FEDERAL COURT OF AUSTRALIA

Director of Consumer Affairs Victoria v Gibson [2017] FCA 240

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| File number: | VID 535 of 2016 |
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| Judge: | **MORTIMER J** |
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| Date of judgment: | 15 March 2017 |
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| Catchwords: | **CONSUMER LAW** – alleged contraventions of ss 18, 21, 29 of the Australian Consumer Law – issues of evidence where respondent does not participate in proceedings – application of s 4 of the Australian Consumer Law – consideration of implied representations – application of federal and state-based Australian Consumer Law |
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| Legislation: | *Australian Consumer Law and Fair Trading Act 2012* (Vic), ss 8, 10, 11, 12, 109, 110, 126, 195, 196  *Competition and Consumer Act 2010* (Cth) Sch 2, *Australian Consumer Law,* ss 4, 18, 21, 22, 29, 224, 232, 246  *Corporations Act 2001* (Cth), s 500(2)  *Evidence Act 1995* (Cth), ss 64, 81, 190(3)  *Trade Practices Act 1974* (Cth), ss 51A(2), 52 |
|  |  |
| Cases cited: | *Australian Competition and Consumer Commission v A Whistle & Co (1979) Pty Ltd* [2015] FCA 1447  *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74, 192 FCR 34  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2014] FCA 634, 317 ALR 73  *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682  *Australian Competition and Consumer Commission v Lux* *Distributors Pty Ltd* [2013] FCAFC 90  *Australian Competition and Consumer Commission v P & N Pty Ltd* [2014] FCA 6  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54, 250 CLR 640  *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226, 148 FCR 132  *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, 238 CLR 304  *Campomar Sociedad, Limitada and Anor v Nike International Limited and Anor* [2000] HCA 12, 202 CLR 45  *Commonwealth Bank of Australia v ZYX Learning Centres Limited* [2014] NSWSC 1676  *Crowley v WorleyParsons Limited* [2017] FCA 3  *Cummings v Lewis* (1993) 41 FCR 559  *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31  *Director of Consumer Affairs Victoria v Dimmeys Stores Pty Ltd and Ors* [2013] FCA 618, 213 FCR 559  *Fletcher v Nextra Australia* [2015] FCAFC 52  *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* [1984] FCA 167, 2 FCR 82  *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1, 249 CLR 435  *Hornsby Building Information Centre Proprietary Limited and Anor v Sydney Building Information Centre Limited* [1978] HCA 11; 140 CLR 216  *Lejzor* *Teper v The Queen* [1952] AC 480  *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* [2010] HCA 31, 241 CLR 357  *North East Equity Pty Ltd v Proud Nominees Pty Ltd and Anor* [2012] FCAFC 1, 285 ALR 217  *Pollitt v The Queen* [1992] HCA 35; 174 CLR 558  *Prior v Mole* [2017] HCA 10  *Rafferty and Anor v Madgwicks* [2012] FCA 37, 287 ALR 437  *REA Group Limited v Fairfax Media Limited* [2017] FCA 91  *Walker v Sell* [2016] FCA 1259 |
|  |  |
| Date of hearing: | 13 September 2016 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area | Regulator and Consumer Protection |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 247 |
|  |  |
| Counsel for the Applicant: | Ms CG Button |
|  |  |
| Solicitor for the Applicant: | Consumer Affairs Victoria |
|  |  |
| Counsel for the Respondents: | Respondents did not appear |
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| **Table of Corrections** |  |
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| 22 September 2017 | In paragraph 233, in the second sentence, “form” has been changed to “from”. |
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| 22 September 2017 | In paragraph 233, in the fourth sentence, “proposition” has been changed to “proportion”. |

ORDERS

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|  | | VID 535 of 2016 |
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| BETWEEN: | DIRECTOR OF CONSUMER AFFAIRS VICTORIA  Applicant | |
| AND: | ANNABELLE NATALIE GIBSON  First Respondent  INKERMAN ROAD NOMINEES PTY LTD (ACN 164 850 748) (IN LIQUIDATION)  Second Respondent | |

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| JUDGE: | MORTIMER J |
| DATE OF ORDER: | 15 March 2017 |

THE COURT DIRECTS THAT:

1. On or before 4 pm on 22 March 2017, the applicant file and serve proposed minutes of final orders, including any proposed form of declaratory relief, reflecting the Court’s reasons for judgment, together with a short submission as to why the proposed minutes of order are appropriate.
2. On or before 4 pm on 22 March 2017, the applicant file and serve any submissions on costs, limited to three pages.
3. The proceeding is otherwise adjourned to a date to be fixed for the consideration of relief by way of penalty.

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

REASONS FOR JUDGMENT

MORTIMER J:

# INTRODUCTION

1. This application is brought by the Director of Consumer Affairs Victoria (***Director***), under the *Australian Consumer Law and Fair Trading Act 2012* (Vic). Under s 8, the Victorian Act adopts the *Australian Consumer Law* set out in Schedule 2 to the *Competition and Consumer Act 2010* (Cth), into Victorian law. I will refer to the Australian Consumer Law, as adopted by Victoria, as “ACL (Vic)” in this judgment. The Director also relies on the ACL itself, and generally makes common allegations under both the federal and state law. Under ss 10, 109 and 110 of the *Australia Consumer Law and Fair Trading Act*, the Director is authorised to bring the proceeding in respect of the ACL (Vic). The Director is also authorised to bring the proceeding in respect of the federal ACL, on the basis that he is an “other person” for the purposes of s 232(2) of the ACL: *Director of Consumer Affairs Victoria v Dimmeys Stores Pty Ltd and Ors* [2013] FCA 618, 213 FCR 559 at [5] (Marshall J). The Court has accrued jurisdiction in respect of the alleged contraventions of state law: see *Walker v Sell* [2016] FCA 1259 at [83]-[85] (Bromwich J).
2. This proceeding concerns alleged conduct of the first respondent, Ms Annabelle Natalie Gibson, in relation to her claims of being diagnosed with brain cancer. The Director alleges that, in the course of developing and promoting a smart phone application and a book, Ms Gibson falsely claimed to have been diagnosed with brain cancer, and claimed to have rejected conventional cancer treatments in favour of embarking on a quest to heal herself naturally. Ms Gibson promoted herself and the claims which are the subject of this proceeding both under her own name and under a business name, “The Whole Pantry”. It is also alleged that, while she claimed that part of the proceeds of sales of the application and the book would be donated to charities, many or most of these donations were not made. The Director contends these claims were made by Ms Gibson through the second respondent, now called Inkerman Road Nominees Pty Ltd which was a company owned and operated by Ms Gibson. At all relevant times, Ms Gibson was its sole director and shareholder. It was incorporated on 17 July 2013 and was, at the time of the conduct said to contravene the ACL and the ACL (Vic), named “Belle Gibson Pty Ltd”. Liquidators were subsequently appointed for the company on 15 April 2016, and after their appointment, the company name was changed to “Inkerman Road Nominees Pty Ltd” on 17 July 2016. I shall refer to it as “the company” where necessary.
3. On 24 May 2016, the day the originating process was filed in this Court, a Registrar made orders granting leave under s 500(2) of the *Corporations Act 2001* (Cth) for the Director to commence and proceed with proceedings against the company, on the condition that the Director will not seek to enforce any judgment against or recover any money from the company without leave of the Court. Accordingly neither the liquidators nor the company have taken any active part in the proceeding.
4. Ms Gibson has not defended the proceeding, nor participated in it. On 8 June 2016, the Director’s solicitors advised my associate that they had been notified that Mills Oakley was acting for Ms Gibson in relation to these proceedings. On 10 June 2016, neither respondent appeared at the first case management hearing. No notice of address for service had been filed by, or on behalf of, either respondent. At that hearing, I ordered that Ms Gibson file a notice of address for service and a defence by 10 July 2016. Ms Gibson subsequently sent a letter to my chambers on 24 June 2016, expressly stating that she would not be defending the proceeding. It is clear from the evidence that although Mills Oakley were acting for Ms Gibson in relation to some matters, they were not instructed by her to file a notice of address for service nor to formally represent her in this proceeding. The matter proceeded to trial on 13 September 2016, without appearances by or on behalf of either respondent.
5. The Director seeks injunctions, declarations, pecuniary penalties, publication orders and costs in respect of alleged contraventions by the respondents of ss 18, 21 and 29 of the ACL and ACL (Vic). The Director submitted the question of liability should be determined first, and given the matter was undefended, I acceded to this submission. Accordingly, this judgment deals with the question of whether the alleged contraventions are made out.
6. For the reasons that follow, I find that the Director has proven the alleged contraventions of s 18 of the ACL and ACL (Vic), some of the alleged contraventions of s 21, but not the alleged contraventions of s 29.

# FACTS

## Evidentiary matters

1. This part of my reasons deals with what I find on the evidence before me to be the factual circumstances surrounding the alleged contraventions of the ACL and ACL (Vic). In support of the application, the Director led the relevant evidence:
2. an affidavit of Hayden Thomas Bellis dated 6 September 2016, together with 38 exhibits. Mr Bellis’ affidavit provided the primary evidence relied upon by the Director, exhibiting evidence including statutory notices issued by Consumer Affairs Victoria to various recipients, in relation to their investigation into Ms Gibson and her company; responses to those notices, excerpts of Ms Gibson’s book, screenshots of her Facebook and Instagram accounts, a screenshot of Ms Gibson’s website, media articles and a transcript of Ms Gibson’s interview on the television program *60 Minutes*;
3. an affidavit of Timothy Simon Sherry dated 6 September 2016, together with four exhibits. Mr Sherry’s affidavit exhibited evidence as to the description of the Android version of The Whole Pantry app;
4. an affidavit of Peter Tziotis dated 13 September 2016, together with seven exhibits. Mr Tziotis’ affidavit provided evidence in relation to attempts by Mr Tziotis of Consumer Affairs Victoria to inform Ms Gibson of the intention to file a series of “without prejudice” letters sent between Consumer Affairs Victoria and Ms Gibson’s lawyers, for the purposes of this proceeding; and
5. a supplementary affidavit of Hayden Thomas Bellis dated 19 September 2016, together with eight exhibits. Mr Bellis’ supplementary affidavit exhibited further evidence including a further media article and screenshots of the various charities that Ms Gibson claimed to have donated to.
6. Some of the evidence adduced by way of documents exhibited to these affidavits was produced by the respondents in response to Notices served on them through their solicitors. Those Notices were given under s 126(1) of the *Australian Consumer Law and Fair Trading Act*. Although the Director was empowered by s 126(2) to do so, the Director did not require Ms Gibson to give answers to questions asked of her on oath or by affirmation. Indeed, the evidence demonstrates that although required to do so by a Notice under s 126(1)(b) and (c) of the *Australian Consumer Law and Fair Trading Act*, Ms Gibson did not attend for a compulsory examination on 23 February 2016. The Director then wrote to Ms Gibson’s solicitors, Mills Oakley lawyers on 18 March 2016. Ms Gibson’s solicitors provided answers on instructions from Ms Gibson, describing the provision of these answers as being on a without prejudice basis. The evidence discloses the Director understood the basis for the claim of without prejudice to be the possible enforcement of the Notices against Ms Gibson. Shortly before the trial was scheduled to commence, Mr Tziotis wrote to Mills Oakley putting them, and their client Ms Gibson, on notice that the Director intended to rely on the answers and information provided by Mills Oakley pursuant to the Notices in order to prove the Director’s allegations in this proceeding. Mills Oakley, and through them Ms Gibson, were given an opportunity to object to the course of conduct proposed by the Director. No responses to the Director’s correspondence were received.
7. I note there is no doubt from the correspondence sent by the respondents’ solicitors that it was Ms Gibson who provided information and instructions to her solicitors for inclusion in the documents answering the Notice. The Director appears to regard this as a sufficiently reliable source of information and has not otherwise sought to prove many of the facts contained in the answers by any other means
8. Section 126(1) Notices were also issued to Apple Australia, Nine Network Australia and Penguin Australia. Answers were provided through lawyers representing each of these organisations. The Director did not call on any representatives from Apple, Nine or Penguin to give evidence at the hearing. No attempt was made by the Director to comply with s 64 of the *Evidence* *Act 1995* (Cth), in order to prove (for example) that calling the makers of the statements to testify would cause undue expense or undue delay, or would not be reasonably practical. No attempt was made otherwise to comply with the rules of evidence in inviting the Court to rely on this material. There is no evidence of a s 126(1) Notice having been issued to Google Australia, Google Play or any corporation associated with Google.
9. In the circumstances of Ms Gibson electing not to defend the proceeding, I am satisfied it is appropriate to waive compliance with the rules of evidence pursuant to s 190(3) of the *Evidence Act*. I consider the subject matter of the answers given by the three organisations is not genuinely in dispute in these proceedings. These proceedings were conducted in public and were reported, in circumstances where no application was made by any of Apple, Nine, or Penguin that the Court should suppress or refuse to admit material provided by them to Consumer Affairs Victoria.
10. By s 126(3) of the *Australian Consumer Law and Fair Trading Act*, it is an offence not to comply with a Notice, or to give false or misleading information or evidence in answer to a Notice. By s 126(4) the privilege against self-incrimination is abrogated, although by s 126(5) there is a use-immunity provision in respect of criminal proceedings. Section 126(5) is not applicable to these proceedings. Given Ms Gibson, through her solicitors, had an opportunity to object to the use of the answers and information provided in this proceeding but did not do so, and chose not to defend the proceeding at all, I am prepared to treat the answers given pursuant to the Notices by the respondents’ solicitors on Ms Gibson’s instructions as admissible. I am prepared to accept they are admissions for the purposes of s 81 of the *Evidence Act*.
11. Aside from the answers given to the s 126(1) Notices, a considerable amount of the documentary evidence consists of media articles, in which Ms Gibson is quoted as making certain statements. There is no evidence that, whether contemporaneously, at some subsequent date, or in the context of these proceedings, Ms Gibson has suggested she has been misquoted in the media, or inaccurately quoted. I am prepared to accept that the substance of what she is reported to have said accurately reflects what she did say to the reporters who then attributed quotes to her. In that sense those statements are also capable of constituting admissions for the purposes of s 81 of the *Evidence Act*.
12. Since these proceedings were undefended, there was no opportunity for debate or objections concerning the admission of statements made by others in newspaper reports, entries on social media or similar sources. I include in this category assertions made by reporters or authors on social media themselves, where they were not purporting to quote something Ms Gibson had said. Despite no objections being made to the admission of such material, the underlying rationale for the hearsay rule is the common law’s quest for the most reliable evidence, generally assumed to be direct evidence which, in the adversary system that produced these rules, could be tested before the court charged with the responsibility of finding facts (*Lejzor* *Teper v The Queen* [1952] AC 480 at 486 (Lord Normand); quoted with approval in *Pollitt v The Queen* [1992] HCA 35; 174 CLR 558 at 573 (Brennan J)).
13. The general approach I have taken in this proceeding to evidence of this kind, where the statements do not purport to be Ms Gibson’s own words, is to place little weight on them where they go to matters on which the Director bears a burden of proof. In many cases, other evidence may have been available but there was no explanation why it was not adduced. Evidence about the Schwarz family and the claimed donations to that family is one example. Where statements in newspaper reports or on social media do no more than form some of the background or context of the broader narrative about Ms Gibson’s activities, I have relied on them at some points for that purpose only.
14. In addition to the affidavits and exhibits, the Director filed an annotated statement of claim, with footnotes bearing cross references to the location in the affidavits of evidence supporting particular allegations. This was helpful. However where there are no references in either the Director’s submissions or in the annotated statement of claim to evidence supporting a particular contention or submissions, and on a reasonable search of the somewhat voluminous documents exhibited to the affidavit no supporting evidence can be discerned, I have taken the approach of determining there is no evidence before the Court to support, whether directly or by way of inference, the contention or submissions made.

## Background to Ms Gibson, her company and The Whole Pantry

1. In addition to being the sole director and shareholder of her company, Ms Gibson was also the registered holder of the business name “The Whole Pantry” (ABN 66 776 548 547). Ms Gibson also developed and controlled the following social media platforms:
2. a website at the address www.thewholepantryapp.com;
3. a Facebook account with the identifier “@TheWholePantry”, which account was held in the name the second respondent; and
4. an Instagram account with the identifier “healing\_belle”, which account was held in the name the second respondent.
5. In response to a Notice issued pursuant to s 126(1)(a) and (b) of the *Australian Consumer Law and Fair Trading Act*, dated 27 May 2015, Ms Gibson, through her legal representatives, confirmed that she, and occasionally her assistant, controlled the content loaded to the Facebook and Instagram accounts, but stated that both accounts were her company’s accounts. The website, on the other hand, was controlled by Ms Gibson only.
6. The website, Facebook account and Instagram account were popular. According to statistics she provided to Penguin Australia on 18 September 2013 as part of her book proposal, Ms Gibson claimed that her website had 64,002 views, her Instagram account had 99,000 followers, and her Facebook account had 11,800 “likes”. I will return to Ms Gibson’s relationship with Penguin and her activities in promoting her book later in these reasons.

## Development and sale of the applications and book

1. Under the control of Ms Gibson, and under the name “The Whole Pantry”, Ms Gibson’s company developed and promoted for sale the following products:
2. an Apple smart phone application known as “The Whole Pantry”, sold via the Apple iTunes App Store between about 5 August 2013 and 16 March 2015;
3. an Android smart phone application known as “The Whole Pantry”, sold via the Google Play store, between about September 2013 to around 11 May 2016; and
4. a book known as “The Whole Pantry”, which was authored by Ms Gibson pursuant to a contract between Penguin and her company. This book was published by Penguin in October 2014, and was withdrawn from sale in March 2015.
5. Both the Apple app and the Android app were developed, wholly or partly, by Ms Gibson. The Apple app was sold pursuant to a contract between Apple and Belle Gibson Pty Ltd, while the Android app was sold pursuant to a contract between Google Play and Belle Gibson Pty Ltd. Both versions of the app were successful. During the period in which it was available on the Apple iTunes online store, the Apple app was downloaded over 411,000 times internationally, and over 115,000 times from the Apple Australian App Store. The Android app was downloaded about 17,000 times from the Google Play store. According to statistics provided by Ms Gibson to Penguin in an email dated 25 March 2014, which the Director relied on, the Apple app had won a number of awards including Best App of 2013 – Food and Drink, Runner up Best App 2013 – Overall, and was listed as an “Editor’s Choice Recommendation” in 14 countries. In total, the evidence established that the respondents received over $280,000 in relation to sales of the Apple app, and over $28,000 in relation to sales of the Android app.
6. Following the success of the app, Ms Gibson pitched her “The Whole Pantry” book to Penguin via email on 18 September 2013. In an email to Ms Nicole Abadee of Penguin, Ms Gibson stated:

Last month I launched the worlds first health, wellness and lifestyle app ‘The Whole Pantry’, with its international successes I have been approached by a few publishing houses with interest in turning this vision into a hard copy.

1. The proposal itself, attached to the email of 18 September 2013, stated:

The book will follow on from the success of Belle’s app available on the iPhone and Android market, The Whole Pantry.

1. Subsequently, Belle Gibson Pty Ltd entered into a publishing agreement with Penguin on 19 November 2013, for the publication of The Whole Pantry book. An advance of $132,500 was payable under that agreement, which was paid in full to Ms Gibson’s company, and the book was published in October 2014.

## Statements made regarding brain cancer and natural remedies

1. In the course of developing and promoting the apps and her book, Ms Gibson made a number of statements about being diagnosed with brain cancer in 2009, about eschewing conventional treatments, and pursuing natural remedies to treat her brain cancer. These statements were made on her Facebook and Instagram accounts, during media interviews, as well as in her book and in the apps themselves. In the proposal for the book, attached to her email of 18 September 2013 to Ms Abadee of Penguin, Ms Gibson stated (in the third person):

Belle is a young, twenty-something mother who found herself pregnant with her 3-year-old son, Olivier, just two weeks after being told she wouldn’t ever be healthy enough to conceive. A few months prior, Belle was diagnosed with terminal brain cancer, the pivotal moment which saw her get ‘back to basics’ with health and healing, turning to mother nature and nutrition to lead the way. Still on her journey with cancer, Belle has surpassed the expectations of her specialists and diagnosis, which she gives entire credit to her holistic and nutritional approach to healing.

1. On 24 March 2014, Ms Katrina O’Brien of Penguin sent a copy of a sales booklet to Ms Gibson, seeking her thoughts on the design of The Whole Pantry book and asking Ms Gibson whether there was anything that she would like to change in either the sales booklet, or the book itself. The sales booklet was to be used to market the book at the London Book Fair. Ms O’Brien stated that the sales booklet was not the final design for the book itself, but that “we’ve hit deadline and had to create something from what we had or could research”. This sales booklet contained the following statement:

Diagnosed with terminal brain cancer several years ago she found herself without support and out of sync with conventional medicine. She began a journey of self-education that resulted in a back to basics approach to healing herself with nutrition…

1. On the evidence, Ms Gibson did not suggest to Ms O’Brien that any changes were required. I am prepared, in the circumstances, to infer the sales booklet published by Penguin contained the quoted statement.
2. The Whole Pantry book itself contains a similar statement:

BELLE GIBSON

Belle Gibson is an inspirational young mother… Diagnosed with terminal brain cancer at the age of twenty, she found herself without support and out of sync with conventional medicine. So began a journey of self-education that resulted in her getting back to basics, as she set out to heal herself through nutrition and lifestyle changes. When Belle decided to share her message on Instagram, her message clearly resonated… Encouraged by that, she created The Whole Pantry App with a vision to provide a motivating and supportive resource filled with delicious recipes, wellness guides and lifestyle support. Belle’s aim is to change the world by nourishing ourselves, each other and the earth.

and

THE STORY SO FAR

…

When were you diagnosed with cancer?

In June 2009, at the age of twenty ... I had a stroke at work - I will never forget sitting alone in the doctor’s office three weeks later, waiting for my test results. He called me in and said ‘You have malignant brain cancer, Belle. You’re dying. You have six weeks. Four months, tops...’

When and why did you decide to try to heal yourself?

I tried chemotherapy and radiotherapy for two months....

I pulled myself out of chemo and radiotherapy - my doctors freaked out, but they couldn’t stop me. I started travelling around the country, speaking to anyone who might help me and treating myself through nutrition and holistic medicine. Meanwhile, I just kept reading, educating myself - everything I now know is gleaned from reading, and speaking with as many people as possible.

I was empowering myself to save my own life, through nutrition, patience, determination and love - as well as salt, vitamin and Ayurvedic treatments, craniosacral therapy, oxygen therapy, colonics, and a whole lot of other treatments.

…

…I wanted to share what I had learnt about health and nutrition on my journey with cancer.

I said right from the start that I was a brain cancer patient, on a quest to heal myself naturally.

1. On 21 July 2013, a post was made on Ms Gibson’s Facebook account. Using the first person, Ms Gibson stated:

I have been healing a severe and malignant brain cancer for the past few years with natural medicine, gerson therapy and foods. its working for me and i am grateful to be here sharing this journey with over 70,000 people worldwide...

1. In December 2013, a post was made on the Instagram account, stating:

Josh [a reference to a young boy who did in fact have brain cancer, and to whom I refer again later in these reasons] has a similar malignant, inoperable brain tumour to the one I have…for the week, we chose this family to donate 100% of app sales to, in hopes to find them a medicine, holistic or happy miracle.

1. On 23 July 2014, a post was made on Ms Gibson’s Facebook account, which quoted an article published by *The* *Sydney Morning Herald*:

‘Five years ago Belle Gibson was told she had a brain tumour that could kill her within four months. Today the tumour is still there, under often personally challenging treatment, and Gibson has founded and is running a Melbourne-based iPhone/iPad app company with a global audience.’

1. The description of Ms Gibson’s background on the Android app, published in the “About” section of the app, stated:

When our founder, Belle, was diagnosed with a terminal form of brain cancer she found herself with no support and no knowledge to begin healing…

1. The Director alleged, and I find, that this description on the Android app remained publicly available until the app was withdrawn from sale around 11 May 2016. Indeed, since the description was contained in the app itself, unless individual purchasers deleted the app or the app was updated to remove the statement, the statement would have continued to appear on the app even after its withdrawal from sale.
2. On 24 July 2014, Ms Gibson is quoted in an article published in *The Age* newspaper as saying:

I still have the cancer, but I’m doing really well, considering…

…

‘It’s been a really personal project for me,’ she said. ‘I wanted to share a whole life philosophy. I see my app as a resource, a place to connect and share. We have recommended reading on health, life, and good advice on promoting better living. We are not just about food but what you put on and in your body and about the environment; how we should live, combating stress, achieving wellness and healthy, wholesome lifestyle.’

1. On 16 September 2014, Ms Gibson is quoted in an article published in *The Age* newspaper as saying:

Six weeks after my diagnosis I changed my diet. Like most Australians, I found I was still eating too many sugars, red meat and refined foods.

1. That same article further quotes Ms Gibson as saying:

We are not trying to convert people from one diet or [endorse] one medical journey over another. We are just tying to encourage people to drink more water, eat more whole foods, move your body a little more – small things that have an incremental impact. I feel better than when I was on conventional medicine – but that’s just my path and may not be right for everyone[.]

## Statements made regarding donations to charity

1. Commencing around late 2013, Ms Gibson and her company also made various statements regarding the donation to charity, or to people in need, of proceeds of sale from the apps and the book.

### App launch donations

1. In or about December 2013, a webpage was created on the website “Eventbrite” to sell tickets to the “virtual launch” of The Whole Pantry app. On this webpage, Ms Gibson, through her company, stated:

We wish you could all be part of our world changing events… but unfortunately we havent yet found a room big enough, so instead we are selling virtual ‘tickets’, with proceeds going to the four charities: Birthing Kit Foundation One Girl Asylum Seeker Resource Centre and the Schwarz Family.

…

This ‘online event’ is for those who want to contribute beyond their App download and be part of creating social, global and radical change with us and our closest Wellness, Food and Lifestyle icons.

1. As I note below, the Schwarz family was not a “charity” in the sense of the three organisations mentioned by Ms Gibson in this webpage posting. The Schwarz family were a family caring for their son Joshua, who had brain cancer. However, Ms Gibson created a category for her charitable giving which she called “TWP families” and the Schwarz family were placed in this category.
2. Three of the four nominees to whom Ms Gibson referred, namely the Asylum Seeker Resource Centre, the Birthing Kit Foundation and the Schwarz family, did not receive a donation referrable to the proceeds of the Eventbrite tickets. The evidence discloses that One Girl received a donation of $1,000 on or around 5 March 2015. This donation was made over a year after the event purporting to raise money for One Girl. An article published in the “current affairs” section of the website “Essential Baby” on 10 March 2015 stated that:

Late last week, immediately after questions from Fairfax, The Whole Pantry paid out $1000 to Melbourne charity One Girl, but maintains this was not a ‘knee-jerk reaction’. Prior to the payment, One Girl said it had repeatedly tried to contact Ms Gibson but had not heard from her about the missing donation.

1. Again, there was no suggestion by Ms Gibson, contemporaneously or subsequently, that the fact or timing of the donation to One Girl, as reported online was inaccurate and I am prepared to accept that report accurately reflects what occurred.
2. In its complaint to Consumer Affairs Victoria in March 2015, the ASRC stated that while the organisation had never received donations from Ms Gibson or her company, they had received a donation from Ms Gibson’s partner, Mr Clive Rothwell, of $1,000 on 9 April 2014, using his The Whole Pantry email. I consider this in more detail at [83] and [223].
3. There was also a physical launch of The Whole Pantry app. This occurred, it appears from the evidence, on 6 December 2013, at a function in St Kilda. According to an email in evidence which was sent by Ms Gibson to Alice Dalley of Nine on 16 June 2015, this physical event was also for the purpose of announcing that Ms Gibson was writing a book to complement the content of the apps.
4. The evidence about this event was sparse, but it appears that at this physical launch, a collection jar was passed around seeking donations for the Schwarz family. According to the email sent from Ms Gibson to Ms Dalley on 16 June 2015, the sum of $800 was raised at the event, which was passed on to the Schwarz family. However, in response to a letter sent by the Director on 18 March 2016 to Ms Gibson’s lawyers, following Ms Gibson’s failure to attend a compulsory examination, Ms Gibson, through her lawyers, stated that only $554 was raised at the event for the Schwarz family, and that Belle Gibson Pty Ltd paid out the difference to make up the $800. There was no evidence enabling the Court to find what, if any, sums were in fact received by the Schwarz family, nor what the source of any funds paid in fact was. Further, these funds were not, on the account given by Ms Gibson, intended to be donations from her company – they were to be donations from people who attended the event. Ms Gibson’s account suggests that only when she realised that the amount raised by the attendees was not significant, did she contribute an additional $246 from her company.

### Schwarz family app donations

1. In or about December 2013, a statement was also made on the Instagram account, in relation to donations to the Schwarz family. This statement was as follows:

Josh [Schwarz] has a similar malignant, inoperable brain tumour to the one I have. From the greatest ache and pains in my heart, I feel this little boys journey and story. Like I said last night - for the week, we chose this family to donate 100% of app sales to, in hopes to find them a medicine, holistic or happy miracle. If you’ve already bought the app, you can go to the link in my profile and buy a ‘virtual ticket’ to our ‘world changing events’ - this ‘ticket’ (donation) gives you power to give back to those without support, inspiration, education or the quality of life most of us are blessed with everyday.

1. It is unclear on the evidence how Ms Gibson came to know the Schwarz family. An article in evidence and published on 21 March 2015 by Rebekah Cavanagh in the *Herald Sun*, entitled “Family of desperately ill boy fear health guru Belle Gibson used their son to bolster her cancer claims”, stated:

Gibson, 23, befriended Ms Schwarz on social media in 2013 after hearing of Joshua’s fight for life with an anaplastic astrocytoma grade three (AA3), caused by a rare genetic disorder.

1. The article further quotes the boy’s mother as saying that Ms Gibson used to ask the family “heaps of questions about Joshy’s cancer and treatments. Was it to give her more credibility?” The family were reported as confirming they knew nothing of the fundraising promotion by Ms Gibson and received no donation from her.
2. Newspaper reports such as these offer little by way of probative evidence, even in a proceeding which is not defended. I place no weight on them for the purposes of any findings necessary to establish the contraventions alleged, and little weight on them even by way of background.
3. At [31(d)] of the annotated statement of claim, there is the following allegation:

Contrary to:

...

(d) the Schwarz App Sales Donation Representation, the Schwarz family did not receive the proceeds of sale of the Whole Pantry App for a week;

1. The annotation to this allegation concedes the Director relies only on “inference from all donations – supporting evidence not supplied for this”. At best, the admission made by Ms Gibson through her solicitors is that $800 was paid to the Schwarz family. I return later in these reasons to whether that admission, compared to the representations alleged to have been made, can result in a contravention of the ACL (Vic).

### Mother’s Day event donations

1. In May 2014, Ms Gibson and her company held a Mother’s Day event. The Director contended that this Mother’s Day event occurred between 15 May 2014 and 22 May 2014. However, in response to a s 126(1) Notice, Ms Gibson, through her lawyers, stated that the event occurred between 11 May and 17 May, noting that 11 May 2014 was Mother’s Day. In a Facebook post dated 15 May 2014, which is set out in full below, the event was said to be held “until this Sunday”, which was 18 May 2014. On the evidence, I find that the event occurred between 11 May 2014 and 18 May 2014. Ms Gibson proposed that, during this period, the full amount of every app purchase would be donated to The 2h Project and the Bumi Sehat Foundation, as well as an additional $1 donation made to those charities for each story posted on the topic of “what ‘Family means to you’”. This event was notified to the public via a Facebook post, dated 15 May 2014, which stated :

Don’t forget – for every App downloaded until this Sunday, your purchase goes straight to The 2h Project and the Bumi Sehat Foundation – To prevent maternal and infant deaths, create medical, parenting and sanitary support in Cambodia and Indonesia. If you’ve already downloaded The Whole Pantry? Tell me what ‘Family means to you’ – stories, memories, grief or funtimes and i’ll donate an extra $1 on your behalf. there is over 250,000 of us on our social media channels…. the potential is HUGE but you have to get involved to change the world with me. – Belle

1. There is no evidence the 2h Project received any donation from Ms Gibson or her company referrable to the proceeds of sale of the app. Ms Gibson had given an explanation for this failure to the media, which was reported online on the “Essential Baby” website on 10 March 2015, and stated that:

Ms Gibson earlier said she had decided to no longer include The 2h Project as a recipient of this campaign because only $2800 was raised and she felt this was not enough money to split between the two organisations.

1. On 22 May 2014, a Facebook post was made in relation to the Mother’s Day event, which stated:

Thanks to all of you, we raised a further $5000 to donate to the Bumi Sehat Foundation in Indonesia…

1. A donation of $5,000 was made to the Bumi Sehat Foundation in July 2015. There is no evidence of any other or earlier donation to the Bumi Sehat Foundation, and I am not satisfied this was a “further” donation. It is likely to have been the only donation. Ms Gibson broke down this donation of $5,000 in an email to Bee Wah Ang of Consumer Affairs Victoria on 15 March 2015. Ms Gibson stated that a total of $2,790 was raised through the app sales during the Mother’s Day event. An additional amount was raised as part of the $1 donations made by Ms Gibson or her company, following the “what ‘Family means to you’” stories. According to Ms Gibson’s email (which I am prepared to treat as an admission), $4,000 was raised for Bumi Sehat Foundation, comprising the $2,790 and the $1 donations. Ms Gibson stated that this amount was then rounded up to $5,000 in total for the donation.
2. I note that this donation was made over a year after the event purporting to raise money for the Bumi Sehat Foundation and, more critically, after the Director had contacted Ms Gibson and her company about the investigation into whether she and her company had contravened the law in relation to the representations about charitable donations that had been made.

### App sales donations

1. Between about October 2014 and March 2015, Ms Gibson, through her company, made various statements that a portion of all sales revenue received from sales of the app was being or would be, donated to various charities.
2. For instance, a screenshot of the website in October 2014 records the following statement:

Part of The Whole Pantry App sales will be donated to rotating charities and organizations …

We feel it’s important that part of their spending goes to help those who aren’t as privileged.

1. A screenshot of the description of the Android app available for sale on the Google Play store in October 2014 records the statement:

part of the sale from your TWP app purchase goes towards rotating charities and organizations that support the health and wellbeing of those globally, protecting and conserving the environment and giving education to those who otherwise don’t have the opportunity.

1. Unlike the description in the app itself, to which I referred at [32] above, this statement was likely to have been removed when the app was withdrawn from sale.
2. The evidence discloses that the only donation made referrable to sales of the app is the sum of approximately $2,790 made to the Bumi Sehat Foundation in July 2015, as part of the $5,000 donation referred to in paragraph 54 above.

### Company earnings donation

1. The Book also included in its introduction the statement that a “large part of *everything*” (emphasis in original) Ms Gibson’s company earned

…is now donated to charities and organisations which support global health and wellbeing, protect the environment and provide education to those who otherwise wouldn’t have the opportunity.

1. The evidence discloses only two donations referrable to her company’s earnings – the first is the same donation to the Bumi Sehat Foundation in July 2015, to which I have referred, made after the Director was in contact with Ms Gibson about suspected contraventions of the law. The second is a donation of $4,823.53 made on or around 15 April 2014 to “Vestal Water on behalf of Kinfolk Café”.

## Media training interview

1. Most of the evidence about these events came from Penguin’s answers to the s 126(1) Notice, and documents provided by Penguin in response to requests by Consumer Affairs Victoria. On 23 September 2014, Ms Gibson attended a media training session with employees of Penguin. She was “interviewed” by a Penguin employee for approximately 1.5 hours, for the purposes of promoting the book and to assist Ms Gibson in preparing for the kinds of questions she might get from the media on the launch of her book. During this interview, Ms Gibson made a number of statements in relation to her health. She spoke about when she claimed to have had a stroke, when she had been diagnosed with cancer, and the various treatments she claimed to have undergone to address her health issues. This media training interview was not publicly available until it was tendered in this proceeding. In this proceeding it was available in both video and transcript form.
2. An excerpt of key parts of the transcript of the media training interview is set out below. The interviewer is not identified by name in the transcript, and is known only by the pseudonym “Ms B”. “Ms A” refers to another Penguin employee who attended the interview. The passages in italics are my emphasis.

MS GIBSON: …that’s where I had – you know, my cancer diagnosis came about when I was in that role.

MS B: In Perth?

MS GIBSON: Yeah.

MS B: So what happened?

MS GIBSON: I had a stroke at work and was being abused on the phone by someone, one of these corporates who I had a pretty close relationship with, and he was assuming that I’d come to work drunk or, you know - and, ‘How dare you come with this level of professionalism? It’s just so unlike you,’ et cetera et cetera et cetera. That took me, like - that took me back, you know. I’d never been that person. I entirely skipped that part of childhood, being that rambunctious, you know, loose teenage persona, and I was just really offended and I remember the looks, the looks that I was getting from those that were sitting in my office and kind of it was like, ‘Can they hear the conversation or is something really happening?’ and then I fell off my chair and came to and went to the doctor’s and they said, ‘You’ve had a stroke.’ *Then it was about a week later, where the cancer diagnosis - - -*

MS B: So were you in hospital? Did they put you in hospital?

MS GIBSON: No. Like, I had a stroke and they’re like, ‘You’ve had a stroke, you’re fine.’

MS B: Really?

MS GIBSON: Yeah.

MS B: Did you do lots of tests?

MS GIBSON: Yeah.

MS B: Yeah.

MS GIBSON: So I was in there for the day. *I wasn’t in there for a long period of time and then I was diagnosed with cancer* and, yeah, that just very quick domino effect of everything to come, you know, of - I lost a lot of my short-term memory and I reflect back on that now, where I was losing that memory before the stroke and was still kind of shady after that. But then that job started to fall apart as well. Like, my whole life started to crumble, and I’d held it together- - -

MS B: So when they said you had cancer, what did they say to you?

MS GIBSON: It was this arsehole doctor who I’d been seeing for a few weeks beforehand.

MS B: Was he part of the hospital? Which hospital was it?

MS GIBSON: St John of God’s in Perth. He’s a doctor that I’d been seeing for a while and I had gone to him a few times and I said, ‘Something’s not right. Vision’s getting blurry,’ you know, ‘I’m feeling a little bit all over the place,’ and that’s when he, you know, dug through the family history and said, ‘You’ve got depression and you’re working too hard.’ I said, ‘I’m not working too hard.’ Like, clearly I thrive on what I do... I’m really passionate about what I’m investing my time in. I know that I don’t have depression. You know, I acknowledge that my mum does but that’s not my story. You know, pre the stroke, I went and got my eyes tested and they’re like, ‘Your vision is pretty fine but if you’re certain, then we give you glasses anyway.’ I’m like, ‘Why are you giving me glasses if you’re telling me my vision’s fine?’ and rolled with it anyway and wore glasses which I feel made it worse. *Had the stroke, got the cancer diagnosis, went back and saw the same doctor.*

It’s like what I wrote about in the book. I was, you know, really hoping for him to apologise and he didn’t. I was hoping for him to say, ‘We’re sorry we didn’t listen to you,’ and he didn’t. *He just looked at me and he said, ‘You’ve got a GBM brain tumour and you’ve got six weeks to four months to live.’ I was in the room and I was alone and I just brushed it off, you know, and I don’t know whether it was that residue from the stroke or whether it was just being a really defiant young woman still and just didn’t care.*

…

MS B: Did they propose a treatment schedule for you?

MS GIBSON: Yeah, there was, and I kind of just left it at arm’s distance and went back after I’d made the acknowledgment that I need to do something about it and that doing something was the typical look for the best, you know, and that - I had age on my side, you know, the always ‘you want the best in life’ kind of thought process and the best was in Melbourne, so that saw me uproot again, from Brisbane to Perth, Perth to Melbourne, and that’s where I, you know, set up home again and started treatment here in Melbourne.

MS B: *So where was your treatment?*

MS GIBSON: *Peter MacCallum.*

MS B: How did that unfold?

MS GIBSON: So I moved from Perth to Melbourne. I was living with one of my best friends, someone who I went to high school with and it still took me about two weeks to really acknowledge why I had moved here. I kind of made myself believe for a few weeks that I was here to support him through his kind of “I don’t know what I’m doing with my life” kind of journey, because I had nothing better to do, and then it kind of hit me again, ‘Oh, that’s right, you actually have your own stuff to deal with.’ *So off I went, took my referral and then ended up with a double whammy, chemo and radiation treatment and - - -*

MS B: *And you were in the Peter MacCallum?*

MS GIBSON: *Yeah*.

MS B: *Yeah. What were the doctors there saying? Was their story any different from the first doctor?*

MS GIBSON: *No.*

MS B: *No?*

MS GIBSON: *No, the story was the same and my team, they were very nurturing.* They were very nurturing in the way of ‘there’s this young woman who’s come from nowhere and has no-one’ *and they were all really worried.* I knew that I was taking their worry on board and it was probably just adding to the layers. But in between this treatment, you know, I was opening up a little bit more, you know, and the blindfold was coming off and I was kind of going, ‘How can I support my body through this process?’ *Then I was looking at naturopaths and acupuncture and traditional Chinese medicine and looking for stories of other people who had supplemented.*

…

MS B: Did you take a job in Melbourne when you got here or you---

MS GIBSON: *Yeah, I ended up taking a job until I realised I shouldn’t be working.* You know, I was still very much in denial. I took a job - one of my 30 first jobs when I was in Brisbane was curating an art gallery which was part gallery, part cafe, and took that training and management stuff and went and helped curate galleries around Melbourne. *I was doing three, but then had a moment where I was on a ladder and dizzy and, you know, when you’ve got a tumour in the middle of your brain, you’re not a very balanced person, not very rational thinking either, but I was up there trying to hang and nail holes into walls and I was like, ‘This is dangerous, you shouldn’t be doing this.’* It was a five-storey terrace building in Brunswick and climbing those really tiny stairs, like, running up and down them all day, yeah, it’s just a bad combination, so I left.

…

MS GIBSON: *Yep. I would have been 21, yeah, about six months after my diagnosis now. And then- so I was not working at all and then was travelling up and down in between treatment, and I went through about three months’ worth of treatment and realised that it’s not my thing.*

MS B: Conventional treatment?

MS GIBSON: Yeah.

MS B: Yeah.

MS GIBSON: Felt much more empowered. *Whatever the outcome was going to be, I felt more empowered to treat myself traditionally, through traditional medicine, was really comfortable with the idea of dying and thought I’d prefer to much - much prefer to try and extend my life even by a little bit through traditional medicine rather than save it with conventional medicine and live like a really happy healthy life even if it’s for a shorter duration. That was my chosen reality at the time.*

…

MS B: So what were you travelling? Why were you travelling up and down the coast?

MS GIBSON: Looking for support?

MS B: You mean medical support?

MS GIBSON: *Medical support. Just looking for - like the weirdest or kookiest healers and also just looking for quality of life.* You know, ‘I want to explore, I want to enjoy, I want to eat good food and be looked after.’ Australia has an abundance of that. You know, we-- -

…

MS B: So while you were seeking those other therapies, *were you still having the chemo and the radiation?*

MS GIBSON: *Yeah*.

…

MS B: So you’d stopped that treatment by that stage?

MS GIBSON: *I had stopped treatment by that stage, yeah, pre becoming pregnant.*

MS B: Right. *So you’d stopped the conventional cancer therapy?*

MS GIBSON: *Yeah*.

MS B: *And then you were following alternative therapies?*

MS GIBSON: *Following alternative therapy.*

…

MS GIBSON: I just break it down to the simplest always: I am pregnant. Women get pregnant. Their bodies know what to do. *You know, I have cancer.* Cancer is an illness. I’m going to treat and heal myself through this, you know. Like, just be really simple about it all and when you’re simple about it and rational about it and break it down to those bite-sized digestible pieces, it’s not overwhelming.

MS B: So, Belle, looking at what you’ve announced on your social media, you’ve *said that the cancer is now in your blood and your spleen and your brain and your uterus and your liver. That’s really- it’s serious now, isn’t it?*

MS GIBSON: *Yeah. I’m going to get tested for ovarian cancer. I no longer have cancer in my uterus. Woo-hoo - - -*

…

MS B: You look really well.

MS GIBSON: I know. Like, my photographer today has been living with liver cancer for 20 years and you would just never know. It was hard to see that reflection, going, ‘Whoa.’ *You would never know. You know, sometimes you do know with me. You know, I’m like this big and puffy or I have a rash which makes me look like I’ve got chicken pox. It’s important to be honest about these things* and it’s great that we have things like social media where I can be honest and do shed light into what’s happening behind those perfectly filtered photos. Not everything is as it seems. And when I’m not, you know, at my local tea shop for, you know, my morning cup of tea, or when I’m not posting on social media or when I’m not the one picking Ollie up from school, I’m most likely in bed or I’m most likely laying on the couch because *I’ve just had a series of seizures, you know.* That’s the stuff that people don’t see or feel comfortable to talk about and that’s the reality of it all. *Right now I’ve got a really stabbing pain in my stomach which I want to crawl to the floor with but it’s just that we’ve not been allowed or empowered to talk about it for so long that all we do see is what media shows us cancer is or what media shows us dying is, and why can’t you die gracefully?* Why can’t you enjoy that?

MS B: *Do you think you’re dying?*

MS GIBSON: *Yeah*.

MS B: *You feel like you’re dying?*

MS GIBSON: *Yeah, and I’m fine with that, and it’s conflicting for a lot of people. Like, I don’t think I’m going to die tomorrow but my body is dying. Like, of course it is, you know. It might be a really slow 10 years but parts of me are shutting down and we only see, you know, really traumatic childbirth, really traumatic death, you know, really traumatic car accidents, and everyone handles it differently but it’s also a choice. Like, I don’t choose to feel victimised by this.*

1. Later during the interview, Ms Gibson makes statements in relation to donations made to charities. These statements are made in response to questions from the interviewer, on the basis that the media may be interested in auditing the charitable donations, and therefore this is a line of questioning Ms Gibson should be prepared for. An excerpt of this part of the transcript is reproduced below. Again, the italics reflect my emphasis.

MS B: Belle, one thing you’ve been very vocal about is giving a lot of the money to charity.

MS GIBSON: Yeah.

MS B: It could be that one of the financial newspapers wants to audit that.

MS GIBSON: Mm’hm.

MS B: Could you facilitate that process?

MS GIBSON: Yeah. At the moment, because we’ve just changed structures, we’re getting all our books tidied. Yeah, but probably could in six months, once I get my shit together.

MS B: Because if you’re saying that you’re giving money to the Asylum Seeker Resource Centre and One Girl and Birthing Kit Foundation, people want to know, you know, what’s going on.

MS GIBSON: Mm’hm.

MS B: So that’s something you could be asked too.

MS GIBSON: Yeah.

MS B: Yeah, about all that.

MS GIBSON: Easy.

MS B: So what would you say? You know, how did you select the charities? How much money have you given? What’s the financial trail?

MS GIBSON: Each- we choose our charities each quarter.

MS B: Mm’hm.

MS GIBSON: *So so far we’ve given to nine charities* and they’re chosen pretty much based on conversations that happen through our social media channels, tapping into what people are really passionate about at the moment, communities, organisations, families, people that they feel need functional support, you know. *We don’t donate in typical ways. You know, a family might need $10,000 and they’ll go, ‘Oh, this family is doing a money-raising drive. They need $10,000,’ but I’ll be the one that reaches and go, ‘Well, what do you need that $10,000 for? Where do you need that support and where is it going?’ and in many ways it’s been, ‘Well, we need money for vitamin C injections for our son who’s living with cancer.’ ‘Great, we’ll pay the bills that come in for that,’ you know, or, ‘Our child has a brain tumour. He can’t regulate his own body temperature. We need an airconditioner.’ ‘Great. Here’s $6000 for airconditioning.’*

[I note Ms Gibson expresses all these statements in the present tense, as if the conduct she describes has already occurred.]

MS B: So a Good Weekend journalist would say, ‘Can we talk to some of these people?’

MS GIBSON: Yeah.

MS B: ‘Can we talk to people at the charities that you’ve helped?’

MS GIBSON: Yep.

MS B: They would want to flesh out that side of the story with the charity.

MS GIBSON: Mm’hm.

MS B: Because that’s---

MS GIBSON: Yeah.

MS B: ---you know, a remarkable thing that you do and they will want to see evidence of that and - - -

MS GIBSON: We- the stories behind it.

MS B: Yep.

MS GIBSON: *And we call it ‘functional donation’ because it’s, like, more of a commitment to going, ‘We want to create an actual change,’ rather than just going, ‘Here’s some money. We’re turning our back on it now,’ and then it’s also beautiful because then I can go back to my community going, ‘We’ve just bought this person this because you’ve done this for your own life.’ Yeah, it’s nice.*

MS A: And are they people that you’ve sort of continued relationships with?

MS GIBSON: Yeah. *Some of them have got acknowledgments in the book. You know, like- yeah, I’m constantly looking for ways we can continue to support them as well. It’s not, “Oh, here’s $10,000, we’re done now,” it’s- I’m really hopeful that that communication line stays open and if they need something, they can come back. We might - you know, with one girl, right now we have to focus on building the app back up, making more money to give more money back in. So it’s, “Please just wait. You’re at the top of our list. We’re building this toilet and this toilet. This is our commitment, but this is when it’s going to happen.” You know, “In the meantime, is there anything else we can support you with?” So lots of commitments to- we don’t get paid until every three months, so, you know, “If you need it now, that’s fine, but we can’t support you for another 11 weeks.”*

MS B: So you’re saying the Apple money comes through every three months?

MS GIBSON: Yeah. Like, you know, we’re operating a start-up at---

MS B: Who’s “we”, Belle?

MS GIBSON: Well, that’s what I wrote about in the book too, ‘we’ as in the community. I am operating a start-up, but at an acceleration level of a big company…

1. The interviewer later returns to the topic of charitable donations, and how Ms Gibson should respond to queries about her donations. This is the exchange:

MS B: I think that you really need to get your story straight about the charities.

MS GIBSON: Yeah.

MS B: Okay. They’re going to go there with that.

MS A: Yeah.

MS GIBSON: They can go there.

MS B: Yeah, yeah. But just say, ‘I’ve given this much to these charities.’ Get a spokesperson from one of the charities to say, ‘Yes, we’ve worked with Belle and she’s made a real difference.’

MS GIBSON: Yeah.

MS B: I think we really need to underpin that---

MS GIBSON: Yeah.

MS B: ---that part of it.

MS A: And it’s a nice part to the story anyway.

MS B: Exactly.

MS GIBSON: It’s beautiful. It’s just like through Cambodia and Indonesia. Not all of them speak English, so it’s more about maybe getting them to send pictures or - - -

MS A: Are any of them in Australia?

MS GIBSON: Pardon?

MS A: Are any of them in any of the---

MS GIBSON: The Asylum Seeker Resource Centre is.

MS A: Okay.

MS GIBSON: Yeah. We’re working on an event. That’s what I was workshopping at Claire’s thing.

MS A: Oh, okay.

MS GIBSON: Yeah. But they’re- that’s about it. I want to start doing something in Palm Island which is nice, but lots of the families actually are most of the families are Australian based and they’re nice stories to discuss.

MS A: Okay.

MS GIBSON: Because they’re really tangible, and they’d be willing to talk as well.

MS A: Even if it was just sort of one, one or two really.

MS GIBSON: Well, it was funny because I was at- for Josh [Schwarz], was at one of his fundraisers and I didn’t even know how they knew me, but the local news, Channel 10 and the local paper, it was like, ‘Belle Gibson’s here,’ you know, ‘to support,’ blah blah. Like, it was the first time that I’ve been really creeped out that they - - -

MS A: People are watching you.

MS GIBSON: Yeah. It was like, ‘How did they know that I was there?’ and like, I was clearly there, but like they felt the need to publish it because, you know, it had been very open that this family had received money from us and, you know, my whole community invested in his story, you know, as well, yeah.

1. Towards the end of the interview, Ms Gibson returns again to the topic of charitable donations and makes statements about the large percentage of profits that are donated by her company to such causes:

MS GIBSON: But away from- yeah, away from the craziness which is nice. I don’t know. It’s hard for me to go to Bali because it just feels so considered now. You know, like, there’s big boutiques, you know, where they’ve got big signs where it’s like, ‘We donate 1 per cent of our profits to cleaning up Bali beaches,’ and I’m like---

MS B: Too late, she cried.

MS GIBSON: --- 1 per cent? *On our worst month, where I think, like, our worst month where we made, like, $700 or something on the app, we still donated 25 per cent of that and the rest went to bills to fix the bugs.*

MS A: Is that kind of normal, around 25 per cent?

MS GIBSON: No, like, some months- you know, our first quarter, it was like 95 per cent.

## Media reports casting doubt on Ms Gibson’s cancer diagnosis and allegations of missing donations

1. Beginning from around March 2015, doubts surfaced in media reports about Ms Gibson’s claims that she had brain cancer. Reporters also began to allege that the money that she claimed to have been donating to charities was not being donated.

### Newspaper reports

1. A number of newspaper articles were published beginning March 2015, in relation to Ms Gibson’s claims. On 8 March 2015, Beau Donelly and Nick Toscano published an article in *The Age*, stating:

Melbourne businesswoman Belle Gibson, founder of food and health app The Whole Pantry, solicited donations from a loyal following of 200,000 people in the name of at least five charities that have no record of receiving money from her.

…

Immediately after questions from Fairfax Media late last week about her fundraising activities, Ms Gibson promised donations to some organisations that have not been paid since she hosted a fundraiser in 2013. She blamed her company’s ‘cash flow’ problems for the 15-month delay.

1. A few days later, on 10 March 2015, a further article in *The Age* was published, alleging:

Fairfax Media on Sunday revealed Ms Gibson, failed to hand over money raised through two charity drives in 2013 and 2014. Four of the five charities promoted as beneficiaries had no knowledge of the fundraising campaigns, which included a function and an online promotion promising to donate app sale proceeds.

1. The article continues:

Ms Gibson last year said $300,000 had already been given to charity but now says these contributions were never made because app sales had not been as high as forecast. Confirmed donations from Ms Gibson and her business total about $7000.

1. On the same day, the same reporters (Beau Donelly and Nick Toscano) published a further article in *The Sydney Morning Herald*, stating:

Fairfax Media understands some friends held an ‘intervention’ at Ms Gibson’s beachside apartment in Elwood last last year [sic], questioning her about her illness. ‘She admitted her diagnosis was questionable’, a former friend said.

1. The stream of media reports continued. Ms Gibson was reported to have engaged the services of lawyers in Melbourne, and was described as tearfully explaining that she may not have had cancer after all. The mother of Joshua Schwarz, the young boy with brain cancer for whom Ms Gibson represented she was raising money, was reported as telling the media that the family did not know about the fundraiser for her son and had not received any money from Ms Gibson.
2. The questioning of Ms Gibson’s claims culminated in an interview she gave for an article by Clair Weaver, published in the May 2015 issue of the *Australian Women’s Weekly*. During that interview, Ms Gibson admitted that she never had cancer:

*The Weekly* asks Belle outright if she has or ever has had cancer.

‘No,’ she confesses. ‘None of it’s true.’

And how did it feel, after more than five years of claiming she was terminally ill, when she confronted this truth?

‘It’s just very scary, to be honest,’ she says, her voice wobbling. ‘Because you start to doubt the crux of things that make up who you are. You know, I’m blonde and I’m tall, and I’ve got hazel eyes and I’ve got cancer. And all of a sudden, you take away some of those high-level things and it’s really daunting.’

### 60 Minutes interview

1. After the article in the *Australian Women’s Weekly*, Ms Gibson agreed to be interviewed by Tara Brown on the television program *60 Minutes*. The programaired on 28 June 2015. Ms Gibson was paid $75,000 by Channel 9 to participate in this interview. During this interview, Ms Gibson admitted that she did not have cancer or undergo conventional medical treatments. She said that at the time that she made statements about having brain cancer, she thought that she did have cancer. She claimed that a “Dr Mark Johns” had attended her home and diagnosed her with cancer, and that she believed the diagnosis was real. An excerpt of this interview follows:

MS BROWN: So he [Dr Mark Johns] comes to your home and he does some tests on you?

MS GIBSON: Mm. He does.

MS BROWN: How does -what sort of tests?

MS GIBSON: It was a box, a machine with lights on the front and that machine was apparently German technology. There’s a- two pads, two metal pads, one that goes below the chair and one that goes behind your back and then that measures what I believe, or remember to be, frequencies.

MS BROWN: And what were the results?

MS GIBSON: He said to me that I had a stage 4 brain tumour and that I had approximately four months to live.

MS BROWN: Why did you write in the foreword of your book that you got this information in your doctor’s office, that you got this prognosis in your doctor’s office?

MS GIBSON: Because I think that being open and telling people the way that it happened would not be understood---

MS BROWN: So you were---

MS GIBSON: ---and that people would be disappointed or angry for me, you know, not following what is the right way to go about this.

MS BROWN: So you lied because you feared you wouldn’t be believed? Is that what you’re saying?

MS GIBSON: It’s not what I’m saying.

MS BROWN: Well, can you be clearer on what you’re saying? I mean, you’re - you were absolutely misleading, weren’t you? You said a doctor gave you this terrible prognosis in his office and you’ve just admitted that you didn’t say it was at your home and it wasn’t with a real doctor because you thought people - -

MS GIBSON: I believed he was a real---

MS BROWN: - - - would be disappointed in you.

MS GIBSON: No. I believed he was a real doctor.

MS BROWN: So did you lie to be believed is the question?

MS GIBSON: I didn’t see him in his doctor’s office in Perth.

MS BROWN: You didn’t see him in his doctor’s office ever because he doesn’t have an office, does he?

MS GIBSON: No.

MS BROWN: Right. You claimed also in your book that you underwent chemotherapy and radiotherapy for two months.

MS GIBSON: Yeah.

MS BROWN: True or false?

MS GIBSON: At the time - - -

MS BROWN: True or false?

MS GIBSON: True. Because at the time, I believed I was having radiotherapy.

MS BROWN: So false?

MS GIBSON: I believed that I was having radiotherapy. When he gave me medication, I was told that it was oral chemotherapy and I believed it.

1. Later on during the interview however, Ms Gibson agreed that she had doubts about her brain cancer diagnosis in 2010.

MS BROWN: I don’t mean to be crass about it, but it was also the fact that despite being given a four-month deadline, you’re still alive.

MS GIBSON: Yeah.

MS BROWN: Was that an indicator to you that you didn’t have brain cancer?

MS GIBSON: It wasn’t an indicator. I went to the Alfred Hospital and I contacted Mark and I had said to him, “I’m not sure where things are at, so I want to go and get a brain scan.” He had me sign paperwork which enlisted him as my medical professional, where the scan from the Alfred would be then passed on to him so we could also consult on it.

MS BROWN: Right. So what did the brain scan show?

MS GIBSON: He brought in scans and it showed a brain tumour, but that wasn’t my scan because most recently I went back to the Alfred and I got my full portfolio from them and I did get that brain scan, but there is no brain tumour there.

MS BROWN: Okay. So what date was that, Belle? When did you go to the Alfred?

MS GIBSON: I will be able to give you this information---

MS BROWN: Well, we’ve already asked for background information. We’ve asked for all your medical records and your medical history. You haven’t given us any doubts. You haven’t given us any brain scans. You haven’t given us any MRIs. You haven’t given us any tissue tests. You haven’t given us anything.

MS GIBSON: I wasn’t explicitly asked for any of that, but I have it.

MS BROWN: Right. You were asked- well, really?

MS GIBSON: Of course I do. The producers I have been working with are aware of my health position. I was - - -

MS BROWN: Belle, Belle, Belle, Belle please, I mean either you’re interested in getting to the bottom of this and presenting the facts as they are - the facts - or you’re not. Okay?

MS GIBSON: It was in 2010 that I went to The Alfred initially.

MS BROWN: Mm’hm. Do you know who you saw there?

MS GIBSON: No, I don’t. But again, I have that information.

MS BROWN: After our interview, Belle finally did hand over a few medical records, but you have to wonder why because this one is damning. It shows, yes, she did visit The Alfred Hospital in Melbourne; and, yes, she did have a brain scan, but she didn’t go because she thought she had brain cancer and, curiously, she didn’t even mention she had brain cancer. She went because she was now convinced she had multiple sclerosis. The scan revealed she didn’t have MS, but most importantly it also showed there was no sign of a brain tumour.

It was actually 2011 and a neurologist in a 40-minute face-to-face consultation tells Belle her brain scans are normal. We’ve also checked with medical professionals who say even if Belle was complaining about MS symptoms only, the MRI would have revealed any tumours in her brain. That 40-minute consultation with the neurologist proves that even if Belle thought at one time she had a brain tumour, she definitely knew in 2011 that she didn’t.

1. Ms Gibson is then later asked about a subsequent doctor she consulted with. The doctor is not identified in the interview, however, based on the evidence to which I refer at [135] below it is probable that the doctor referred to is Dr Phil Best, a naturopath.

MS BROWN: Belle says her new health guru told her the cancer was now in her blood, spleen, brain, uterus and liver. Unlike Mark Johns, this man does exist, but when we spoke to him he denied giving Belle such devastating news because he’s not qualified to diagnose cancer. He’s saying he never ever told you that you had cancer throughout your body.

MS GIBSON: Mm’hm.

MS BROWN: Did he ever say that to you?

MS GIBSON: He did.

MS BROWN: So he’s lying, you’re not lying?

MS GIBSON: I am not lying. He definitely told me that my brain tumour is still present and that I have new and secondary cancers.

MS BROWN: And how did he assess that?

MS GIBSON: In the same way that Mark did; similar machines and similar equipment.

MS BROWN: Did you think to go to a doctor? Did you think to go to the hospital? Did you think to get this checked out?

MS GIBSON: Not really, not initially. I was devastated.

MS BROWN: It just seems like you chose to believe that you had cancer.

MS GIBSON: Nobody wants to live with the fear of a terminal illness or dying.

MS BROWN: No. And nobody knows that better than people who actually live with that and you didn’t live with that. That’s not what you had.

MS GIBSON: No, it’s not, but I lived for years with the fear that I was dying and that is horrible and I’m still coming to terms with the - I can take that off my shoulders now.

1. At the conclusion of the interview, Ms Gibson stated that it was only just before the news was broken by the media that she was planning to tell her “community” that she had been lied to, and that she did not have cancer:

MS GIBSON: It didn’t need to. Once I started to figure out where I stood and what reality actually was and I had received the definitive, ‘No, you do not have cancer,’ then that was something that I had to come with- come to terms with. That takes a lot and it was really traumatising. I was feeling a huge amount of grief and - - -

MS BROWN: Grief for not having cancer?

MS GIBSON: No, that I had been lied to and that I felt like I had been taken for a ride. It took me a lot to unpack that and once I was strong enough, I was ready to come out and speak with my community about it and I had a definitive date and that date was only 10 days before the media broke it.

## Withdrawal of Apps and Book

1. Once the media began to make and report allegations against Ms Gibson in March 2015, and well before the *Australian Women’s Weekly* article and the *60 Minutes* interview, The Whole Pantry book was withdrawn from sale by Penguin. Penguin explained the withdrawal to Ms Gibson in a letter dated 16 March 2015 by stating that it was due to Ms Gibson’s failure to respond to its legal representatives’ inquiries of her concerning the media allegations.
2. The Whole Pantry Facebook and Instagram accounts were also taken down around March 2015. As at the date of this judgment, The Whole Pantry website is no longer publicly available, however it is unclear from the evidence when it was taken down.
3. Around March 2015, the Apple app was withdrawn from sale from the Apple App Store. The reason for this withdrawal was given as lack of compliance with Apple’s App Store policies. According to Apple Australia’s response to the s 126 Notice, Apple Australia became aware of media allegations of false statements made by Ms Gibson about her medical condition and her charitable donations. Ms Gibson was asked by the Apple “App Store Review Team” to respond to questions, but failed to do so. The Whole Pantry Apple app was withdrawn and never reinstated.
4. Quite a long time afterwards (around 11 May 2016), The Whole Pantry Android app was withdrawn from the Google Play store. On the evidence of Mr Bellis, this came about when, during the investigation into Ms Gibson’s conduct, it was discovered that The Whole Pantry Android app was still available for sale. Upon that discovery, the Director wrote to Google Australia Pty Ltd, as the Australian subsidiary of Google Inc, the operators of the Google Play store, requesting that the Android app be removed from public sale. Whether the removal occurred as a direct result of the Director’s letter, or for reasons known only to Google Australia Pty Ltd, is not clear on the evidence

## Lodgement of complaint to Consumer Affairs Victoria

1. On 11 March 2015, a representative of the Asylum Seeker Resource Centre lodged a consumer complaint with Consumer Affairs Victoria. In the statement attached to the complaint form, the ASRC explained that it was alerted by a journalist on 24 February 2015 that Ms Gibson claimed to have donated money to the ASRC following a fundraising event in December 2013. I infer that this is the event referred to in [38] above. No person from the ASRC gave evidence in this proceeding. The ASRC alleged in its complaint that it had no records of any donation of any kind from Ms Gibson or The Whole Pantry. However there was a donation from Ms Gibson’s partner, Mr Clive Rothwell, of $1,000 on 9 April 2014, using his “The Whole Pantry” email. The ASRC also disclosed attached email correspondence sent to it by Ms Gibson on 25 September 2014, which indicated she wished to contribute financial support to the ASRC. There was a short response to Ms Gibson from the ASRC and thereafter no further communications until March 2015. In early March 2015 Ms Gibson called the ASRC seeking to explain why there had been no donation, and pledging to make one. In an email the following day Ms Gibson said:

We fully intend on finalising 2014’s pledged donation, and contributing in 2015 also, when the cash-flow management is stabilised.

1. On the evidence no funds were ever donated to the ASRC by Ms Gibson or by her company.
2. Consumer Affairs Victoria commenced its investigation on approximately 21 April 2015, following the ASRC’s complaints. This proceeding was commenced on 24 May 2016.

# RELEVANT LEGISLATIVE PROVISIONS

1. Section 8 of the *Australian Consumer Law and Fair Trading Act* provides:

**Application of Australian Consumer Law**

(1) The Australian Consumer Law text, as in force from time to time—

(a) applies as a law of this jurisdiction; and

(b)     as so applying may be referred to as the Australian Consumer Law (Victoria); and

(c) as so applying is a part of this Act.

(2)     This section has effect subject to sections 9, 10 and 11.

1. Section 9 of the *Australian Consumer Law and Fair Trading Act* has no present relevance. By s 10 of that Act, the Director is the “regulator” for the purposes of the ACL (Vic). By s 11, in substance, the *Acts Interpretation Act 1901* (Cth) is deemed to apply to the ACL (Vic) and the *Interpretation of Legislation Act 1984* (Vic) is deemed not to apply.
2. By s 12 of the *Australian Consumer Law and Fair Trading Act*:

**Application of Australian Consumer Law**

(1)     The Australian Consumer Law (Victoria) applies to and in relation to—

(a)     persons carrying on business within this jurisdiction; or

(b)     bodies corporate incorporated or registered under the law of this jurisdiction; or

(c)     persons ordinarily resident in this jurisdiction; or

(d)     persons otherwise connected with this jurisdiction.

1. There is no debate that by this provision the ACL (Vic) applies to Ms Gibson and to her company.
2. Section 18 of the ACL, as adopted by s 8 of the ACL (Vic), imposes the following prohibition:

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

(2) Nothing in Part 3‑1 (which is about unfair practices) limits by implication subsection (1).

Note: For rules relating to representations as to the country of origin of goods, see Part 5‑3.

1. Section 18 is not a penalty provision.
2. Sections 29(1)(e), (f) and (g) of the ACL, as adopted by s 8 of the ACL (Vic), provide that a person must not make false or misleading representations concerning testimonials or the uses or benefits of goods or services:

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

…

(e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or

(f) make a false or misleading representation concerning:

(i) a testimonial by any person; or

(ii) a representation that purports to be such a testimonial;

relating to goods or services; or

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits;

…

1. Section 29 is a penalty provision.
2. Section 4 of the ACL, as adopted by s 8 of the ACL (Vic), provides that representations with respect to future matters may fall within the definition of “misleading”, where that word is used in the ACL:

(1) If:

(a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and

(b) the person does not have reasonable grounds for making the representation;

the representation is taken, for the purposes of this Schedule, to be misleading.

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

(a) a party to the proceeding; or

(b) any other person;

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

(3) To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or

(b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.

(4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:

(a) a misleading representation; or

(b) a representation that is misleading in a material particular; or

(c) conduct that is misleading or is likely or liable to mislead;

and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

1. Section 21 of the ACL, as adopted by s 8 of the ACL (Vic), prohibits unconscionable conduct in connection with goods or services. It is a penalty provision, and provides:

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

…

(3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

1. The matters to which a court may have regard for the purposes of s 21 are set out under s 22, which provides:

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the ***customer***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier’s conduct towards the customer was consistent with the supplier’s conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier’s intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

1. Section 195 of the *Australian Consumer Law and Fair Trading Act* sets out how an officer of a body corporate may be deemed to have contravened the same provision of the Act as the body corporate:

(1) If a body corporate contravenes or commits an offence against any provision of this Act, each officer of the body corporate is deemed to have contravened the same provision if the officer knowingly authorised or permitted the contravention.

(2) A person may be proceeded against and, in the case of an offence, convicted under a provision in accordance with subsection (1) whether or not the body corporate has been proceeded against under that provision.

(3) Nothing in this section affects any liability imposed on a body corporate for a contravention of this Act by the body corporate.

1. Section 196 of the *Australian Consumer Law and Fair Trading Act* sets out how the state of mind of a body corporate may be established:

(1) If, in a proceeding under this Act in respect of conduct that is engaged in by a body corporate and to which this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show—

(a) that an officer, employee or agent of the body corporate engaged in that conduct within the scope of the actual or apparent authority of the officer, employee or agent;

and

(b) that the officer, employee or agent had that state of mind.

(2) The following conduct engaged in on behalf of a body corporate is also taken, for the purposes of this Act, to have been engaged in by the body corporate—

(a) conduct by an officer, employee or agent of the body corporate within the scope of the actual or apparent authority of the officer, employee or agent; or

(b) conduct by any other person—

(i) at the direction of an officer, employee or agent of the body corporate; or

(ii) with the consent or agreement (whether express or implied) of such an officer, employee or agent—

if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the officer, employee or agent.

…

(6) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person’s reasons for the intention, opinion, belief or purpose.

1. Section 139B of the *Competition and Consumer Act 2010* (Cth) similarly sets out how the state of mind of a body corporate may be established:

**139B Conduct of directors, employees or agents of bodies corporate**

(1) If, in a proceeding under this Part or the Australian Consumer Law in respect of conduct that is engaged in by a body corporate and to which this Part or the Australian Consumer Law applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show:

(a) that a director, employee or agent of the body corporate engaged in that conduct within the scope of the actual or apparent authority of the director, employee or agent; and

(b) that the director, employee or agent had that state of mind.

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

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

(b) by any other person:

(i) at the direction of a director, employee or agent of the body corporate; or

(ii) with the consent or agreement (whether express or implied) of such a director, employee or agent;

if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken, for the purposes of this Part or the Australian Consumer Law, to have been engaged in also by the body corporate.

# THE DIRECTOR’S CONTENTIONS

1. There is some inconsistency in the way the Director has pleaded his case. In the Originating Application, the Director contended Ms Gibson had contravened only s 18 of the ACL (Vic). In relation to the company, the Director contended it had primary liability under both the ACL and ACL (Vic) (see [4] and [6] of the amended Originating Application dated 31 May 2016). In the Statement of Claim however, the Director only sought declarations in respect of the company under the ACL, not the ACL (Vic) (see prayer H).
2. In relation to the relief sought, the Director seeks injunctions under s 232(2) of the ACL against the company, but as against Ms Gibson, he seeks injunctions under s 232(2) of both the ACL and ACL (Vic) (see [1] and [2] of the amended Originating Application). As I said at [1] above, the Director is authorised to seek an injunction under both s 232(2) of the ACL and the ACL (Vic). The Director only seeks pecuniary penalties and non-punitive orders under the ACL (Vic), and not the ACL.
3. It is not clear from the Director’s pleadings as to why the case was put differently in relation to Ms Gibson and her company. The relief sought by the Director is also unclear – for example, why injunctions are sought against Ms Gibson under both federal and state law, but declarations are only sought under state law. The Director will be given an opportunity to clarify the relief sought prior to final orders being made. I proceed on the basis of the Director’s contentions in his Originating Application – that Ms Gibson contravened provisions of the ACL (Vic), and her company contravened provisions of both the ACL and ACL (Vic).
4. The Director’s contentions can be divided into two categories – the first relates to statements regarding Ms Gibson’s brain cancer diagnosis, and the second relates to statements regarding Ms Gibson or her company’s charitable donations.

## Cancer contentions

1. The Director alleges that from at least July 2013, either Ms Gibson or her company made three statements amounting to representations about Ms Gibson’s health, through a range of different media platforms. They were:
2. Ms Gibson had been diagnosed with brain cancer in 2009;
3. Ms Gibson had been given four months to live; and
4. Ms Gibson had taken and then rejected conventional cancer treatments in favour of embarking on a quest to heal herself naturally.
5. In support of this contention, the Director relies on the statements reproduced at [26], [27], [29], [30], [31], [32], [34], [35] and [36] above. The Director also relies on statements made to Penguin, and in connection with the sale of The Whole Pantry book including in the proposal extracted at [25] and in the media training session referred to at [63] to [67]. Finally, the Director relies on the proposed promotional material produced by Penguin, on the basis that Ms Gibson or her company either approved the material or failed to inform Penguin that it contained inaccurate statements.
6. The Director contends that these statements amount to representations by Ms Gibson or her company, that:
7. Ms Gibson had brain cancer (the ***Cancer Representation***); further or alternatively
8. Ms Gibson had a reasonable basis to believe she had brain cancer (the ***Cancer Reasonable Basis Representation***); further or alternatively
9. Ms Gibson had had conventional medical treatment for her brain cancer (the ***Treatment Representation***).
10. With the exception of those relating to the Android app, each of the these three representations are said to have been ongoing, not withdrawn or corrected by Ms Gibson or her company, or further or alternatively not withdrawn or corrected prior to the article published in The *Australian Women’s Weekly* in May 2015. In relation to the Android app, it remained available for purchase until much later. The Director contends that each of the three representations in the description of the app was not withdrawn until the app was withdrawn around 11 May 2016.
11. The Director submits that, contrary to the statements and the representations about her health:
12. Ms Gibson never suffered from brain cancer;
13. Ms Gibson did not at any time, further or alternatively did not after November 2014, have a reasonable basis to believe she had brain cancer; and
14. Ms Gibson had not had conventional medical treatment for her brain cancer.
15. The Director further submits that the conduct that Ms Gibson is said to have engaged in was also conduct within her actual or apparent authority, as the director of the company. Therefore, Ms Gibson’s conduct is taken to have been engaged in by the company, and Ms Gibson’s state of mind is taken to be the state of mind of the company.
16. By engaging in this conduct, the Director claims that Ms Gibson and/or her company contravened ss 18, 21 and 29 of the ACL and ACL (Vic).

## Charity contentions

1. In relation to the representations made regarding charitable donations by Ms Gibson or her company, as set out in [37] to [62] above, the Director contends that these were representations by Ms Gibson or her company that:
2. a portion of all sales revenue received from sales of the app was being, or would, within a reasonable time of receipt be, donated to charities (the ***App Sales Donation Representation***);
3. a “large part of everything” the company earned “is now donated to charities and organisations which support global health and wellbeing, protect the environment and provide education to those who otherwise wouldn’t have the opportunity” (the ***Company Earnings Donation Representation***);
4. proceeds from the sale of “virtual tickets” to the launch of the app would be donated to four charities, namely:
   1. the Birthing Kit Foundation;
   2. One Girl;
   3. Asylum Seeker Resource Centre; and
   4. the Schwarz family;

(the ***App Launch Event Donations Representation***);

(4) in or about December 2013, 100% of app sales for a week would be donated to the Schwarz family (the ***Schwarz App Sales Donation Representation***); and

(5) between 11 May 2014 and 18 May 2014, in connection with a Mother’s Day event:

(a) the full amount of the purchase of The Whole Pantry app for a week would be donated to two charities:

* + 1. The 2h Project; and
    2. the Bumi Sehat Foundation;

(b) an additional $1 would be donated to those charities for each story on the theme of “family” posted;

(c) as a result of the event, $5,000 had been raised to donate to the Bumi Sehat Foundation; and

(d) the funds raised would be provided to the named charities within a reasonable period of time following 22 May 2014.

(the ***Mother’s Day Fundraising Representations***);

1. The Director cumulatively describes these as the ***Charitable Giving Representations.***
2. Contrary to each of the Charitable Giving Representations, the Director contends that the only donations made by Ms Gibson or her company were:
3. a $5,000 donation made to the Bumi Sehat Foundation in July 2015, which may be referrable to the Company Earnings Representation and the Mother’s Day Fundraising Representations. Approximately $2,790 of this donation may be referrable to the App Sales Donation Representation;
4. a $4,823.53 donation made on or around 15 April 2014 to “Vestal Water on behalf of Kinfolk Café”, which may be referrable to the Company Earnings Representation; and
5. a $1,000 donation made on 5 March 2015 to One Girl, which may be referrable to the App Launch Event Donations Representation.
6. The Director contends that, to the extent that these Charitable Giving Representations were representations with respect to future matters, the Representations were made without reasonable grounds (although there is some confusion as to how the Director pleads this – I deal with this further at [197] below). By making these Representations, the Director claims that Ms Gibson and/or her company contravened ss 18 and 21 of the ACL and ACL (Vic).

## Alternative contentions

1. In the alternative, if the Court is not prepared to find Ms Gibson contravened the ACL provisions directly on her own account, the Director contends that Ms Gibson was the guiding mind and will of her company and fully controlled it. Therefore, the Director contends, Ms Gibson knowingly authorised and permitted the contraventions by her company, and so is deemed to have personally contravened the same provisions of the ACL (Vic).

# CONSIDERATION

1. I deal with the principles applicable to determining whether contraventions of ss 18, 21 and 29 have occurred, then consider Mr Gibson’s recorded explanations for her conduct, and finally turn to each of the alleged contraventions individually.
2. At the outset, there is no doubt that all of the conduct alleged against the respondents occurred in trade and commerce. The promotion, marketing and sales of The Whole Pantry book and apps were commercial activities. The conduct of the launches of the apps was part of the promotion of this commercial activity.
3. I note also that it is not in dispute on the evidence that at the time of the alleged contravening conduct, the second respondent’s name was “Belle Gibson Pty Ltd”. The name of the company reflected the fact that the key to the success of the goods it and Ms Gibson promoted and sold was Ms Gibson’s name, and the cancer story which accompanied that name. It was her company, and only hers. She used it – and its name – as a vehicle to promote herself, and to promote the goods and services she sought to sell, on the basis of her story about surviving cancer.
4. The choice of a respondent not to participate in a proceeding has forensic consequences. It does not alter the fact that a person in the Director’s position carries the burden of proving the allegations made, to the standard of the balance of probabilities. However, non-participation by a respondent may mean that there is an absence of evidence (whether oral or documentary) capable of affecting the Court’s evaluation of the existing evidence and material adduced by the active party. It also means that the evidence and material adduced by the active party is not tested from the perspective of the respondent.

## Applicable principles

1. The phrases “false and misleading representation” in s 29 of the ACL, and the phrase “misleading or deceptive” in s 18 of the ACL have not been construed as having different content: see *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14]-[15] (Gordon J); *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2014] FCA 634, 317 ALR 73 at [40] (Allsop CJ); *REA Group Limited v Fairfax Media Limited* [2017] FCA 91 at [13] (Murphy J). Given that the subject matter of s 29 could be seen as a subset of conduct that might otherwise fall within s 18, it would be appropriate to give the phrases a consistent meaning, although s 18 is not a penalty provision.
2. In *Campomar Sociedad, Limitada and Anor v Nike International Limited and Anor* [2000] HCA 12, 202 CLR 45, the High Court identified what has subsequently been described as a “practical” distinction (see French CJ in *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, 238 CLR 304 at [26] (*Campbell*)) in context between circumstances where representations have been made to individuals, and where they have been made to the community or public at large. In the latter situation (which is this case, since the representations were all made on various social media platforms), the Court said (at [105]):

The initial question which must be determined is whether the misconceptions, or deceptions, alleged to arise or to be likely to arise are properly to be attributed to the ordinary or reasonable members of the classes of prospective purchasers.

1. The approach is an objective one and involves asking whether the impugned conduct viewed as a whole has a tendency to lead a person into error: see *Campbell* at [25] (French CJ); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54, 250 CLR 640 at [49] (French CJ, Crennan, Bell and Keane JJ); *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* [2010] HCA 31, 241 CLR 357, at [15] (French CJ and Kiefel J) (*Miller*).
2. In *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* [1984] FCA 167, 2 FCR 82 at 88 (*Global Sportsman*), Bowen CJ, Lockhart and Fitzgerald JJ emphasised the objective nature of the approach to be taken:

If a corporation is alleged to have contravened s. 52(1) by making a statement of past or present fact, the corporation’s state of mind is immaterial unless the statement involved the state of the corporation’s mind. Whether or not s. 52(1) is contravened does not depend upon the corporation’s intention or its belief concerning the accuracy of such statement, but upon whether the statement in fact contains or conveys a meaning which is false; that is to say whether the statement contains or conveys a misrepresentation. Most commonly, such a statement will contain or convey a false meaning if what is stated concerning the past or present fact is not accurate; but a statement which is literally true may contain or convey a meaning which is false.

1. Their Honour’s view has been approved in subsequent decisions: *Fletcher v Nextra Australia* [2015] FCAFC 52 at [12] (Middleton, McKerracher and Davies JJ). See also *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1, 249 CLR 435 at [9], where French CJ, Crennan and Kiefel JJ consider, with reference to s 52 of the *Trade Practices Act 1974* (Cth) which is equivalent to s 18 of the ACL and ACL (Vic), that “s 52 is not confined to conduct which is intended to mislead or deceive. A corporation could contravene s 52 even though it acted reasonably and honestly”.
2. There is no material difference between s 52 and s 18 which might render their Honours’ observations inapplicable. Further, no different principle applies to individuals.
3. In *Hornsby Building Information Centre Proprietary Limited and Anor v Sydney Building Information Centre Limited* [1978] HCA 11; 140 CLR 216, Stephen J gave an example (at 227) of the situation set out in the last sentence of *Global Sportsman* quoted above:

To announce an opera as one in which a named and famous prima donna will appear and then to produce an unknown young lady bearing by chance that name will clearly be to mislead and deceive. The announcement would be literally true but none the less deceptive, and this because it conveyed to others something more than the literal meaning which the words spelled out.

1. Silence, or non-disclosure, is just as capable of falling within s 18 (and s 29) as a positive representation: see *Miller* at [18], referring to *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31*,* a Full Federal Court decision (*Ramensky*), and *Rafferty and Anor v Madgwicks* [2012] FCA 37, 287 ALR 437. As Black CJ pointed out in *Ramensky* (quoted by French CJ and Kiefel J in *Miller* at [18]) the question is whether the conduct (silence or non-disclosure falling within this concept) was misleading or deceptive. This is relevant to Ms Gibson’s non-disclosures of the fact she did not have cancer after she was unequivocally told this was the case.
2. The prohibition in s 21 can be described as involving questions of conscience: see *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226, 148 FCR 132 at [33], although as the Full Court in *National Exchange* pointed out (at [30]), such language does not mean that statutory prohibitions such as s 21 are constrained by common law or equitable concepts: they are statutory sources of liability. In *Australian Competition and Consumer Commission v Lux* *Distributors Pty Ltd* [2013] FCAFC 90 at [41] the Full Court said:

In our view, the above conduct was unconscionable. It is unnecessary to deal with the cases on s 51AB of the TPA and s 21 of the ACL in any detail. The word “unconscionability” means something not done in good conscience: for example, *Hurley v McDonald’s Australia Ltd* [1999] FCA 1728 at [22]; *ACCC v Allphones Retail Pty Ltd (No 2)* [2009] FCA 17; 253 ALR 324 at [113]; *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [291], [293], and the cases discussed therein. No argument was put that required any consideration of the authorities. Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty.

1. In the present case, the context is both a consumer protection context (as to the sales of The Whole Pantry apps and the book), and a somewhat distinct context of charitable giving. I say that the latter situation is somewhat distinct because, whereas consumer protection generally operates in a situation where people are seeking out goods and services to purchase for themselves or others, a situation of charitable giving involves different considerations. People are motivated to give to charity not to gain something for themselves, but to help others. Even in a situation where (as with the respondents’ conduct) charitable giving is linked to the purchase of goods, the motivation which is being tapped by those making the representations is the community’s sense of wishing to help others. This is relevant in my opinion both to how the unconscionability of the situation is assessed, as well as the characterisation of what was misleading or deceptive about the respondents’ conduct.

## Ms Gibson’s explanations

1. Ms Gibson is recorded as providing a number of explanations for the representations she made about having cancer. In March 2015, when the initial questioning of her claims really took hold in the media, she told a reporter from *The Australian* that she had been “led astray” by a doctor who diagnosed her. She was reported as saying (with the reporter’s description of her tone):

‘It’s hard to talk about it,’ she said plaintively. ‘I would say that it was more of a misdiagnosis than completely fictional.’

1. This is consistent with what would later be said on her behalf in answers to the s 126(1) Notices: namely, that Ms Gibson believed she had cancer, but was mistaken.
2. More detailed explanations, along the same lines, were given by Ms Gibson through her media interviews (notably the *60 Minutes* interview, and her mock interview with Penguin), and in answers provided on her behalf to Consumer Affairs Victoria, in answer to the s 126 Notices issued against her.
3. Ms Gibson claimed she met Dr Mark Johns at a social event in Perth at some unspecified time. In 2009, she claimed she believed she was diagnosed with terminal brain cancer and given four months to live by Dr Johns. Ms Gibson claimed that Dr Johns told her that he was an immunologist and neurologist, and that she saw Dr Johns intermittently between June 2009 and 2011, but did not see him in any medical consulting rooms. Dr Johns diagnosed her terminal brain cancer through “at home testing involving his electronic equipment”. Dr Johns provided what Ms Gibson claims she believed was oral chemotherapy medication. Ms Gibson also claims that she believed the use of the “electronic equipment”, which was administered at her home between 2009 and 2011, was radiotherapy. I note that the assertion by Ms Gibson that she was diagnosed by Dr Johns in her home is inconsistent with the account she gave in the Penguin media training interview: see [64] above. In that interview, she gave an account which suggested the cancer diagnosis occurred at St John of God hospital in Perth. Similarly, she claimed in that training interview that she received treatment at Peter MacCallum. These claims are inconsistent with the account given on behalf of Ms Gibson and on her instructions, in the answers to the s 126 Notices provided by Mills Oakley.
4. Between October and November 2011, Ms Gibson consulted a registrar of the neurology unit at the Alfred Hospital. In recounting Ms Gibson’s presenting symptoms and medical history, the registrar’s letter to the referring doctor made no mention of Ms Gibson having reported that she had been diagnosed with brain cancer. Ms Gibson had a brain MRI. The consultant neurologist at the Alfred reported to the referring doctor that Ms Gibson had attended to get her results and the results were “perfectly normal”.
5. Sometime between June and November 2014, Ms Gibson claimed she was introduced to another doctor, Dr Phil Best, through a friend. She claims to have consulted Dr Best at a naturopathy clinic and at her home. Ms Gibson claims that, in June 2014, Dr Best confirmed her brain cancer and also diagnosed cancer of the uterus, spleen and liver using “electronic equipment which fed data back to his computer”.
6. In November 2014, Ms Gibson then consulted Dr Phillip Soffer, a conventional general practitioner, and claimed that she then learned that she did not have cancer. After learning of this, Ms Gibson did not inform Apple, Google or Penguin of that fact. Ms Gibson explained this by saying that first, she would not update Apple on health or personal matters, and second, that she was in shock and denial at the time that she received the news that she was cleared of cancer diagnoses.
7. For the reasons I set out at [138] below, and to the extent it is necessary to do so in order to determine whether the contraventions of the ACL and the ACL (Vic) alleged by the Director have been made out, I do not accept Ms Gibson’s explanations.
8. In the present proceeding, Ms Gibson’s explanations are no more than claims or assertions. She chose not to attend the compulsory examination which she was required to attend, assuming the notice was valid. The information she provided through her legal representatives was not sworn or affirmed, nor even in her own words. She has chosen not to defend this proceeding, and therefore not to explain herself in public and in circumstances where she has promised to tell the truth. Nor did she make admissions so that liability was not in issue. She is entitled to make those choices, but as I note, they have forensic consequences. There is little or no admissible evidence before me to substantiate the explanations given on her behalf by her legal representatives, nor the explanations she is recorded as giving herself. What admissible evidence does exist tends in my opinion to contradict those explanations, or to cast doubt on their veracity. I explain that conclusion in more detail below in relation to each contravention.

## Health Representations

### The Cancer Representation

1. Statements were made expressly by Ms Gibson about having brain cancer, and there is no difficulty in characterising what she said as making a representation that she had brain cancer, or a brain tumour.
2. In her email to Penguin (see [25] above), ahead of the book contract, she described herself in the third person in the following way:

A few months prior, Belle was *diagnosed with terminal brain cancer*, the pivotal moment which saw her get ‘back to basics’…

(Emphasis added.)

1. The sales booklet made the same statement. When published, The Whole Pantry book itself, in describing Ms Gibson, described her as “*diagnosed with terminal brain cancer* at the age of twenty” (emphasis added). In the part of the book headed “The Story So Far”, as I have set out at [27] above, the following statements are made:

I will never forget sitting alone in the doctor’s office three weeks later, waiting for my test results. He called me in *and said ‘You have malignant brain cancer, Belle. You’re dying. You have six weeks. Four months, tops*...’

(Emphasis added.)

1. Social media accounts operated by the respondents made similar statements: “I have been healing *a severe and malignant brain cancer* for the past few years”; “Five years ago Belle Gibson was told *she had a brain tumour* that could kill her within four months”; and “When our founder, Belle, was *diagnosed with a terminal form of brain cancer”* (emphasis added).
2. Ms Gibson also made express statements in interviews she gave, such as “*I still have the cancer*” (emphasis added).
3. Through her legal representatives, Ms Gibson had admitted the statements were false. She also made admissions of falsity on the *60 Minutes* program, and in the interview given to the *Australian Women’s Weekly*.
4. To the *Australian Women’s Weekly* she is reported to have said: “No…none of it’s true”.
5. On the *60 Minutes* program, she said:

MS BROWN: It is all here. You know, you go on Instagram in 2013, “I have been healing a severe and malignant brain cancer for the past few years with natural medicine, Gerson therapy and foods. It’s working for me.”

MS GIBSON: It is and if any - - -

MS BROWN: Except you didn’t have brain cancer.

MS GIBSON: No, I didn’t.

MS BROWN: No.

MS GIBSON: Well, when I was writing that, I thought that I did and I was feeling well.

MS BROWN: Yes, but even then you misrepresented what you thought was your truth, which was all a big lie anyway.

MS GIBSON: I’m really sorry and it hurts me and I beat myself up every day for how I have hurt those who mean a lot to me.

1. Even without those admissions, Ms Gibson’s statements were obviously false, given what the evidence reveals about Ms Gibson’s subsequent health and conduct: she was not living with brain cancer at any stage of her life. The brain MRI scan performed at the Alfred Hospital in Melbourne in 2011 confirmed that Ms Gibson did not have a brain tumour. This was well before she launched The Whole Pantry apps and book. Then, in November 2014, she was tested by a qualified medical practitioner, Dr Phillip Soffer, and the evidence before the Court, such as it is, indicates the tests showed nothing of note, given that the entry on the notes stated “result marked as ‘no action’ to remove patient from discuss list.”
2. I am satisfied that, in the context the statements were made, members of the community reading those statements would be erroneously led to believe that Ms Gibson was suffering from terminal brain cancer when this was never the case.
3. As she said on the *60 Minutes* interview, Ms Gibson’s explanation is that she believed she had brain cancer, because that is what she was told by Mr Johns. I do not accept that explanation, but Ms Gibson’s explanation is immaterial to the characterisation of what she said as misleading or deceptive for the purposes of s 18 of the ACL and the ACL (Vic).

### The Treatment Representation

1. Just as with the representations about having cancer, Ms Gibson stated expressly that she had been treated for cancer with conventional methods. There is no difficulty in characterising what she said as making a representation that she had undergone conventional treatments for cancer.
2. In The Whole Pantry book, Ms Gibson states:

I tried chemotherapy and radiotherapy for two months...

I pulled myself out of chemo and radiotherapy - my doctors freaked out, but they could not stop me…

1. Having conventional treatment was the premise upon which the rest of Ms Gibson’s story was built – that is, that she turned away from conventional treatments for cancer, in favour of “healing” herself through nutrition and other alternative remedies. I have set out many of those statements about her alternative regimes at [25], [27], [29], [34] and [36] above.
2. Ms Gibson has maintained (including on the *60 Minutes* program and in answers provided through her solicitors) that she was given what she believed was radiotherapy and oral chemotherapy by Mark Johns, who “treated” her in Perth.
3. Notwithstanding these claims, there is no evidence to suggest Ms Gibson had any conventional cancer treatment. There are no medical or hospital records to that effect, although she was asked to produce them. There are no records of her being under the care of any qualified medical practitioners at the time of her alleged diagnosis in 2009, nor in the months thereafter when she stated she was undergoing chemotherapy and radiotherapy, which she stated she then gave away in favour of non-conventional treatments.
4. I am satisfied on the balance of probabilities that the representations were false, and that reasonable members of the community reading the statements in The Whole Pantry book would be led to believe that Ms Gibson had undergone conventional radiotherapy and chemotherapy, when that was not the case. I am satisfied no reasonable member of the community would have read those statements and understood Ms Gibson intended to refer to some kind of “alternative” chemotherapy or radiotherapy that was not conducted in a hospital or accredited medical facility under qualified medical supervision; and also would not have read and understood those statements as referring only to what Ms Gibson *believed* she had undergone by way of treatment.

### The Cancer Reasonable Basis Representation

1. The representation is said to be that Ms Gibson had a reasonable basis to believe she had brain cancer. The Director contends this is a representation to be implied from the other statements Ms Gibson made, and from her conduct in making the claims that she had been diagnosed with brain cancer, had four months to live and had taken and rejected conventional treatments in favour of alternative treatments.
2. The Director submits Ms Gibson did not have a reasonable basis to believe she had cancer and puts this contention by reference to two different time periods. First, that Ms Gibson *never* had a reasonable basis to believe she had brain cancer. This contention is based on Ms Gibson’s own accounts which I have set out at [133] to [135] above of how she came to be “diagnosed” and “treated” by Mr Johns, and then Mr Best, neither of whom were qualified medical practitioners, as well as the fact that a brain MRI scan in 2011 confirmed she did not have brain cancer.
3. Alternatively, the Director contends there was no reasonable basis for Ms Gibson to believe she had brain cancer after she consulted Dr Phillip Soffer in November 2014. It was after this consultation that Ms Gibson admitted she no longer believed she had cancer, but was too disturbed to correct all the misstatements which were by then still in the public arena. In the *60 Minutes* interview, she said:

MS GIBSON: It didn’t need to. Once I started to figure out where I stood and what reality actually was and I had received the definitive, ‘No, you do not have cancer,’ then that was something that I had to come with – come to terms with. That takes a lot and it was really traumatising. I was feeling a huge amount of grief and - - -

MS BROWN: Grief for not having cancer?

MS GIBSON: No, that I had been lied to and that I felt like I had been taken for a ride. It took me a lot to unpack that and once I was strong enough, I was ready to come out and speak with my community about it and I had a definitive date and that date was only 10 days before the media broke it.

1. In *Campbell*, French CJ said at [32]-[33], omitting footnotes:

It is important in considering whether conduct is misleading or deceptive to identifyclearly the conduct to be characterised. If the conduct is said to consist of a statement made orally or in writing, the first question to be asked is what kind of statement was made. Was it a statement of historic or present fact made on the basis that its truth was known to its maker? Was it a statement of opinion? That is to say was it a statement of “judgment or belief of something as probable, though not certain or established”? The term “estimate” itself, used as a verb, means the “act of valuing or appraising” or an “approximate judgement of the number, quantity, position, etc, of something”.

A statement of opinion may be a statement with respect to a future matter. It may take the form of a prediction. A forward estimate relating to the financial results of a business is a class of prediction. In strict logic there may be some category overlap between opinions and statements of fact. Opinions may carry with them one or more implied representations according to the circumstances of the case. There will ordinarily be an implied representation that the person offering the opinion actually holds it. Other implied representations may be that the opinion is based upon reasonable grounds, which may include the representation that it was formed on the basis of reasonable inquiries. In the case of a person professing expertise or particular skill or experience the opinion may carry the implied representation that it is based upon his or her expertise, skill or experience.

1. Whether or not a particular representation should be seen as carrying such an implication will ultimately depend on the circumstances of each case: see *Commonwealth Bank of Australia v ZYX Learning Centres Limited* [2014] NSWSC 1676 at [215] (Hamill J).
2. I am satisfied on the evidence that there was an implied representation made by Ms Gibson of the kind alleged. The Director did not rely on any particular authority to contend there was an implied representation of this kind. The implication for which the Director contends arises in circumstances quite different to those addressed by French CJ in *Campbell*. In and from mid-2013, Ms Gibson was not offering an opinion about having brain cancer, purporting to be qualified or experienced to do so (in which case one might find there was implied representation that she had reasonable grounds for that opinion). Rather, she was making a statement of both historic and present fact: that she had been living with brain cancer since 2009 and continued to do so. That was false.
3. However, the context in which the statements were made does carry an implication that she had a reasonable basis for making the statement. In my opinion, this is significant because those reasonable members of the community reading the introduction to her book (or promotional material about it), or the information about her apps, or her media statements, would be doing so at least in part for the purpose of deciding whether to buy the products she was selling. Part of being convinced to buy what Ms Gibson was selling would involve accepting that she was not a hypochondriac or an irrational person, but an “ordinary” young woman who had suffered a tragic health event in her early life, who had nevertheless found a way to survive that event, and live with it.
4. The context in which the statements were made which supports my finding of an implied representation that Ms Gibson had a reasonable basis for believing she had brain cancer are as follows. First, Ms Gibson’s statements used the language of mainstream medical profession such as “diagnosis” and “specialists”. The use of the word “terminal” is a word familiar in medical diagnosis of cancer. In an Instagram post the day after the launch of the app, which was in evidence, and which referred to Joshua Schwarz, Ms Gibson described her cancer as a “malignant, inoperable brain tumour” – also, I might add, comparing herself to Joshua Schwarz. To describe her condition as a “tumour” again suggests some kind of medical investigation which has confirmed the existence of a tumour, such as a MRI scan. Using the word “malignant” again suggests a conclusion brought about after medical investigation, as opposed to “benign”. Another online promotion for her app describes Ms Gibson as undergoing “personally challenging treatment”, which carries at least two implications: first that she is being “treated”, again a concept usually associated with being cared for by the medical profession and second the use of the word “challenging” plays on the usual associations with the discomfort and difficulties of people who must undergo chemotherapy or radiotherapy. There is ample contextual evidence in the introduction to The Whole Pantry book, in the section entitled “The Story So Far”. This is, I emphasise, written by Ms Gibson in the first person. It is replete with terms such as “diagnosis”. It also recounts a story about Ms Gibson passing out in a park:

I tried chemotherapy and radiotherapy for two months, and one day I woke up in the middle of a city park just opposite the hospital, hours after falling asleep there.

1. Later in that same passage, she spoke of the “hospital lawn”. The implication clearly is that Ms Gibson had been at the hospital having chemotherapy and radiotherapy. That is, the implication was she was being treated in a mainstream medical context for a medically diagnosed condition. Further on in this introduction she speaks of being “retested” each year, describing this as “intensive”, and then describes her condition as   
   “stable” with “no growth of the cancer”. Again, this contextualises her claims and places her in mainstream medical care situation – at least by this stage, in conjunction with her own self “healing” through alternative means. She then speaks of being in the “neurological cancer boat”, and having “occasional seizures, brain-fail, forgetfulness, and very not-so-pretty things that come with it all”, as well as her “cancer journey”. These statements all place her claimed illness in a context of the kind of suffering endured by those with a true diagnosis of cancer.
2. Having found the implied representation as alleged by the Director, I find further that Ms Gibson had no reasonable basis to believe she had cancer from the time she began making these claims in public to promote The Whole Pantry book and the apps in mid-2013. I make that finding on the basis of the evidence as it is before the Court, noting that there has been no explanation or elucidation given to the Court by Ms Gibson. Nor however, has she ever sought to resile from the explanations she has given in public, or contend that she has been misreported or inaccurately reported. She repeated her explanations on national television on the *60 Minutes* program, having also persisted with them in the recorded interview conducted by Penguin. I consider the Court is entitled in this proceeding to take what Ms Gibson has said as an accurate reflection of, and an admission about, her state of mind and what she relied on in making statements to the public that she had been diagnosed with brain cancer, underwent conventional treatment and then abandoned that treatment to “heal” herself through nutrition and other alternative treatments.
3. The bases that Ms Gibson has given in her explanation are neither reasonable nor rational. In particular, her initial “diagnosis” was, on one of her accounts, by a man who was not a qualified medical practitioner, in an examination undertaken in her own home. She has maintained Mr Johns used “electronic equipment” but has not explained in any detail what that was. The most detailed explanation she gave appeared during her *60 Minutes* interview, when she said:

It was a box, a machine with lights on the front and that machine was apparently German technology. There’s a - two pads, two metal pads, one that goes below the chair and one that goes behind your back and then that measures what I believe, or remember to be, frequencies.

1. How a person acting reasonably and rationally could think a machine of that kind, operated in her home, would detect inoperable brain tumour defies credulity. Right from the start, circumstances such as these provided no reasonable or rational basis for a person to believe she or he had “inoperable” brain cancer – least of all, because the individual making the “diagnosis” was not qualified to perform any operations or surgery. In my opinion it is unreasonable and irrational to accept, at apparently face value, what a person in the position of Mr Johns (as Ms Gibson has described him) might say about an illness as serious as a brain tumour. Two years later, although she had been told she had only four months to live, Ms Gibson was not only alive, but well. She has never given an account of any serious debilitation occurring between 2009 and 2011, and certainly no hospitalisations because of the effects of having an inoperable tumour in her brain. Then in 2011 she underwent a conventional medical procedure – a MRI scan – at the Alfred hospital. On the evidence, that showed no abnormalities. A reasonable and rational person at this time, subject to any extenuating circumstances or a conflicting second medical opinion, would not continue to believe she or he had an inoperable brain tumour which would drastically shorten her or his life. Especially so, again, where the person does not claim to have been suffering from any serious health effects due to the asserted tumour.
2. Further, for the three years between the clear MRI scan in 2011 and meeting Mr Best in June 2014, Ms Gibson did not claim to have been treated by any medical practitioners, or indeed any non-medical practitioners. Nor did she claim to have suffered any serious side effects or illnesses during this time which might be attributed to her brain cancer. She gives no explanation of what happened to her brain cancer, and instead claims that Mr Best “diagnosed” her with a range of other cancers – of the uterus, and the liver to name two. Again, this occurred with same kind of unspecified “electronic equipment”.
3. It was only in November 2014, when Ms Gibson saw a qualified medical practitioner, Dr Philip Soffer, and (I infer) was informed of the results of the tests Dr Soffer carried out, that she admitted she no longer believed she had cancer. Why this persuaded her when the 2011 MRI scan did not is not clear on the evidence.
4. Finally, although I have found there was no reasonable (or rational) basis for Ms Gibson to believe she had brain cancer, it is likely that in determining any applicable penalty, the Court may need to consider whether Ms Gibson genuinely believed she had brain cancer, even if there was no rational or reasonable basis for her to do so. Whether or not Ms Gibson held a genuine belief on that question may be relevant to how the Court determines appropriate penalty. As I have noted, at the moment I am not satisfied on the evidence to which the Director has drawn my attention, and on which the Director has relied in submissions, that I should find Ms Gibson had *no genuine belief* she had brain cancer. This is quite different from a finding that there was no reasonable or rational basis for her public statements that she did. Not all human beings are rational and reasonable all of the time. A finding of no genuine belief would involve a finding to the effect that Ms Gibson concocted a ruse from the start, in order to deceive consumers into purchasing her products, knowing that she was doing so on an entirely falsified basis. I would need more persuasive evidence than I have currently been directed to in order to make such a finding. It seems to me that, at least in some respects, it might be open to find that Ms Gibson suffered from a series of delusions about her health condition. I make no such finding: rather, I simply note it might be open to do so as part of explaining why I am not satisfied on the balance of probabilities that, as the Director would have it, Ms Gibson “did not really believe” she had cancer.
5. At present, on the evidence as it stands, the only finding of a conscious lie against Ms Gibson that I am prepared to make concerns the inconsistency identified at [133] above. In the Penguin interview, Ms Gibson suggested her cancer diagnosis occurred at the St John of God hospital in Perth, and that she received treatment at Peter MacCallum hospital in Melbourne. Her later admissions demonstrate these statements were false. I am prepared to find, in the uncomfortable circumstances of questioning in the Penguin interview, that they were deliberately false. Ms Gibson lied about these matters in the Penguin interview.

## Conclusion on s 18 of the ACL and ACL (Vic)

1. As I have found above, each of the three representations constituted misleading or deceptive conduct, in trade and commerce, contrary to s 18 of the ACL and the ACL (Vic).
2. I find that both Ms Gibson and her company engaged in that conduct. While the contractual arrangements for the Facebook and Instagram accounts might have been with the company, Ms Gibson was responsible for the content. She operated the website. She was the author of the foreword and introduction (“The Story So Far”) to The Whole Pantry book, it being written in the first person, even if the contract with Penguin was with her company. Many of the clearest misleading or deceptive statements occur in this introduction. It was Ms Gibson who put the book proposal to Penguin, in her own email communications. It was Ms Gibson who was asked to, and (I infer) authorised the content for the marketing material for the book at the London Book Fair. It was Ms Gibson who verified her claims in her media training session with Penguin.
3. As mentioned in [100] above, the Director’s position was unclear on which contraventions of which provisions were pressed. The Director will be given an opportunity to clarify the relief sought prior to final orders being made. However, on the evidence I am satisfied Ms Gibson has contravened s 18 of the ACL (Vic) and the company has contravened s 18 of the ACL and the ACL (Vic).
4. Where necessary (for example in her communications with Penguin), Ms Gibson undertook this conduct on her own behalf but also within her actual or apparent authority as a director of her company within the terms of s 196(2) of the *Australian Consumer Law and Fair Trading Act* and s 139B(2) of the *Competition and Consumer Act 2010* (Cth), so as to render the company liable for her conduct.
5. The fact that the company contracted to publish the book, and contracted to operate the Facebook and Instagram accounts, also means the company is liable as a principal for the making of misleading or deceptive representations on those platforms and in that book. The effect of s 195(1) of the *Australian Consumer Law and Fair Trading Act* is that, having authorised the company to engage in that conduct (of contracting and authorising the publication of the statements), Ms Gibson is deemed to have personally contravened the same provisions of the ACL (Vic): here, s 18.
6. The circumstances of Ms Gibson’s conduct being so intertwined with the company she controlled and directed, I am also satisfied that each of the company and Ms Gibson also have accessorial liability for the s 18 conduct of the other, within the terms of s 216(4) of the *Australian Consumer Law and Fair Trading Act* and ss 224(1)(c)-(e) and 246(1)(b) of the ACL (Vic).

## Section 29 of the ACL and ACL (Vic)

1. The Director relies on three aspects of s 29 to establish liability in each of the respondents. He contends that each of the respondents:
2. made a false or misleading representation that purports to be a testimonial by a person (Ms Gibson) relating to goods (s 29(1)(e));
3. made a false or misleading representation concerning a testimonial by any person (Ms Gibson) relating to goods (s 29(1)(f)); and
4. made a false or misleading representation that goods have performance characteristics, uses or benefits (being information concerning wellness successfully used by Ms Gibson, as a person diagnosed with terminal brain cancer who had rejected conventional treatment, to prolong her life and improve her quality of life) (s 29(1)(g)).
5. The Director did not refer to any authorities defining the term “testimonial”. While I am not aware of any Australian authorities considering the definition of the term “testimonial” in this context, the term has been taken by this Court to variously refer to “customer testimonials”, testimonials expressed by “customers”, “consumers” or “clients”; or “reviews”: *Australian Competition and Consumer Commission v A Whistle & Co (1979) Pty Ltd* [2015] FCA 1447; *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74, 192 FCR 34; *Australian Competition and Consumer Commission v P & N Pty Ltd* [2014] FCA 6. This is consistent with the definition in the *Macquarie Dictionary*, which defines “testimonial” as, inter alia, “a writing certifying to a person’s character, conduct, or qualifications, or to a thing’s value, excellence, etc.; a letter or written statement of recommendation.” In each of these instances, “testimonial” has been defined by reference to a “customer”.
6. The “goods” for the purposes of s 29 are The Whole Pantry book and the apps. There was little by way of submission by the Director about how it was said that any of Ms Gibson’s statements, and if so which of them, constituted “testimonials” relating to the apps or the book. Were any of the three representations set out at [104] above, or what was called the “health claims” (see [106] above) properly characterised as “testimonials” for the apps and the book? In my opinion they were not. Each of them was a statement about Ms Gibson herself, and what had happened to her. Whether or not there were other statements made by Ms Gibson which could be more closely connected to the content of the apps and the book that might properly be seen as “testimonials” is not to the point, as the Director did not rely on any other statements as constituting a contravention of s 29 of the ACL and the ACL (Vic).
7. Nor were any of the three representations, or the “health claims” representations “concerning” a testimonial relating to goods (s 29(1)(f)), because this suggests there were two linked sets of communications – a representation(s) and then a testimonial. That is not what occurred here.
8. Further, I do not consider the Director has made out the allegation of a contravention of s 29(1)(g). For that provision to be contravened the Director would need to prove that the statements by Ms Gibson, or her company were false or misleading representations about the uses or benefits of the apps or the books. This strays into the area of discourse left untouched by the Director’s case: namely, whether representations were made that activities of the kind promoted – diet, health, exercise and “wellness” (being the use or benefits of the apps and the book) could help cure, or stabilise, cancer – were false or misleading claims. The Director has adduced no evidence about the effectiveness one way or the other, of the strategies recommended by Ms Gibson in her apps and in her book.
9. In my opinion, none of the Director’s allegations that the respondents contravened s 29 of the ACL and/or the ACL (Vic) are made out.

## Section 21: unconscionable conduct

1. The Director’s case under s 21 rests (according to the written submissions) on the basis that the Court should not assume in Ms Gibson’s favour that she truly believed she had cancer. Essentially, the same matters are relied on as were relied on for the absence of a reasonable basis for her belief. I have set out at [170] above why I do not consider these two propositions to be of the same nature.
2. The additional factor relied on by the Director under s 21 is that after being told, and accepting, in November 2014, that she did not have any form of cancer, Ms Gibson took no steps to withdraw her claims or stop sales of the apps or the book. Rather, the Director submits she continued to promote all three, and assured her publisher, Penguin, that she did have cancer.
3. Three pieces of evidence are relied upon. The first are the answers given by Penguin to questions asked under cover of a s 126 Notice.
4. In answer to one question about what inquiries Penguin made of Ms Gibson’s medical history, Penguin stated (through its lawyers):

On many of these occasions Penguin made general enquiries of Ms Gibson in relation to her medical history. These enquiries are detailed in the response to Question 12, but particular note is to be given to a media training session conducted by Penguin on 23 October 2014 during which Ms Gibson was asked to provide specific details about her medical history. At the time. although Penguin considered that certain aspects of Ms Gibson’s responses were unclear, Penguin nevertheless remained of the view that Ms Gibson had suffered from brain cancer. This is because Ms Gibson consistently stated the fundamental bases of her personal circumstances and medical history.

1. I note that the reference to the media training session on 23 October 2014 in the quote above appears to be incorrect. Penguin subsequently states in its response that the session was conducted on 23 September 2014. Chronologically, the interview with Ms Gibson occurred about a month before Penguin published the book, which occurred in October 2014.
2. It is clear from some of Penguin’s subsequent responses that some allegations surfaced almost immediately after the book was published, but still before Ms Gibson’s attendance on Dr Soffer:

On or around 22 October 2014, Julie Gibbs [a Penguin employee]was informed by Ms Gibson that one of her friends had become jealous and had ‘turned’ on her. Ms Gibbs understood this to mean that a friend of Ms Gibson had been making false allegations to the effect that Ms Gibson had fabricated part of or all of her illness.

On 29 October 2014, Nick Owens of Sefiani Communications [contracted by Penguin in relation to the book] provided a draft ‘Contingency communications’ document (Tab 210). The document included draft media statements for a scenario in which it was being alleged that Ms Gibson had fabricated part of or all her story.

1. Penguin did not provide details of any responses by Ms Gibson to these allegations prior to an email sent to Penguin on 13 January 2015. That is two months after her tests with Dr Soffer. Penguin stated:

In an email to Penguin on 13 January 2015 Ms Gibson stated, among other things that:

*... I faced a big uncertainty with my most recent integrative doctor disappearing (uncontactable, leaving me without some invoiced medical supplies etc), bringing much doubt and grief to myself and family. With this at hand, I’ve been put through the works, and have had to spend the last six weeks getting new testing, and becoming referred onto a new team to take back control of the situation. Where I currently stand is that there is talk of possible remission, at least partial remission, (this is huge and great news!)*

*I am also scheduled in for surgery later on in the year to remove what has been found in two of my organs. The fingers crossed, best possible scenario is that surgery in what we hope to be February, will remove anything that I was recently diagnosed with. There is potential that these foreign tissues are benign, putting me in a fantastic position to move forward and heal, but that won’t be confirmed until they’re removed.*

*The advice from my doctor is that I allow myself time to digest the idea of surgery, something I’ve always been resistant to, and also allow myself privacy through it all, preventing me from becoming further overwhelmed by my situation*.

1. The second piece of evidence is the answers given by Apple to questions asked under cover of a s 126 Notice. So far as I have been able to ascertain, Apple does not provide any information relating to the period Nov 2014 to March 2015 about communications from Ms Gibson. It does refer to emails in May, June and July 2014 but these emails do not substantiate the Director’s contentions, being of a more general nature about Ms Gibson’s app.
2. The third is some email communications from Ms Gibson to Penguin, to which I have already referred.
3. It is true that in her email to Penguin in January 2015, Ms Gibson is clearly implying that she still has cancer, and indeed is about to undergo surgery to remove tumours. There is no evidence Ms Gibson ever underwent any surgery to remove tumours or had other operations related to cancer. No doubt representations of this kind encouraged Penguin to continue to market and sell the book until the further revelations in March 2015.
4. Again, however, the problem to which I referred earlier arises. Is this evidence sufficient to make a finding that Ms Gibson had no genuine belief after November 2014 that she had cancer yet continued to represent to her publishers directly, and to her fans, followers, readers and consumers more generally, that she did? Has the Director established on the balance of probabilities that Ms Gibson was acting against conscience in, essentially, deliberately withholding information that she did not have cancer (and had never had it)? I do not consider there is a sufficient probative basis in the evidence to make such a finding. As I have noted above, another explanation is that Ms Gibson remained under some kind of delusion that she had cancer. She may have had other psychological or psychiatric issues. Those possibilities are reasonably open on the evidence. I am not persuaded on the evidence she was acting unconscionably.
5. It is also true as the Director submits, that Ms Gibson herself gave an explanation for not volunteering her apparent state of good health soon after November 2014, by saying that she was in “shock and denial” at being given the news. This was how, through her lawyers, she answered the Director’s questions in the s 126 Notice. That answer is not consistent with what she told Penguin in January 2015: see [190] above. Is it evidence of deliberate falsehood, or conduct otherwise of a kind justifying characterisation as conduct “against conscience” for the purposes of s 21? I do not consider the Director has discharged his burden of proof simply by pointing to two possibly inconsistent accounts, given months apart by Ms Gibson in circumstances where she has given no direct evidence.
6. Accordingly, the Director’s allegations of contraventions of s 21 of the ACL and the ACL (Vic) are not made out.

## Charitable Giving Representations

1. There is a lack of clarity in the Director’s pleadings in relation to the Charitable Giving Representations. In the Statement of Claim, the Director contends that the Charitable Giving Representations were representations as to a future matter, within the meaning of s 4 of the ACL and ACL (Vic) (see [32] of the Statement of Claim). However, in his submissions, the Director contends that s 4 is relied upon only to the extent that “the representations concerning charitable giving concerned what *would* be donated” (emphasis in original). If that is the case, the Director contends that “they were representations as to a future matter”. It is unclear whether the Director intends to rely on s 4 only as an alternative pleading. In the circumstances, I consider the characterisation of the Charitable Giving Representations both as representations as to future matters and representations as to contemporaneous matters.
2. Section 4 is in relevantly similar terms to the former s 51A(2) of the former Trade Practices Act, and is set out at [94] above. The effect of a provision in these terms does not turn on the intention of the maker of the representation, nor whether she or he genuinely believed that a future state of affairs would occur, or a future event would come to pass. This was explained by Sheppard and Neaves JJ in *Cummings v Lewis* (1993) 41 FCR 559 at 565 where their Honours said:

His Honour said, in relation to Mr Leckie’s representations, that he saw no reason to believe that, when Mr Leckie made the statements which his Honour found to have been made, he lacked “genuine intentions and a genuine belief in the accuracy of his prediction, or that he was indifferent to those questions.” His Honour thought that Mr Leckie genuinely believed his “encouraging assertions”. Genuine or honest belief is not what s 41 of the Act refers to. It refers to the person making a representation not having reasonable grounds for making it. The distinction is perhaps a fine one, but the fact that a person may honestly believe in a particular state of affairs does not necessarily mean that he has reasonable grounds for his belief that the statement he makes is correct.

1. In *Prior v Mole* [2017] HCA 10 at [98], Gordon J considered the meaning of “reasonable grounds” in a statutory context:

When a statute prescribes that there must be ‘reasonable grounds’ for a state of mind, it requires the existence of facts sufficient to induce that state of mind in a reasonable person. It is an objective test. The question is not whether the relevant person thinks they have reasonable grounds.

(Footnotes omitted.)

1. Save for the Company Earnings Donation Representation (see [213] to [217] below), each of the statements upon which the Director relies in relation to the Charitable Giving Representations could be characterised as a representation as to a future matter. Each could be seen as a statement of intent made by Ms Gibson or her company, as to what she and her company would do in the future with sale proceeds from The Whole Pantry app and book, and from fundraising events that were undertaken. As I set out below, some of the representations are also capable of characterisation as representations about existing facts.
2. If s 4 applies, the meaning of s 4(2) must be considered. In *North East Equity Pty Ltd v Proud Nominees Pty Ltd and Anor* [2012] FCAFC 1, 285 ALR 217 (*North East Equity*), the Full Court said at [28] – [30] (of s 51A, but the principles are applicable to s 4):

Section 51A(2) imposes an evidential burden on the respondents to adduce evidence on the issue of whether there were reasonable grounds for making the representations. No persuasive burden (onus) falls upon the respondents to *prove* that they had reasonable grounds: *Australian Competition and Consumer Commission v Universal Sports Challenge* [2002] FCA 1276; *Fubilian Catering Services Ltd v Compass Group (Australia) Pty Ltd* [2007] FCA 1205; *McGrath v Australian Naturalcare Products Pty Ltd* [2008] FCAFC 2; (2008) 165 FCR 230.

At [33], the Full Court observed that the relationship between the burden cast upon the respondents to adduce evidence of reasonable grounds, and the dispositive burden upon the appellant, once the respondents had adduced evidence of reasonable grounds, was important in the present case. When relying upon s 51A(1), taken alone, to establish a contravention of s 52, two integers must be satisfied by an applicant. The first is that the representation relied upon must be a representation with respect to a future matter, and the second is that the representor did not have reasonable grounds for making the representation.

However, the question of whether a respondent had, at the time of making the representation as to the future matter, reasonable grounds for making it, is particularly illuminated by the knowledge, understanding, or reasoning of the respondent. Section 51A(2) therefore casts an evidential burden on the respondent to adduce evidence on that issue, that is, some evidence ([33], first Full Court decision) of reasonable grounds for making the representation, failing which the deeming effect of s 51A(2) is engaged thus making it unnecessary for the applicant to prove the second integer under s 51A(1) in order to establish a contravention of s 52. Once evidence is adduced by a respondent in discharge of the evidential burden, the applicant must satisfy the dispositive burden of showing that the respondent did not have reasonable grounds for making the representation.

(Emphasis in original.)

1. The principles set out by the Full Court in *North East Equity* are an authoritative statement of the interpretation of s 4(2): *Crowley v WorleyParsons Limited* [2017] FCA 3 at [71] (Foster J).
2. In this case, the application of s 4(2) is straightforward because Ms Gibson did not adduce any evidence to the effect that she had reasonable grounds for the representations as to future matters alleged by the Director to have been made by her, and her company.
3. Accordingly, s 4(1)(b) is satisfied, and the representations made by Ms Gibson and her company, if otherwise established by the Director, are taken to be misleading.
4. Even without the operation and effect of s 4, I would have been satisfied that each of the representations alleged by the Director was made, and amounted to misleading or deceptive conduct for the purposes of s 18 of the ACL and ACL (Vic).

### The App Sales Donation Representation

1. There are said to be two representations involved in the statements relied upon in this category: one express and one implied.
2. The express representation is said to be that a portion of all sales revenue received from sales of The Whole Pantry app was being or would, within a reasonable time of receipt be, donated to charities. The Director contends it was made by Ms Gibson, alternatively by her company, through the statements I have set out at [56] to [59] above.
3. The implication for which the Director contends is bound up with the first allegedly express representation, and is contended to be that donations would be made “reasonably promptly” following receipt of funds.
4. The statements at [57] to [58] make the express representation alleged by the Director. I am also satisfied the statements carry the implication for which the Director contends. The context of the representations – statements made on The Whole Pantry website and on the description of the Android app – is that the donations are an integral feature of the sales of the app as those sales occur. The language used – “Part of the Whole Pantry app sales will be donated” - and “part of the sale….goes towards” implies to the ordinary and reasonable reader that as sales are made, donations will result. The present or future tense is used, and this is reinforced by describing the recipients as “rotating” charities, suggesting there will be a constant flow of funds from app sales.
5. In making these representations, I am satisfied the respondents engaged in conduct that was misleading or deceptive in contravention of s 18 of the ACL and the ACL (Vic).
6. It was not the case that a portion of all sales from The Whole Pantry app were donated to charities. As I have found at [59] above, the only donation from sales of the app was the sum of approximately $2,790 made to the Bumi Sehat Foundation in July 2015, as part of a larger donation of $5,000 made over a year after the event purporting to raise money for Bumi Sehat. This donation was also well after the falsity of Ms Gibson’s claims came to light. An ordinary and reasonable person hearing a statement to effect I have described (about a portion of all sales of the apps going to a particular person or organisation) would be led into error, because the statement suggests donations would be in multiples, and regularly, just as the sale of the app would be. Further, the one donation that was made occurred over a year after the event purporting to raise money for Bumi Sehat Foundation and, more critically, after the Director had contacted Ms Gibson and her company about the investigation. In other words, it is difficult to see any link in fact between the representation made by Ms Gibson and her company, and the donation of $2,790, despite Ms Gibson and her company attributing that sum to app sales in the documents provided to the Director.
7. As I have noted above, this being a representation as to a future matter, s 4 of the ACL and ACL (Vic) applies and in the absence of evidence to the contrary from Ms Gibson, there are taken to be no reasonable grounds for that representation and it is misleading.

### The Company Earnings Donation Representation

1. The express representation is said to be that Ms Gibson and/or her company stated that a “large part of everything” the company earned “is now donated to charities and organisations which support global health and wellbeing, protect the environment and provide education to those who otherwise wouldn’t have the opportunity”.
2. The statement was made in the context I have found at [61] above: namely, as part of the introduction in The Whole Pantry book. However, it is worthwhile extracting the whole of the paragraphs in which these statements are made, so that the context can be fully appreciated. The heading is: “At the foundation of all you do is community – why is that?” This is what Ms Gibson says:

In the beginning, thanks to Instagram, I tapped into a world of people who were feeling uninspired and unsupported. For the first time in my life I felt overwhelming love and support – from endless numbers of people! There just isn’t enough out there for those wanting to live their best lives possible. Pain is part of the human condition, but I couldn’t bear to think of people suffering alone, or feeling anything but supported through it.

Now, it’s become more than just supporting The Whole Pantry (TWP) community, who I feel are lucky to be able to access health and wellness information, support and education. I realise that there are millions of people out there without that access, and I feel it is important to help them too, inspiring a ‘giving back’ end to TWP. A large part of *everything* the company earns is now donated to charities and organisations which support global health and wellbeing, protect the environment and provide education to those who otherwise wouldn’t have the opportunity. The TWP community helps me choose who to support – it’s world-changing for them too, to be able to say, ‘we’re helping ourselves, and that’s helping others, too’. It’s become fundamental now.

My community is my family now. They’re my game-changers and inspirers. I wouldn’t be capable of saying with confidence that I’m changing the world with them, if they didn’t take this leap of crazy with me.

(Emphasis in original.)

1. In terms, this is not a representation as to a future matter. Rather what is conveyed by this statement is that, at the time Ms Gibson was making the statement what she was “doing” was donating a large part of “everything” to charities. This is emphasised by the use of the word “now” in “now donated”.
2. This representation was false. An ordinary and reasonable reader would be led, erroneously, to believe that throughout the time the book was available for purchase, a large part of everything Ms Gibson’s company earned (including from sales of the book) was being donated, on a contemporaneous and continuous basis. That was not the case at all.
3. Rather, the evidence discloses only two donations referrable to the company’s earnings. The first is the donation to the Bumi Sehat Foundation in July 2015 (totalling $5,000, $2,790 of which was said by Ms Gibson to be referrable to sales of The Whole Pantry app, although those sales are still within the earnings of the company). This payment was made after the Director was in contact with Ms Gibson about suspected contraventions of the law. The second is a donation of $4,823.53 made on or around 15 April 2014 to “Vestal Water on behalf of Kinfolk Café”. According to a Facebook post, dated 8 March 2015, this donation to “Vestal Water” was “funding for a filtration system to Kinfolk Café, a not-for-profit café in Melbourne CBD”. Thus, a little under $10,000 was donated from the company’s earnings, and none of it continuously, contemporaneously or reasonably promptly. On no view were the sums donated “a large part” of everything the company earned.

### The App Launch Event Donations Representation

1. This statement was made in notifications on social media for the virtual launch of The Whole Pantry app. Ms Gibson and her company stated that proceeds from the sale of “virtual tickets” to the launch of The Whole Pantry app would be donated to four charities. Those charities were:
2. the Birthing Kit Foundation;
3. One Girl;
4. Asylum Seeker Resource Centre; and
5. “TWP families”, with one family (the Schwarz family) identified specifically;
6. In relation to the Schwarz family, the notification stated that “Joshua, 5, has terminal brain cancer Which cant be operated on. His family are hoping to fly him to mexico as a last resort for treatment”.
7. The last part of the notification stated that this “‘online event’ is for those who want to contribute beyond their App download and be part of creating social, global and radical change with us and our closest Wellness, Food and Lifestyle icons”.
8. These statements could be characterised, on the one hand, as representations as to a future matter – namely, the donation by the company and Ms Gibson, in the future, of the proceeds of sale from the “virtual tickets”. If so, for the reasons I have set out at [198] to [204] above, there were no reasonable grounds for that representation and it is misleading.
9. Alternatively, I am satisfied Ms Gibson and her company made a representation as to existing fact that was misleading or deceptive in any event. An ordinary and reasonable reader would be led, erroneously, to think that all proceeds from the virtual tickets were concurrently or contemporaneously being donated to one of the four causes set out in the notification, or being spread between them. There were no concurrent or contemporaneous donations made.
10. On the evidence as it stands, three of these groups received no money from Ms Gibson or her company: ASRC, the Birthing Kit Foundation and the Schwarz family. One Girl received $1,000 in March 2015, about the same time the media were starting to investigate Ms Gibson’s claims. That is some three months after the “virtual” launch. There is some evidence, in the complaint from the ASRC, that Ms Gibson’s then partner, Mr Clive Rothwell, made a donation to the ASRC of $1,000 in April 2014. There is no evidence of how this donation came to be made. The fact that Mr Rothwell used his The Whole Pantry email to communicate with the ASRC is neither here nor there in terms of linking the donation of this money with the representation made in the social media notifications. There is no evidence the Schwarz family received any money from the sale of “virtual tickets” to The Whole Pantry launch.

### The Schwarz App Sales Donation Representation

1. Also in December 2013, Ms Gibson and her company stated on the healing\_belle Instagram account that “100% of app sales” for a week would be donated to the Schwarz family.
2. This can be characterised as a representation to a future matter and for the reasons I have given above, s 4 applies so that it is taken to be misleading, in the absence of evidence of reasonable grounds for the statement from Ms Gibson or her company to the contrary. I am satisfied it was a representation, and a misleading one.
3. It could also be characterised as a statement of present fact. An ordinary and reasonable person reading that statement on the Instagram account would be led, erroneously, to believe that 100% (an unequivocal amount) of whatever app sales were made that week were, concurrently or contemporaneously, being donated to the Schwarz family as they were received.
4. That representation was false. There is no evidence before the Court that the Schwarz family received a cent from Ms Gibson or her company in relation to sales of The Whole Pantry app, although their son Joshua was truly seriously ill with brain cancer.
5. In some statements through her lawyers in answer to a s 126 Notice, Ms Gibson maintained that she collected $800 in a jar which she did give to the Schwarz family. I have dealt with this assertion at [44] above. Without evidence from Ms Gibson in this proceeding, or evidence supporting such a claim, I am not prepared to accept the account of $800 asserted in documents by or on behalf of Ms Gibson should be found to be a donation meeting the description in the representations, or as even having in fact occurred. Further, I am not prepared to find, in any event, that the Schwarz family received this money.

### The Mother’s Day Fundraising Representations

1. This conduct concerned statements made on the Facebook account of The Whole Pantry in May 2014. The statements are set out at [51] above.
2. App purchases between 11 May 2014 and 18 May 2014 were said by Ms Gibson and the company’s Facebook post to go “straight to the 2h Project and the Bumi Sehat Foundation”. There was to be an additional donation from Ms Gibson and the company of an extra $1 for each person who purchased the app that week.
3. Again, these can be characterised as representations as to future matters and s 4 applies. As I have noted above, the outcome of the application of s 4 in circumstances where Ms Gibson has not adduced any evidence is that there are taken to be no reasonable grounds for the representations and they are taken to be misleading. As with some of the other statements, I am also satisfied that even without the application of s 4, the statements are misleading or deceptive because the representation could also be characterised as a representation that concurrently or contemporaneously, the 2h Project and the Bumi Sehat Foundation were to receive funds from app purchases made that week. That is the import of the phrase “straight to”.
4. Contrary to what was said on the Facebook post, no funds went “straight” to the 2h Project and the Bumi Sehat Foundation in May 2014. Nor did any funds go to those two organisations shortly thereafter. Instead, more than a year later and once she realised (I infer) she was under investigation and that the media were scrutinising her claims, Ms Gibson made a once off donation to the Bumi Sehat Foundation of $5,000. There is no evidence that these funds were in any way related to the receipts from app sales during the week of 11 to 18 May 2014, nor that the extra $1 per person which Ms Gibson stated would be paid, was paid. There was simply a lump sum donation in July 2015. I am not prepared to infer, in the absence of evidence from Ms Gibson and the company, that there was any connection between these funds and what the company received by sales in the week commencing 11 May 2014.

## Taking a more global approach

1. Looked at globally, the falsity in the representations is also apparent. During the relevant period (mid-2013 until March 2015), the company received over $420,000 from sales of the app and the book, and the advance from Penguin on the book. Of this figure, the evidence shows that about $10,000 was donated. That proportion does not represent a “large part of everything”, nor can it represent “routine” donations by the respondents of part of the proceeds of sale. The $10,000 did not go to, and was not divided between, all the people and organisations which Ms Gibson had identified as the charitable projects to which members of the community would see some of the sales proceeds donated. Rather the donations were sporadic, ad hoc and, as to some of them, opportunistic: apparently motivated by the disquiet emerging in early 2015 concerning the truthfulness of Ms Gibson’s claims.
2. The evidence also discloses the financial situation of Ms Gibson and her company during a more limited time frame, which again supports a finding that the representations were false.
3. I have found above that at least one of the “donations” – the $800 in a jar passed around at the physical launch of the app on 6 December 2013 – was not a donation from the company in the way it was represented would occur and there is no evidence that money made its way to the Schwarz family. However, even taking the answers to the s 126 Notice given on Ms Gibson’s behalf as otherwise accurate, the amounts these responses admit were donated totals just over $12,000 in the two year period 16 April 2013 to 26 May 2015. The accounts of the company, which were in evidence, disclose that for the narrower period of the financial year ending 30 June 2014, the company’s income was $319,878, with a profit of $250,031. There was no apparent financial reason that the representations could not have been fulfilled. Moreover, those same accounts show that at the year ending 30 June 2014, the company had over $70,000 in one of its bank accounts, and had loaned Ms Gibson personally over $50,000. These matters may be more relevant to penalty than liability but it is clear that money was available and choices were made to spend it on other things, including on Ms Gibson herself.
4. All Ms Gibson’s marketing of herself and her company projected the image of a successful, booming enterprise with a wholesale dedication to charitable giving. Any reasonable member of the community reading the statements from The Whole Pantry Facebook or Instagram accounts would be led, erroneously, to believe that this was an enterprise where substantial proportions of what people paid over to purchase the apps or the book would be given to charitable causes, on a regular and ongoing basis.
5. Also examined more globally, it is apparent neither Ms Gibson nor her company had any reasonable grounds for these representations. There was no plan or system in place about the allocation of sales to the nominated charities. On the evidence, no directions were given by Ms Gibson (or anyone else employed by her or acting on her behalf) about the diversion of income to the nominated charities. There was no evidence any person was monitoring the sales as they came in so as to ensure the representations would be given effect. There were no grounds at all for these representations, let alone reasonable ones.

## Section 21

1. In contrast to the approach I have taken above in relation to the cancer representations by Ms Gibson, I am satisfied that the misleading or deceptive representations made by Ms Gibson and the company about the charitable donations which she and her company would make, constituted unconscionable conduct for the purposes of s 21 of the ACL and ACL (Vic). Here, there is no exculpatory explanation available. I infer Ms Gibson well knew the potential drawing power of statements that a portion of sales made would go to charity. I am prepared to infer that she well understood that telling stories about the good works done by these organisations, or stories about the dire needs they represented, or the dire needs existing in individual families such as the Schwarz family, would stir members of the community into purchasing the app when they otherwise might not, or stir members of the community into purchasing her app rather than another. These representations had a clear marketing element.
2. Ms Gibson was in control of the company, and of the marketing and business operations surrounding The Whole Pantry brand. She had the capacity to follow through on the representations she had made in social media, which representations were made to serve her own commercial interests and those of her company, as well as marketing an image of herself in the media which she clearly took advantage of. In order to secure these advantages for herself and her company (financial, business, promotional) she played on the empathy and generosity of the Australian community towards causes that were seen to be deserving. Her “pitch” overwhelmingly used groups likely to evoke sympathy because of their vulnerabilities – young girls, asylum seekers, sick children. The use of Joshua Schwarz, a seriously ill child, in this way is particularly unconscionable.
3. The evidence discloses the myriad of ways in which Ms Gibson secured promotional advantages for herself and her company through promoting this image of herself. In terms of the app, this was featured in a number of Apple’s promotions, including on its “Great Aussie Apps and Games” promotion. Ms Gibson was invited to appear on a panel at an Apple Retail Store event to discuss her app. Apple’s public relations and marketing personnel introduced Ms Gibson to the media and press for interviews. She was invited by Apple to attend the Worldwide Developers Conference in San Francisco California in June of 2014.
4. Ms Gibson also secured significant promotions for her book. The Whole Pantry book was promoted by Penguin at the London Book Fair, including through a promotional sales booklet. It was promoted at a sales conference, on Penguin’s website, and on Penguin’s social media accounts, including through Facebook and Twitter. It was a featured title in book stores – in Target, Collins, Dymocks and Leading Edge. Ms Gibson had interviews with numerous publications, including *Australian Women's Health magazine, Cosmopolitan, Elle, Marie Claire, Sunday Life, Sunday Magazine, The Age,* the *Herald Sun* and *The Australian*. She had a photoshoot with *Marie Claire* and *Elle*. She appeared on TV and radio interviews, including on the Channel Seven program, *Sunrise*. She made blog posts for the websites of online book retailers, and appeared at bookstores. She conducted interviews with book retailers, including Booktopia and Bookworld. She won the “Fun Fearless Female of the Year” award, presented by *Cosmopolitan*.
5. In securing this public profile, and the financial and personal benefits which came with it for herself and her company, Ms Gibson deliberately played on the genuine desire of members of the Australian community to help those less fortunate. I am satisfied that Ms Gibson contravened s 21 of the ACL (Vic) and her company contravened s 21 of the ACL and ACL (Vic) in relation to the representations about charitable giving.

## The respondents’ liability for the Charitable Giving Representations

1. I am satisfied both respondents engaged in conduct that was misleading or deceptive in making the Charitable Giving Representations above. The contract for the publication of The Whole Pantry book was between the company and Penguin, The Whole Pantry app was sold by the company and the Instagram and Facebook accounts were held by the company. Despite this, Ms Gibson was the author and driving force behind all of the representations. Frequently they were statements in the first person by her, or purported to be. I am satisfied Ms Gibson contravened s 18 ACL (Vic), and the company contravened s 18 of the ACL and ACL (Vic), for the same reasons.
2. In relation to the Charitable Giving Representations, I am also satisfied Ms Gibson contravened s 21 of the ACL (Vic) and the company contravened s 21 of the ACL and ACL (Vic).
3. My findings on the attribution of Ms Gibson’s state of mind to the company, and on accessorial liability as I have set them out at [175]-[177] above also apply to the Director’s allegations concerning Charitable Giving Representations.

## Conclusions on contraventions

1. I have upheld most, but not all, of the allegations made against the respondents by the Director. There will be directions that the Director file a proposed minute of orders, including any proposed declaratory relief, which is consistent with these reasons for judgment, together with a short submission on why the Director contends the proposed declarations and orders are appropriate, and what he contends are the appropriate orders as to costs.
2. Once final orders are pronounced, the Court will give directions concerning the hearing and determination of relief by way of penalties, in light of the Court’s conclusions on liability.

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| I certify that the preceding two hundred and forty-seven (247) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. | |

Associate:

Dated: 15 March 2017