

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v The Joystick Company Pty Ltd [2017] FCA 397

File number: VID 1057 of 2016

Judge: **GILMOUR J**

Date of judgment: 2 May 2017

Catchwords: **TRADE PRACTICES** – misleading and deceptive conduct – false and misleading representations as to the health effects and benefits of e-cigarette products – imposition of pecuniary penalty – principles relevant to the imposition of a penalty pursuant to s 224 of the Australian Consumer Law – agreed penalty – consideration of whether agreed penalty is within the permissible range of penalties – declarations – compliance orders – injunctions – corrective notices

Legislation: *Australian Consumer Law* ss 18, 29, 29(1)(a), 29(1)(g), 33, 224, 224(1)(a)(ii), 224(1)(e), 224(2), 232(1)(e), 246
Competition and Consumer Act 2010 Schedule 2
Evidence Act 1995 (Cth) s 191
Federal Court of Australia Act 1976 (Cth) ss 21, 43
Trade Practices Act 1974 (Cth) ss 76, 76E, 76E(2)

Cases cited: *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2010] FCA 929
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (2015) 327 ALR 540
Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union [2007] ATPR 42-140
Australian Competition and Consumer Commission v Humax Pty Ltd [2005] FCA 706
Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3) (2005) 215 ALR 301
Australian Competition and Consumer Commission v Marksun Australia Pty Ltd [2011] FCA 695
Australian Competition and Consumer Commission v MSY Technology Pty Ltd (No 2) (2011) 279 ALR 609
Australian Competition and Consumer Commission v

Pepe's Ducks Ltd [2013] FCA 570
Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc (1999) 161 ALR 79
Australian Competition and Consumer Commission v Safeway Stores Pty Ltd (1991) 145 ALR 36
Australian Competition and Consumer Commission v Sampson [2011] FCA 1165
Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4) (2011) 282 ALR 246
Australian Competition and Consumer Commission v Target Australia Pty Ltd (2001) ATPR 41–840
Australian Competition and Consumer Commission v Telstra Corporation Ltd (2010) 188 FCR 238
Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640
Australian Competition and Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2) [2002] FCA 1548
Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors (2015) 326 ALR 476
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421
Markarian v R (2005) 228 CLR 357
Ministry for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd (2004) ATPR 41–993
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
Ponzio v B&P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Rural Press v Australian Competition and Consumer Commission (2003) 216 CLR 53
Singtel Optus v Australian Competition and Consumer Commission (2012) 287 ALR 249
Trade Practices Commission v TNT Australia Pty Ltd (1995) ATPR 41-375

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Solicitor for the Applicant:	Norton Rose Fulbright Australia
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Table of Corrections

5 May 2017

The notice preceding the Orders on page i has been amended to refer to the correct names of the first respondent and second respondent.

ORDERS

VID 1057 of 2016

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

AND: **THE JOYSTICK COMPANY PTY LTD (ACN 164 002 519)**
First Respondent

MR ALEXANDER McDONELL
Second Respondent

JUDGE: **GILMOUR J**

DATE OF ORDER: **2 MAY 2017**

NOTICE

TO: THE JOYSTICK COMPANY PTY LTD
MR ALEXANDER McDONELL

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

- A. REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME
SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR**
- B. DISOBEY THIS ORDER BY DOING AN ACT WHICH THE ORDER
REQUIRES YOU NOT TO DO,**

**YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY
OR OTHER PUNISHMENT.**

**ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING
WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER
MAY BE SIMILARLY PUNISHED.**

THE COURT DECLARES THAT:

1. From at least June 2015 to early July 2016, the first respondent, The Joystick Company Pty Ltd (Joystick), in trade or commerce:
 - (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law (ACL), being Schedule 2 to the *Competition and Consumer Act (No 2) 2010* (Cth);

- (b) in connection with the supply or possible supply of goods, and the promotion of the supply or use of goods, made false or misleading representations that the goods:
 - (i) were of a particular composition, in contravention of s 29(1)(a) of the ACL; and
 - (ii) had approval, in contravention of s 29(1)(g) of the ACL; and
- (c) engaged in conduct that is liable to mislead the public as to the nature or characteristics of goods, in contravention of s 33 of the ACL,

by representing to consumers on its website (Joystick Website) that the e-cigarette products supplied by it:

- (d) did not contain carcinogens and toxic substances;
- (e) did not contain any of the carcinogens and toxic substances found in traditional tobacco cigarettes;
- (f) did not contain Formaldehyde; and
- (g) had flavours all of which had received "compliance" approval from the Australian Competition and Consumer Commission (ACCC),

when that was not the case.

2. The second respondent, Mr Alexander McDonell (Mr McDonell), acting in his capacity as director of Joystick and being responsible for the conduct of Joystick at all material times up to and including early July 2016, and having knowledge of the essential elements of the contraventions of ss 18, 29(1)(a), 29(1)(g) and 33 of the ACL by Joystick referred to in paragraph 1, was knowingly concerned in, or a party to, those contraventions, for the purposes of ss 224(1) and 232(1) of the ACL.

UPON THE FIRST RESPONDENT, BY MR ALEXANDER MCDONELL, AND THE SECOND RESPONDENT MAKING UNDERTAKINGS TO THE COURT IN THE FORM ATTACHED TO THESE ORDERS,

THE COURT ORDERS THAT:

Pecuniary penalties

3. Joystick and Mr McDonell each pay to the Commonwealth of Australia pecuniary penalties in respect of the contraventions of ss 29(1)(a), 29(1)(g) and 33 of the ACL referred to in paragraphs 1 and 2 above, as follows:

- (a) in respect of Joystick, a pecuniary penalty in the amount of \$50,000, to be paid within 30 days of the date of this order; and
- (b) in respect of Mr McDonell, a pecuniary penalty in the amount of \$10,000, to be paid in instalments as follows:
 - (i) \$5,000 to be paid within four months of the date of this order; and
 - (ii) \$5,000 to be paid within six months of the date of this order.

Compliance orders

4. Mr McDonell, at his own expense, is to:

- (a) within 3 months of the date of this order, attend and undertake a training session on the responsibilities and obligations under ss 18, 29 and 33 of the ACL;
- (b) ensure that the training referred to in paragraph (a) is administered by a suitably qualified compliance professional or legal practitioner with expertise in the ACL; and
- (c) provide to the Applicant a written statement or certificate from the person conducting the training referred to in paragraph (a), within 14 days of completion of the training, verifying that such training has occurred.

Other orders

5. Mr McDonell pay a contribution to the Applicant's costs of, and incidental to, this proceeding in the amount of \$5,000, to be paid within two months of the date of this order.

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

Annexure A

Australian Competition and Consumer Commission

Applicant

The Joystick Company Pty Ltd (ACN 164 002 519) and another

Respondents

UNDERTAKING BY FIRST RESPONDENT

The Joystick Company Pty Ltd (ACN 164 002 519), by its sole director Alexander McDonell who is authorised to do so on its behalf, hereby gives an undertaking to the Court that:

- (a) for a period of three years from the date of this undertaking, it will not, whether by its directors, servants or agents or otherwise howsoever, engage in the supply, possible supply, sale or promotion of e-cigarette products; and
- (b) it has closed its Facebook, Twitter and Instagram accounts, and it will not seek to re-activate those accounts for a period of three years from the date of this undertaking.

Date:

Signature of Alexander McDonell

For and on behalf of The Joystick Company Pty Ltd (ACN 164 002 519).

Annexure B

Australian Competition and Consumer Commission

Applicant

The Joystick Company Pty Ltd (ACN 164 002 519) and another

Respondents

UNDERTAKING BY SECOND RESPONDENT

I, Alexander McDonell, of _____

[INSERT ADDRESS]

hereby give an undertaking to the Court that for a period of three years from the date of this undertaking, I will not whether by myself, my servants, agents or otherwise howsoever, engage in the supply, possible supply, sale or promotion of e-cigarette products.

Date:

Signature of Alexander McDonell

REASONS FOR JUDGMENT

GILMOUR J:

- 1 The parties filed joint written submissions for this penalty hearing. These are detailed. I consider them to accurately state the legal principles applicable and to set out in detail, together with the Joint Statement of Agreed Facts (SOAF), the relevant facts. These reasons have drawn substantially from those submissions.
- 2 By its Concise Statement filed 7 September 2016 (Concise Statement), the applicant (ACCC) alleged that each of the first respondent (Joystick) and the second respondent (Mr McDonell) engaged in conduct that contravened ss 18, 29(1)(a), 29(1)(g) and 33 of the Australian Consumer Law (ACL), being sch 2 of the *Competition and Consumer Act 2010* (Cth) (CCA). Joystick and Mr McDonell admit the contraventions.
- 3 The conduct occurred between the period of at least June 2015 to July 2016, and involved the promotion and sale of e-cigarette products to consumers in Australia, including to consumers via Joystick's website.
- 4 In particular, the ACCC alleged that:
 - (a) Joystick, in trade or commerce:
 - (i) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL;
 - (ii) in connection with the supply or possible supply of goods, and the promotion of the supply or use of goods, made false or misleading representations that the goods:
 - (A) were of a particular composition, in contravention of s 29(1)(a) of the ACL; and
 - (B) had approval, in contravention of 29(1)(g) of the ACL; and
 - (iii) engaged in conduct that was liable to mislead the public as to the nature or characteristics of goods, in contravention of s 33 of the ACL, by representing to consumers that the e-cigarette products supplied by it:
 - (iv) did not contain carcinogens and toxic substances;

- (v) did not contain any of the carcinogens and toxic substances found in traditional tobacco cigarettes;
- (vi) did not contain Formaldehyde; and
- (vii) had flavours all of which had received "compliance" approval from the Australian Competition and Consumer Commission (ACCC),

by publishing statements to that effect, namely the representations at paragraph 5 of the Concise Statement (Representations).

- (b) Mr McDonell had knowledge of Joystick's conduct, and was, directly or indirectly, knowingly concerned in or a party to the contraventions by Joystick referred to at [4](a) above, within the meaning of ss 224(1)(e) and 232(1)(e) of the ACL.

5 Joystick and Mr McDonell have admitted these allegations in the Concise Response filed 25 October 2016 (Concise Response). Those admissions are confirmed in the SOAF. I am satisfied that there is a proper basis in the evidence for the admissions made and the facts agreed. The SOAF was admitted into evidence under s 191 of the *Evidence Act 1995* (Cth).

6 While recognising that the question of relief remains at the discretion of the Court, the parties seek by consent the orders set out in the minutes of the proposed order signed by the parties on 15 March 2017 (the Proposed Consent Order), namely:

- (a) declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act), in the form set out in paragraphs 1 and 2 of the Proposed Consent Order;
- (b) an order for payment by Joystick of a pecuniary penalty in the sum of \$50,000 pursuant to s 224 of the ACL, in the form set out in paragraph 3(a) of the Proposed Consent Order;
- (c) an order for payment by Mr McDonell of a pecuniary penalty in the amount of \$10,000 pursuant to s 224 of the ACL, to be paid in instalments, in the form set out in paragraph 3(b) of the Proposed Consent Order;
- (d) a non-punitive order pursuant to s 246 of the ACL requiring Mr McDonell to undertake training, in the form set out in paragraph 4 of the Proposed Consent Order; and

- (e) payment by Mr McDonell of a contribution to the ACCC's costs pursuant to s 43 of the Federal Court Act, in the form set out in paragraph 5 of the Proposed Consent Order, to be paid within two months as set out in paragraph 5 of the Proposed Consent Order.

7 The parties have agreed the factual basis for the orders sought, which is set out in the SOAF and materials referred to in the SOAF.

Joystick has ceased trading, including ceasing operation of the Joystick Website and the respondents have provided undertakings to the Court that they will not engage in the supply, possible supply, sale or promotion of e-cigarette products for a period of three years.

8 In those circumstances, the ACCC does not press for the injunctions and publication order sought in its originating application filed 2 September 2016.

Orders by consent: Principles

9 In *Commonwealth of Australia v. Director, Fair Work Building Industry Inspectorate & Ors* (2015) 326 ALR 476 the High Court, while confirming the role of the court in determining the appropriate penalty, affirmed without alteration the long-standing practices of this Court when receiving and considering submissions on the amount of civil penalties: *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41–993.

10 The High Court confirmed that joint, or separate, submissions as to quantum of pecuniary penalty can be received and, if appropriate, accepted in contested civil penalty proceedings: *Fair Work Building Industry Inspectorate* at [1], and per the plurality (with whom Gageler and Keane JJ agreed on this point at [68] and [79] respectively). The plurality held:

- (a) at [60] that it is to be expected that the regulator will be in a position to offer informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance;
- (b) at [61] that the submissions of a regulator will be considered on their merits in the same way as the submissions of a respondent and subject to being supported by findings of fact based upon evidence, agreement or concession; and

- (c) at [64] that it is consistent with the purposes of civil penalty regimes, and the public interest, that the regulator take an active role in attempting to achieve the penalty it considers appropriate and thus that the regulator's submissions as to the terms and quantum of a civil penalty be treated as a relevant consideration.

11 There is a well-recognised public interest in the settlement of cases under the *Trade Practices Act 1974* (Cth) (TPA), and by extension, the CCA. As was stated by Burchett and Kiefel JJ in *NW Frozen Foods* at 291:

There is an important public policy involved. When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the ACCC to turn to other areas of the economy that await their attention.

12 Further, in *ACCC v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79, French J (as his Honour then was) noted at 86 [18] that:

The court has a responsibility to be satisfied that what is proposed is not contrary to the public interest and is at least consistent with it...Consideration of the public interest, however, must also weigh the desirability of non-litigious resolution of enforcement proceedings.

13 In deciding whether to make consent orders proposed by the parties, the Court must be satisfied that it has the power to make the orders proposed and the orders are appropriate: *ACCC v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548 at [1]; *ACCC v REIWA* at 86-87.

14 Once the Court is satisfied of these matters, it has been recognised that the Court should exercise judicial restraint in scrutinising proposed settlements. As Lee J stated in *ACCC v Target Australia Pty Ltd* (2001) ATPR 41-840 at [24].

It is the Court's duty in receiving consent orders in any matter to scrutinise such orders as to their appropriateness. However, after being satisfied as to the appropriateness of the orders, the Court should be slow to impede final settlement of such matters, particularly those involving public interest considerations. Moreover, the public has an interest in the mutual settlement of litigation, and subject to the foregoing the Court should be careful not to refuse to make orders simply because the orders may have been different had it been the Court's task to formulate them.

Contraventions

15 The contraventions by Joystick are admitted and set out in the Proposed Consent Order at paragraph 1 and in the SOAF in paragraph 23.

- 16 The involvement of Mr McDonell in the contraventions by Joystick is also admitted and set out in the Proposed Consent Order at paragraph 2 and the SOAF in paragraph 24.

Declarations

- 17 By consent, the ACCC, Joystick and Mr McDonell seek the declarations in paragraphs 1 and 2 of the Proposed Consent Order. The Court has a wide discretionary power to make declarations under s 21 of the Federal Court of Australia Act 1976 (Cth): *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-8 per Gibbs J. There Gibbs J held that the following three threshold requirements should be satisfied before a declaration will be made:

- (a) the question must be a real and not a hypothetical or theoretical one;
- (b) the applicant must have a real interest in raising it; and
- (c) there must be a proper contradictor.

- 18 Each of these requirements is satisfied in this case:

- (a) the proposed declarations relate to conduct that contravenes the ACL and the matters in issue have been identified and particularised by the parties with precision.
- (b) it is in the public interest for the ACCC to seek to have the declarations made and for the declarations to be made as:
 - (i) there is a significant legal controversy in this case, which is being resolved, and
 - (ii) the ACCC is the public regulator under the CCA and has a genuine interest in seeking the declaratory relief; and
- (c) the respondents are proper contradictors (notwithstanding their consent) because each is a person who contravened, or was involved in contraventions of, the ACL and is the subject of the declarations, therefore having a genuine interest in resisting the granting of the declarations: as to this last point see *ACCC v Sampson* [2011] FCA 1165 at [13]–[18].

- 19 Notwithstanding the agreement reached between the parties as to the terms of the declaration, it is for the Court to determine whether it has the power and whether it is, in all the circumstances, appropriate to do so: *ACCC v Construction, Forestry, Mining and Energy*

Union [2007] ATPR 42-140 at [3]–[6]. Both parties submit that the declarations sought are appropriate because they serve to:

- (a) record the Court's disapproval of the contravening conduct;
- (b) vindicate the ACCC's claim that Joystick contravened, and Mr McDonell was involved in Joystick's contraventions of, the ACL;
- (c) assist the ACCC in the future in carrying out the duties conferred on it by the CCA;
- (d) assist in clarifying the law; and
- (e) act as a deterrent to other persons and corporations from contravening the ACL: *ACCC v CFMEU* at [6].

20 The proposed declarations contain sufficient indication of how and why the conduct complained of contravenes the ACL: *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 91.

21 It is, in my opinion, appropriate for the Court to order the declaratory relief on the basis of the admissions made by the respondents and materials referred to in the SOAF.

Training

22 The parties seek a non-punitive order requiring Mr McDonell to undertake training as set out in paragraph 4 of the Proposed Consent Order.

23 Section 246 of the ACL empowers the Court to make such an order.

24 The minimum requirements for the training are set out in the Proposed Consent Order. It is therefore clear to Mr McDonell what he must do to comply with the order.

25 It is appropriate to make the non-punitive order in the circumstances of this case.

Pecuniary Penalties - Applicable Principles

Section 224 of the ACL

26 Pursuant to s 224(1)(a)(ii) of the ACL, if the Court is satisfied that a person has contravened a provision of Part 3-1 of the ACL, which includes ss 29 and 33, the Court may order the person to pay such pecuniary penalty, in respect of each act or omission by the person to which it applies, as the Court determines to be appropriate.

27 The ACL does not empower the Court to impose a pecuniary penalty for a contravention of s
18 of the ACL.

28 The maximum penalty in respect of a contravention of a provision of Part 3-1 of the ACL:

- (a) for a body corporate is \$1.1 million; and
- (b) for a natural person is \$220,000.

29 A person is not liable to more than one pecuniary penalty in respect of the same conduct:
s 224(4) ACL.

30 In determining the appropriate pecuniary penalty, s 224(2) of the ACL requires the Court to
have regard to all relevant matters, including:

- (a) the nature and extent of the act or omission and of any loss or damage suffered
as a result of the act or omission;
- (b) the circumstances in which the act or omission took place; and
- (c) whether the person has previously been found by a Court in proceedings under
Chapter 4 or Part 5-2 of the ACL to have engaged in any similar conduct.

31 I will consider these matters below.

Additional considerations

32 Section 224 of the ACL was preceded by, and is in substantially identical terms to, s 76E of
the TPA. The Court has confirmed, with some exceptions, the application to s 76E of the
TPA of the principles relevant to the imposition of a civil penalty under the former s 76 of the
TPA (relating to restrictive trade practices): *ACCC v MSY Technology Pty Ltd (No 2)* (2011)
279 ALR 609 at 624. I accept the parties submission that given the similarities between s
224(2) of the ACL and s 76E(2) of the TPA, both of which require the penalty to be deemed
“appropriate by the Court, the guiding principles developed for s 76 of the TPA are also of
relevance to the power contained in s 224 of the ACL: *ACCC v Pepe’s Ducks Ltd* [2013]
FCA 570 at [16].

33 The principles applicable to agreed penalty submissions in civil penalty proceedings remain
those in *NW Frozen Foods* and *Mobil Oil*. In *NW Frozen Foods*, Burchett and Kiefel JJ
outlined a checklist of matters that judges have regarded as of assistance in the assessment of
a pecuniary penalty under s 76 of the TPA. In considering the imposition of a penalty under s

76E of the TPA, Perram J in *ACCC v Singtel Optus Pty Ltd (No 4)* (2011) 282 ALR 246 at [11] set out an updated checklist of relevant considerations, which was referred to without demur on appeal: *Singtel Optus v ACCC* (2012) 287 ALR 249 at [37]. That checklist has been considered by this Court in ordering pecuniary penalties under s 224 of the ACL: *Pepe's Ducks* at [17]; *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540 at 544 [8] where it was also noted at [9] that the factors did not exhaust relevant considerations.

34 The guiding considerations identified by Perram J were:

- (a) the size of the contravening company;
- (b) the deliberateness of the contravention and the period over which it extended;
- (c) whether the contravention arose out of the conduct of senior management of the contravener or at some lower level;
- (d) whether the contravener has a corporate culture conducive to compliance with the ACL, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;
- (e) whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of the ACL in relation to the contravention;
- (f) whether the contravener has engaged in similar conduct in the past;
- (g) the financial position of the contravener; and
- (h) whether the contravening was systematic, deliberate or covert.

35 Each of these will be considered below.

Purpose of deterrence

36 The principal object of a pecuniary penalty is deterrence, both specific deterrence and general deterrence. This informs the assessment of the appropriate penalty where commercial profit is what drove the contravening conduct: *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 [65].

37 The role of deterrence in the present case is addressed below.

Where penalties sought by consent

38 As the parties submit litigation to establish contraventions of the ACL can be complex, time consuming and costly. It is in the public interest for litigation under the ACL (as with other litigation) to be concluded in the shortest time frame that is consistent with justice being done between the parties, freeing the Court and the ACCC as regulator to deal with other matters. To that end, the Court has looked favourably upon negotiated settlements, provided that their terms recognise that the ultimate responsibility for the terms and making of the orders that resolve the proceedings lies with the Court: *NW Frozen Foods* at 291.

39 Provided that the Court is satisfied that the terms of the orders are appropriate, it is in the public interest for the Court to make orders on the terms that have been agreed between the parties so as to encourage parties to assist the ACCC in its investigations and achieve negotiated settlements. The Court has recognised that, in addition to savings in time and costs, there is a public benefit in imposing agreed pecuniary penalties where appropriate as parties would not be disposed to reach such agreements were there unpredictable risks involved: *NW Frozen Foods* at 291.

40 In *NW Frozen Foods* at 291, the Full Federal Court held that the key question for the Court in relation to proposed agreed penalties is whether the amount proposed is "within the permissible range" in all the circumstances. In some other recent cases, it has been held that the phrase "permissible range" refers to that range that would be permitted by the Court, which is neither manifestly inadequate nor manifestly excessive: *Ponzio v B&P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [129]; *Pepe's Ducks* at [25].

41 The decision of the Full Federal Court in *NW Frozen Foods* was considered by the Full Federal Court in *Mobil Oil*. The Full Federal Court in *Mobil Oil* held that the decision in *NW Frozen Foods* disclosed no error of principle. The Full Federal Court further held, at [54], that determining whether the amount proposed is within the permissible range may be approached by the Court either by considering first the proposed penalty and then whether it falls within the permissible range, or by considering first the appropriate range and then determining whether the proposed penalty falls within that range.

42 In *NW Frozen Foods*, the Full Federal Court held :

We agree with the statement made in several of the cases cited that it is not actually useful to investigate whether, unaided by the agreement of the parties, we would have arrived at the very figure they propose. The question is not that; it is simply whether, in the performance of the Court's duty under section 76, this particular

penalty proposed with the consent of the corporation involved and of the Commission, is one that the Court should determine to be appropriate.

43 In *Mobil Oil*, the Court noted at [51] that the following propositions emerged from the reasoning on this issue in *NW Frozen Foods*:

- (a) it is the Court's responsibility to determine the appropriate penalty;
- (b) determining the quantum of a penalty is not an exact science;
- (c) there is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy;
- (d) the view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty;
- (e) in determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case;
- (f) where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so in the circumstances of the case;
- (g) where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure is, in the Court's view, appropriate in the circumstances of the case, and in answering that question:
 - (i) the Court will not reject the agreed figure simply because it would have been disposed to select some other figure; and
 - (ii) the agreed penalty will be appropriate if within the "permissible range".

Determining penalty figure

44 In *Markarian v R* (2005) 228 CLR 357 the High Court said that the process of arriving at an appropriate sentence for a criminal offence involves an intuitive or instinctive synthesis of all the relevant factors. That process is also applicable to the assessment of pecuniary penalties under s 224 of the ACL: *ACCC v Marksun Australia Pty Ltd* [2011] FCA 695 at [90]–[91] and:

45 In *Markarian v R*, Gleeson CJ, Gummow, Hayne and Callinan JJ held:

- (a) assessment of the appropriate penalty is a discretionary judgment based on all relevant factors (at 372 [27]);
- (b) "...careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick" (at 372 [31]);
- (c) it will rarely be appropriate for a Court to start with the maximum penalty and proceed by making a proportional deduction from that maximum (at 372 [31]);
- (d) the Court should not adopt a mathematical approach of increments or decrements from a predetermined range, or assign specific numerical or proportionate value to the various relevant factors (at 373 [37]);
- (e) it is not appropriate to determine an 'objective' sentence and then adjust it by some mathematical value given to one or more factors such as a plea of guilty or assistance to authorities (at 374 [37]);
- (f) the Court "may not add and subtract item by item from some apparently subliminally derived figure" to determine the penalty to be imposed (at 375 [39]); and
- (g) since the law strongly favours transparency, accessible reasoning is necessary in the interests of all, and, while there may be occasions where some indulgence in an arithmetic process will better serve the end, it does not apply where there are numerous and complex considerations that must be weighed (at 375 [39]).

Pecuniary Penalties - Application

46 By consent, the parties seek orders imposing pecuniary penalties pursuant to s 224 of the ACL on:

- (a) Joystick, in the amount of \$50,000; and
- (b) Mr McDonell, in the amount of \$10,000.

47 The facts and admissions establishing the particular conduct which Joystick admits constitute contraventions of the ACL, and which Mr McDonell admits gave rise to his involvement in the contraventions by Joystick, are set out in the SOAF, together with other matters relevant to penalties.

48 Each of the s 224 factors and considerations set out by Perram J in *ACCC v Singtel Optus Pty Ltd (No 4)* at [11] regarding the imposition of pecuniary penalties is considered below.

Nature, extent and duration of conduct, and circumstances in which it took place

49 Joystick made the Representations, which were false or misleading in contravention of ss 29(1)(a), 29(1)(g) and 33 of the ACL. As set out at paragraph 4 of the SOAF, Mr McDonell was responsible for the conduct of Joystick.

50 The Representations were made on the Joystick website, which was accessible to the general public. The Representations purported to convey to consumers that Joystick's e-cigarette products:

- (a) did not contain carcinogens and toxic substances;
- (b) did not contain any of the carcinogens and toxic substances found in traditional tobacco cigarettes;
- (c) did not contain Formaldehyde; and
- (d) had flavours all of which had received "compliance" approval from the ACCC.

51 Joystick did not have scientific or other evidence to support the Representations referred to in subparagraphs (a) to (c) of the preceding paragraph, nor had it received, or even sought, any approval from the ACCC of the type referred to in subparagraph (d) in [50] of these reasons.

52 The conduct occurred from at least June 2015 to July 2016, in respect of the representations made on the Joystick website.

53 I find that the contraventions are serious. The conduct was in respect of serious matters concerning public health. The conduct was directed to the general public and the medium of communication was the internet, which is far-reaching.

54 The Representations had the potential to mislead a wide range of consumers about the health effects of non-nicotine e-cigarettes. Consumers were not in a position to ascertain the falsity of the Representations. The misrepresentations deprived consumers of the opportunity to make properly informed decisions.

55 Consumers of Joystick's e-cigarette products were misled, or were likely to have been misled, into believing that the use of those products would not expose them to carcinogens or toxic

substances, like those contained in conventional tobacco cigarette smoke. The exposure to those carcinogens or toxic chemicals may have caused harm to the health of those consumers who, if they had been informed of the presence of these chemicals in the e-cigarettes, may have chosen not to purchase and use them.

Amount of profit gained and loss caused

56 The parties are unable to ascertain the number of consumers who relied upon the Representations. The parties are therefore unable to quantify the amount of profit gained by Joystick by the contraventions of ss 29(1)(a), 29(1)(g) and 33 of the ACL.

57 The parties are also unable to quantify the non-pecuniary loss to consumers caused by the contraventions. Consumers lost the opportunity to make a different choice and avoid potential adverse health consequences.

58 The ACCC notes that:

- (a) the contravening Representations were made on the Joystick Website for a period of at least one year and one month;
- (b) Joystick sold 3,441 units of e-cigarettes to consumers in the 2015/16 financial year to March 2016; and

59 Whilst the majority of Joystick's sales of e-cigarette products were online sales to consumers in Australia, it also supplied 630 units of e-cigarettes to retailers on a wholesale basis in the 2015/16 financial year to March 2016.

Size of contravener and financial position

60 The respondents have provided the ACCC with information regarding their respective personal and business financial positions, which is set out in the McDonnell affidavit and at paragraphs 28 to 35 of the SOAF.

61 In particular, the respondents have provided the following information:

- (a) in respect of Joystick:
 - (i) during the financial years ending 30 June 2014 to 30 June 2016, Joystick generated revenue in the sum of \$543,013, but incurred a net loss of \$79,849;
 - (ii) it has assets totalling \$1,146;

- (iii) it has liabilities of \$86,673; and
- (iv) it has ceased trading.
- (b) in respect of Mr McDonell:
 - (i) during the financial years ending 30 June 2014 to 30 June 2016, he received income from Alumbra Pty Ltd totalling \$141,363;
 - (ii) the income he received from Alumbra Pty Ltd related to promotional activities he undertook for that company and did not relate to Joystick;
 - (iii) he did not receive an income from Joystick;
 - (iv) he is presently unemployed, having terminated his employment with Alumbra Pty Ltd in or around August 2015;
 - (v) he has no assets;
 - (vi) he has liabilities of approximately \$55,200;
 - (vii) he is the guarantor of an outstanding loan owed by Joystick to the ANZ Bank in the sum of approximately \$52,000 as at 10 March 2017. On 10 March 2017, Mr McDonell reached an agreement with ANZ to pay the ANZ Bank the sum of \$25,000 in order to discharge that personal guarantee. Mr McDonell intends to finance the \$25,000 by way of a loan from his parents; and
 - (viii) he has loaned the sum of \$27,700 to Joystick, which he does not expect to be repaid .

62 An instalment arrangement is proposed for payment of the pecuniary penalty sought in respect of Mr McDonell. Mr McDonell considers that, with the proposed instalment arrangement, he would be capable of paying the pecuniary penalty sought.

63 As noted above, the respondents have informed the ACCC that Joystick has ceased trading. While capacity to pay any pecuniary penalty is a relevant factor, this must be balanced against the key consideration of general deterrence: *ACCC v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301 at 319 [87], 321 [99]–[100].

Deliberateness of the contravening conduct

64 Joystick did not have scientific or other evidence to support the Representations, and did not carry out or commission any testing of the e-cigarette products or make reasonable or

adequate enquiries to substantiate the accuracy of the Representations. By failing to do so, it made the Representations deliberately and without reasonable grounds.

65 Joystick made the statements set out in paragraphs 9(a) to (e) of the SOAF on the Joystick Website with the intention that consumers who were seeking to avoid exposure to the harmful chemicals found in conventional tobacco cigarette smoke would be induced to purchase its e-cigarette products.

66 Joystick did not have ACCC approval for the flavours of its e-cigarette products, or any other approval from the ACCC to support the representation that it did have such approval, and had not sought any such approval from the ACCC. Accordingly, it made this representation deliberately or recklessly and without reasonable grounds.

67 Accordingly, the Representations contravening ss 29(1)(a), 29(1)(g) and 33 of the ACL, were made recklessly, and for commercial reasons.

Participation of senior management

68 Mr McDonell was, at all relevant times, the sole director of Joystick and responsible for the conduct of Joystick.

69 Mr McDonell has admitted his involvement, and that he is responsible for Joystick's contraventions of the ACL.

Culture in respect of compliance with ACL

70 At the time of the contravening conduct, Joystick did not have a culture of compliance with the ACL.

Disposition to cooperate

71 The respondents admitted liability at an early stage in these proceedings, and have agreed to the terms of the Proposed Consent Orders and SOAF.

72 As a result of the cooperation of the respondents, a trial in this proceeding has been avoided. A contested trial would have consumed a larger amount of the Court's time and the ACCC's time and resources.

Whether prior similar conduct

73 The respondents have not previously been found by a court to have contravened the ACL. Nor has it previously been alleged that the respondents have contravened the ACL.

Deterrence

74 As stated at [36] of these reasons, the principal objective of a pecuniary penalty is deterrence.

75 As Allsop CJ stated in *ACCC v Coles Supermarkets* at 561 [95]:

It is important that sellers in the market recognise that consumers are entitled to reliable, truthful and accurate information. Confidence in such is a matter of importance for the Australian community and economy. It is an important factor in market efficiency. General and specific deterrence are important in order to encourage the maintenance of a fair, reliable and efficient market. Consumers play a vital part in that market. They buy the goods and services that commercial entities proffer.

76 It is necessary for the penalty to be of a sufficient magnitude for general deterrence, so as to deter others who may be tempted to engage in similar contraventions, including in particular other online traders, or other businesses that trade in goods which may have an impact on the health of the public.

77 It is also necessary for the penalty to be of a sufficient magnitude to achieve specific deterrence, in that the penalty must be sufficiently high to deter the respondents from repeating the contravening conduct. The fact that the respondents have consented to injunctions does not detract from the need for specific deterrence. As Allsop CJ said in *ACCC v Coles Supermarkets* at 558 [79], consent by a party to an injunction "does not speak to whether or not it needs to be deterred from future similar conduct. ... It cannot ... rightly be taken as some sign that the consenting party has seen the error of its ways and is unlikely to engage in similar conduct again".

Parity principle

78 The parity principle requires that when penalties are imposed, "there should not be such an inequality as would suggest that the treatment meted out has not been even handed": *NW Frozen Foods* at 295.

79 Similar contraventions should incur similar penalties. However, the Court has emphasised that caution needs to be exercised in comparing penalties imposed in different cases, as every case necessarily turns on its own facts. In *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at 264 [60], the Full Court observed that:

...the Court is not assisted by...citation[s] of penalties imposed in other cases, where the combination of circumstances were different from the present, as if that citation is apt to establish a "range" of penalties appropriate in this case.

80 The Full Court endorsed the following passage of Middleton J in *ACCC v Telstra Corporation Ltd* (2010) 188 FCR 238 at 275 [215]:

It is apparent that there are many difficulties in simply referring to penalties previously imposed for contraventions of legislation in widely differing circumstances or in circumstances where some of the factors are similar but others dissimilar to those of the present proceeding. In each case, the court must take into account the deterrent effect of the penalty and the fact that the penalties "should reflect the will of Parliament that the commercial standards laid down in the Act must be observed but not be so high as to be oppressive": see *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* [1978] ATPR at 40-091 at 17,896.

81 I am informed by the parties that there are, at present, no cases of breach of the ACL involving similar circumstances with which to compare this case.

82 The mandatory and discretionary factors to which the Court is to have regard provide sufficient guidance as to the appropriateness of the proposed penalties. I am satisfied that the proposed penalties are appropriate taking into account the nature and extent of the respondents' conduct.

Maximum penalties and courses of conduct

83 As noted above, the maximum penalty in respect of contraventions of a provision of Part 3-1 of the ACL:

- (a) for a body corporate, is \$1.1 million; and
- (b) for a natural person, is \$220,000.

84 A person is not liable to more than one pecuniary penalty in respect of the same conduct.

85 Although it may be possible to characterise each of the various instances of conduct the subject of these proceedings and admitted by the respondents as separate contraventions of the ACL, the parties submit that, in the circumstances of this case, it is appropriate that a single penalty be imposed upon Joystick, and upon Mr McDonell for his involvement in the contraventions of Joystick. In *Pepe's Ducks* at [39] the Court took such an approach:

In this case the parties agreed on a global penalty for all contraventions without identifying the number of contraventions in respect of which the penalty ought be imposed. I did not think it necessary to engage in the complex exercise of determining the precise number of contraventions.

Totality principle

86 In determining the appropriate penalty for multiple offences the "totality principle" must also be considered. This was applied in *Trade Practices Commission v TNT Australia Pty Ltd*

(1995) ATPR 41-375 at 40, 169, and subsequently endorsed in *ACCC v Baxter Healthcare Pty Ltd* [2010] 929 at [22] where the Court held that the total penalty for each offence ought not to exceed what is proper for the entire contravening conduct involved. This approach was endorsed by Goldberg J in *ACCC v Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53 where his Honour said:

The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved... But that does not mean that a court should commence by determining an overall penalty and then dividing it among the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined.

...

[A] sentencer or penalty fixer must, as an initial step, impose a penalty appropriate for each contravention and then as a check, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct involved.
[footnotes omitted]

87 The totality principle operates as a "final check" to ensure that the penalties to be imposed on a wrongdoer, considered as a whole, are just and appropriate: *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at 397 [42] (Stone and Buchanan JJ); *Clean Energy Regulator v MT Solar Pty Ltd & Ors* [2013] FCA 205 at [81]–[82].

88 I accept the parties submission that the penalties proposed in relation to the contravening conduct of Joystick, and Mr McDonell's involvement in the contravening conduct of Joystick, are just and appropriate in all the circumstances of the case and appropriately take account of the entirety of each respondent's conduct. They are both within what I regard as the permissible range.

Proposed penalties

89 As stated above, the parties submit that the Court should make orders imposing pecuniary penalties pursuant to s 224 of the ACL on:

- (a) Joystick, in the amount of \$50,000; and
- (b) Mr McDonell, in the amount of \$10,000.

90 The parties have agreed that the pecuniary penalty ordered against Mr McDonell may be payable by instalments. The parties seek orders as set out in subparagraphs 3(a) and (b) of the Proposed Consent Orders, which propose the following arrangements:

- (a) in respect of Joystick, \$50,000 to be paid within 30 days; and
- (b) in respect of Mr McDonell:
 - (i) \$5,000 within four months; and
 - (ii) \$5,000 within six months.

91 I accept that the penalty amount is appropriate. It is open to the Court to order payment of penalties by instalments where there is sufficient financial material before the court to justify the instalment arrangements: *ACCC v Humax Pty Ltd* [2005] FCA 706 at [12]. I accept the submission that it is appropriate for the Court to order that the penalty imposed on Mr McDonell in this case be paid by instalments.

Costs

92 The ACCC has not sought a contribution from Joystick towards the ACCC's costs of the proceeding.

93 Mr McDonell has agreed to make a contribution of \$5,000 towards the ACCC's costs of the proceeding, to be paid within two months. Although this amount does not reflect the ACCC's true costs in the matter, the ACCC was prepared not to fully pursue its costs in the interests of an early settlement and, no doubt, given Mr McDonell's financial circumstances: see *Pepe's Ducks* at [41]–[42]. I will make this order as to costs.

I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

Associate:

Dated: 2 May 2017