a multi-level marketing scheme as a result of post-introduction activities of the members introduced by participants were also intended to be recruitment payments requires consideration of whether such payments were also considered

to be part of that vice or mischief.

Their Honours concluded:

[43] The above references are consistent with the view that is apparent in s 61AAD(1)(b) and in the Explanatory Memorandum and the examples given in it, that the vice inherent in pyramid selling schemes is the reward that, as a matter of substance, is given directly or indirectly, for the introduction of new participants, rather than a reward based on sales or other such activities by a participant or others introduced by participants. In the present case, the ACCC was not able to refer the court to any material or cases that suggest that the latter activities, which the ACCC itself described as a legitimate multi-level marketing scheme, were an aspect of the vice or mischief aimed at by the legislative prohibition of pyramid selling schemes. Indeed, the ACCC was not able to point to any economic or social vice or mischief involved in a multi-level marketing scheme that would warrant such a scheme falling within the prohibition of pyramid selling schemes proscribed by Div 1AAA.

[44] True it is, the marketing of goods and services may be involved in a pyramid selling scheme, as subs (3)(e) makes clear. But the converse does not follow; the fact that there is multi-level marketing of goods and services does not necessarily mean there is a “pyramid selling scheme”.

[45] The relevant provisions have to be applied case by case to infinitely variable fact situations. The statutory purpose would not be served either by a construction in which:

(a) it is sufficient that there is an element of introduction, even though that is not enough in itself to earn any reward, and no matter what else has to be done subsequently to earn a reward, and no matter how genuine or competitive the goods or services being sold; or, on the other hand;

(b) the recruitment payment must be solely for introduction, no matter how worthless the prospect of selling goods or services under the scheme.

The first construction would criminalise commercial activity which the material to which we have referred, including the ACCC’s own public statements, does not recognise to be illegitimate. The second would open the door to artificial evasion, and could not be reconciled with s 65AAD(3)(e).

[46] The real vice inherent in pyramid selling schemes appears to be that the rewards held out are substantially for recruiting others, who in turn get their rewards substantially for recruiting still more members, and so on. If there is no underlying genuine economic activity the scheme must ultimately collapse and many people will have been induced to pay money for nothing. We see the purpose of the legislation as directed at proscribing schemes where the real or substantial rewards held out are to be derived substantially from the recruitment of new participants, as distinct from rewards for genuine sales of goods or services.

These paragraphs place in context the earlier reference made with respect to paras [43] and [46], to the “vice” against which the statutory prohibition is directed.

18 It should finally be noted that the concern of provisions such as s 45 (and its predecessor provisions) has not been to proscribe what their Honours in *Australian Communications Network* referred to as “*legitimate multi-level marketing scheme[s]*”. Leane J had recognised as much in *Australian Competition and Consumer Commission v Destiny Telecom International Inc* (1997) ATPR 41-588 when his Honour concluded that the trading scheme there contravened s 61 of the *Trade Practices Act* as that section was then drafted:

The material makes two things very clear: one is that the principal benefit available to the

participant, stressed by the documents, is the receipt of the commissions. It is the ability to make large sums of money which is quite plainly described as the principal attraction of participation. Undoubtedly the benefits of the card itself, and the various telephone services to which it will give access, are stressed also, but there is in my view no question that the principal benefit of participation in the scheme is said to be the receipt of money - indeed, the receipt of very large sums of money.

Additionally, and this I think has some significance, it is made clear that there is particular benefit in early participation, and in participation as an initial participant rather than as somebody introduced by an initial participant because, it is said (and having regard to the nature of what is proposed, there is obvious logic in it) by participating at the top and early one is likely to make more money than if one were to participate further down or later. It is said that even participants introduced later may make a satisfactory return from participation: (1997) ATPR at 44,116.

The scheme there involved a participant paying an initial sum of \$100 and receiving two benefits. One was a telephone card which enabled the making of telephone calls and the other was the receipt of commissions. See also: *Australian Competition and Consumer Commission v World Netsafe Pty Ltd* [2000] FCA 1827. Similarly, in *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424 a scheme was struck down which did not involve the sale of any genuine product.

19 The concern of the legislature, at its most simple and subject to the statutory language employed, has been throughout to catch pyramid selling which did not generate income for members through the sale of genuine products as opposed to the redistribution of money from members of the scheme who later joined for the benefit of the few who originated it: *Corones, Pyramid selling schemes caught by the Trade Practices Act: some much needed clarification*, (2001) 29 Aust Bus L Rev 348.

20 Section 46 provides:

Marketing schemes as pyramid schemes

- (1) To decide, for the purpose of this Schedule, whether a scheme that involves the marketing of goods or services (or both) is a pyramid scheme, a court must have regard to the following matters in working out whether participation payments under the scheme are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments:
 - (a) whether the participation payments bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied with under the scheme (as assessed, if appropriate, by reference to the price of comparable goods or services available elsewhere);
 - (b) the emphasis given in the promotion of the scheme to the entitlement of participants to the supply of goods or services by comparison with the emphasis given to their entitlement to recruitment payments.
- (2) Subsection (1) does not limit the matters to which the court may have regard in working out whether participation payments are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments.

Referral selling

21 Division 5, also within Pt 3 of the *Australian Consumer Law*, deals with “*Other unfair practices*”, namely “*referral selling*” and “*harassment and coercion*”.

22 Within Div 5, s 49 provides as follows:

Referral selling

A person must not, in trade or commerce, induce a consumer to acquire goods or services by representing that the consumer will, after the contract for the acquisition of the goods or services is made, receive a rebate, commission or other benefit in return for:

- (a) giving the person the names of prospective customers; or
 - (b) otherwise assisting the person to supply goods or services to other consumers;
- if receipt of the rebate, commission or other benefit is contingent on an event occurring after that contract is made.

As the terms of s 49 make apparent, the section is directed against the making of representations inducing consumers to acquire goods or services in the expectation that they will receive a rebate, commission or other benefit. A contravention of the section may result in both the imposition of a pecuniary penalty and a claim for damages. Section 49 had its counterpart provision in s 57 of the *Trade Practices Act*.

23 In addition to identifying the legislative objective sought to be achieved by the former s 57 ([1999] FCA 1161 at [30], (1995) 95 FCR at 311), Lindgren J in *Giraffe World* construed s 57 such that the comparable reference to “*that contract*” in the concluding words of s 57 was a reference “*back to the ‘contract’ expressly referred to in the section, that is, the contract for the acquisition of goods or services made by the original consumer*”: [1999] FCA 1161 at [32], (1999) 95 FCR at 311. His Honour later observed:

[74] While a case where the individual was not induced at all by the holding out of the prospect of earning commission would not be caught by s 57, I do not think that section requires that the representation described in it should be the sole or even the dominant inducement operating on the consumer's mind. In my view, it suffices that it be a “real” or “significant” inducement. The section is intended to compel corporations to ensure that they do not encourage consumers to acquire goods or services for a certain price while thinking that the “true price” will ultimately prove to be less, because of commissions to be received, when there is no certainty that they will be received at all because their receipt is contingent on the occurrence of later events outside the consumer's control. It would be consonant with this objective to understand the notion of “induce” in the section in the manner that I have indicated, and it would be discordant with it to understand it as activated only where the prospect of receiving commissions was the sole or dominant inducement.

24 These same conclusions are equally applicable to the construction of the current s 49.

THE LYONESS LOYALTY PROGRAM

25 The manner in which pyramid selling schemes operate, it has been said, can be “*complex and elusive*”: *Worldplay Services* [2004] FCA 1138 at [87], (2004) 210 ALR at 581 per Finn J.

26 The present Lyoness Loyalty Program is no exception.

27 For present purposes it is sufficient to note that Lyoness Asia operates a loyalty shopping program in Australia which has three levels of participants, namely:

- Lyoness Asia and Lyoness Australia;
- those merchants with whom Lyoness Australia has entered an agreement, described as Loyalty Merchants; and
- consumers who are Members of the Lyoness Loyalty Program.

At its heart is the concept that Members who purchase goods or services from a Loyalty Merchant receive a discount and potentially other benefits.

28 The Lyoness program itself was originally founded in July 2003 and is active in more than 40 countries. As of 2015 it has well over 3,000,000 registered Members world-wide.

29 The Australian Lyoness program commenced in April 2012. The facts relevant to the resolution of the present proceeding, however, pre-date April 2012.

30 The complexity of the program is such that it is necessary separately to examine:

- the events preceding April 2012; and
- post-April 2012.

31 For the purposes of seeking to establish contraventions of ss 45 and 49 of the *Australian Consumer Law*, the Commission seeks (*inter alia*) to place considerable reliance upon the manner in which parts of the program were promoted to potential future Members; the Respondents seek (*inter alia*) to focus attention upon the terms and conditions regulating the rights and benefits of prospective Members and persons who became Members. The Commission seeks to focus upon what is described in its pleadings, repeated in the terms and conditions regulating the rights and entitlements of Members, as “*Premium Members*”.

32 Of particular relevance are:

- the steps which must be undertaken to become a Member and to become a Premium Member;
- the benefits which a Member may receive in the form of “*Cashback*” and “*Friendship Bonuses*”; and
- the manner in which a Member may become entitled to “*Extended Member Benefits*”, including (*inter alia*) a “*Loyalty Commission*”; “*Loyalty Cash*”; a “*Loyalty Credit*”; a “*Loyalty Commission Bonus*” and “*Bonus Units*”.

In very general terms, the entitlement of any Member to receive “*Extended Member Benefits*” would depend upon the number of “*units*” held in a particular category of a matrix called the “*Accounting Program*”. There were five different categories of “*units*” in the “*Accounting Program*”. The contractual terms and conditions which described these entitlements were set forth in the *Additional Terms and Conditions* which could be signed by an existing Member. Although strictly speaking it was a concept existing only after April 2012, there was an uneasy tension in the submissions of the Commission between repeated references to both “*membership*” and “*premium membership*” prior to that date.

33 In addition to Members receiving discounts on purchases, it is also of relevance to note:

- the manner in which a Member could proceed through different “*Career Levels*” and the manner in which cash payments could also be received, being cash payments made to the nominated bank account of a Member.

Repeated reference was made in the materials relied upon by the Commission to the prospect of Members receiving “*income*” or “*passive income*”.

34 Although the analysis of the factual material involves complexity and detail, it is not necessary to master it in its entirety in order to understand the manner in which the Commission seeks to advance its case. Nor is a mastery of that complexity and detail necessary to resolve many of the factual allegations advanced on behalf of the Commission.

35 Some understanding of the manner in which the Lyonesse Loyalty Program operated and the volume of the business activities being undertaken nevertheless remains essential. It is thus necessary to:

- initially set forth the relevant factual material being available to Members and prospective Members; and to
- set forth the content of what was referred to as the “*Lyonesse Movie*”.

It is also necessary to set forth:

- the content of the forms needed to be completed by prospective Members and the contractual terms and conditions prior to April 2012; and
- membership post-April 2012, including the contractual terms and conditions then in place.

These issues roughly follow the chronology of events whereby the Loyoness Loyalty Program was initially promoted to persons in Australia, and the establishment of that program thereafter. It is also necessary to have some understanding as to:

- the volume of shopping and the value of benefits both prior to, and subsequent to, April 2012.

It is only against that factual and contractual context that the application of ss 44 and 49 of the *Australian Consumer Law* then can be meaningfully assessed.

The “unique opportunity” of Lyoness membership prior to April 2012

36 Prior to the launch of the Australian Lyoness program in April 2012, the Lyoness Loyalty Program was promoted by a group of four residents of the United Kingdom, described as the “*Global Go Getters*”. The *Global Go Getters* were Mr Phil Watts, Ms Sally Watts, Mr Andy Hansen and Ms Wendy Hansen.

37 What assumed some importance throughout the hearing was the encouragement being extended to persons in Australia to become Members of the Lyoness Loyalty Program – the opportunity to become such Members prior to the launch of the program in Australia in April 2012 was repeatedly referred to as a “*unique opportunity*”. The encouragement took the form of material distributed in the form of “*webinars*”, promotional material, meetings with the *Global Go Getters*, materials generated by persons in Australia who became Members, and a “*Lyoness Movie*”.

38 In setting forth the encouragement being extended to those instrumental in establishing the Lyoness Loyalty Program in Australia, it is prudent to set forth not merely the text of at least some of the conversations that occurred but also the graphic depiction of what was sought to be achieved. In many instances, the graphic depiction of the program displays more easily the manner in which the program was to operate, than do the verbal explanations. The verbal communications, of course, may not have the same impact upon a reader and potential Member as the more “*glossy*” pictorial representations. In now reproducing some of these

40 There were in evidence various versions of the different “webinars”.

Ms Rylah was a registered nurse in the State of Queensland. She made what was known as a “Down Payment” in September 2011 and thereby became a Lyonsess Member. In about August/September 2011 Ms Rylah was in regular contact with Mr Craig Wotton, who appears to have been approached to assist in the Australian launch of Lyonsess. Mr Wotton forwarded to Ms Rylah material to assist her in the promotion of Lyonsess. Part of that material was information on “*how to start a conversation about Lyonsess*” with potential new Members. The information provided the text and suggestions about how to relate to the prospective new Member. An extract from that information included the following:

The diagram illustrates the flow of money and products between Lydness, Tesco, and a Personal Loyalty Account.

Top Section (Lydness and Friends):

- LYDNESSE** (represented by a person icon) sends **1%** to **20-30 Friends (Direct!)** (represented by a group of people icon).
- 20-30 Friends (Direct!)** send **8%** back to **LYDNESSE**.
- LYDNESSE** sends **7%** to **TESCO** (represented by a person icon).
- TESCO** sends **£100,-** to **LYDNESSE** (labeled **Product**).

Middle Section (Tesco and Friends):

- TESCO** sends **2%** to **Direct: 0.5%** and **Indirect: 0.5%** (represented by a person icon).
- Direct: 0.5%** and **Indirect: 0.5%** send **3%** to **TESCO**.

Bottom Section (Personal Loyalty Account):

- TESCO** sends **£100,-** to **Personal Loyalty Account** (represented by a box with a person icon and a flag).
- Personal Loyalty Account** sends **£45,-** to **TESCO**.
- Personal Loyalty Account** sends **£405 Reimbursement** to **TESCO**.

Bottom Left Section (Product Flow):

- 2,000,000** (represented by a person icon) sends **16,500 PC** to **TESCO** (represented by a person icon).
- TESCO** sends **16,500 PC** to **Personal Loyalty Account** (represented by a box with a person icon and a flag).

- 43 Ms Rylah also gave evidence of watching “webinars” between August 2011 and March 2012. In mid-March 2012 she gave evidence of making her own presentations in order to secure new Members, during which she would say words to the following effect:

Well, I think you can see how excited Phil and all the team in the UK are about Lyonesse in Australia. This is a great opportunity and a great time to be starting in Lyonesse. We are in one of the best international teams, with Phil and Sally and Andy and Wendy. They have enormous experience and can give us all, as a team, the support we need to start up a great business to earn passive income.

Objection was taken to parts of Ms Rylah’s evidence, including the above account of what she told prospective new Members. The references to Phil, Sally, Andy and Wendy were references to members of the *Global Go Getters*.

- 44 Ms Rylah also gave evidence of attending a Lyonesse Training Workshop in August 2012 during which a Lyonesse “leader”, Mr Matthias Mueller, gave a motivational address saying words to the following effect (without alteration):

Now, the loyalty commission bonus: - and you should do this with your directs by looking at the back office – the rule is that there is always a benefit when you support your lifeline

Your first goal is to help everyone find 4 directs who make downpayments and that will give them belief. Once they have 4 directs that gives them eligibility, to start picking up the bonuses. As soon as they see the money, they will understand, they will “get it”.

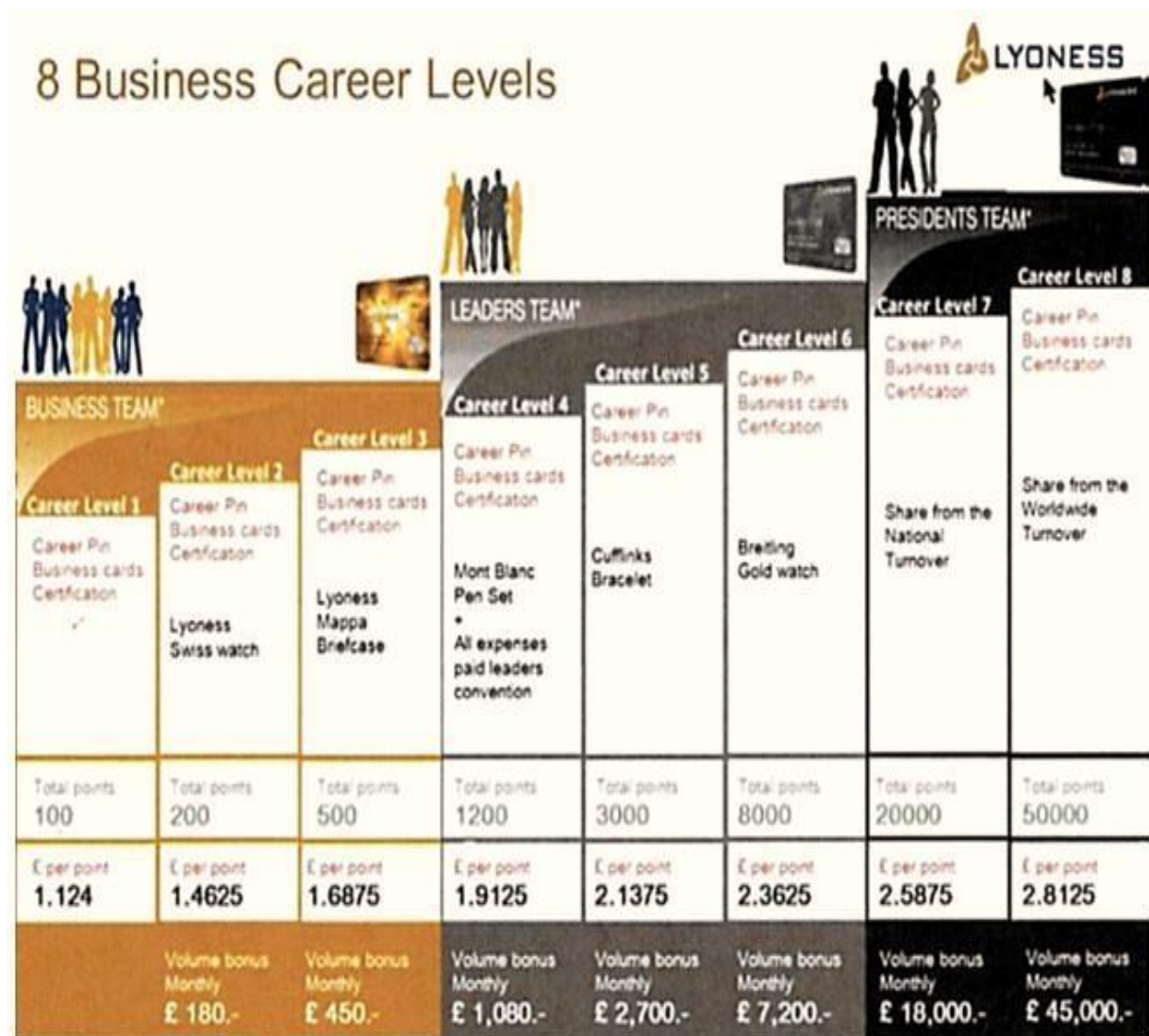
After Sensation, (in September) there will be a change in the training program so that they will also be able to start with 3/1/1 and that will be enough to enable them to go to Workshop 1.

To become Premium Members, they either have to save or just work on it.

The thrust of this address was, obviously enough, to convey the potential benefits of membership. The reference to “directs”, it may presently be noted, was a reference to those further Members “directly” introduced by an existing Member. Exhibited to the affidavit of Ms Rylah was one version of one of the presentations given. Although she could not recall the date upon which she recorded that version, an extract provided as follows:

I’m going to start at career level 8 because that’s always the first place everybody looks on the screen. Career level 8 is the highest level in the Lyonesse shopping community. It gives you a share of the worldwide turnover of Lyonesse, and at this level you’d be generating 50,000 points in any given calendar month. But these 50,000 points could be as simply as 25,000 shoppers generating two of those £45 shopping units per month. And at this level you will be reimbursed at a maximum rate of £2.81 per point per month. Plus in addition, every month that you re-qualify for level 8 you will receive an additional £45,000 by way of your volume bonus monthly. Now please remember ladies and gentlemen this is just two of our ten income streams.

On the next page appeared the following diagram depicting what was intended to be conveyed:



The chart illustrates the progression through 8 Business Career Levels, from the Business Team to the Presidents Team. Each level is represented by a colored box with a silhouette of people above it. The levels are: Career Level 1 (orange), Career Level 2 (yellow), Career Level 3 (light green), Career Level 4 (green), Career Level 5 (dark green), Career Level 6 (teal), Career Level 7 (blue), and Career Level 8 (dark blue). The chart includes details on required certifications, rewards, total points, earnings per point, and volume bonuses for each level.

BUSINESS TEAM*			LEADERS TEAM*			PRESIDENTS TEAM*	
Career Level 1	Career Level 2	Career Level 3	Career Level 4	Career Level 5	Career Level 6	Career Level 7	Career Level 8
Career Pin Business cards Certification	Career Pin Business cards Certification Lyoness Swiss watch	Career Pin Business cards Certification Lyoness Mappa Briefcase	Career Pin Business cards Certification Mont Blanc Pen Set • All expenses paid leaders convention	Career Pin Business cards Certification Cufflinks Bracelet	Career Pin Business cards Certification Breitling Gold watch	Career Pin Business cards Certification Share from the National Turnover	Career Pin Business cards Certification Share from the Worldwide Turnover
Total points 100	Total points 200	Total points 500	Total points 1200	Total points 3000	Total points 8000	Total points 20000	Total points 50000
£ per point 1.124	£ per point 1.4625	£ per point 1.6875	£ per point 1.9125	£ per point 2.1375	£ per point 2.3625	£ per point 2.5875	£ per point 2.8125
	Volume bonus Monthly £ 180.-	Volume bonus Monthly £ 450.-	Volume bonus Monthly £ 1,080.-	Volume bonus Monthly £ 2,700.-	Volume bonus Monthly £ 7,200.-	Volume bonus Monthly £ 18,000.-	Volume bonus Monthly £ 45,000.-

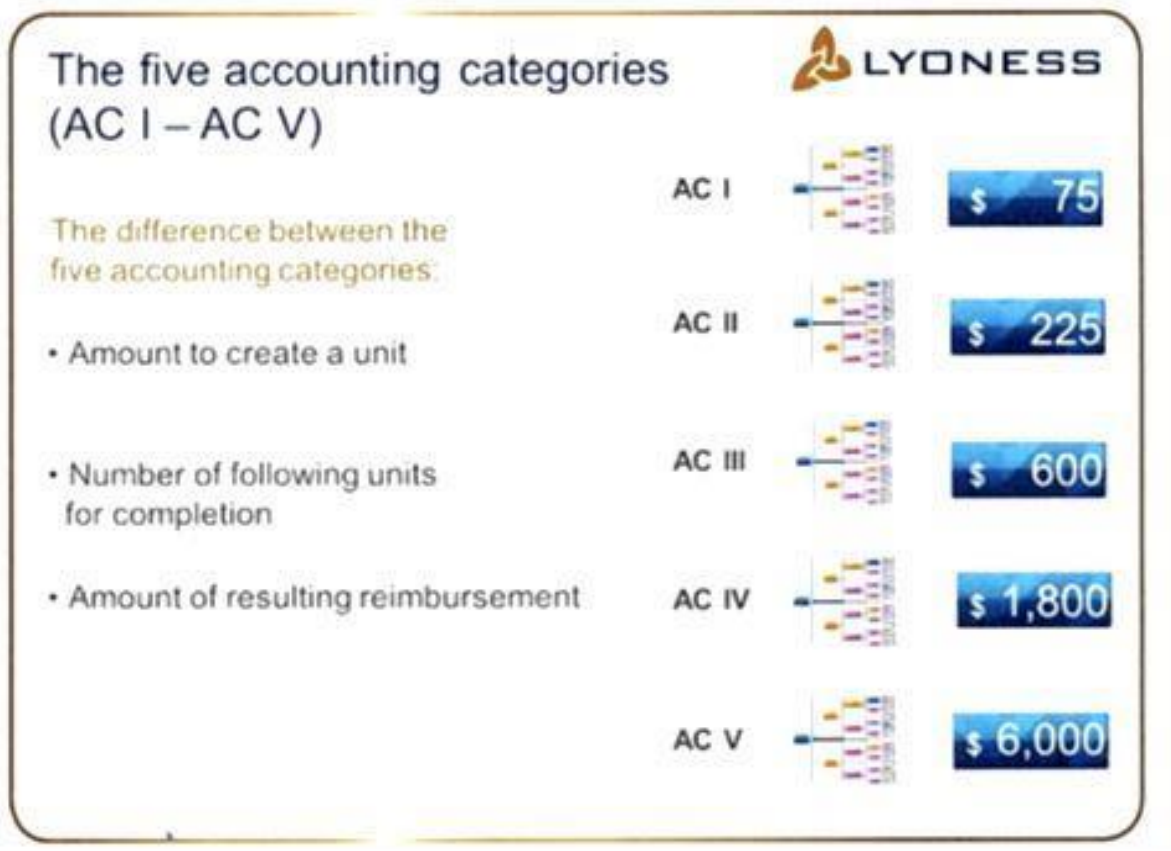
45 Another of the “webinars” exhibited to the affidavit of Ms Rylah set forth the following text (without alteration):

Now I look at an example in Australia, there’s actually a member in Australia who in the first 30 days made \$5,500. That’s not enough money to retire but it certainly is a big difference. It could be the difference between keeping your house or losing it, it could be the difference between having a great Christmas or not, it could be the difference in not having to worry about sending your partner out to work or whatever. So the Lyoness shopping community we’re not into selling anything, we’re just leveraging what happens anyway. We build our team with benefits and the loyalty card. You can actually generate a substantial income for months if you just follow the system, plug it to your leaders, listen to your leaders and then they can advise you on how you develop your own team.

...

And this is a passive residual income that once we’re into phase 3 and 4 you cannot stop. As long as consumers around the world want to buy the products, goods and services and get cash back that we offer, and members, you will receive a passive residual income.

That “webinar” also set forth the following depiction, including a quantification of the “amount of resulting reimbursement” given certain assumptions being made about the various “Accounting Categories”:



46 Mr Neill also gave evidence of having a meeting in London in mid-September 2011 when he met the Managing Director of Lyonesse UK (Mr John French) and the *Global Go Getters*. Prior to going to London he watched a number of the “webinars”. Albeit in a passage in his affidavit to which objection was taken, Mr Neill maintains that during one of these “webinars” Mr Wotton described, as follows, the manner in which the program was to be introduced into Australia and that the “*founding members*” would be part of a “*unique opportunity*”:

The information in this webinar has been authorised and approved by Lyonesse head office.

The launch in Australia will be a phased program. Phase 1 will be complete when 500 foundation members are in place. The second phase will be the opening launch in Australia.

Phase 3 is rolling out of the small medium enterprise (SME) program, and issuing of cashback cards to get shopping underway. Phase 4 involves Lyonesse conducting a mass media advertising campaign, which will benefit the founding members.

Once Australia reaches 500 founding members, Lyonesse will put in 1,000,000 customers through a very aggressive mass media advertising campaign. These founding members will have the privilege of 1,000,000 new customers being divided amongst them, benefiting from the result of the advertising program. This is a unique opportunity and we are a privileged few

to be part of the launch.

In another passage in his affidavit to which objection was taken, Mr Neill also maintains that in another “webinar” Mr Andy Hansen “*focused on the importance of recruiting new members, and recommended a process of approaching a potential member or ‘prospect’*”.

Mr Neill’s account of what Mr Hansen said was as follows:

You move up career levels with units accumulating from your team, which means that you earn more money. You should introduce 5 people to Lyoness as premium members, and teach these 5 people to introduce another 5 people as premium members. To achieve career level 3, you guide your direct recruits to teach their 5 people to recruit another 5 premium members.

Give the prospect a sentence about Lyoness, and then invite them to an information webinar. You cannot expect a prospect to understand Lyoness from the first webinar. You should follow up with them a few days after the webinar, and either invite them to another webinar or meet with them to discuss Lyoness.

47 During the meeting in London, Mr Neill maintains that he had the following exchange with the managing director of Lyoness UK, Mr John French:

French: So, what do you like about Lyoness? What do you think you can achieve?

Neill: There is a great opportunity in being one of the first 500 members in Australia. Being part of the launch, there are obvious benefits in the advertising campaign.

Thereafter, Mr Neill maintains that either Mr Hansen or Mr Watts said:

If you get a team together quickly, with the best people you can find, then you will get to the first 500 members quickly.

Thereafter, the following exchange took place between Mr Neill and Mr Hansen:

Neill: How many lines do I need in my team?

Hansen: Find your best 5 people and introduce them to Lyoness, and then get them to do the same thing. There has to be 500 premium members to open up Australia.

Thereafter, Mr Neill commenced recruiting other persons as Members and, in doing so, said to the prospective new Members words to the following effect:

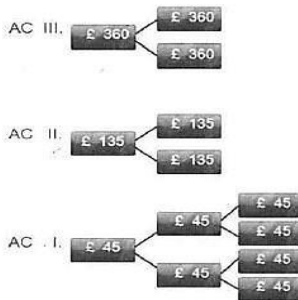
“I have been looking at a company called Lyoness, and they have a program that gives cashback to members. We are looking to have 500 premium members before Lyoness will launch in Australia. When Lyoness starts in Australia, there will be an advertising campaign. The original 500 premium members will benefit by having the customers recruited through the advertising campaign allocated underneath them. You should look at a webinar about Lyoness.”

As he became more familiar with the Lyoness Loyalty Program, in October 2011 Mr Neill developed his own “flipchart” set of slides which he in turn used when seeking to recruit other consumers into the program. One of those slides was as follows:



Getting Started...

✓ Premium Member - Gift Card Down Payment



Down payment: £1,800.00

- Free registration
- Free Web-office
- Free Text message service
- LYONESS Cashback Card Gold
- Right to participate in sales / media campaigns
- Workshops
- 10 different income streams
- International member registration portal
- The right start for you & your business

Maturity Value: £ 14,914.80

The “10 different income

streams” referred to is a reference to the ten different types of rebates that may be received under the scheme, being:

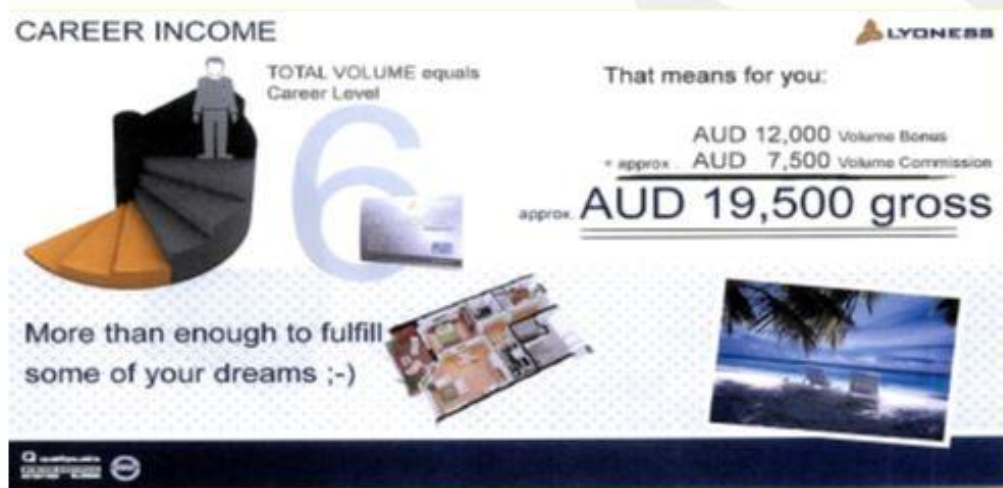
- cash back;
- friendship bonus;
- loyalty cash;
- loyalty credits;
- loyalty commissions;
- loyalty partner bonus;
- bonus units;
- category re-booking;
- volume commissions; and
- volume bonus.

48 In a further passage in his affidavit, to which objection was taken by the Respondents, Mr Neill maintains that a further part of the words he would use when seeking to recruit new Members were the following:

If you look at slide 8, entitled “Immediate + Remaining Discount in Customer Account” say you started shopping today, it would take some considerable time for you to create a sizeable income. So we have a fast start program such that you make in advance some down payments: you purchase units that are already complete and they go into the accounting program. So here you’ve purchased a total of 7 units, £45 units in accounting level 1, £335 units in accounting 2 and £360 units in accounting 3 and that all totals up to £1,800 so they are, they call them down payments. You’ve actually pre-purchased those units and they’re sitting there, and when other units to in behind your units as we’re already shown you that moves through and it starts off your shopping program once we open the shopping program here in Australia. Now when those units move through the matrix, that £1,800 investment – which is in effect what it is – as well as giving you free registration and a website and text message servicing, the Lyoness cards, access to workshops and all the other income streams, that £1,800 that converts into £14,000 nearly £15,000.

Unique to the language employed by Mr Neill was his use of the term “*investment*”. Although described by Senior Counsel for the Respondents as a “*maverick*”, the fact remains that this was the language he employed. But nothing turns, with respect, upon this sole use of that term by Mr Neill.

- 49 Reference should also be made (merely by way of example) to the following reference to “*Career Income*” that a Member could achieve upon attaining “*Career Level 6*”:



This depiction comes from part of the material used in “*Business Workshop 1*” and is dated as being the September 2013 version.

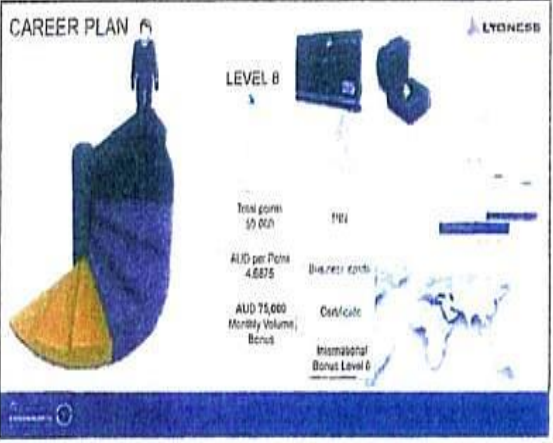
- 50 Many of these graphic depictions of the manner in which the Lyonesse Loyalty Program was to operate are scattered throughout many of the documents – be those documents annexed to the affidavits of witnesses called by the Commission or in documents produced on discovery by the Respondents or obtained as a result of the search warrant executed in September 2013.

The Lyonesse Movie & scripts – March 2012

- 51 Prior to April 2012 was a conference held in Macau, in or around March 2012. Those attending were the “*Lyonesse Leaders*”. A new means of securing membership in Australia was then released in the form of a *Lyonesse Movie* in relation to the Lyonesse Loyalty Program of approximately 15 minutes duration. That movie was available to be viewed by any member of the public on the internet site of Lyonesse Australia. In or around March 2012, Lyonesse International also produced written materials in relation to the Lyonesse Loyalty Program and provided information which was available to the public in relation to that program.

52 Parts of the “scripts” that accompanied the *Lyonesse Movie* again referred to the different “Career Levels” that could be achieved and the benefits that could be received. Albeit omitting parts of those scripts, parts of one script included the following:





53 Also released after the Macau conference was an extended *Lyonesse Movie* of some 30 minutes in length. The longer *Lyonesse Movie* was only available to Premium Members.

54 A “still” from part of that *Lyonesse Movie* was as follows:



55 Part of that which was said during the longer version of the *Lyoness Movie* was the following:

Right now Lyoness is still in the process of introducing the cash back card in the market and this presents a great opportunity. Once this card is accepted at the most [well-known] businesses that become loyalty merchants things are going to happen very fast. After that everyone will want to have this card. Those who are ready to participate and communicate the benefits to others have a great future ahead of them. There is a great opportunity that still many people don't have the cash back card. If everyone already had the card it would be too late to build a substantial business by recommendations.

56 In addition to the two versions of the *Lyoness Movie* and the scripts, by no later than May 2012 Lyoness International produced "training materials".

Membership & terms and conditions prior to April 2012

57 Although the Commission placed greater reliance upon the steps being taken to encourage persons to become Members, the Respondents placed greater reliance upon the contractual terms and conditions which regulated the rights and entitlements of Members.

58 However these competing stances may ultimately be resolved, it remains of obvious relevance to in fact set forth those contractual rights and entitlements.

59 The form of application to be completed by prospective Members prior to April 2012 was set forth in a pamphlet titled "*Australian Team Members Registration Process*". The pamphlet outlined "*the new process for registering new members in Lyoness who live in Australia*".

60 The form of application there set forth titled "*Initial order and registration*" stated at the outset the following:

After successful registration and initial order placement you will receive your Lyoness Cashback Card by post. The cost of £1.80 for your initial order will be paid for by your recommender. (sponsor).

Please pay attention to the phase status of your country when placing your initial order. Phase

1 countries (National subsidiary not yet established or is not yet active)

- (Voucher order not yet possible)
- Minimum voucher Down Payment £1,800. (7/3/3)

The form of document then set forth the information required to be provided by an applicant.

Part of that information was the following:

Registration - free of charge

Lyoness Europe AG, Bäumlihofstrasse 7, CH-8470 Birmst. Schweiz registered as
CH-179.3/22.427-4 see Handelsregisteramt des Kantons St. Gallen Hauptregister

Mr / Mrs / Company										First name (or company name)*									
Surname (or representative of company)*																			
Address / street / house and number*																			
Post code*										City*									
Date of birth																			
Mobile phone*																			
Email address																			
☐ Yes, please send me the Lyoness newsletter and other useful information regularly via text message										☐ Yes, please send me the original Cashback Card issued by Lyoness Europe AG including their Terms and Conditions and supplements									

Further information required to be provided also included:

Voucher Down Payment

ORDER DETAILS (all amounts in GBP) ✓					minimum order GBP 1500.- (7/3/3)	
PAYMENT METHOD	NUMBER OF UNITS	LOYALTY PARTNER (NAME / ID)*	AC	UNIT PRICE	TOTAL	
Down payment	7	INSPIRE / 44300398	I	£45.00	£315.00	
in payment	3	INSPIRE / 44300396	II	£135.00	£405.00	
Down payment	3	INSPIRE / 44300396	III	£360.00	£1,080.00	
First order minimum GBP 1500.- (7 x AC I, 3 x AC II, 3 x AC III)					GRAND TOTAL	£1,800.00

This payment is a down payment for future purchases. It should be specifically noted that you will only receive the complete amount in the form of original Loyalty Partner vouchers (down payment + top-up payment * voucher total) for a surcharge in accordance with Lyoness Member Benefit (MB). Surcharge option in accordance with Member Benefit (MB).

The form of document also provided for “Bank Details” to be provided. At the foot of the document was the following notation:

Important Notice: Should no payment be made by the new Member within 21 days after the date of signature of the Customer Agreement, no registration is possible. The recommender must ensure that there are enough funds in his/her purchase account to cover the costs of the registration for the new member. If this money has not been received within 21 days then the new member will not be registered.

In many of the forms which had been otherwise completed, no bank details were provided; in some of the forms, the details under “*Voucher Down Payment*” were left blank.

61 The contractual terms and conditions that governed membership in Australia prior to April 2012 were set forth in the *UK General Business Terms* for Lyoness Customers in the United Kingdom. Clause 2.1 provided as follows:

2. The relationship between the Customer and LYONESS

2.1 Nothing in these General Business Terms nor in any agreement between a Customer and LYONESS shall render a Customer an employee, servant, worker agent or partner of LYONESS nor shall any Customer hold himself out as such.

Clause 9.1 provided as follows:

9. Charges

9.1 Participation by the Customer in the LYONESS System is always free of charge unless specific provisions provide for a charge for particular services. No special administrative charges will therefore be made against the Customer for purchases made.

Clause 15 addressed “*Down Payments*”. Clause 15.1 provided as follows:

15. Down payments

15.1 In addition to the possibility of generating positions through purchases (remaining profit margin), the Customer also has the opportunity of obtaining positions through down payments (minimum first order: 3 positions in business category 1). These are down payments on future purchases, i.e. the profit margin in advance which offer the opportunity to save for planned future purchases and generate further reimbursements. Save as set out in paragraph 10.5A of Appendix 1 to these General Business Terms, it is not possible for the down payment to be refunded, as the profit margins which have arisen will have been included in the account and paid. However, the Customer has the opportunity to top up his down payments at any time, until the position pays out (shopping voucher) in the respective business category as set out in Clause 10.3. By topping up according to the relevant profit margin code for the desired Partner Company, the down payment becomes a full payment and the Customer receives the full amount in the form of vouchers from the Partner Company (down payment + top up payment = voucher value). If this is the case and the position (created by down payments) changes the Customer’s status to a full payment, this has the consequence that, after achieving the position pay out in the respective business category, the respective reimbursement (purchase reimbursement) will be paid out, less the original prepayment.

Appendix 1 to these *UK General Business Terms* thereafter addressed “*Lyoness Reimbursements*” and “*Types of Payment*”. That *Appendix* also referred to the benefits of purchasing a “*Business Package*”.

62 No provision of these *UK General Business Terms* referred to a “*Premium Member*”.

Membership post-April 2012

- 63 The Australian Lyonesse Loyalty Program commenced in April 2012.
- 64 Once again, a consumer could become a Member by being recommended by an existing Member and by completing an application form on-line. The existing Member paid a \$1.50 application fee; the applicant joined for free.
- 65 By signing the application form, the consumer acknowledged that he became bound by the *General Business Terms and Conditions*. Those *General Business Terms and Conditions* constituted an agreement between the new Member and Lyonesse Asia. The introduction to those terms and conditions provided as follows:

Introduction

Lyonesse Asia Limited, with its registered office at Suite 2607-12, 26th Floor, Tower 2, The Gateway, Harbour City, Tsim Sha Tsui, Kowloon, Hong Kong, and company number 1619260 registered with the Registrar of Companies of Hong Kong (Lyonesse Asia) is a member of the Lyonesse Group of companies which operate an international shopping community which offers Lyonesse Members (Members) the opportunity to receive benefits ("Lyonesse Loyalty Program") through the purchase of goods and services from approved Lyonesse retailers or service providers called Loyalty Merchants ("Loyalty Merchants"). This Agreement is between the Member and Lyonesse Asia.

Clause 1.1 provided as follows:

1. Object of the Agreement

1.1. To the extent permitted by these General Terms and Conditions (Agreement) you are entitled to participate in the Lyonesse Loyalty Program with Lyonesse Merchants using the types of shopping available through Lyonesse Loyalty Program and you have the opportunity to benefit ("Member Benefits"). You may also recommend the Lyonesse Loyalty Program to others, being Direct or Indirect Members within the meaning of Clause 7.3 ("Recommending Person") but you are under no obligation to recruit further members to participate in the Lyonesse Loyalty Program.

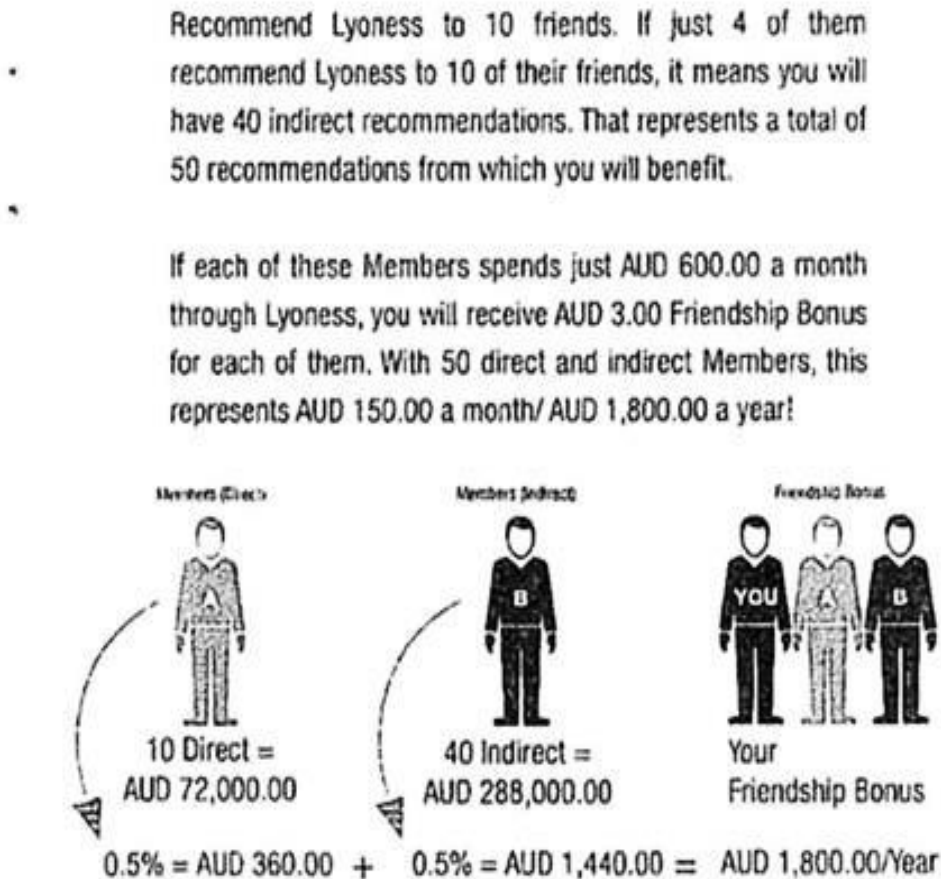
Clause 3.1 described the relationship as follows:

3. Legal Relationship

3.1 Nothing in this Agreement will be construed as to create a relationship of employment, agency or partnership between Lyonesse and the Member (including, for the avoidance of doubt, when a Member is acting as Recommending Person). There is no obligation on a Member at any time to participate in the Lyonesse Loyalty Program or to recommend or recruit further Members, and the Member acting in the capacity of Recommending Person acts independently of Lyonesse. Given a Recommending Person's independent obligations and responsibilities, the Recommending Person must comply with all applicable laws (including privacy laws and consumer protection laws) and codes of conduct.

- 66 By becoming a Member, a consumer was entitled to receive a "*Cashback*" for purchases and a "*Friendship Bonus*". A "*Friendship Bonus*" arose where the existing Member had introduced a new Member (described as a "*Direct*" Member), and also where that Direct Member had in turn introduced a further new Member (described as an "*Indirect*" Member)

and where either or both of the Direct and Indirect Members undertook shopping with Lyoness Loyalty Merchants. A brochure forwarded from the solicitors for Lyoness in September 2013 depicted this relationship as follows:



The *General Business Terms and Conditions* described the relationship as follows in cl 7.2 and 7.3:

7.2. Cashback: for Purchases which are recorded by Lyoness in the Lyoness Loyalty Program, the Member receives up to 2% Cashback. The percentage specified by the respective Loyalty Merchant at www.lyoness.com.au (login area) is valid for Cashback. Cashback payments take place in accordance with Clause 7.4.

7.3. Friendship Bonus: Members have the opportunity to benefit from the Lyoness Friendship Bonus. For every Purchase made through the Lyoness Loyalty Program with Loyalty Merchants by your Direct and Indirect Members, a Member has the opportunity to receive:

- a) Up to 0.5% direct friendship bonus (for Purchases made by your Direct Members, namely Members who were directly introduced by you as an existing Member)
- b) Up to 0.5% indirect friendship bonus (for Purchases by Indirect Members ie those Members who have been introduced by your Direct Members) – a Friendship Bonus does not accrue for other Indirect solicited Members.

67 A Member could also sign what were described as the *Additional Terms and Conditions*. No fee was payable in the event that an existing Member chose to sign these additional terms. These *Additional Terms and Conditions* regulated both:

- the manner in which a Member could become a “*Premium Member*” (cl 5.4); and
- the entitlement of a Member to receive “*Extended Member Benefits*” (cl 7).

68 Clause 5 provided for the transition from membership to “*Premium Membership*”. That clause, in its entirety was as follows (without alteration):

5.) Voucher Down Payments and Premium Membership

5.1. As well as making Purchases through the Lyoness Loyalty Programme, the Member also has the opportunity to generate Loyalty Benefits by making a binding Down Payment order for Vouchers/Gift Cards, in this case the same amount of credit will be booked into the Member’s personal Loyalty Account for the Down Payment as was booked for the purchase in Clause 4.2 above. However, no Cashback or Friendship Bonus is paid for a Down Payment.

5.2. The Member has the opportunity to make a binding Down Payment order for Vouchers/Gift Cards. The Down Payment must be at least the relevant benefit percentage for Member Benefits for the chosen Loyalty Merchant. The GTCs and the ATCs do not give right for a claim for reimbursement of the Down Payment.

5.3. Any Down payments for Voucher/Gift card orders do not expire. Until the point that full payment is received for the Voucher/Gift Card orders, the Member may change the Loyalty Merchant they originally chose. This could however mean that the Member Benefit will also change, as it varies depending on the Loyalty Merchant, as explained in Clause 4.3.

5.4. A Member can become a Premium Member if they have fulfilled the following criteria:

Fully paid (and booked) Purchases using the Cashback Card, Vouchers and/or Online Shopping of AUD 30,000 within 12 months.

If a purchase volume of AUD 30,000 has not been achieved in accordance with 5.5 a) then the Member can make up the difference using Down Payments (booked) for Voucher Orders/Gift Cards, whereby the Down Payment amount should be multiplied by ten (a Down Payment of AUD 1,500 represents e.g. a purchase volume of AUD 15,000).

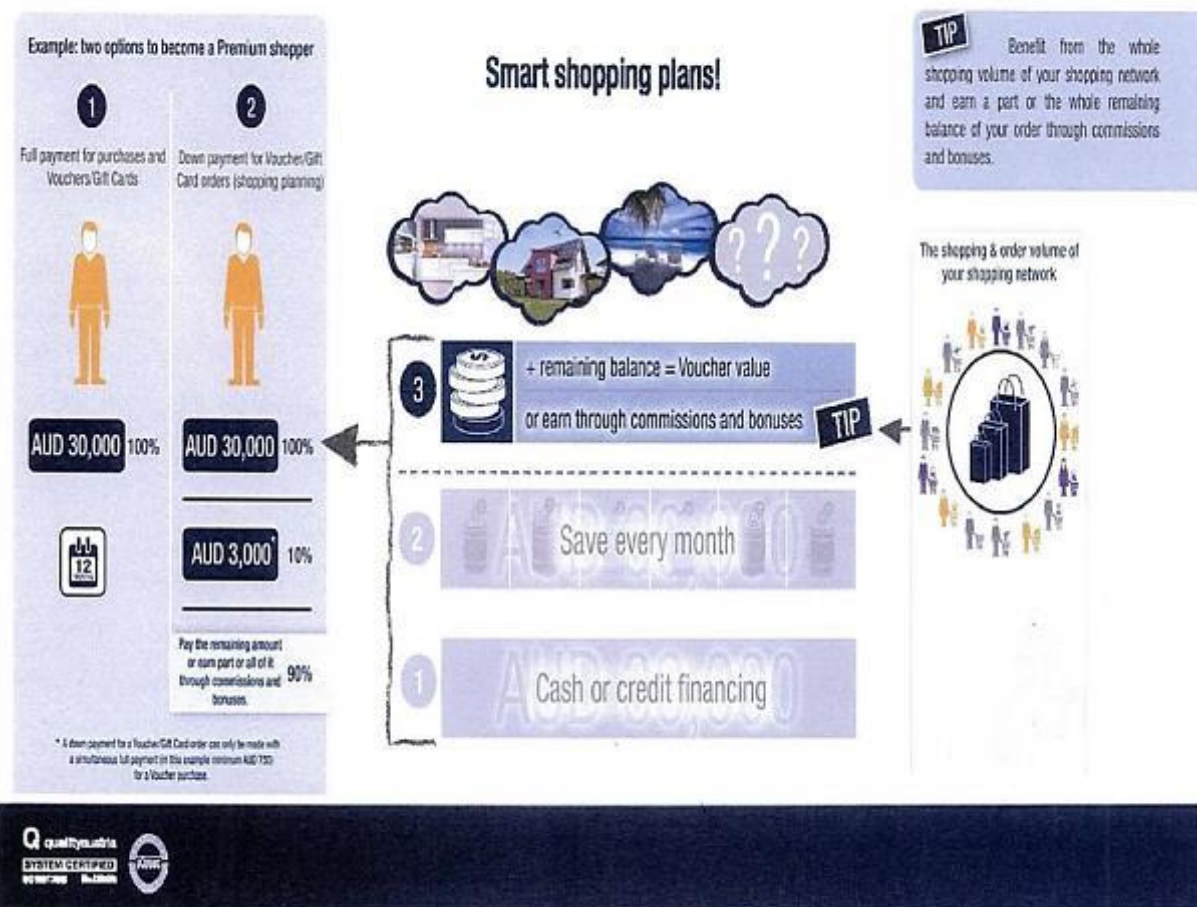
Made (and booked) Down Payments for Vouchers/Gift Cards of AUD 3,000 (Premium Voucher Down Payment)

5.5. Down Payments of up to AUD 2,925 can be accepted if the Member has made Purchases of at least AUD 300, or makes a simultaneous Voucher order for this amount (fully paid) at the same time that he makes the Down Payment. Down Payments of AUD 3,000 can be accepted if the Member has made Purchases of at least AUD 750, or makes a simultaneous Voucher order for this amount (fully paid) at the same time that he makes the Down Payment. If a Member has already made Down Payments of AUD 3,000 then further Down Payments are only possible if the Member has made an equal amount of Purchases as the amount of Units (inc. the new Down Payment).

5.6. Premium Members receive additional service support in the Lyoness Loyalty Programme (including without limitation Gold Cashback Card, Cashback Magazine).

Clause 5.4, it may be noted, provided for a number of ways in which a Member could become a Premium Member. This was depicted in the Lyoness promotional material as follows:

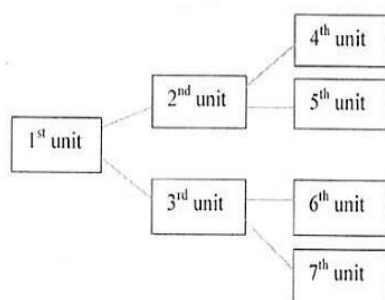
PREMIUM MEMBERSHIP



Clause 5.6, it will be noted, provided for the benefits of premium membership.

69 Clause 7 of the *Additional Terms and Conditions* provided for “*Extended Member Benefits*”. These *Extended Member Benefits* were in the form (*inter alia*) of a “*Loyalty Commission*”, “*Loyalty Cash*”, “*Loyalty Credit*”, “*Loyalty Commission Bonus*” and “*Bonus Units*”. Every Member who signed the *Additional Terms and Conditions* had the opportunity to obtain *Extended Member Benefits*.

70 The entitlement of any Member to receive *Extended Member Benefits* depended upon the number of “*units*” held in the “*Accounting Program*”. A Member qualified for units upon accumulating a certain number of credits. The amount of credits in turn depended upon either cash purchases or the making of “*Down Payments*”. Each time a Member obtained a new unit in a designated *Accounting Category*, the new unit would sit behind or “*follow*” the existing unit as follows:



71 Depending upon the *Accounting Category* to which a Member belonged, a Member could become entitled to a payment of a *Loyalty Commission*. A Member, for example, in *Accounting Category 1* would receive a \$12 payment if he had 6 units; a Member in *Accounting Category V* would receive \$6,000 when he had accumulated 50 units.

72 Similarly, a Member could become entitled to a *Loyalty Cash* payment direct to his bank account. A *Loyalty Credit* could accrue through the Member's own shopping, which would then entitle him to receive vouchers in the dollar amount of that credit.

73 The number of units dictated a Member's "*Career Level*".

The volume of shopping & benefits – prior to and subsequent to April 2012

74 The volume of shopping and benefits to Australian Members prior to April 2012 was addressed in part in a series of internal *Master Reports* and *Sales Reports*.

75 For the period prior to April 2012, a *Master Report* produced on discovery by the Respondents provided as follows:

Master Report

Continent	Country	Month	Total Members	Previous month Activ/New	Current month Activ/New	Buying Members / % per activ	IST Shopping / per activ Member	Shopping per buying Member/ % per buying Member	Number of Sales / per Sale	CB Total / from PM		
Asia	61 AU	06.2012	3806	2552	3757	1882	829,213.37	440.60	4073	15,037.52		
				995	1203	50.09%	220.71	49.45%	203.59	10,636.92		
		05.2012	2603	1554	2552	1116	462,173.10	414.13	2828	8,297.74		
				512	995	43.73%	181.10	42.87%	163.43	7,133.87		
		04.2012	-31.61%		-32.07%	-68.64%	-44.26%	-6.01%	-30.57%	-44.82%		
			1608	1037	1554	366	118,258.56	323.14	643	2,221.88		
			257	512	23.55%	76.11	22.76%	183.93	2,206.14			
		03.2012	-57.75%		-58.64%	-414.21%	-85.74%	-26.66%	-84.21%	-85.22%		
			1096	780	1037	202	13,285.79	65.77	322			
			194	257	19.48%	12.81	18.43%	41.26				
		02.2012	-71.20%		-72.40%	-831.68%	-98.40%	-85.07%	-92.09%	-100.00%		
			839	587	780	178	2,577.91	15.04	282			
			205	194	22.82%	3.43	21.22%	9.50				
		01.2012	-77.96%		-79.24%	-957.30%	-99.68%	-96.59%	-93.08%	-100.00%		
			645	385	587	159	754.44	4.81	292			
			95	206	27.09%	1.30	24.65%	2.62				
		12.2011	-83.05%		-84.38%	-1083.65%	-99.91%	-98.91%	-92.83%	-100.00%		
			439		385	141	1,944.64	13.79	244			
				96	36.52%	5.05	32.12%	7.37				
			-68.47%		-89.75%	-1234.75%	-99.77%	-96.87%	-94.01%	-100.00%		
		Total			3806	2552	3757	1882	829,213.37	440.60	4073	15,037.52
						995	1203	50.09%	220.71	49.45%	203.59	10,636.92
		Total			3806	2552	3757	1882	829,213.37	440.60	4073	15,037.52
						995	1203	50.09%	220.71	49.45%	203.59	10,636.92

This *Master Report* was described in the affidavit of discovery as recording (*inter alia*) the “volume and value in Euro per month (IST) of shopping (gift cards, or fully paid purchases online or instore) by members, with associated ratios, and number of shopping transactions per month”.

76 If reference is made, for example, to the figures in the column headed “CB Total/from PM”, the percentages track the changes in “Cashback” from one month to the next. Thus the 44.82% was calculated as follows:

$$\begin{array}{r} \$15,037.52 \\ - \$ 8,297.74 \\ \hline = \$ 6,739.78 \end{array}$$

The difference was said to represent the change from the period from May to June 2012. The percentage was calculated as follows:

$$\$6,739.78 / \$15,037.52 = 44.82\%$$

So much seems to flow naturally from the *Report* itself.

77 For the period from June through to December 2012, another *Master Report* records in part the following:

Country	Month	Total Members	Previous month Activ/New	Current month Activ/New	Buying Members / % per activ	1ST Shopping / per activ Member	Shopping per buying Member/ % per buying Member	Number of Sales / per Sale	CB Total / from PM	FB Total / from PM	LB Total / % from Shopping
61 AU	12.2012	8223	7456	8109	1024	763,203.45	745.32	1996	15,198.40	7,632.03	12,893.31
			601	891	12.63%	94.12	12.45%	382.37	12,402.18	6,228.64	1.69%
	11.2012	7545	7082	7456	848	209,736.06	247.33	1848	3,646.34	1,835.73	7,023.91
			764	601	11.37%	28.13	11.24%	113.49	3,034.84	1,529.42	3.35%
	10.2012	-8.25%		-8.05%	-20.75%	-72.52%	-66.82%	-7.41%	-76.01%	-75.95%	-45.52%
		7141	6332	7082	1216	451,474.01	371.28	2442	8,537.40	4,272.40	7,300.92
			445	764	17.17%	63.75	17.03%	184.88	6,783.36	3,394.82	1.62%
	09.2012	-13.16%		-12.66%	15.79%	-40.84%	-50.19%	22.34%	-43.83%	-44.02%	-43.37%
		6377	5886	6332	1063	409,847.98	385.56	1893	7,008.78	3,551.03	8,820.47
		838		445	16.79%	64.73	16.67%	216.51	5,951.76	3,021.63	2.15%
	08.2012	-22.45%		-21.91%	3.67%	-46.30%	-48.27%	-5.16%	-53.88%	-53.47%	-31.59%
		5932	5047	5886	2411	1,280,361.74	531.05	4786	24,065.03	12,034.65	13,901.39
07.2012	-27.86%		-27.41%	57.53%	67.76%	-28.75%	139.78%	58.34%	57.69%	7.82%	
		1288	838	40.96%	217.53	40.64%	257.52	18,254.51	9,134.33	1.09%	
	5094	3757	5047	2351	1,191,226.56	466.95	5264	22,290.82	11,163.26	11,399.98	
06.2012	-38.05%		-37.76%	59.86%	56.08%	-37.35%	163.73%	46.67%	46.27%	-11.58%	
		1203	1288	50.54%	236.03	50.08%	226.30	15,263.25	7,635.45	0.96%	
	3805	2552	3757	1882	829,213.37	440.60	4073	15,037.52	7,541.17	7,568.26	
		995	1203	50.00%	220.71	49.45%	203.59	10,636.92	5,338.33	0.92%	
	-53.72%		-53.67%	45.59%	8.65%	-40.88%	104.05%	-1.06%	-1.19%	-40.53%	
Total		8223	7456	8109	1024	763,203.45	745.32	1996	15,198.40	7,632.03	12,893.31
			601	891	12.63%	94.12	12.45%	382.37	12,402.18	6,228.64	1.69%

The figure of 1.69% in the column headed “LB Total / % from Shopping” also seems to have been derived from performing the following calculation:

$$\text{\$ } 12,893.31 / \text{\$ } 763,203.45 = 1.69\%$$

78 Part of the *Australian Sales Report* for the period from April 2012 through to January 2013 records as follows the value in Australian dollars of shopping at those Loyalty Merchants identified:

Months	April	May	June	July	August	September	October	November	December	January
Merchants										
Harvey Norman	15,800 AUD	48,800 AUD	-10,200 AUD	-200 AUD	-2,000 AUD	-800 AUD	0 AUD	0 AUD	0 AUD	0 AUD
Woolworths	122,350 AUD	473,200 AUD	945,950 AUD	1,316,600 AUD	1,354,850 AUD	280,950 AUD	370,700 AUD	-800 AUD	34,450 AUD	6,350 AUD
Peep Toe	0 AUD	0 AUD	0 AUD	0 AUD	8,110 AUD	5,150 AUD	660 AUD	1,910 AUD	3,120 AUD	3,120 AUD
Prouds	0 AUD	0 AUD	0 AUD	0 AUD	37,200 AUD	38,800 AUD	16,350 AUD	20,750 AUD	28,100 AUD	27,900 AUD
Hotel Voucher	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	33,210 AUD	2,850 AUD	35,960 AUD	37,750 AUD	81,300 AUD
Freedom Furniture	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	23,400 AUD	25,750 AUD	19,500 AUD	38,650 AUD	58,350 AUD
Super Retail: Rebel Sport	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	5,000 AUD	12,350 AUD	15,950 AUD	19,950 AUD	28,200 AUD
Super Retail: Amart All Sports	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	100 AUD	2,750 AUD	4,350 AUD	8,050 AUD	7,300 AUD
Super Retail: Super Cheap Auto	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	1,350 AUD	13,100 AUD	15,650 AUD	21,250 AUD	29,550 AUD
Super Retail: Ray's Outdoors	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	1,450 AUD	3,250 AUD	5,900 AUD	8,500 AUD	10,400 AUD
Super Retail: BCF	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	5,950 AUD	14,600 AUD	19,550 AUD	27,900 AUD	18,400 AUD
Super Retail: Goldcross Cycles	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	1,800 AUD	1,150 AUD	650 AUD	1,650 AUD	2,100 AUD
Barbeques Galore	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	2,550 AUD	12,850 AUD	11,250 AUD	15,150 AUD	14,650 AUD
Dymocks	0 AUD	0 AUD	0 AUD	0 AUD	0 AUD	3,370 AUD	4,000 AUD	7,460 AUD	9,545 AUD	6,380 AUD
Total	138,150 AUD	522,000 AUD	935,750 AUD	1,316,400 AUD	1,398,160 AUD	402,280 AUD	480,360 AUD	158,080 AUD	254,065 AUD	294,000 AUD

There were like details for other periods of time.

79 The *Australian Sales Report* for the period from April 2012 through to December 2014 again records the following total volume of sales in respect to those Loyalty Merchants identified:

Months	Total
Merchants	
Harvey Norman	0 AUD
Woolworths	0 AUD
Peep Toe	0 AUD
Prouds	336,550 AUD
Hotel Voucher	471,370 AUD
Freedom Furniture	452,400 AUD
Super Retail: Rebel Sport	285,650 AUD
Super Retail: Amart All Sports	101,350 AUD
Super Retail: Super Cheap Auto	391,650 AUD
Super Retail: Ray's Outdoors	93,800 AUD
Super Retail: BCF	311,350 AUD
Super Retail: Goldcross Cycles	14,750 AUD
Barbeques Galore	227,400 AUD
Dymocks	87,105 AUD
Coles	14,794,500 AUD
Kmart	982,400 AUD
Liquorland	1,188,550 AUD
Coles Express	5,510,850 AUD
Marks & Spencer	15,810 AUD
Target	293,700 AUD
Dick Smith	128,800 AUD
Toyworld	11,425 AUD
Total	25,699,410 AUD

80 In lieu of Loyalty Agreements being produced in respect to each of the Small/Medium Enterprises, a Schedule was compiled by the parties showing those enterprises participating in the Lyonesse Loyalty Program and the dates upon which such agreements were entered into.

CONTRAVENTIONS OF SECTIONS 44 & 49

81 In very summary form, the case advanced on behalf of the Commission in its *Amended Statement of Claim* in respect to pyramid selling alleges that:

- the making of “Down Payments” were “*participation payments*” for the purposes of s 45(1)(a) of the *Australian Consumer Law*;

and (*inter alia*) that:

- “*Premium Members were induced to become Premium Members by making Down Payments by the prospect held out to them that they would thereby become entitled to receive financial benefits being Extended Member Benefits of a higher value than those Down Payments*”; and that
- such benefits were “*recruitment payments*” for the purposes of s 45(1)(b) of the *Australian Consumer Law*.

The Commission concludes in this respect that the Lyonesse Loyalty Program was a “*pyramid scheme*” within the meaning of s 45. The Commission further alleges (*inter alia*) that:

- Lyonesse Australia, Lyonesse International, Lyonesse Asia and Lyonesse UK were each “*participants*” in the Lyonesse Loyalty Program and therefore contravened s 44.

82 Again in very summary form, the case advanced on behalf of the Commission in its *Amended Statement of Claim* in respect to referral selling was that:

- the “*receipt of Direct Friendship Bonus and Indirect Friendship Bonus by a Premium Member was contingent on shopping by Members with Units Down Line from Units held by the Premium Member...*”;
- the “*amount of Loyalty Commission, Loyalty Commission Bonus, Volume Commission or Volume Bonus which a Premium Member might receive was contingent on Down Payments made by Members with Units Down Line from the Units held by the Premium Member*”; and

- persons were induced to “*become Premium Members by acquiring Units in the Lyoness Accounting Program*” by representations that “*each such Member would receive benefits in return for recommending new Members...*”.

The Commission concludes in this respect that the Lyoness Loyalty Program constituted “*referral selling*” within the meaning of s 49. The Commission thereafter alleges that:

- Lyoness Australia and Lyoness Asia engaged in referral selling and, in the alternative, that Lyoness Australia was knowingly concerned in or party to the contravention by Lyoness Asia within the meaning of s 224 of the *Australian Consumer Law*.

83 It is relevantly concluded that the Commission’s case in respect to “*pyramid selling*” fails primarily because:

- even had there been a “*participation payment*” that fell within s 45(1)(a), any “*recruitment payment*” which was thereafter made was not a payment “*in relation to the introduction to the scheme of further new participants*” as required by s 45(1)(b).

It has also been concluded that:

- there has been no holding out to persons that they “*will be entitled, in relation to the introduction to the scheme of further new participants*” to be provided with a “*recruitment payment*” for the purposes of s 45(1)(b).

Another difficulty in the path of the Commission, it is respectfully considered, was its failure to make good the following allegations in its *Amended Statement of Claim*, namely its allegations in:

- para [39] that “*a person could become a Member in Australia only by making a Down Payment*”;
- para [40] that in order to become a Premium Member it was a “*practical requirement that a Down Payment be made ... because there did not exist any realistic alternative*”; and
- paras [42] and [43] that the value of benefits “*was due to Down Payments*”.

The failure to establish paras [39], [40], [42] and [43] of course, only provides further reason to reject the “*pyramid selling*” allegations.

84 It is further concluded that the Commission’s case in respect to “*referral selling*” also fails, primarily because:

- the phrase appearing in s 49, namely that a consumer “*will ... receive a rebate, commission or other benefit in return for*” (relevantly) “*giving ... the names of prospective customers...*” should be construed in a manner comparable to the phrase in s 45 (namely, “*in relation to the introduction to the scheme of further new participants*”) and that the phrase in s 49 requires a “*relevant, sufficient or material connection or relationship*” between the giving of the names and the receipt of the benefit, and that that relationship has not been made out.

It is also further concluded that the Commission has most probably failed to make good the allegations in:

- paras [68] and [69] of the *Amended Statement of Claim*, namely the allegations that Lyoness Asia and Lyoness Australia induced persons to become Premium Members “*by representing that each such Member would receive benefits in return for recommending new Members...*”.

Although the decision of the Full Court in *Australian Communications Network* was a decision in respect to “*pyramid selling*”, it is respectfully further considered that their Honours’ insistence upon the need for “*the real or substantial rewards held out ... to be derived substantially from the recruitment of new participants, as distinct from rewards for genuine sales of goods or services*” ([2005] FCAFC 221 at [46], (2005) 146 FCR at 425) applies equally to both ss 45 and 49.

85 Notwithstanding these being the principal bases upon which the claims for relief advanced by the Commission are to be dismissed, it is nevertheless prudent to address – albeit perhaps in briefer form than may otherwise have been required – a number of the other competing submissions advanced for resolution. It is also prudent initially to address the manner in which amendments were made throughout the hearing to the allegations being advanced for resolution and to the claims for relief.

Questions as to the pleadings & particulars

86 The case as initially advanced for resolution by the Commission raised the prospect that the case, as it was opened by Senior Counsel on its behalf, departed in at least two material respects from the case as pleaded.

87 The first potential departure went to the very heart of its case. As pleaded, the “*scheme*” which was expressly identified as the “*pyramid scheme*” the subject of challenge was the “*Lyoness Loyalty Program in Australia*”. So much expressly followed from at least the

introductory heading to paras [39] and [40] of its *Statement of Claim*. Those paragraphs provide (in part) as follows:

The Lyoness Loyalty Program in Australia

- 39. Until 26 April 2012 a person could become a Member in Australia only by making a Down Payment.
- 40. Further to paragraph 39 at all relevant times, in order for a person in Australia to become a Premium Member it was a practical requirement that a Down Payment be made to or for the benefit of Lyoness Asia or Lyoness Europe AG as the case may be, because there did not exist any realistic alternative.

Paragraphs [42] to [50] thereafter proceed to address the significance sought to be attached by the Commission to the making of the “*Down Payment*” as the “*participation payment*” and the “*inducements*” held out which resulted in the “*recruitment payments*”. Thereafter para [52] provides as follows:

- 52. In the premises, the Lyoness Loyalty Program in Australia was a pyramid scheme within the meaning of section 45 of the ACL:
 - (a) At all times from September 2011;
 - (b) In the alternative at all times from April 2012;
 - (c) In the further alternative from September 2011 to April 2012.

Annexure A to the *Originating Application*, moreover, identified the scheme in respect to which declaratory relief was sought as the “*Lyoness Loyalty Program*”. An injunction, for example, was sought restraining the Respondents “*from establishing, promoting, taking part in or otherwise participating in the Lyoness Loyalty Program inside or outside of Australia*”.

88 The potential departure from this identification of the “*pyramid scheme*” the subject of challenge in Senior Counsel’s opening on the first day of the hearing was to confine the “*pyramid scheme*” to only that part of the “*Lyoness Loyalty Program*” whereby “*Members*” (at least after April 2012) could become “*Premium Members*”.

89 If there were a contravention of s 45, as alleged by the Commission, there was at least the prospect of disharmony between that conduct which constituted the contravention alleged and relief which attached to the Lyoness Loyalty Program as a whole.

90 Such a shift in focus, it was then suggested, required an amendment to the *Statement of Claim* and an amendment to the form of relief as identified in the *Originating Application*.

91 The second potential departure from the pleadings in the *Statement of Claim* which occurred in the opening of the Commission’s case focussed attention on the introductory words to

s 45(1)(a), namely the characteristic that “*some or all new participants must provide*” a participation payment.

92 The case for the Respondents was (*inter alia*) that:

- cl 5.4 of the *Additional Terms and Conditions* provided for three ways in which a Member could become a Premium Member and that contractually the making of a “*Down Payment*” of \$3,000 was but one of the ways; and
- as a factual matter there were a number of Members who became Premium Members after April 2012 other than by way of making a “*Down Payment*”.

That factual matter, so the Commission submitted, mattered not. It was sufficient to satisfy the terms of s 45(1) if “*some*” of the existing Members fell within the terms of s 45(1)(a).

93 That, again, at least raised the prospect that there was further disharmony between the case as pleaded and the case as opened on behalf of the Commission. As pleaded, there was certainly no express allegation that only “*some*” of the existing Members became Premium Members by the making of a “*Down Payment*” and the allegations that were made were drafted in terms which suggested that the allegation applied to “*all*” Members.

94 Leave was granted on the second day of the hearing to amend the *Originating Application* and the *Statement of Claim*. *Annexure A* to the *Originating Application*, in particular, was then the subject of revision. No amendment of the pleading was sought expressly contending that “*some*” of those persons made a “*participation payment*”. The *Defence* as first filed was taken to be a *Defence* to the *Statement of Claim* as amended.

95 A final matter which occasioned some attention on the first day of the hearing was the provision of further particulars by the Commission by way of a letter dated 23 July 2015 in respect to:

- para [44] of the *Statement of Claim*, namely that paragraph which identified those “*Premium Members who were induced to become Premium Members by making Down Payments*” – the July 2015 letter providing a list of the names of a further 63 such Members; and
- para [54], namely that paragraph which identified by name those “*people in Australia who were recruited as Premium Members by the Global Go Getters*” – the July 2015 letter stating that by “*20 February 2012, 658 Premium Members had been so*

registered” and that by “27 February 2012, over 800 Premium Members had been so registered...”.

Although initially opposed on the basis that the further particulars were in substance an amendment, the Respondents’ opposition to the provision of these further particulars was recast in terms of prejudice. Such a basis of opposition, it was then considered, was well-founded. The identification of a significant number of further Members by name so close to the hearing effectively deprived the Respondents of any realistic opportunity to examine the circumstances surrounding each of those persons; the identification – not by name – but by number, had the potential to occasion even greater prejudice.

96 The decision communicated to the parties at the time was that the Commission would be permitted to rely upon the further particulars but that an adjournment would be granted to the Respondents if they so wished. The Respondents elected to proceed with the hearing.

97 The matter proceeded on the second day of the hearing, on 28 July 2015. Senior Counsel on behalf of the Respondents commenced his submissions on 30 July 2015. There were repeated submissions, directed (*inter alia*) to what were said to be remaining deficiencies in the pleading of the case advanced by the Commission.

98 Substantially towards the close of the Respondents’ oral submissions, and at the outset of the hearing on the final day, another application was made by the Commission to further amend both the *Amended Originating Application* and the *Amended Statement of Claim*. An application was also then made for further discovery in respect to an existing issue in the proceeding.

99 Leave to further amend the *Amended Originating Application* was consented to. Leave was accordingly granted. Other than in one minor respect, the substance of the amendment sought to the *Amended Statement of Claim* was to insert the following underlined revisions (without alteration):

The Lyoness Loyalty Program in Australia

39. ~~Until 26~~ From 4 October 2011 until April 2012, ~~a~~ some or all persons ~~could~~ could become a Premium Member in Australia only by making a down Payment.

Particulars

“Premium Member” includes a reference to the purchaser of a ‘business package’ under the UK terms and conditions.

40. Further to paragraph 39 at all relevant times, in order for a person ~~in Australia~~ to become a Premium Member in Australia, it was a practical requirement for some or all of those persons that a Down Payment be made to or for the benefit of Lyoness Asia or Lyoness Europe AG as the case may be, because there did not exist any realistic alternative.

These amendments were opposed by the Respondents. Leave to amend was refused. As explained by the Commission, the further amendments were being made by way of “*clarification*”. There were essentially two reasons for refusing the amendment, namely:

- if the case the Commission sought to advance was that, consistent with the wording of s 45(1)(a), “*some or all new participants*” were required to provide a participation payment, that case ought to have been advanced at the outset when the proceeding was either first filed or shortly thereafter. Not only should the Commission have formed a view regarding the width of the case it sought to advance from the outset, the confined nature of the pleading in para [39] of the initial *Statement of Claim* had been previously “*flagged*” by the Respondents. Even in the absence of prejudice to the Respondents, it was considered inappropriate to permit the case to proceed to hearing and for submissions to proceed (almost to conclusion) and then to permit the Commission to “*re-think*” its position having had the benefit of submissions by Senior Counsel for the Respondents;

and, moreover:

- there was the very real prospect of prejudice to the Respondents. The proposed amendment to para [39] went beyond simply “*clarifying*” those persons who could become a Member or (as proposed) a Premium Member. That amendment, if allowed, would have had a ripple effect through (for example) to para [40] and the allegation there made as to inducements that had been held out. An allegation that inducements had been held out to “*Members*” was, it was considered, different to an allegation that inducements had been held out to “*some*” of those Members. In the absence of “*clarifying*” those persons who either were, or perhaps were, represented by the narrow category of “*some*” Members, it would be difficult for the Respondents to test (for example) whether the inducements either induced that more limited category of Members or were capable of inducing those Members.

Although there had been no cross-examination of witnesses such that the Respondents could perhaps legitimately complain that they had suffered prejudice by “*showing their forensic hand*”, it was considered on balance that the amendment should nevertheless be refused. An award of costs, even on an indemnity basis, was considered not to be an adequate answer to remedying the overall prejudice to the Respondents. The Respondents had come to meet one

case in respect to the alleged contravention of s 45 and the Commission, it was considered, should be confined to that case.

100 The application for “*further discovery*” was refused. It was that application, if granted, which would have occasioned delay in the conduct of the hearing. Any delay, it was submitted on behalf of the Respondents, would occasion even greater commercial prejudice to the business activities of the Respondents than was already being suffered. The impetus for the application for further discovery was that it emerged during the Respondents’ oral submissions that the Commission may have misunderstood the manner in which some financial records of the Respondents were to be construed. But the time for discovery, it was concluded, had long passed. The time to address any question of further discovery – or to address any uncertainty on the part of the Commission as to the evidence it required to advance its submissions in respect to financial records – was prior to the hearing and not at its conclusion. Nor had any inadequacy been demonstrated in the existing discovery which had been sought.

PYRAMID SELLING – SECTION 45

101 Central to the “*pyramid selling*” case advanced on behalf of the Commission was the need to identify with some degree of certainty:

- the “*scheme*” which it was said constituted the “*pyramid scheme*”;
- and thereafter, the two “*characteristics*” of that “*pyramid scheme*”, namely:
- the “*participation payment*” for the purposes of s 45(1)(a); and
 - the “*recruitment payment*” for the purposes of s 45(1)(b).

102 Considerable reservation is expressed as to the manner in which the “*pyramid scheme*” was described by the Commission. Considerable difficulty was also experienced with respect to discerning, with an appropriate degree of certainty, some of the factual bases upon which the terms of s 45 were to be applied.

103 Notwithstanding such difficulties, it has been concluded that:

- the preliminary submission advanced on behalf of the Respondents as to the application of s 45(1)(a) to the facts is to be rejected, namely that any consideration of whether a new participant “*must provide*” a participation payment is to be confined to

the contractual terms and conditions that regulate the rights and entitlements of participants in the scheme; and

- for the purposes of establishing the fact of a “*participation payment*”, namely the first of the two “*characteristics*” of a pyramid scheme, the Commission has failed to make good the allegations it advances in paras [39], [40], [42] and [43] of its *Amended Statement of Claim*.

The latter conclusion would be a sufficient basis upon which the Commission’s case in respect to a contravention of s 45 should be rejected. Even had the Commission’s case in respect to the making of a “*participation payment*” been pleaded differently, its case in respect to s 45 would nevertheless have failed because it has been further concluded that:

- even had there been a “*participation payment*” that fell within s 45(1)(a), any “*recruitment payment*” which was thereafter made was not a payment “*in relation to the introduction to the scheme of further new participants*” as required by s 45(1)(b).

In many respects, it is this conclusion upon which the failure of the Commission’s case should rest. This conclusion in respect to s 45(1)(b) does not depend upon any deficiency in the manner in which the Commission pleaded its case in respect to s 45(1)(a) or the prospect that a differently pleaded case may have led to a different conclusion in relation to the merits of the alleged contravention of s 45. It has also been concluded that:

- there has been no holding out to persons that they “*will be entitled, in relation to the introduction to the scheme of further new participants*” to be provided with a “*recruitment payment*” for the purposes of s 45(1)(b).

That part of the case in which the Commission met with success, albeit a success having no immediate consequences, was its contention that:

- inducements had been held out to new participants relating to the benefits to which they may ultimately have become entitled.

104 Although the “*pyramid selling*” case fails, if for no other reason than the failure to satisfy the requirement of s 45(1)(b) that a “*recruitment payment*” was a payment “*in relation to the introduction to the scheme of further new participants*”, it remains prudent to:

- set forth the description of the Lyoness Loyalty Program as defined by the Commission in its pleadings;

and thereafter

- sequentially progress through each of the conclusions reached and to address some of the competing submissions.

The structure of the scheme as described by the Commission

105 The *Amended Statement of Claim* does not itself expressly define the “pyramid scheme” the subject of challenge. But it does provide in para [52] that “to the extent that it had the characteristics pleaded in paragraphs 39 to 51, the *Lyonesse Loyalty Program* in Australia was a pyramid scheme within the meaning of section 45 of the *ACL*”.

106 There is, however, a noticeable lack of symmetry between the *Amended Statement of Claim* and the *Further Amended Originating Application* which seeks a declaration that the *Lyonesse Loyalty Program* was a “pyramid scheme to the extent that it had the characteristics referred to in paragraphs 2 and 3 in *Annexure ‘A’*...”.

107 This lack of symmetry is disturbing.

108 Further reason for concern emerges when consideration is directed to the form of *Annexure A* as set forth in the *Further Amended Originating Application*, as ultimately amended on the final day of the hearing. As ultimately amended, *Annexure A* stated (without alteration):

The *Lyonesse Loyalty Program* (LLP) operated and was structured as follows:

1. People applied to become members of the LLP as a result of promotion of the LLP by the Respondents; by Andy Hansen, Wendy Hansen, Phil Watts and Sally Watts operating under the collective name ‘Global Go Getters’; and as a result of their being canvassed by existing members of the LLP.
- 1A. For persons in Australia, the LLP included but was not limited to arrangements whereby registration and participation as a member occurred under either or both of written UK terms and conditions and Australian terms and conditions. The terms and expressions used in this Annexure apply in each instance, as the case may be, in accordance with the Table in paragraph 10 below.
2. In order for a person in Australia to become a premium member of the LLP it was a practical requirement that a down payment be made to or for benefit of the Second Respondent or *Lyonesse Europe AG*.
3. It was held out to potential members of the LLP that in return for down payments, they would be entitled to benefits ~~known as Extended Member Benefits~~ the amount of which depended upon their introducing to the LLP further new members who made down payments.
4. Under the LLP, a member was entitled to a rebate on purchases made through retailers and service providers approved by the First Respondent (*Loyalty Merchants*) or Third Respondent (Partner Companies), and on purchases made by members directly or indirectly recommended for membership by the existing member.
5. Members were also allocated a *Loyalty Account* into which was credited a notional rebate (*Loyalty Benefit*) for each purchase made by the member at a *Loyalty Merchant* and for any down payment made by a member on shopping vouchers and gift cards. A down payment was not payable or repayable to the member and provided no benefits to a member other than those associated with acquisition of units in the *Lyonesse Accounting Program*, as described below.

6. Loyalty Benefits could be used by the member to accrue units in a matrix called the Lyoness Accounting Program. The matrix had five levels and a unit in each level had a notional value, ranging from \$75 to \$6000. Each unit issued to a member was placed within the Lyoness Accounting Program to follow the unit (Down Line) in the Accounting Category nominated by the member who recommended that member.
7. Members who came to hold specified numbers of units in the Lyoness Accounting Program were eligible to receive Extended Member Benefits, which included the following financial benefits:
 - 7.1 Loyalty Commission;
 - 7.2 Loyalty Commission Bonus;
 - 7.3 Volume Commission;
 - 7.4 Volume Bonus; and
 the following accruals of non financial benefits with the ~~LLP~~Lyoness Loyalty Program:
 - 7.5 Loyalty Credit; and
 - 7.6 Bonus Units.
8. The number of members directly or indirectly recommended by the existing member, and the Loyalty Benefit accrued by those members, was relevant to the existing member's eligibility for Extended Member Benefits and the amount of Extended Member Benefits received.
9. A premium member received a specified number of units in the Lyoness Accounting Program and became eligible to receive Volume Commission.
10. The terms and expressions in this Annexure, and itemised in the Table below under 'Australian Term', are also to be taken as references to the "UK term", as required, in respect of the operation and structure of the LPP under the UK terms and conditions:

<u>Australian Term</u>	<u>UK Term</u>
<u>\$ (amount)</u>	<u>£ (amount)</u>
<u>Bonus units</u>	<u>Bonus Positions</u>
<u>Loyalty Account</u>	<u>Personal Reimbursement Account</u>
<u>Lyoness Accounting Program</u>	<u>Accounting System</u>
<u>Loyalty Benefit</u>	<u>Benefit</u>
<u>Loyalty Commission;</u>	<u>System commission</u>
<u>Loyalty Commission Bonus;</u>	<u>Partner bonus</u>
<u>Loyalty Merchant</u>	<u>Partner Companies / Lyoness Authorised Dealers</u>
<u>Volume Bonus.</u>	<u>Business Bonus</u>
<u>Volume Commission</u>	<u>Business team – career reimbursement</u>
<u>Loyalty Credit</u>	<u>Shopping Credit</u>
<u>Premium member</u>	<u>Lyoness Business Partner / Business Package</u>
<u>Units</u>	<u>Positions</u>

The form of *Annexure A* remained substantially the same from the outset as originally set forth in the *Originating Application* through to that set forth in the *Further Amended*

Originating Application. The course plotted by the Commission when drafting its ongoing amendments was to make some deletions and some additions to the original format.

109 Both as initially described, and as finally described, it justifiably attracted criticism from Senior Counsel for the Respondents. The amendments did little to remove the justifiable concerns of the Respondents.

110 A fundamental objection taken by Senior Counsel for the Respondents was that there never was in fact a Lyoness Loyalty Program “structured” in the manner described in *Annexure A*. As pleaded in the *Statement of Claim*, both prior to and subsequent to its amendment, the Lyoness Loyalty Program was said to operate in Australia both prior to and subsequent to the Australian launch of the program in April 2012. But some parts of the “structure” initially described in *Annexure A* (e.g., paras [4] and [6]) could only apply to the program subsequent to April 2012. Other parts of the “structure” (e.g., paras [2] and [3]), it was contended were simply erroneous. The amount of the “benefits” described, for example, in para [3] did not depend upon “introducing to the LLP further new members who made down payments”; the amount of the benefits, by reference to the *Additional Terms and Conditions*, depended upon the number of “units” held in the relevant “Accounting Category”.

111 The substance of the first raft of amendments to the *Originating Application* did not vary the form of *Annexure A* but confined the declaratory relief sought in respect to the “pyramid scheme” being challenged to the scheme described in *Annexure A* “to the extent that it had the characteristics referred to in paragraphs 2 and 3 in *Annexure “A”*...”.

112 The amendments on the last day of the hearing to the *Amended Originating Application*, and the leave granted by consent to file a *Further Amended Originating Application*, addressed some of these criticisms.

113 Had it been concluded that there was a contravention of s 45 of the *Australian Consumer Law*, it would have become necessary to give more detailed attention to the “structure” described in *Annexure A* – even as amended – and the appropriateness of granting declaratory or other relief founded upon the “pyramid scheme” there described. Declaratory relief in the form sought by the Commission would have been refused. The “structure” of the scheme as ultimately described, with respect, still left a lot to be desired. But it is unnecessary to pursue such musings further.

Section 45(1)(a)(i) – participation payments

114 The pleadings in respect to the first “characteristic” of a “pyramid scheme”, namely that of a “participation payment”, are contained within paras [39] to [41] of the *Amended Statement of Claim*. The content of paras [39] and [40], complete with the “Particulars” provided in respect to the latter paragraph, bear repetition. Those paragraphs, including the “Particulars” provided in respect to para [40], provide as follows:

The Lyonesse Loyalty Program in Australia

- 39. Until 26 April 2012 a person could become a Member in Australia only by making a Down Payment.
- 40. Further to paragraph 39 at all relevant times, in order for a person in Australia to become a Premium Member it was a practical requirement that a Down Payment be made to or for the benefit of Lyonesse Asia or Lyonesse Europe AG as the case may be, because there did not exist any realistic alternative.

Particulars

- (a) Persons in Australia who joined as Premium Members before April 2012 were allocated units in the Lyonesse Accounting Program in the United Kingdom, with Down Payments made to acquire those units being made to or for the benefit of Lyonesse Europe AG. In some cases those units held by Australian based Members in the Lyonesse Accounting Program in the United Kingdom were transferred in or about April 2012 to be units in the Lyonesse Accounting Program in Australia.
 - (b) From April 2012 Down Payments were made to or for the benefit of Lyonesse Asia.
 - (c) From April to August 2012 the only high volume retailers in Australia from which purchases could be made resulting in Loyalty Benefits were Woolworths and Harvey Norman. In each case Lyonesse Australia or Lyonesse Asia resold gift cards redeemable at those stores and had no other arrangements with them. If any Loyalty Benefits accrued as a result of purchase of those Gift Cards they were for amounts not exceeding 2% of the price of the Gift Cards.
 - (d) From August 2012 to March 2013 there were no high volume retailers in Australia from which purchases could be made resulting in Loyalty Benefits.
 - (e) From March 2013 the only high volume retailer in Australia from which purchases could be made resulting in Loyalty Benefits was Coles. Since March 2013 Lyonesse Asia had resold gift cards redeemable at Coles stores and has had no other arrangement with Coles and Loyalty Benefits accrue to Members who purchase those Gift Cards at the rate of 2% of the purchase price.
 - (f) To acquire Premium Membership through Loyalty Benefits accruing on gift cards or any other purchases required spending on gift cards of not less than \$30,000.
41. By reason of the matters alleged in paragraphs 39 and 40 the Down Payments made by Premium Members were participation payments within the meaning of s. 45 of the ACL.

For present purposes, the lack of symmetry between the *Amended Statement of Claim* and *Annexure A* (as amended), and the criticisms of the drafting of *Annexure A*, may presently be

left to one side. Separate from these difficulties, the Commission confronts further difficulties in respect to the application of s 45(1)(a) and (1)(b) to the facts.

115 For the purposes of s 45(1)(a), it is sufficient to make out the first “*characteristic*” of a pyramid scheme if “*some or all new participants*” provide another participant a “*participation payment*”. There is no requirement that “*all*” participants must do so. But, in the absence of the amendment, that is the case that the Commission set out to prove.

116 Absent from para [40] of the *Amended Statement of Claim* is any allegation that in order to become a Premium Member “*some or all*” persons had to make a “*Down Payment*”. That, of course, was the amendment the Commission sought to make on the final day of the hearing and the amendment that was refused.

117 Even had such an amendment been permitted, it would not have led to any different conclusion. Some of the further submissions advanced on behalf of the Respondents, with respect, missed their target; others, however, hit home.

118 These further submissions included the following.

The participant must provide – the rules of the scheme?

119 When addressing the first of the two “*characteristics*” of a “*pyramid scheme*” set forth in s 45(1), s 45(1)(a) provides in part that “*to take part in the scheme, some or all new participants must provide, to another participant or participants*” a “*participation payment*”.

120 The source of this requirement that a participant “*must provide*” such a payment, it was submitted on behalf of the Respondents, could only be found within the scheme itself. Albeit short of a contractual requirement to provide such a payment, the submission was that it was within the scheme itself that the source of any requirement must be found.

121 This submission is rejected.

122 Section 45(1)(a), it is respectfully concluded, is not to be construed so restrictively. All that the section requires is that if a participant is to take part in the scheme, he “*must provide*” a payment. One manner in which such a requirement may be imposed would be a contractual requirement. But circumstances can well be envisaged in which the contractual rules of a scheme, or even the rules of a scheme having no contractual force and effect, may only regulate the relationship between the parties to the scheme once that relationship has been established. Left unregulated by any contract (or other non-binding rules) may be a factual

requirement to make a payment in advance of any contract or other relationship coming into existence.

Down payments: pre-April 2012

123 Paragraph [39] of the *Amended Statement of Claim* expressly identifies membership of the Lyoness Loyalty Program in Australia prior to April 2012. It alleges that “*a person could become a Member in Australia only by making a Down Payment*”. Although para [40] is expressed to be “[f]urther to paragraph 39”, para [40] can only apply to membership after April 2012 as prior to that point of time there was no category of Member described as a “*Premium Member*”.

124 The allegation in para [39], it is concluded, is to be rejected.

125 In order to make good this allegation, reference was made by the Commission to a number of documents including the blank form of application for membership and some of those forms which had in fact been completed.

126 The form of application was that set forth in the pamphlet titled “*Initial order and registration*”. It posed some questions as to what it meant and how it was to be construed.

127 On behalf of the Commission it was contended that this application form was to be construed as requiring the payment of a “*Voucher Down Payment*”. So much, it was contended, was supported by:

- the almost universal completion by applicants of that part of the form addressing “*Voucher Down Payments*”; and
- the notation at the bottom of the form which provided (in part) that “... [s]hould no payment be made by the new Member within 21 days after the date of signature of the Customer Agreement, no registration is possible”.

The failure of substantially all applicants who completed this form to provide the “*Bank Details*” requested, according to the Commission, mattered not. Those details, it was submitted, were more directed to the bank account into which future payments were to be made rather than providing the details of the bank account from which any payment for membership should be debited. The notation, it was submitted, was to be construed according to its terms – if no payment of the “*Voucher Down Payment*” was made within 21 days, the registration was not “*possible*”.

128 If reference were made only to the form of this document and the manner in which it had been completed by many applicants, the Commission could well have prevailed in making good its allegation in para [39].

129 But the document does not stand alone. Clause 9.1 of the *UK General Business Terms* for Lyoness Customers in the United Kingdom expressly states that “[p]articipation by the Customer in the LYONESS System is always free of charge unless specific provisions provide for a charge for particular services”.

130 Although the meaning of cl 9.1 may be uncertain, it is concluded that the Commission has not discharged its onus of making good the allegation in para [39] of the *Amended Statement of Claim*, that prior to April 2012 “a person could become a Member in Australia only by making a Down Payment”. Although many people did in fact become Members in that manner, no conclusion can safely be drawn that making a “Down Payment” was the “only” way in which a person could become a Member in Australia prior to April 2012. It is not to the point, with respect, for the Commission to contend that there was no evidence “the other way”. The onus remained on the Commission to make good its allegations.

A practical requirement: at all relevant times

131 Paragraph [40] of the *Amended Statement of Claim* alleges that “at all relevant times, in order for a person in Australia to become a Premium Member it was a practical requirement that a Down Payment be made to or for the benefit of Lyoness Asia or Lyoness Europe AG as the case may be, because there did not exist any realistic alternative.”

132 Notwithstanding the reference in para [40] of the *Amended Statement of Claim* to a person becoming a “Premium Member”, the Commission set out to prove as part of its case that such monies as were being generated to Members prior to April 2012 necessarily came from the making of “Down Payments”. Such a conclusion, it was contended, was supported by an inference to be drawn from:

- the *Master Report* for the period from December 2011 through to June 2012; and
- the limited number of Lyoness Loyalty Merchants during that period of time.

If the monies being generated to Members were not attributable to shopping, so contended the Commission, they had to be attributable to the “Down Payments”. Presently left to one side is the fact that para [40] is to be confined to events post-April 2012 by reason of the reference to a person becoming a “Premium Member”, a category of membership only arising after April 2012.

- 133 As for the *Master Report*, the Commission submitted that the *Report* for the period from December 2011 through to June 2012 exposed an absence of any “*Cashback*” payments for the entire period from December 2011 through to March 2012 – hence the absence of any entry for each of those months above the reference to “-100%” in that column headed “*CB Total/from PM*”. The difficulty with that submission stems from the submission advanced by the Respondents that the *Master Report* recorded in Euros the total value of “*Cashback*” for those months and that – until the launch of the Lyoness Loyalty Program in Australia in April 2012 – all such “*Cashback*” was still being recorded in the overseas accounts of Lyoness rather than in the Australian accounts.
- 134 In the absence of evidence as to the manner in which the *Master Report* should be understood or the manner in which “*Cashback*” was being recorded, no inference can safely be drawn from that part of the *Master Report* upon which the Commission relied. The affidavit of discovery relevant to the *Master Report* did not descend to the detail required to resolve the competing submissions.
- 135 As for the number of available Loyalty Merchants from which products could be purchased, the Commission contended that there were a limited number. The more limited the number, the greater the likelihood – so the Commission contended – that monies paid to Members derived from “*Down Payments*” rather than from shopping. The Schedule of agreements entered into with Small/Medium Enterprises jointly prepared by the parties exposed the first such agreement being entered into in January 2012. But no inference can be drawn from this alone. For the period from December 2011 through to March 2012, there was shopping being undertaken by Australian Lyoness Members with Loyalty Merchants which was not recorded in the *Master Reports*. The volume of such shopping was, according to the submission of the Respondents, still being entered in the overseas records of the program. Again, the absence of evidence means that the drawing of any inference remains an uncertain exercise.
- 136 An inference cannot be drawn that prior to April 2012 it was a “*practical requirement*” in order to become a Premium Member that a “*Down Payment*” be made because there was no “*realistic alternative*”.
- 137 More generally expressed, and not confined to the period prior to April 2012, the Commission sought to make out its allegation in para [40] of its *Amended Statement of Claim* both by reference to:

- the inherent unlikelihood of persons becoming Premium Members, not by way of making a “*Down Payment*”, but rather the inherent unlikelihood of an individual consumer achieving that status by reference to purchases exceeding \$30,000 in any one year; and
- various calculations as to the number of consumers who made “*Down Payments*” and separate calculations as to the number of those consumers who did in fact spend more than \$30,000 in any one year.

The former, with respect, is an uncertain touchstone. Although s 144 of the *Evidence Act 1995* (Cth) (the “*Evidence Act*”) provides that proof is no longer required about knowledge that is not reasonably open to question, and although it may be accepted that s 144 may well permit a Court to have regard to a wider range of facts than those susceptible of judicial notice at common law (cf. *Owens v Repatriation Commission* (1995) 59 FCR 559 at 589 per Drummond J), it is respectfully concluded that the Court is in no position to form any view as to the number of consumers who would or could spend more than \$30,000 with any one or more of the Lyonesse Loyalty Merchants in one year. People on an average income, it may readily be accepted, would be extremely unlikely to do so. But there remain many consumers who earn far in excess of the average income. The quantum of disposable income and so much of that income as may be spent with Lyonesse Loyalty Merchants is, with respect, speculative. Section 144 of the *Evidence Act* does not confer “*an unlimited discretionary power on a court to take into account unproven facts that might bear on the issues to be resolved*”: *Norrie v New South Wales Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [224], (2013) 84 NSWLR 697 at 743 per Sackville AJA.

138 The various calculations undertaken by the Commission, however, require separate consideration. There are two such calculations.

139 First, for the period from 27 September 2011 through to early November 2012, 1,946 individuals made a “*Down Payment*” of £1,800 (or \$3,000). Although the periods of time do not correspond, for the period from 6 October 2011 through to 6 April 2012, 1,933 people applied for membership by completing the “*Initial order and registration*” form.

140 Based upon these figures, a finding can be made that the majority of persons who became Members prior to April 2012 did so by making a “*Down Payment*”. And such a finding may well go some way towards a conclusion that, as a practical matter, that is how persons did become Members. But such a finding does not also lead to a conclusion that the making of a “*Down Payment*” was a “*practical requirement ... because there did not exist any realistic*

alternative". The only conclusion that can safely be founded upon these figures is that persons usually became Members by making a "*Down Payment*".

141 The second calculation was (perhaps) more revealing – but it was also a more confined calculation. That calculation depicted the comparative number of persons who became Premium Members due to the making of a "*Down Payment*", as opposed to shopping, after April 2012. That calculation was as follows:

Period	Loyalty Benefit due downpayment	Premium Member due downpayment	Premium Member due shopping
Apr – Dec 2012	\$ 95,442	31	Nil
Jan – Dec 2013	\$251,053	83	13
Jan – Oct 2014	\$361,071	120	34
Oct 14 – Apr 15	Unknown	Unknown	3

Although incomplete, for the period from April 2012 through to April 2015 it emerges that 234 persons made a "*Down Payment*"; 50 persons became Premium Members through shopping. At an earlier stage of the hearing, when a separate calculation was undertaken by the Commission in respect to the shopping undertaken by 37 Members, it was exposed that:

- in 21 of those cases, premium membership was achieved by the purchase of a car; and
- in 15 cases, "*on the face of the transactions*" it was said on behalf of the Commission that "*premium membership seems to have been achieved as a result of exceptional or atypical spending, for which no explanation is offered by the Respondents*".

Instances of what was said on behalf of the Commission to represent "*atypical spending*", included the following history of purchases for one Member during the period from September 2013 through to September 2014:

Get Tools Direct	3,995.00
Coles Express	4,200.00
Coles	1,900.00
Pest King	770.00
Able Airlec	68,956.66
Brett Holt	43,822.49
Floorwerx	12,805.00
DealsDirect	1,539.90
Barbecues Galore	500.00
Ray's Outdoors	1,000.00
Dryman	1,861.20
Avis Australia	406.01
Pacific Office	341.20
Amart All Sports	300.00
Magic Spanners	1,673.10
Total	144,070.56

The table in which this history of spending was recorded further stated that the *List of Documents* from which the history was extracted “*suggests that this member is in fact a merchant*”. Another instance relied upon by the Commission to support its characterisation of “*atypical spending*” was the following:

Lazy River Bar	66.10
Coles	3,100.00
Coles Express	4,400.00
Cabundra Surf	50.00
Bi-Rite Browns	32,905.00
Target	250.00
Liquorland	450.00
Rebel	159.99
Cooroy Fish ‘N’	29.95
Amart All Sports	200.00
Krung Thep Thai	112.30

Why this was said to be “*atypical*” was not further explained by the Commission.

142 Although it may well be open to find that for the purposes of para [40] of the *Amended Statement of Claim* that an overwhelming number of persons (or even a very significant percentage) of those who became Premium Members did so by making a “*Down Payment*”, it is the next step in the pleading in para [40] which leads to its rejection. None of the evidence for the period either prior to or subsequent to April 2012 founds a conclusion that there was no “*realistic alternative*”.

The recruitment payments – s 45(1)(b)

143 A “*pyramid scheme*” is defined by s 45 as a scheme with both the characteristics of a “*participation payment*” (s 45(1)(a)) and a “*recruitment payment*” (s 45(1)(b)).

144 The failure of the Commission to make good its allegations in respect to s 45(1)(a) makes it unnecessary to address s 45(1)(b). But both the requirements imposed by s 45(1)(a) and s 45(1)(b) were addressed in the evidence and submissions. And it is the failure to satisfy the requirements of s 45(1)(b) which is the preferred basis – or the “*primary*” basis – upon which it has been concluded that the Commission’s pyramid selling case fails.

145 Two matters in respect to s 45(1)(b) should, however, be noted at the outset.

146 First, s 45(1)(b) refers to participation payments that were “*entirely or substantially induced by the prospect held out to new participants*” of an entitlement to receive “*financial or non-financial benefits*”. The terms of that provision, it will be noted, do not refer to a

“representation” that “*financial or non-financial benefits*” will be received; s 45(1)(b) is drafted in terms of a person being “*induced*” by the prospect of a benefit being provided. By way of contrast, s 49 employs the language of a person inducing a consumer to acquire goods or services “*by representing that the consumer*” will receive a rebate, commission or other benefit.

147 The search, so contended the Commission, was not to discern from the evidence a “representation” that by making a “*Down Payment*” financial benefits would be received – the search was to discern from the evidence the holding out of “*inducements*” that financial benefits “*could be derived*” or that the making of a “*Down Payment ... would generate financial benefits*”. Consistent with the language of s 45(1)(b), the Commission’s submission that the search is not for a “representation” – but rather an inducement – is accepted.

148 Second, the term “*inducements*” is not confined to contractual rights or obligations. Indeed, an “*inducement*” entirely separate from a contractual term or entitlement may act as an “*inducement*” to enter into a contract. An “*inducement*” to enter a contractual arrangement may be a contractual entitlement that only a party to the contract can obtain. But the search for any “*inducement*” to enter into a contract may well precede the entering into of any such contract.

149 Subject to these comments, the manner in which the Commission has pleaded its case with respect to the making of “*recruitment payments*” for the purposes of s 45(1)(b) of the *Australian Consumer Law* are set forth in paras [42] to [52] of the *Amended Statement of Claim*.

150 Those paragraphs, including underlined amendments, provide as follows:

42. At all relevant times, any material entitlement of a Member to Loyalty Commission, Volume Commission, Loyalty Commission or Volume Bonus was due to Down Payments made by the Member and Members with Units Down Line from Units held by the Member and was not the result of accrual of any entitlement under the GTCs or ATCs through shopping.

Particulars

- (a) In the period from January to June 2013 a total of about \$4.66m was paid by Down Payment by Australian Members.
- (b) In the same period a total of \$159,450 accrued as Loyalty Benefits as a result of shopping by Australian Members.
- (c) The amount of Loyalty Benefits which accrued as the result of shopping to Australian Members was immaterial in comparison to the amount of Down Payment and consequently to the calculation of Extended Member Benefits.
- (d) Further particulars may be provided following discovery.

43. At all relevant times, there was no material prospect that a person who became a Premium Member by making a Down Payment would thereby receive financial benefits greater than the cost of the Down Payment other than by receiving Loyalty Commission, Volume Commission, Loyalty Commission and/or Volume Bonus due to Down Payments made by Members with units Down Line from those held by the Premium Member.

Particulars

The Applicant repeats the allegation at paragraph 34 and relies upon the particulars to paragraph 41.

44. Premium Members were induced to become Premium Members by making Down Payments by the prospect held out to them that they would thereby become entitled to receive financial benefits being Extended Member Benefits of a higher value than those Down Payments.

Particulars

- (a) John Neill, Margot Rylah, Gayle Roberts, Teri Bartolo and Shannon Friedman were so induced.
 - (b) Further particulars may be provided following discovery.
45. From about September 2011 until about April 2012 the Lyoness Loyalty Program was promoted to people in Australia by Andy Hansen, Wendy Hansen, Phil Watts and Sally Watts operating under the collective name "Global Go Getters", through webinars during which the prospect was held out that financial benefits in excess of the payment required to acquire the membership could be derived by attendees who became Premium Members and recruited further Premium Members.

Particulars

- (a) Webinars known as Opportunity Webinars were usually conducted on Tuesdays and Thursdays each week between September 2011 and March 2012.
 - (b) Webinars known as Ten Income Stream Webinars were usually conducted on Saturdays each week.
 - (c) The inducements were communicated partly orally, by words spoken by the presenter or presenters of each webinar.
 - (d) The inducements were communicated partly in writing, by slides displayed on attendees' computer screens during each webinar.
 - (e) Recordings of the Opportunity Webinars and the Ten Income Stream Webinars in the possession of the applicant are available from the applicant's solicitors
46. In or around March 2012 Lyoness International and further or in the alternative Lyoness Asia published or approved a video (**Lyoness Movie**) by making it available to Premium Members through their private logins to the Lyoness website, together with scripts to be used in presenting the Lyoness Movie.
47. From no later than May 2012 Lyoness International and further or in the alternative Lyoness Asia published or approved materials to train Premium Members in use of the Lyoness Movie.
48. The Lyoness Movie, when viewed with the use of the scripts to be used in presenting it, held out the prospect that people who chose to become Premium Members would thereby become entitled to receive financial benefits being Extended Member Benefits that are greater than the cost of the Down Payment required to become a Premium Member.

Particulars

A copy of each version of the Lyoness Movie and of scripts of those videos and of each script and record of training materials used in conjunction with the Lyoness Movie in the possession of the applicant is available from the

applicant's solicitor.

49. At the workshops alleged in paragraph 60 below the attendees were trained to market Premium Membership in the Lyoness Loyalty Program by holding out the inducement that by making a Down Payment and recruiting others to become Premium Members a person would generate financial benefits significantly greater than the value of the Down Payments.
50. The marketing activities referred to in paragraphs 44 to 49 did not contain any material inducement that by making a Down Payment to become a Premium Member a person would become entitled to any rights other than the matters alleged in those paragraphs, or in certain limited circumstances the recovery of the value of the Down Payment.
51. By reason of the matters alleged in paragraphs 14 to 34 and 42 to 50, inducements of real or substantial financial benefits were held out to new Premium Members of the Lyoness Loyalty Program that were derived substantially from the recruitment of new Premium Members.
52. In the premises to the extent that it had characteristics pleaded in paragraphs 39 to 51, the Lyoness Loyalty Program in Australia was a pyramid scheme within the meaning of section 45 of the ACL:
 - (a) At all times from September 2011;
 - (b) In the alternative at all times from April 2012;
 - (c) In the further alternative from September 2011 to April 2012.

151 Of these paragraphs:

- paras [42] and [43] make allegations as to the source of “*any material entitlement*” and the absence of any “*material prospect*”;
- paras [44] to [49] are brought together in the allegation in para [50];
- para [51] brings together the “*inducements*” relied upon; and
- para [52] is the conclusion that by reason of the characteristics pleaded in paras [39] to [51] the Lyoness Loyalty Program was a “*pyramid scheme within the meaning of section 45*”.

The primary basis upon which it is concluded that the “*pyramid selling*” aspect of the Commission’s case fails is that the “*recruitment payment*” identified by the Commission is not a payment “*in relation to the introduction to the scheme of further new participants*” within the meaning of and for the purposes of s 45(1)(b). Notwithstanding this conclusion, some of the remaining competing submissions which divided the parties should briefly be addressed, including the allegations in paras [42] and [43] and some of the allegations as to the “*inducements*” held out. In addressing the allegations in respect to the “*inducements*”, it is also prudent to address those allegations by reference to the particular paragraphs identified because the subsequent pleadings in respect to the “*referral selling*” part of the Commission’s

case seek to place reliance upon the “*inducements*” particularised in respect to paras [46] to [49] and para [60].

In relation to – s 45(1)(b)

152 Section 45(1)(b) provides in relevant part that the person making the “*participation payment*” has been induced to do so by reason of an entitlement to a “*recruitment payment*” which is made “*in relation to the introduction to the scheme of further new participants*”.

153 It is this requirement which it is respectfully concluded has not been satisfied by the Commission.

154 The conclusion that the Commission’s case must be rejected involves two steps, namely:

- the meaning to be given to the statutory phrase “*in relation to the introduction to the scheme of further new participants*”; and
- the application of that phrase to the facts of the present case.

The statutory phrase in question is not satisfied merely by reason of there being some “*causal connection*”: *Australian Communications Network, supra*. With respect to the predecessor provision to s 45(1)(b), Heerey, Merkel and Siopis JJ there found that “*an element of introduction*” was not sufficient to satisfy the requirement that the payment be made “*in relation to*” the introduction of further members: [2005] FCAFC 221 at [45], (2005) 146 FCR at 425. The statutory phrase in question requires there to be “*a relevant, sufficient or material connection or relationship, rather than merely a causal connection or relationship*”: (at [29], 421). Their Honours went on to conclude:

[46] ... We see the purpose of the legislation as directed at proscribing schemes where the real or substantial rewards held out are to be derived substantially from the recruitment of new participants, as distinct from rewards for genuine sales of goods or services.

155 On the facts of the present case, it is concluded that:

- no financial or non-financial benefit was received “*in relation to the introduction to the scheme of further new participants*” – all benefits received were “*in relation to*” further activities subsequently undertaken by the “*new participants*”; and
- the “*evil*” to which s 45 is directed is not present in this case – the “*scheme*” being promoted is a “*scheme*” founded upon future “*rewards for genuine sales of goods or services*”. The Commission, it may be noted, did not set out to prove that there were no “*genuine*” sales or economic activity being pursued by Members.

In short, on the facts of the present case it is concluded that there was no “*relevant, sufficient or material connection or relationship*” between the introduction of new Members and any “*financial or non-financial benefits*” thereafter received by the person making the “*participation payment*”.

156 On the facts of the present case, the mere introduction of a new Member did not result in the existing Member receiving any benefit. Any entitlement to receive a benefit was occasioned – not by the introduction of the new Member – but from the pursuit of shopping activity by that new (Direct) Member or Members and the shopping activities of (Indirect) Members who, in turn, may have been introduced by such new Members.

The recruitment payments & financial benefit – paragraphs [42] & [43]

157 Paragraph [42] of the *Amended Statement of Claim* contained the allegation that “*at all relevant times*” the value of benefits being received was “*due to Down Payments made by the Member and Members with Units Down Line from Units held by the Member and was not the result of accrual of any entitlement under the GTCs or ATCs through shopping*”. But one of the *Particulars* provided maintained that the “*amount of Loyalty Benefits which accrued as the result of shopping to Australian Members was immaterial in comparison to the amount of Down Payment and consequently to the calculation of Extended Member Benefits*”.

158 Paragraph [42] assumes relevance to the allegation in para [51] of the *Amended Statement of Claim* that inducements were held out by reason of (*inter alia*) the matters pleaded in “*paragraphs 42 to 50*”.

159 To support the allegation, Counsel for the Commission submitted that reference could be made to:

- the *Master Reports* which it was said exposed the fact that the “*percentage of loyalty benefit accruing from shopping has been stable at generally less than 2% at all times since the official launch of the Lyoness Loyalty Program in Australia in April 2012*”; and
- the value of benefits in fact received by Mr Neill and Ms Rylah which were attributable to shopping.

The allegation has not been made out.

160 If reference is made to the *Master Reports*, it is concluded that no satisfactory inference can be drawn that the loyalty benefit accruing from shopping has generally been at less than 2%

or, as further submitted by the Commission, that 98% of benefits received were attributable to “the making of voucher down-payments by the Lifeline of the Premium Member concerned”.

161 The reference in the submissions of the Commission to “less than 2%” and “98% or more” may be traced back to the *Master Report* for the period from June to December 2012 and the column headed “LB Total / % from shopping”. To give content to the manner of calculating the “Loyalty Benefit”, Counsel for the Commission referred to cll 4.2 and 5.1 of the *Additional Terms and Conditions*. Clause 4.2 provides in part that the “Loyalty Benefit is the remaining amount of the Member Benefit which is available to be calculated in accordance with the Member Benefit Code (MBC) after CashBack and any Friendship Bonus has been deducted”. Clause 5.1 provides in part that a “Member has the opportunity to generate Loyalty Benefits by making a binding Down Payment...”.

162 By way of example, reference was made by Counsel for the Commission to the entry under that column of the *Master Report* for December 2012. That entry recorded in Australian dollars the amount \$12,893.31 and a calculation of 1.69%. The submission was that the 1.69% was the amount as a percentage of the *Loyalty Benefit* received which was referable to shopping; the balance of 98.31% was, inferentially, said to be attributable to “Down Payments”. If the benefit was not referable to shopping, so it was submitted on behalf of the Commission, it was necessarily referable to “Down Payments”.

163 In the absence of evidence explaining the *Master Reports*, it is difficult to construe the information recorded.

164 Senior Counsel on behalf of the Respondents maintained that the percentage was a calculation of the “Loyalty Benefit” as a percentage of total in-store shopping. So construed, the relevant calculation was the following:

$$\$12,893.31 / \$763,203.45 = 1.69\%$$

The *Master Reports*, according to the Respondents, did not attempt to calculate the value of benefits derived from “Down Payments” – that was, in their submission, a matter of no immediate relevance to them. The calculation proposed by the Respondents does indeed result in the percentage identified. But again, that was but a competing submission advanced by the Respondents to answer the inference advanced by the Commission.

165 In the absence of further explanation, the *Master Reports* by themselves do not provide a safe basis upon which the inference advanced on behalf of the Commission should be drawn. Submissions are not a substitute for evidence.

166 Albeit not provided as particulars in respect to para [42] of the *Amended Statement of Claim*, the evidence of Mr Neill and Ms Rylah does not take the matter much further. Both Mr Neill and Ms Rylah, it may be accepted, did in fact receive far greater amounts derived from “*Down Payments*” in comparison to the amounts they received which were attributable to shopping. Although they were two of the first Australian Lyonsess Members, they remained two of many. But the overall value of shopping being undertaken was considerable. If attention remains focussed on December 2012, by way of example, the total of in-store shopping for that month was \$763,203.45. The *Sales Report* for the period from April 2012 through to June 2013, albeit a report of sales in major Loyalty Merchants rather than for all Loyalty Merchants, showed a total of \$7,796,180.

167 Uncertain or unexplained financial records and the experience of a limited number of Members, without more, are not a satisfactory factual foundation to make any finding in accordance with para [42] of the *Amended Statement of Claim*. In the absence of a factual finding being made as sought in para [42], para [43] of the *Amended Statement of Claim* also fails. Although the “*Particulars*” supplied in relation to para [43] seek to rely upon the “*particulars to paragraph 41*”, there are no particulars provided in respect to para [41] either in the *Statement of Claim* as initially filed or as amended.

168 Given the failure to make out the allegations in paras [42] and [43], if the allegation as to inducements being held out as made in para [51] of the *Amended Statement of Claim* is to be substantiated, that allegation must be made good by reference to the remaining paragraphs, namely paras [44] through to [50].

Section 45(1)(b) – entirely or substantially induced

169 Although the Commission’s case advanced in respect to s 45 fails (*inter alia*) by reason of its failure to establish that any “*recruitment payment*” that may have become payable was not a payment “*in relation to the introduction to the scheme of further new participants*”, brief reference should be made to that part of the Commission’s case which contended that such “*participation payments*” as had been made were “*entirely or substantially induced by the prospect held out ... that they will be entitled ... to be provided with*” a “*recruitment payment*”.

- 170 It is in this respect that the Commission’s factual allegations met with some limited success.
- 171 Given the other conclusions that have been reached as to the application of s 45(1)(a) and (1)(b), it is perhaps a sterile exercise to make separate findings in respect to the “*inducements*” that had been “*held out*” to “*new participants*”. But it is probably better to make such findings as are considered warranted by the evidence, albeit in very summary form, and thereby resolve an aspect of the proceeding that attracted competing submissions.
- 172 There can be no doubting the fact that inducements were held out to prospective Members that they would ultimately receive “*financial benefits*” other than the discounts they received on purchases made from Loyalty Merchants. But for the other reasons why the s 45 case advanced by the Commission has failed, it would otherwise have been concluded as a factual matter that such participation payments as were made were “*entirely or substantially induced by the prospect held out to new participants...*”.
- 173 Left to one side for present purposes is the separate question of the manner in which such “*financial benefits*” may ultimately have been received. Also left to one side is the relevance of the actual contractual terms and conditions set forth in either or both of the *General Business Terms and Conditions* and the *Additional Terms and Conditions* to the character of the “*inducements*” found other than in those contractual terms and conditions. The *Introduction* to those *General Business Terms and Conditions* and cl 1.1, for example, focus attention upon the “*Object of the Agreement*” and do so other than by reference to any benefit apart from “*Member Benefits*” which fall short of the “*Extended Member Benefits*” – including the “*Volume Commission*” payments upon achieving certain “*Career Levels*”.
- 174 The present concern is simply to focus on the nature of the “*inducements*” held out to Members or prospective Members of the Lyonesse Loyalty Program, those being the “*inducements*” set forth in the *Lyonesse Movie*, the “*webinars*” and other promotional materials. Also left to one side is whether or not such findings as are made in respect to those “*inducements*” would otherwise fall within the reach of s 45(1)(b).
- 175 It is unnecessary to refer expressly to all of the evidence relied upon by the Commission to make good this allegation. It is sufficient to make brief reference to paras [44] to [50] of the *Amended Statement of Claim*.
- 176 For the purposes of s 45(1)(b), the Commission alleges (*inter alia*) in its *Amended Statement of Claim*:

- that “Premium Members were induced to become Premium Members by making Down Payments by the prospect held out to them that they would thereby become entitled to receive financial benefits being Extended Member Benefits of a higher value than those Down Payments” (para [44]);
- that from September 2011 until April 2012 the Lyonesse Loyalty Program was promoted to people in Australia “through webinars during which the prospect was held out that the financial benefits in excess of the payment required to acquire the membership could be derived by attendees who become Premium Members and recruited further Premium Members” (para [45]); and
- that either Lyonesse International or Lyonesse Asia “published or approved a video” (para [46]) or “published or approved materials to train Premium Members in use of the Lyonesse Movie” (para [47]) and that the “Lyonesse Movie, when viewed with use of the scripts to be used in presenting it, held out the prospect that people who chose to become Premium Members would thereby become entitled to receive financial benefits being Extended Member Benefits that are greater than the cost of the Down Payment required to become a Premium Member” (para [48]); and
- that commencing in June 2012 Lyonesse International, Lyonesse Asia and Lyonesse Australia “promoted the Lyonesse Loyalty Program by training members to promote the Lyonesse Loyalty Program in Australia at workshops known as Lyonesse Business Workshop 1 and Lyonesse Business Workshop 2” (para [60]).

A common “battle line” behind which the Respondents sought shelter were the terms and conditions which regulated the rights of the Members of the Lyonesse Loyalty Program. The written submissions of the Respondents thus contended that in “circumstances where the receipt by a member of benefits in excess of the amount of a voucher down payment was entirely dependent upon the amount and value of shopping undertaken by the member and/or those he subsequently introduced to the program, neither the Global Go Getters nor anyone from Lyonesse would be in a position to be able to say, with any confidence, whether or not the new member would ever receive benefits of that volume”. The submissions further contended that “[e]verything would turn on the amount of shopping undertaken by persons whose identity was not even known to the Global Go Getters or Lyonesse”. Any alleged holding out, it was contended “would have no substantial persuasive quality”.

177 That submission advanced on behalf of the Respondents is rejected. Although the contractual route whereby benefits may ultimately be received might assume relevance to whether

payments were received “*in relation to the introduction to the scheme of further new participants*”, the resolution of that issue stands separate and apart from the nature of the inducements held out to potential new participants.

178 In respect to para [44], it is understood that the allegation is that Mr John Neill, Ms Margot Rylah, Ms Gayle Roberts, Ms Teri Bartolo and Ms Shannon Friedman were induced to make “*Down Payments ... by the prospect held out to them that they would thereby become entitled to receive financial benefits being Extended Member Benefits of a higher value than those Down Payments*”.

179 It is further understood that the allegation in para [45] is that the *Global Go Getters* there named held out the prospect “*that financial benefits in excess of the payment required to acquire the membership could be derived by attendees who became Premium Members and recruited further Premium Members*”. These prospects are alleged to have been held out “*through webinars*”, being the “*webinars*” particularised.

180 For the purposes of para [44] of the *Amended Statement of Claim* (for example), the argument of the Respondents was further refined such that they submitted that the phrase “*Extended Member Benefits*” as employed in para [44] was itself defined in para [21]. And para [21], the Respondents then submitted, was confined to the benefits there identified and that it was those Members “*who held Units in the Lyoness Accounting Program [who] were eligible to receive benefits*”. It was cl 7 of the *Additional Terms and Conditions* which addressed “*Extended Member Benefits*”; and all Members – not only Premium Members – were entitled to sign those *Additional Terms and Conditions* and receive “*Extended Member Benefits*”.

181 There was, with respect, a certain disharmony between (for example) paras [21] and [44] of the *Amended Statement of Claim*, and a certain disharmony between the entitlements conferred by the contractual terms and conditions and the pleadings. But “*inducements*” for the purposes of s 45(1)(b), it is considered, are not confined to a search of contractual terms and conditions.

182 Notwithstanding that disharmony, the case for the Commission was relatively simple: by reason of what was conveyed in the “*webinars*”, inducements were held out to persons, namely that by becoming Premium Members there was a prospect that they would receive financial benefits in excess of the payments they made to secure premium membership.

183 So construed, and leaving aside the conclusion as to the construction of the phrase “*in relation to*” in s 45(1)(b), the allegations advanced by the Commission in paras [44] and [45] should otherwise be accepted.

184 For the purposes of paras [44] and [45], and if attention is focussed on what was said to persons such as Ms Rylah and Mr Neill and what was conveyed in the “*webinars*”, there can be no doubt that consumers were being told that they had a prospect of receiving benefits by participating in the Lyoness Loyalty Program, including not only discounts when goods were purchased from Loyalty Merchants but also benefits in the form of *Extended Members Benefits* and “*passive income*”. Such was the evidence of Ms Rylah. The “*flipcharts*” prepared by Mr Neill, for example, referred to “*10 different income streams*” and depicted (*inter alia*) a “*maturity value*” of £14,914.80 as against a “*Down Payment*” of £1,800. Without attempting to be exhaustive, the “*webinars*” particularised in para [45] variously made to reference to:

- the “*unique opportunity*” being offered to “*founding members*” by the *Global Go Getters*;
- *Extended Member Benefits*;
- the prospect of earning additional money and “*passive income*”, with repeated examples being provided as to the amount by reference to the “*Career Levels*” under discussion; and
- the prospect of moving up the “*Career Levels*” and earning “*more money*”.

Although much of the evidence of Mr Neill was the subject of objections taken at the outset of the hearing, it is considered that it remains admissible. The evidence is relevant to what consumers were being told. Similar evidence was, in any event, given by Ms Rylah to which no objection was taken. No reliance, however, was placed upon certain language which may be unique to a particular witness – such as Mr Neill and his use of the term “*investment*”.

185 Notwithstanding the width and generality of the statements that have been made to prospective new Members, none of those statements is tantamount to the prospect that a Member “*will be entitled*” to the receipt of a benefit. The prospect of future benefits is certainly conveyed by the statements made; but such statements fall short of a statement being made that a person “*will be entitled*” to the receipt of such benefits as required by s 45(1)(b). And such representations as were made as to the prospect of receiving benefits cannot be taken out of the context in which they were made. That context included not only

the prospect of receiving benefits by participating in the Lyoness Loyalty Program; that context also included an explanation as to the manner in which that program operated. Part of that context was the fact that the prospect of receiving a benefit – or any “*entitlement*” to receive a benefit – depended not only upon the “*introduction to the scheme of further new participants*” – but also upon those introduced Members themselves engaging in future shopping activities. Free from any consideration as to the terms of any contractual relationship between the parties, this is in fact the manner in which the program was being explained.

186 Although it is concluded that the Commission has met with some factual success in respect to its allegations in paras [44] and [45] of the *Amended Statement of Claim*, it must further be recognised that conduct between September 2011 and April 2012 would have assumed little relevance to any further conclusion regarding any current contravention of s 45 of the *Australian Consumer Law*.

187 In paras [46] to [49] the Commission shifts its attention to the *Lyoness Movie*, the scripts used in presenting the movie and “*training materials used in conjunction with the Lyoness Movie*”. Paragraph [46] addresses the period “*in or around March 2012*”; para [47] addresses the period “*from no later than May 2012*”. The Respondents’ *Defence* to paras [46] and [47] admits that “*in or about February 2012, Lyoness International produced a video in relation to the Lyoness Loyalty Program*” and that the video “*was available to be viewed by any member of the public on the internet site of Lyoness Australia*”. It is further admitted that “*in or about April 2012, Lyoness Asia produced written materials in relation to the Lyoness Loyalty Program*”. It is also admitted that the *Lyoness Movie* and the written materials were “*provided to the public about the operation of the Lyoness Loyalty Program*” and “*were able to be used by Members who wished to recommend the Lyoness Loyalty Program to other people*”. Otherwise paras [46] and [47] are denied by the Respondents.

188 The same disharmony between the contractual terms and the pleadings persists. But, again the case for the Commission is relatively simple: when the *Lyoness Movie*, the scripts and training materials are reviewed, there can be distilled from those materials inducements for persons to become Premium Members because by doing so they would become entitled to financial benefits greater than the costs of the “*Down Payment*”.

189 For the purposes of para [48] of the *Amended Statement of Claim*, in respect to the *Lyoness Movie* and the scripts, it is concluded that the prospect was held out to persons that they may receive benefits greater in value than the cost of the Down Payment. The substance of the

allegation, it is considered, is the prospect of persons receiving financial benefits greater than the cost of the “*Down Payment*”. The fact that such benefits were not confined to Premium Members, as alleged, and that there was no requirement to make a “*Down Payment*” in order to become a Premium Member, it is respectfully concluded, does not detract from the substance of the allegation being advanced in para [48].

190 If reference is made to the *Lyoness Movie*, extracts from the movie quantified the potential “*volume bonus*” and “*volume commission*” that would be payable at various “*Career Levels*”. The scripts that accompanied the *Lyoness Movie* also quantified the value in Australian dollars of the “*Volume Bonus*” and “*Volume Commission*”. This was depicted in those scripts as “*Career Income*”. As from around March 2012, by way of further example, those watching the longer *Lyoness Movie* were told that “*things are going to happen very fast*”. People were encouraged to move quickly because otherwise “*it would be too late to build a substantial business by recommendations*”.

191 But reservation is expressed as to whether or not these findings as to the character of the inducements held out to Members would of themselves be sufficient to make good the pleading in para [51] of the Commission’s *Amended Statement of Claim*. That allegation may have been made out if (for example) the concluding words to that allegation were deleted such that the allegation was confined as follows:

By reason of the matters alleged in paragraphs 14 to 34 and 42 to 50, inducements of real or substantial financial benefits were held out to new Premium Members of the Lyoness Loyalty Program ~~that were derived substantially from the recruitment of new Premium Members.~~

But such was not the allegation made by the Commission. The deleted phrase, it is considered, is a description as to the character of the benefits rather than a description of the “*inducements*” held out. As the Respondents correctly pointed out, “*the recruitment of new Premium Members*” did not of itself confer any “*benefit*” upon an existing Member other than the prospect of receiving benefits derived from the spending of the recruited Members.

REFERRAL SELLING – SECTION 49

192 The alleged contraventions of s 49 are levelled by the Commission against Lyoness Asia and Lyoness Australia.

193 This part of the Commission’s case received comparatively far less attention than its case in respect to pyramid selling.

194 For the purposes of s 49, it is alleged (*inter alia*) that:

- representations were made by both Lyoness Asia and Lyoness Australia whereby persons were induced to become Premium Members; and that
- those representations were “*that each such Member would receive benefits in return for recommending new Members to the Lyoness Loyalty Program...*”.

The “*benefits*” included “*receipt of Direct Friendship Bonus and Indirect Friendship Bonus*”.

195 The form of the pleading in the *Amended Statement of Claim* was as follows:

Contraventions – Referral Selling

66. The receipt of Direct Friendship Bonus and Indirect Friendship Bonus by a Premium Member was contingent on shopping by those Members with Units Down Line from the Units held by the Premium Member with Loyalty Merchants.
67. The amount of Loyalty Commission, Loyalty Commission Bonus, Volume Commission or Volume Bonus which a Premium Members might receive was contingent on down Payments made by Members with Units Down Line from the Units held by the Premium Member.
68. By reason of the matters alleged in paragraphs 46 to 49 Lyoness Asia induced persons to become Premium Members by acquiring Units in the Lyoness Accounting Program by representing that each such Member would receive benefits in return for recommending new Members to the Lyoness Loyalty Program.

Particulars

The benefits were Direct Friendship Bonus, Indirect Friendship Bonus, Loyalty Commission, Loyalty Commission Bonus, Volume Commission and Volume Commission Bonus.

69. By reason of the matters alleged in paragraphs 46 to 49 and 60 Lyoness Australia induced persons to become Premium Members by acquiring Units in the Lyoness Accounting Program by representing that each such Member would receive benefits in return for recommending new Members to the Lyoness Loyalty Program.

Particulars

The Applicant repeats the particulars to paragraph 68.

70. The price of Premium Membership was less than \$40,000.

Particulars

In every case a person acquired Premium Membership by payments which did not exceed \$30,000.

71. By reason of the matters alleged in paragraphs 66, 68 and 70 Lyoness Asia engaged in referral selling within the meaning of s. 49 of the *Australian Consumer Law* (Cth).
72. By reason of the matters alleged in paragraphs 66, 69 and 70 Lyoness Australia engaged in referral selling within the meaning of s.49 of the *Australian Consumer Law* (Cth).
73. Further, or in the alternative to paragraph 72, Lyoness Australia was knowingly concerned in or partly to the contravention by Lyoness Asia alleged in paragraph 71 within the meaning of s.224 of the *Australian Consumer Law* (Cth).

196 It is concluded that the claimed contravention of s 49 should be rejected because:

- the phrase appearing in s 49, namely that a consumer “*will ... receive a rebate, commission or other benefit in return for*” (relevantly) “*giving ... the names of*

prospective customers...” should be construed in a manner comparable to the phrase in s 45 (namely, “*in relation to the introduction to the scheme of further new participants*”) and that the phrase in s 49 requires a “*relevant, sufficient or material connection or relationship*” between the giving of the names and the receipt of the benefit, and that that relationship has not been made out.

This conclusion renders it unnecessary to make any further findings or to express any separate conclusions on other factual and legal submissions as were advanced. Again, however, briefly addressed are:

- the pleadings in paras [68] and [69] of the *Amended Statement of Claim*.

A representation that a consumer will receive a benefit in return for – s 49

197 Section 49, it should be noted at the outset, is drafted in terms of a representation being made that a consumer “*will ... receive a rebate, commission or other benefit in return for...*” (relevantly) giving “*the names of prospective customers...*”.

198 Three features of s 49 should be noted at the outset.

199 First, s 49 is potentially cast in narrower terms than s 45(1). That the terms of s 49 require a representation to be made that a “*consumer will ... receive a rebate*”, stands in contrast to the width of language employed in s 45(1)(b), namely that the making of a participation payment has been induced “*by the prospect held out to a new participant that they will be entitled...*” to a recruitment payment. But both ss 45 and 49 are directed to a common end. In the case of s 45 it is “*the prospect*” that a new participant “*will be entitled*” to a recruitment payment. In the case of s 49 it is the fact that a consumer “*will receive*” a benefit. Notwithstanding a common objective, s 45 is drafted with all the width of meaning that the phrase “*the prospect*” naturally conveys. In this regard, s 45 may have a wider reach than s 49.

200 Second, s 49 is drafted in terms of a person inducing a consumer to acquire goods or services “*by representing that the consumer will ... receive a rebate, commission or other benefit...*”. Section 45 does not include any qualification as to the means by which the “*participation payments*” may be induced – s 45(1)(b) merely requires that the participation payment be “*induced by the prospect held out...*”.

201 Third, and irrespective of whether or not s 49 is drafted in narrower terms than s 45, s 49 requires that a representation be made that a consumer will receive a benefit “*in return for*” giving “*the names of prospective customers...*”.

202 Notwithstanding such differences as may emerge from the manner in which ss 45 and 49 have been drafted, s 49 does require that a consumer “*will ... receive a rebate, commission or other benefit in return for*” (relevantly) “*giving ... the names of prospective customers...*”.

203 Again, and as with the case involving pyramid selling, the two steps that must be taken when considering s 49 involve:

- the interpretation to be given to the statutory phrase “*will ... receive a rebate ... in return for...*”; and
- the application of that phrase to the facts of the present case.

204 Consistent with the interpretation given to the phrase appearing in s 45, namely “*in relation to the introduction to the scheme of further new participants*”, it is concluded that the statutory phrase of present relevance also requires a “*relevant, sufficient or material connection or relationship*” between the giving of the names and the receipt of the benefit: see *Australian Communications Network* [2005] FCAFC 221 at [29], (2005) 146 FCR at 421.

205 The decision of Lindgren J in *Giraffe World*, it is respectfully concluded, does not stand in the way of this conclusion being reached and is indeed consistent with that conclusion. The facts of *Giraffe World* revolved around the marketing of an “*ion mat*” which was said to benefit the health of persons who slept on it. The case for the Australian Competition and Consumer Commission in that case included allegations of misleading or deceptive conduct. The Commission further alleged that Giraffe World had engaged in “*referral selling*” contrary to the provisions of the then s 57 of the *Trade Practices Act*. It alleged that Giraffe World had promoted a scheme involving membership of a “*Giraffe Club*” (“GC”) and of a “*Grow Rich System*” (“GRS”). Importantly for present purposes, in outlining the scheme Lindgren J there observed:

[15] I need not describe every aspect of the GRS, and, therefore, of the Scheme of which the GRS was the most important part. It suffices that I give an outline at this stage. A member of the GRS was entitled to be paid commission by GW for successfully “*introducing*” newcomers. The evidence is not clear as to what the notion of “*introduction*” meant. Ultimately, nothing turns on the point, and I will assume in favour of GW and as it contends, that the commission earning event was the introduction of someone who bought a Mat, whether or not that person also joined the GC or the GRS or both.

His Honour proceeded on the assumption that “*member A of the GRS would earn a direct commission for introducing another person (B) to buy the Mat, and if B became a member of the GRS, A would earn indirect commissions as B introduced others to buy the Mat*”: [1999] FCA 1161 at [16], (1999) 95 FCR at 307. The question that did arise for resolution in *Giraffe*

World was “whether GW induced a consumer to acquire the Mat or the membership rights, or both, by representing that that consumer would afterwards receive commissions in return for assisting GW to supply the Mat or such membership rights to others, if receipt of the commissions was contingent on an event occurring after the consumer made his or her own contract”: [1999] FCA 1161 at [29], (1999) 95 FCR at 311 (Emphasis in original). But the assumptions that were made by Lindgren J meant that his Honour’s attention was not directed to the different question of what was required to be proved to make good an allegation that a consumer “will ... receive a rebate, commission or other benefit in return for giving ... the names of prospective customers” then appearing in s 57 of the *Trade Practices Act*.

206 The interpretation of that phrase, it is thus concluded, should be the same as the interpretation given to the comparable phrase in s 45(1)(b) by the Full Court in *Australian Communications Network*.

207 And as with the like conclusion in respect to s 45, on the facts of the present case it is likewise concluded that there is no sufficient connection or relationship between the giving of the names and the receipt of the benefit. On the facts of the present case, the giving of the names of itself did not give rise to the receipt of any benefit. Any benefit was again dependent upon the named person in fact taking further steps, including shopping.

208 The facts of the present case do not give rise to the “evil” against which the prohibition of referral selling is directed.

The inducements by representations held out

209 Section 49, in contrast to s 45(1)(b), refers to “induc[ing] a consumer to acquire goods or services by representing that the consumer ... will receive a rebate, commission or other benefit...”. The reference to “representing” is missing from the language of s 45(1)(b). But nothing was sought to be made by either the Commission or the Respondents of this difference in statutory language.

210 Paragraphs [68] and [69] of the *Amended Statement of Claim*, being paragraphs directed to Lyoness Asia and Lyoness Australia respectively, identify:

- the source of the “inducement” held out – being, in respect to para [68], those “matters” referred to in paras [46] to [49] of the *Amended Statement of Claim* and, in the case of para [69], paras [46] to [49] and para [60] of the *Amended Statement of Claim*;

- the character of that “*inducement*” – namely an inducement to “*persons to become Premium Members by acquiring Units in the Lyoness Accounting Program*”;
- the nature of the “*representations*”, namely representations that Members “*would receive benefits in return for recommending new Members*”; and
- the character of those “*benefits*”, particularised as “*Direct Friendship Bonus, Indirect Friendship Bonus, Loyalty Commission, Loyalty Commission Bonus, Volume Commission and Volume Commission Bonus*”.

Paragraphs [68] and [69], it should thus be noted, contain a series of discrete allegations. It may well have been preferable for each discrete allegation to have been separately pleaded such that each discrete allegation could be separately resolved. But such uncertainty as is thereby generated may be left to one side.

211 What is relatively certain is that by reason of the difference in the statutory language employed in ss 45 and 49, the allegations in paras [68] and [69] of the *Amended Statement of Claim* appropriately shift attention to the “*representations*” that are said to have been made.

212 The correct factual character of the various statements referred to in paras [46] to [49] and para [60] of the *Amended Statement of Claim*, however, has previously been resolved. No different factual conclusion is reached in respect to the character of those statements for the purposes of s 49. Consistent with the earlier conclusion in respect to para [51], it is presently concluded that representations were in fact made that Members would receive benefits. But such representations as were made necessarily have to be construed in context. And that context includes the explanation as to the manner in which the Lyoness Loyalty Program operated and the need for introduced Members to in fact engage in shopping before any benefits would flow. Even divorced from the terms of the contractual relationship between the parties, such representations as were made as to the receipt of benefits were made in the context of the manner in which the program operated.

213 For the purposes of paras [68] and [69] of the *Amended Statement of Claim*, reservation is thus expressed as to whether there was in fact a representation that a Member would receive a benefit in return for giving the names of further new Members *simpliciter*; given the context in which representations were made, the more accurate characterisation of what was being conveyed to consumers was the prospect that they would receive benefits, not simply by reason of introducing new Members, but the prospect that they would receive benefits if the

new Members they introduced in fact went on to engage in shopping activities at Loyalty Merchants.

214 Further reservation as to whether the Commission has made good its allegations in paras [68] and [69] of the *Amended Statement of Claim* arises by reason of:

- the pleading that by reason of the “*matters alleged in paragraphs 46 to 49 and 60*” persons were “*induced ... to become Premium Members by acquiring Units in the Lyonesse Accounting Program*” – one reservation being whether persons were induced to become Premium Members “*by acquiring Units in the Lyonesse Accounting Program*”, and another reservation arises by reason of the fact that the particularised “*benefits*” were not necessarily confined to those who became “*Premium Members*”; and
- the pleading that Members “*would receive benefits in return for recommending new Members*” – no “*benefit*” being received simply by reason of the fact of either recommending or introducing new Members.

Further to this last consideration, and consistent with their submission in respect to para [51] of the *Amended Statement of Claim*, the Respondents submitted in respect to para [68] that:

Further, and contrary to the allegation pleaded in paragraph 68, there were no representations made that a member would receive benefits “in return for recommending new members to the program”. Again, as previously explained, what was stated (and what is obvious from the terms of the program) is that a member receives nothing for introducing a new member. The only rewards are those which flow from actual shopping.

Whether by design or otherwise, the pleading in para [68] is, to this extent, different to that in para [51]. The presently relevant part of para [68] is the pleading that representations were made that “*each such Member would receive benefits in return for recommending new Members to the Lyonesse Loyalty Program*”. But, as with the comparable finding made in respect to s 45 and para [51] of the *Amended Statement of Claim*, the present finding in respect to para [68] is again a finding that does not seek to address the impact of those contractual terms and conditions which constrain the receipt of any “*benefits*” to that arising from actual shopping – as opposed to the mere fact of introducing new Members. If it were necessary to do so, no finding would be made that any particular consumer was in fact induced to become a Member by reason of the “*representations*” made.

215 Although it is unnecessary to pursue these considerations further, had a contrary conclusion been reached in respect to the construction of s 49 of the *Australian Consumer Law*, it would

most probably have been concluded that the Commission did not make good its pleadings in paras [68] and [69] of its *Amended Statement of Claim*.

CONCLUSIONS

216 The *Amended Statement of Claim* and the *Further Amended Originating Application* should be dismissed.

217 For the purposes of the “*pyramid selling*” part of its case, the Commission has failed to establish that:

- such participation payments as were made were induced by the prospect held out that new participants would receive a benefit “*in relation to the introduction of the scheme of further new participants*” for the purposes of s 45(1)(b) of the *Australian Consumer Law*.

The Commission has also failed to make good its pleadings in the following paragraphs of its *Amended Statement of Claim*, namely:

- paras [39] and [40]; and
- paras [42] and [43].

Even had a different conclusion been reached, declaratory relief in the form of *Annexure A* to the *Further Amended Originating Application* would have been refused. There was a disturbing lack of correlation between that *Annexure* and the pleadings. *Annexure A*, more importantly, did not accurately describe the Lyoness Loyalty Program in Australia.

218 For the purposes of the “*referral selling*” part of its case, the Commission has similarly failed to establish that:

- a consumer “*will ... receive a rebate, commission or other benefit in return for*” (relevantly) “*giving ... the names of prospective customers...*” for the purposes of s 49 of the *Australian Consumer Law*.

219 Given these conclusions, it is unnecessary to resolve any question regarding the participation of any of the Respondents in contraventions of the *Australian Consumer Law* which have not been found to have occurred. No conclusion is thus expressed in respect to paras [62] to [65] or para [73] of the *Amended Statement of Claim*.

220 There is no reason why costs should not follow the event.

THE ORDERS OF THE COURT ARE:

1. The proceeding is dismissed.
2. The Applicant is to pay the costs of the Respondents.

I certify that the preceding two hundred and twenty (220) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 23 October 2015