

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v American Express

Australia Limited [2024] FCA 784

File number: NSD 1038 of 2022

Judgment of: **JACKMAN J**

Date of judgment: 19 July 2024

Catchwords: **CORPORATIONS** – design and distribution obligations in Part 7.8A of the *Corporations Act 2001* (Cth) – joint submissions on liability – where defendant admits two conventions of ss 994C(4) and 994C(5) of the Act – where contraventions relate to two credit cards distributed to customers in David Jones stores – whether knowledge requirement in chapeau applies to each sub-paragraph – whether subsequent reference to “first knew” in chaussette should be construed in context as meaning “first knew or ought reasonably to have known”

PRACTICE AND PROCEDURE – duties of counsel to the Court – where joint submissions failed to provide reasons why the parties’ proposed construction of the Act may be wrong – where the parties’ proposed construction was untenable

CORPORATIONS – agreed penalty

Legislation: *Corporations Act 2001* (Cth) ss 994C, 1317G

Cases cited: *Australian Building and Construction Commission v Pattinson* [2022] HCA 13; (2022) 274 CLR 450
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3; (2018) 262 CLR 157
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd [1997] FCA 450; (1997) 145 ALR 36
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2015] FCA 330; (2015) 327 ALR 540
Australian Competition and Consumer Commission v Equifax Australia Information Services and Solutions Pty Ltd [2018] FCA 1637
Australian Competition and Consumer Commission v Get

Qualified Australia Pty Ltd (in liq) (No 3) [2017] FCA 1018
Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; (2013) 250 CLR 640
Australian Securities and Investments Commission v Commonwealth Bank of Australia [2020] FCA 790
Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147
Beckwith v The Queen (1976) 135 CLR 569
Commonwealth v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; (2015) 258 CLR 482
Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39; (2010) 269 ALR 1
Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd [2013] HCA 36; (2013) 248 CLR 619
HFM043 v Republic of Nauru [2018] HCA 37; (2018) 359 ALR 176
Markarian v R [2005] HCA 25; (2005) 228 CLR 357
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72; (2004) ATPR 41–993
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134; (1996) 71 FCR 285
Qantas Airways Limited v Transport Workers Union of Australia [2023] HCA 27; (2023) 412 ALR 134
R v A2 [2019] HCA 35; (2019) 269 CLR 507
Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; (2012) 287 ALR 249
Taylor v The Owners – Strata Plan No 11564 [2014] HCA 9; (2014) 253 CLR 531
Volkswagon Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49; (2021) 284 FCR 24

Herzfeld, Perry and Thomas Prince, *Interpretation* (2nd ed, 2020)

Division: General Division
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Number of paragraphs: 119

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Counsel for the Plaintiff: Ms S Mirzabegian SC, Mr D Tynan and Ms T Epstein

Solicitor for the Plaintiff: Australian Securities and Investments Commission

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Solicitor for the Defendant: MinterEllison

ORDERS

NSD 1038 of 2022

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

AND: **AMERICAN EXPRESS AUSTRALIA LIMITED (ACN 108 952
085)**
Defendant

ORDER MADE BY: **JACKMAN J**
DATE OF ORDER: **19 JULY 2024**

THE COURT DECLARES THAT:

1. Pursuant to section 1317E(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), the defendant (**American Express**) contravened section 994C(4) of the Corporations Act in the period from 25 May 2022 to 5 July 2022 by failing to cease issuing a co-branded credit card (**DJs Amex Card**) in circumstances where:
 - (a) American Express made a target market determination for the DJs Amex Card and offered the DJs Amex Card for acquisition to retail clients;
 - (b) American Express ought reasonably to have known, by 11 May 2022, that the cancelled application rates for the DJs Amex Card were a circumstance that would reasonably suggest that the target market determination for the DJs Amex Card was no longer appropriate;
 - (c) American Express did not, in the period between 11 and 24 May 2022, review the target market determination for the DJs Amex Card; and
 - (d) the distribution of the DJs Amex Card was not excluded conduct within the meaning of section 994A of the Corporations Act.
2. Pursuant to section 1317E(1) of the Corporations Act, American Express contravened section 994C(4) of the Corporations Act in the period from 25 May 2022 to 5 July 2022 by failing to cease issuing a co-branded credit card (**DJs Amex Platinum Card**) in circumstances where:

- (a) American Express made a target market determination for the DJs Amex Platinum Card and offered the DJs Amex Platinum Card for acquisition to retail clients;
- (b) American Express ought reasonably to have known, by 11 May 2022, that the cancelled application rates for the DJs Amex Platinum Card were a circumstance that would reasonably suggest that the target market determination for the DJs Amex Platinum Card was no longer appropriate;
- (c) American Express did not, in the period between 11 and 24 May 2022, review the target market determination for the DJs Amex Platinum Card; and
- (d) the distribution of the DJs Amex Platinum Card was not excluded conduct within the meaning of section 994A of the Corporations Act.

THE COURT ORDERS THAT:

- 3. Within 90 days of receipt of a penalty invoice, American Express pay to the Commonwealth pursuant to s 1317G(1) of the Corporations Act a pecuniary penalty of \$8,000,000 in respect of American Express's conduct declared to be contraventions of s 994C(4) of the Corporations Act.
- 4. Within 90 days of receipt of a costs invoice, American Express pay ASIC's costs of and incidental to the proceeding in the agreed sum of \$200,000.

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

REASONS FOR JUDGMENT

JACKMAN J:

Introduction

- 1 This case concerns what are described as the “design and distribution obligations” in Part 7.8A of the *Corporations Act 2001* (Cth) (**Act**) (**DDO**), specifically those contained in ss 994C(4) and 994C(5) of the Act. The proceedings were originally fixed for a 5-day contested hearing commencing on 11 March 2024. On 5 March 2024, I vacated that hearing at the request of the parties and made directions for the preparation of joint submissions on liability and penalty, and fixed the hearing for 27 May 2024. During the course of that hearing, it became apparent that the parties wished to have the opportunity to supplement their joint submissions and requested a further hearing on 1 July 2024.
- 2 The defendant (**American Express**) admits two contraventions of s 994C(4) of the Act and two contraventions of s 994C(5) of the Act in the period between 25 May 2022 and 5 July 2022 (**Contravening Period**) (amounting to four contraventions in total). The contraventions relate to two co-branded credit cards (the **DJs Amex Card** and the **DJs Amex Platinum Card**) (together, **the DJs Cards**), which were primarily distributed to customers in David Jones stores, and the target market determination (**TMD**) for each card.
- 3 In broad terms, the DDO seek to improve consumer outcomes by ensuring that financial services providers have a customer-centric approach. In accordance with the DDO in the Act, American Express made a TMD for each of the DJs Cards which were in place at the commencement of the DDO scheme on and from 5 October 2021. However, American Express admits that subsequently, in the Contravening Period, it knew that there was a circumstance in respect of each of the DJs Cards, being a circumstance that reasonably suggested that the TMDs for the DJs Cards were no longer appropriate, although American Express did not know that the circumstance had that characteristic. American Express also accepts that it ought reasonably to have known by 11 May 2022 that the cancelled application rates for the DJs Cards were a circumstance that would reasonably suggest that the TMD for each of the DJs Cards was no longer appropriate. Despite this, American Express did not cease issuing the DJs Cards in the Contravening Period and, during that same period, did not take all reasonable steps to ensure that David Jones was informed that it must not continue distributing the DJs Cards. While American Express admits that it contravened ss 994C(4) and 994C(5), I must satisfy myself as

to the correctness or otherwise of those admissions before making declarations and granting other relief.

- 4 The plaintiff (**ASIC**) and American Express join in seeking:
- (a) declarations of contraventions in the form of either Annexure A or Annexure B to the Supplementary Joint Submissions on Penalty dated 25 June 2024;
 - (b) on the basis of the admitted contraventions, orders pursuant to s 1317G(1) of the Act that it pay a total pecuniary penalty of \$10,800,000 (**Agreed Penalty A**) if I find that both ss 994C(4) and (5) were contravened, or \$8,000,000 (**Agreed Penalty B**) if I find that only s 994C(4) was contravened; and
 - (c) an order that American Express pay ASIC's costs of and incidental to the proceeding in the agreed sum of \$200,000.

5 The parties have jointly filed a Statement of Agreed Facts and Admissions dated 29 February 2024 (**SAFA**), that includes admissions of contravention by American Express and sets out the facts relating to the admitted contraventions of ss 994C(4) and (5) of the Act by American Express, as agreed pursuant to s 191 of the *Evidence Act 1995* (Cth). The SAFA further sets out the relevant facts in the period between 5 October 2021 and 5 July 2022 (**Relevant Period**). On the resumption of the hearing on 1 July 2024, the parties tendered a Supplementary Statement of Agreed Facts and Admissions dated 25 June 2024 (**SSAFA**), which corrected some infelicities in [120] and [121] of the SAFA.

The Legislative Scheme

Legislative history

6 Part 7.8A of the Act contains certain requirements relating to the design and distribution of financial products for retail clients. Part 7.8A was introduced by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth). The Revised Explanatory Memorandum to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) (the **Revised Explanatory Memorandum**) explains the intention behind the provisions relevantly as follows:

1.2 The Corporations Act relies heavily on disclosure to assist consumers understand and select appropriate financial products. However, disclosure can be ineffective for a number of reasons, including consumer disengagement, complexity of documents and products, behavioural biases, misaligned interests and low financial literacy. The

availability of financial advice may not be sufficient to overcome these issues. A consumer may not seek financial advice or may receive poor-quality advice.

1.3 The Financial System Inquiry recognised these shortcomings of the existing disclosure regime. In response, it recommended the introduction of a targeted and principles-based product design and distribution obligation. The Government accepted this recommendation to introduce design and distribution obligations on 20 October 2015.

...

1.7 ... These new obligations improve consumer outcomes by ensuring that financial services providers have a customer-centric approach to making initial offerings of products to consumers.

7 The reforms originated from recommendations in the Final Report of the Financial System Inquiry in November 2014, which noted (at p 204):

Product issuers and distributors are best placed to understand the features of a product and its appropriate target market. Introducing a targeted design and distribution obligation for all products would decrease the number of consumers buying products that do not meet their needs, and would make the industry more customer-focused in product design. Therefore, the Inquiry recommends introducing a principles-based regulatory obligation that enables industry to develop standards of practice tailored to product classes.

8 The DDO regime requires financial product issuers and distributors to develop and maintain effective product governance arrangements across the life cycle of financial products. The regime is intended to help consumers obtain financial products by requiring issuers and distributors to take a “customer-centric approach” to the design and distribution of financial products: Revised Explanatory Memorandum at [1.5], [1.7]. In addition to an obligation to identify an appropriate target market within a TMD, inherent in this consumer-centric approach is a requirement for financial product issuers and distributors to actively review events and circumstances that may suggest that an existing TMD is no longer appropriate.

9 The new DDO regime in the Act imposes a number of obligations on financial product issuers and distributors, namely to make a TMD (s 994B), to review the TMD and cease issuing the product where circumstances or events reasonably suggest the TMD is no longer appropriate (s 994C), to take reasonable steps to ensure “retail product distribution conduct” is consistent with the TMD (s 994E), and to keep records regarding the TMD (s 994F).

Relevant provisions

10 The references given in this section of the judgment are to the legislation as it existed during the Contravening Period. Section 994B(1) provided that certain persons must make a TMD for a financial product. Pursuant to s 994B(2)(a), such a person had to make a TMD for a financial

product before any person engaged in “retail product distribution conduct” in relation to the product.

- 11 The term “retail product distribution conduct” was defined in s 994A(1) as including “dealing” in a financial product. Section 994B(1)(ba) relevantly provided that (subject to subs (3), which is not presently relevant), a person must make a target market determination for a financial product if the product is covered by s 994AA(1)(b) and the person issues the product to another person as a retail client. Section 994AA(1)(b) relevantly defined a “financial product” as including a financial product within the meaning of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). A credit card is a financial product within the meaning of s 12BAA(7)(k) of the ASIC Act (contained in Division 2 of Part 2 of the ASIC Act) and regs 2B(1)(a) and (3) of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
- 12 The effect of subss 994B(1) and (2) was therefore that an issuer of a credit card must make a TMD prior to offering the product for distribution to consumers. Section 994B(5) contained the requirements for TMDs, including that they describe the class of retail client that comprises the target market for the product (para (b)), specify any conditions and restrictions on retail product distribution conduct in relation to the product, known as the “distribution conditions” (para (c)), and “specify events and circumstances (“review triggers”) that would reasonably suggest that the determination is no longer appropriate” (para (d)).
- 13 Section 994C related to the circumstances in which a TMD must be reviewed and the consequences of a failure to review a TMD. Relevantly for the purpose of this proceeding, subss 994C(4) and (5) provided:

(4) If:

- (a) a person makes a target market determination for a financial product; and
- (b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients at any time during a review period for the determination; and
- (c) the person knows, or ought reasonably to know, that:
 - (i) a review trigger for the determination has occurred; or
 - (ii) an event or circumstance has occurred that would reasonably suggest that the determination is no longer appropriate;

then, from as soon as practicable, but no later than 10 business days, after the person first knew of the occurrence of the review trigger, event or

circumstance, the person must not engage in retail product distribution conduct in relation to the product unless:

- (d) the person has reviewed the determination and, if the determination is no longer appropriate, made a new target market determination in accordance with section 994B; or
- (e) the retail product distribution conduct is excluded conduct.

(5) If:

- (a) a person makes a target market determination for a financial product; and
- (b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients at any time during a review period for the determination; and
- (c) the person knows that:
 - (i) a review trigger for the determination has occurred; or
 - (ii) an event or circumstance has occurred that would reasonably suggest that the determination is no longer appropriate;

the person must, as soon as practicable, but no later than 10 business days, after the person first knew of the occurrence of the review trigger, event or circumstance, take all reasonable steps to ensure that regulated persons who engage in retail product distribution conduct in relation to the product (or are expected to do so) are informed that they must not engage in retail product distribution conduct in relation to the product unless:

- (d) the determination has been reviewed since the review trigger, event or circumstance occurred and, if a new target market determination is required, it has been made; or
- (e) the retail product distribution conduct is excluded conduct.

14 Contraventions of subss 994C(4) and (5) each relevantly attract civil penalties: s 1317E of the Act. In addition, contravention of s 994C(5) is an offence: s 1311(1) and (1A) of the Act.

15 In the present case, ASIC does not rely on subss 994C(4)(c)(i) or 994C(5)(c)(i), namely the occurrence of a review trigger for the TMD. Subsections 994C(4)(c)(ii) and (5)(c)(ii) direct attention to whether the TMD is “no longer appropriate”. That is, the sub-sections refer to the scenario where a person knows (or, in sub s (4)(c)(ii), ought reasonably to know) that an event or circumstance has occurred that would reasonably suggest that the TMD is no longer appropriate.

16 “Appropriate” was defined in s 994A(1) as meaning that “a target market determination for a financial product is appropriate if it satisfies the requirements of subsection 994B(8)”. Subsection 994B(8) provides:

- (8) A target market determination for a financial product must be such that it would be reasonable to conclude that, if the product were to be issued, or sold in a regulated sale:
- (a) to a retail client in accordance with the distribution conditions—it would be likely that the retail client is in the target market; and
 - (b) to a retail client in the target market—it would likely be consistent with the likely objectives, financial situation and needs of the retail client.

Salient Agreed Facts

Background to the DJs Cards

- 17 On 19 February 2008, American Express and David Jones, together with David Jones Financial Services Ltd, entered into an agreement pursuant to which the DJs Cards were made available to retail consumers: SAFA [9]–[10]. The DJs Amex Card was offered to customers between August 2008 and 5 July 2022, and the DJs Amex Platinum Card was offered to customers between September 2012 and 5 July 2022: SAFA [12], [14].
- 18 Customers were able to apply for the DJs Cards in one of two ways: either via an in-store application process (comprising direct-to-consumer sales in David Jones’ stores by David Jones staff and concession staff) or online: SAFA [16]. The primary distribution channel for the DJs Cards was in-store, which accounted for approximately 80 to 90 percent of all DJs Cards issued: SAFA [16]–[17]. At all relevant times, the in-store application process was completed by the customer filling out a digital tablet-based application (other than on infrequent occasions when the tablet was unavailable, in which case a paper application form was available): SAFA [11].
- 19 Consumers who completed the application process in-store could (SAFA [20]):
- (a) be approved “instantly” for use of a DJs Card, which occurred when the customer provided sufficient personal and financial information to be verified in accordance with applicable laws;
 - (b) be “conditionally” approved for use of a DJs Card, which occurred when the customer was required to provide further information in relation to their application at a later time; or
 - (c) have their application declined, which occurred when, for example, the consumer failed the responsible lending checks.

- 20 Where a consumer was conditionally approved for a DJs Card, the application would subsequently be reviewed by American Express to follow up with the customer and seek additional information required for the purpose of assessing the application, with customers providing such information at a later time: SAFA [20(b)] and [22]. If the consumer subsequently provided the required information that satisfied the applicable laws, their application could be fully approved: SAFA [22(c)]. However, if the customer did not provide the required information, their application would lapse after 45 days and be automatically cancelled: SAFA [22(d)]. A customer whose application had been conditionally approved could also request that the application be cancelled: SAFA [22(e)]. In the interim, the customer was provided with a fixed line of credit to spend in store at David Jones on the day of conditional approval: SAFA [23].
- 21 American Express and David Jones tracked the number of applications received for DJs Cards and the number of DJs Cards approved, issued and activated: SAFA [25]. Further, David Jones allocated each David Jones store a target in respect of the applications and activations, of which American Express was aware: SAFA [24].
- 22 In order to manage the American Express/David Jones relationship and the DJs Cards, American Express and David Jones had a “David Jones Alliance” team made up of individuals responsible for acquisition, product and engagement, and capability and operations: SAFA [40]–[41]. American Express staff who were primarily responsible for acquisition, which included the Director of the Alliance and the Acquisition Manager, were focused on customer acquisition of new Cards and working with David Jones to develop the strategy and the campaigns to drive acquisition of the Cards: SAFA [42]. These staff were also responsible for marketing and developing acquisition incentive offers, monitoring cancelled application rates and coming up with strategies to reduce those rates: SAFA [40]–[42].
- 23 During the Relevant Period, American Express had assigned a “Product Manager” for the DJs Cards, who was in the David Jones Alliance and was responsible for managing the product portfolio (which included making decisions about the product design and any benefits provided by the DJs Cards); managing the performance of the DJs Cards, including the economic performance and customer satisfaction; and addressing customer retention and cancellation of the DJs Cards. The Product Manager was separate from, and reported to, the Director of the David Jones Alliance: SAFA [43]. The Product Manager was primarily concerned with the product design and engagement: SAFA [43]–[45].

The TMDs for the DJs Cards

- 24 In the period between June 2021 to September 2021, American Express undertook a Design and Distribution Project (**DDO Project**) to develop TMDs across its full product suite, including the DJs Cards: SAFA [72]. As part of the process of developing the TMDs, American Express developed a Critical Assessment Questionnaire to assess the DJs Cards against the likely objectives, financial situation and needs of customers in the target market: SAFA [75]. The final version of the Critical Assessment Questionnaire stated that “Attrition is our achilles [sic] heel, which is driven by the ACQ [ie acquisition] model – 85-90% of all acquisition happening via F2F [ie face to face] selling instore”: SAFA [76]. Further, the document drew attention to the fact that there was a higher level of “attrition” where a customer applied for a Card inside a David Jones store than other sales channels used by American Express for other products: SAFA [73]–[76]. Relevant American Express staff understood the word “attrition” in this particular context of the Critical Assessment Questionnaire to refer to card applications that were cancelled, and not cards that were cancelled: SAFA [77].
- 25 On 5 October 2021, American Express issued TMDs for each of the Cards. The TMDs included a Description of the Target Market, being: “consumers that are looking to make purchases on credit with a card that earns either Membership Rewards points or Qantas points and David Jones benefits as listed in the product key features below”. The target market for the DJs Amex Platinum Card additionally included consumers who were looking to earn travel benefits: SAFA [79], [81].
- 26 The review triggers in both of the TMDs included (SAFA [79(e)] and [81(e)]:
- (a) "material change to the key product features, attributes, eligibility and/or terms and conditions";
 - (b) "material changes to fees or interest rates";
 - (c) "high default rates, high hardship rates or evidence of unmitigated risks to vulnerable customers";
 - (d) "material or unexpectedly high number of complaints (as defined in section 994A(1) of the Act) about the product or distribution of the product"; and
 - (e) the use of Product Intervention Powers, regulatory orders or directions that affect the product”.

27 In the case of the DJs Amex Card, the review triggers also included: “abnormal cancellation rates”: SAFA [79(e)(iii)]

Monitoring of cancelled application rates at American Express

28 The Cancellations Working Group used the following terms in relation to the DJs Cards (SAFA [48]–[49]):

- (a) “cancellation”, which occurred when an application for a DJs Card was submitted, but the application did not result in American Express establishing an account and issuing a permanent card. Cancellations occurred where a customer had submitted an application for a DJs Card; the application was subject to further information being provided and/or a final decision by Amex; and, prior to Amex making the final decision, the application lapsed, was withdrawn or was cancelled;
- (b) “decline”, which may have occurred, for example, when an application for a DJs Card was submitted and American Express rejected the application because American Express’s credit risk policies were not satisfied. A “cancellation” was different from a “decline”; and
- (c) “attrition”, which occurred when American Express had issued a card, and the card was subsequently cancelled by the customer. American Express measured and monitored “attritions” separately from “cancellations”.

29 Cancellations of DJs Card applications was a metric that American Express monitored for various reasons: SAFA [47]. Throughout the Relevant Period, there were a number of working groups or forums within American Express that considered cancelled application rates, as well as a number of internal documents and publications that were regularly circulated that referred to cancelled application rates.

30 In or around June 2020, American Express and David Jones started a “Cancellations Working Group”, which met monthly: SAFA [52]. The objective of the Cancellations Working Group was to identify opportunities to reduce the number of cancellations associated with instore Card applications: SAFA [53]. This was one of American Express’s highest priority initiatives in the David Jones Alliance: SAFA [53].

31 The American Express attendees at the Cancellations Working Group meetings were the David Jones Alliance Director, Acquisition Manager, and Acquisition Assistant Manager: SAFA [55]. Notably, although addressing cancelled application rates of the Cards was a responsibility of

the Product Manager (SAFA [45(d)]), the Product Manager for the Cards did not attend the Cancellations Working Group meetings, but rather the David Jones Alliance Director and the David Jones Alliance Acquisition Manager attended: SAFA [57]. The slide deck circulated for Cancellations Working Group meetings included target cancelled application rates, cancelled application rates, cancellation reasons, application volumes and instore sales strategies: SAFA [59]. Cancelled application rates were also discussed internally within American Express through reports and at other meetings: SAFA [60]–[71].

Reasons for high cancelled application rates

32 The main reasons for cancellations of Card applications considered by the Cancellations Working Group included: (i) the application had not been completed for more than 45 days; (ii) the customer requested the cancellation; (iii) the application was a duplicate; (iv) there were circumstances of fraud; and (v) there was an inability to validate additional identification documents due to being unable to contact the applicant within 45 days or the applicant did not meet those requirements: SAFA [50].

33 Customers were offered incentives to acquire DJs Cards in the form of a discount at the point of sale when applying for a DJs Card, ranging from 10-30%: SAFA [26]. The discount only applied instore if the customer was instantly or conditionally approved for a DJs Card: SAFA [27]. American Express was aware that point-of-sale discounts resulted in increased cancellations of DJs Card applications: SAFA [28]. The training material stated in part: “Data suggests that some customers may only be interested in the ‘immediate’ mark-down opportunity, therefore do not go onto complete their application”: SAFA [32].

34 Further, by October 2021, American Express was aware that among the reasons for customers opting not to complete the application process or requesting to cancel their Card application was that some customers did not understand that they were applying for a credit card with an annual fee: SAFA [32]. This issue was identified in training material provided to David Jones’ staff in October 2021, the content of which had been approved by American Express: SAFA [31].

Process for identifying and actioning a review trigger

35 In or around September 2021, prior to the TMDs being issued by 5 October 2021, American Express created a document entitled “DDO — Product Design & Distribution Obligations Product Owner Guide” (**DDO Product Owner Guide**) which applied to all American Express

personal credit cards to which the DDOs apply, including the DJs Cards: SAFA [83]–[84]. The DDO Product Owner Guide stated that American Express must “[r]eview the TMD periodically and when required by the TMD review triggers” and provided that the “Product Owner” was ultimately responsible for assessing whether a review trigger had occurred or an event or circumstance had occurred that would reasonably suggest that the TMDs were no longer appropriate: SAFA [85(d)] and [86].

36 The DDO Product Owner Guide also set out the internal American Express process to be adopted once a review trigger had been identified, including considering amendments needed to the “target market” or the details of additional “distribution conditions”: SAFA [88].

37 For the purpose of the DDO Product Owner Guide, American Express considered that the “Product Owner” for the DJs Cards was the Product Manager: SAFA [86]. Prior to the commencement of the DDOs, American Express’s Project Management Office held sessions with Product Owners about the DDOs under the Act and the Guide: SAFA [90].

38 Although sessions were held with Product Owners explaining the design and distribution obligations and the DDO Product Owner Guide (SAFA [90]), the DDO Product Owner Guide did not itself provide any guidance to Product Owners on how to determine if and when a review trigger had occurred, or an event or circumstance had occurred that would reasonably suggest that the TMDs for the Cards were no longer appropriate: SAFA [89]. Further, American Express did not otherwise prescribe predetermined numbers, rates or matrices for the purpose of identifying when a particular review trigger had occurred, or otherwise provide guidance as to what was meant by “abnormal cancellation rates”. Instead, American Express relied on the experienced and professional judgment of key staff involved in the David Jones Alliance to identify if and when a review trigger or a relevant event or circumstance had occurred: SAFA [89].

39 Significantly, during the Relevant Period, despite what was specified in the DDO Product Owner Guide as referred to above and outlined in sessions with Product Owners explaining the design and distribution obligations and the DDO Product Owner Guide, the Product Managers for the DJs Cards were not aware who was responsible for deciding when a review trigger had occurred: SAFA [90], [91(b)]. Although the Cancellations Working Group was the primary forum in which the David Jones Alliance Director would consider and monitor cancelled application rates for the purpose of the DDOs, the Product Manager for the DJs Cards did not attend the meetings of the Cancellations Working Group and was not informed at any point

during the Relevant Period that the monthly cancelled application rates for the DJs Cards were a review trigger or an event or circumstance that reasonably suggested that the TMDs were no longer appropriate for the purposes of the DDO. Nor did the Product Manager consider independently whether the monthly cancelled application rates were a review trigger or a relevant event or circumstance for the purpose of the DDOs: SAFA [91].

40 Further, although the Director of the David Jones Alliance was aware of the DDO and review triggers under the TMDs and attended the Cancellations Working Group meetings, the Director did not consider at any point during the Relevant Period whether the monthly cancelled application rates were a review trigger or a relevant event or circumstance for the purposes of the DDO: SAFA [93].

American Express's knowledge of a "circumstance"

41 Between October 2020 and October 2021, American Express was aware of high cancelled application rates for applications among customers who had applied for one of the DJs Cards at a David Jones store, including because some customers were unaware they had applied for a credit card, may have only been interested in an immediate mark-down (i.e. discount) and therefore did not subsequently complete their application, could not be reached by American Express to finalise the application, did not submit income verification documents to American Express, or because of an error with the application: SAFA [98].

42 On 26 August 2021, the Acquisition Manager for the David Jones Alliance at American Express sent an email to various staff of American Express and David Jones attaching an updated slide deck for the Cancellations Working Group for August that had taken place that day: SAFA [95]. The slide deck contained a slide entitled "Cancellations – KPIs", which stated that (SAFA [96]):

- (a) the average cancellation rate in 2020 was 52%;
- (b) the target cancellation rate for 2021 was originally 45% and had been revised down to 35%.

43 Each of the slide decks for the meetings of the Cancellations Working Group that took place on 29 September 2021, 12 October 2021, 16 November 2021, 16 December 2021 and 2 February 2022 contained a similar slide entitled "Cancellations – KPIs", which stated that the average cancellation rate in 2020 was 52% and that the target cancellation rate in 2021 was 35%: SAFA [97].

44 In addition, following lower than historical cancelled application rates in November and December 2021 (SAFA [99]–[101]), between January and May 2022, the Acquisition Manager sent monthly emails to David Jones staff attaching the Cancellation Insights Report which referred to “headline” cancelled application rates ranging from 42% to 60% (SAFA [102]–[106], [109]). The Cancellations Working Group was paused from January 2022. Accordingly, American Express and David Jones did not meet in April or May 2022 to consider the cancelled application rates for in-store applications of the Cards in the month of April 2022: SAFA [109]–[110].

45 From December 2021 to March 2022, American Express was aware of high headline rates of cancelled applications and took steps to monitor and reduce in-store cancellations: SAFA [106]. These efforts included engaging with David Jones to seek to understand the reasons for the high cancelled application rates and identifying the key drivers of cancellations and implementing action plans to address those reasons: SAFA [106]. Despite these efforts, the rates of cancelled applications did not reduce, and instead increased: SAFA [108].

46 By 11 May 2022, the headline monthly rate of cancelled applications for the Cards applied for in David Jones was 60%: SAFA [111(a)]. The high rates of cancelled applications had become entrenched and the actions taken by American Express and David Jones to address these rates were not working: [111(b) and (c)]. These were matters in respect of which American Express had actual knowledge: SAFA [112].

47 The circumstance referred to in the preceding paragraph reasonably suggested that the TMDs were no longer appropriate: SAFA [113]. That is because it would no longer be reasonable to conclude that if the DJs Cards were issued to a retail client in-store in accordance with the distribution conditions in the TMDs, it would be likely that the retail client was in the target market or, if the retail client was in the target market, it would likely be consistent with the likely objectives, financial situation and needs of the retail client: SAFA [113].

Admitted Contraventions of the Act

48 American Express admits that, by reason of the matters at [94] to [111] of the SAFA, by 11 May 2022, it knew that a circumstance had occurred in respect of each of the DJs Cards (namely the matters specified at [111] of the SAFA). Para 111 of the SAFA is as follows:

By 11 May 2022:

- a. the headline monthly rate of cancelled applications for the DJs Cards applied for

- in David Jones stores was 60%;
- b. high rates of cancelled applications had become entrenched; and
- c. the actions taken by American Express to address these rates were not working.

It is an agreed fact that that circumstance reasonably suggested that the TMDs for the DJs Cards were no longer appropriate (SAFA at [113]). However, it is also agreed that American Express did not have actual knowledge that the circumstance identified at [111] of the SAFA reasonably suggested that the TMDs were no longer appropriate: SAFA at [114].

49 In those circumstances, American Express admits that, in the period from 25 May 2022 to 5 July 2022, it contravened:

- (a) s 994C(4) of the Act by failing to cease issuing each of the DJs Cards; and
- (b) s 994C(5) of the Act by failing to take all reasonable steps to ensure that David Jones was informed that it must not continue distributing each of the DJs Cards,

when it knew that a circumstance had occurred, and (as a matter of objective fact, but not to American Express's actual knowledge) that circumstance reasonably suggested that the TMDs were no longer appropriate: SAFA [112]–[114]; SSAFA [4] and [6]. Whether I accept that admission depends on whether I accept the parties' construction of subss 994C(4)(c) and (5)(c), which I deal with below. As I explain, I reject the parties' construction, with the result that I do not accept American Express's admission as to its contravention arising in this way, and I do not accept that American Express contravened s 994C(5) at all.

50 In addition, it is common ground between the parties that by 11 May 2022 American Express ought reasonably to have known that the matters set out in SAFA [111] (of which it had actual knowledge) constituted the occurrence of a circumstance that reasonably suggested that the TMDs were no longer appropriate: SSAFA [5]–[6]. In my view, that conclusion is correct, and is amply established by the matters set out in the SAFA [94]–[113] which I have summarised above under the sub-heading "American Express's knowledge of a 'circumstance'". It is also admitted that by 25 May 2022 (ie 10 business days after 11 May 2022) American Express did not review the TMDs for the DJs Cards or cease issuing the DJs Cards: SAFA [115]. On the basis of those particular admissions concerning constructive knowledge, I accept that American Express contravened s 994C(4), but not s 994C(5)

51 I note that from 5 July 2022, American Express ceased issuing the DJs Cards (SAFA [12] and [14]), and instructed David Jones to cease all in-store distribution of the DJs Cards with effect

from that date: SAFA [116]. Subsequently, the parties agreed to end the partnership: SAFA [116].

Construction of subss 994C(4) and (5)

52 There are two issues which arise in these proceedings concerning the proper construction of the provisions which the parties agree have been contravened. The first concerns the extent to which the matters in para (ii) in each of subss 994C(4)(c) and (5)(c) must be known or (in the case of s 994C(4)(c)) ought reasonably to be known. The second concerns the knowledge which is required in order to trigger the response imposed by s 994C(4). The first of those issues was raised by the parties and, contrary to their joint submissions, I regard the matter as so obvious that it does not raise a real issue of construction at all. The second issue was not raised by the parties at the initial hearing on 27 May 2024, but does raise a genuine issue of construction.

The knowledge requirement in para (c)(ii)

53 A plain reading of s 994C(4)(c) conveys that the relevant condition for the operation of s 994C(4) is that the person knows, or ought reasonably to know, that the elements of subpara (i) or subpara (ii) are satisfied. In the case of subpara (i), the person must know, or ought reasonably to know, that a review trigger for the determination has occurred. In the case of subpara (ii), the person must know, or ought reasonably to know, that an event or circumstance has occurred that would reasonably suggest that the determination is no longer appropriate. It is obvious from the structure and syntax of subparagraphs (c)(i) and (ii) that the relevant knowledge must be of all of the elements of (i) or all the elements of (ii). The same reasoning applies to s 994C(5), except that s 994C(5)(c) is confined to actual knowledge, in that it does not pick up the concept of constructive knowledge denoted by the expression “ought reasonably to know” as used in s 994C(4)(c). Confirmation that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act is provided by the Revised Explanatory Memorandum at [1.91], which stated relevantly:

Issuers are prohibited from engaging in retail product distribution conduct in relation to the product, from as soon as practicable (but no later than 10 business days) after they knew or ought to have known that the determination may be inappropriate, until they have reviewed the determination and, if necessary, made a new determination.

Consideration may be given to that material pursuant to s 15AB of the *Acts Interpretation Act 1901* (Cth) (**Interpretation Act**).

54 To my surprise, the parties jointly submitted that that obvious construction is wrong. Their submission is that para (c) in each of ss 994C(4) and (5) has two relevant components:

- (a) that the person knows (or alternatively, in the case of s 994C(4), ought reasonably to know) that an event or circumstance “has occurred”; and
- (b) the event or circumstance “would reasonably suggest” that the TMD is no longer appropriate.

The parties submit that only (a) and not (b) is the subject-matter of the knowledge requirement. That is (putting to one side the “ought reasonably to know” aspect of s 994C(4)), it is necessary that the person possesses the requisite knowledge that the event or circumstance has occurred. That subjective knowledge being established, it is then to be objectively determined that the event or circumstance reasonably suggests that the TMD is no longer appropriate, but (so the parties submit) the person need not know that the event or circumstance reasonably suggests that the TMD is no longer appropriate. This submission was developed at some length in the parties’ initial joint written submissions, but oddly the parties did not then provide any reasons or submissions as to why their argument may be wrong. Given that there was no contradictor in the case, this was a dereliction of the duties of counsel to the Court, as senior counsel for both parties ultimately accepted (T26.16–33, 39.17–40.6). Quite apart from the duties of counsel to the Court, barristers owe it to themselves in all proceedings (irrespective of whether there is a contradictor) to consider the opposing point of view, if only to spare themselves and the Court from the kind of insubstantial arguments that rise like bubbles to the surface and disappear. At the end of the initial hearing, the parties requested a further month to consider their respective positions, and they did file further written submissions which set out arguments for the competing construction. The submissions made jointly by the parties in favour of their rather odd construction are as follows.

55 First, the parties jointly submitted that their construction is supported by the text, context and purpose of ss 994C(4) and (5). The parties submitted that the question of whether the event or circumstance suggests that the TMD is no longer appropriate is an objective one (namely, whether the event or circumstance would reasonably suggest that it is no longer appropriate). That was said not to require the person to know that the event or circumstance reasonably suggests that TMD is no longer appropriate (again, putting to one side the “ought reasonably to know” aspect of s 994C(4)). The parties submitted that if the correct construction was that the person must know that the event or circumstance “reasonably suggested that the TMD was

no longer appropriate”, there would be little or no work for the words “reasonably suggest” to do, and a high degree of uncertainty would be introduced in relation to the scope of the provision and the nature of the obligation it imposes. (ASIC also submitted that the alternative construction would require the words “to the maker of the determination” to be inserted after “reasonably suggest” (T14.36–39), but American Express did not appear to join in that submission, and the significance of the submission escapes me.)

56 I do not understand this first submission. It is true to say that the question whether the event or circumstance would reasonably suggest that the TMD is no longer appropriate is an objective one, but it is hardly surprising that the draftsman referred to an objective matter as the subject matter of the required knowledge. One cannot know something which is not true. Other mental states (such as belief) may be apt for matters which are not necessarily true. The element of reasonably suggesting that the TMD is no longer appropriate is an essential component of the requirement of knowledge, because without it one does not know what event or circumstance is required to be known. The terms “event or circumstance” are so open-ended that they require some specification of the characteristics of the “event or circumstance” in order to give the provision a sensible operation. That is obviously why the draftsman has clearly indicated by the punctuation and structure of the provision that the requisite knowledge must be of all the elements of either para (i) or para (ii).

57 In what appeared to be an adjunct to the first line of argument, ASIC submitted in writing for the resumed hearing on 1 July 2024 (after a further month’s deliberation) that the word order of para (c)(ii) supported its construction, in that it was said that if the provision were intended to require the person to know that an event or circumstance of a particular quality has occurred, one would expect the words “has occurred” in para (c)(ii) to follow after the word “appropriate”, rather than after the words “an event or occurrence”. When I told senior counsel for ASIC that the point was far too subtle for my mind, and requested some elaboration, senior counsel replied that there was nothing further she could say beyond what had been put in writing (1.7.24 at T9.40–10.8). That may be so, but if a submission is to be put then counsel should be in a position to explain it, or at least to give it some paraphrasable meaning. The word order is entirely natural and does not indicate that the knowledge requirement extends to anything less than all the elements of para (c)(ii).

58 Second, the parties jointly submit that the correctness of their construction is supported by the greater certainty afforded by that construction, such certainty being warranted in the context of

a civil penalty provision, with reference to *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36; (2013) 248 CLR 619 at [48] (Crennan, Kiefel, Bell, Gageler and Keane JJ); and *Qantas Airways Limited v Transport Workers Union of Australia* [2023] HCA 27; (2023) 412 ALR 134 at [40] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). As those authorities indicate, like the imposition of criminal liability, the imposition of a civil penalty should be certain and its reach should be ascertainable by those who are subject to it.

59 I accept the general principle which is the subject of that submission, but I regard the principle as operating strongly against, rather than in favour of, the parties' construction. As I have indicated above, in my view, the provision is clear in requiring the relevant knowledge to extend to the relevant event or circumstance reasonably suggesting that the determination is no longer appropriate. Certainty and ascertainability are enhanced by a construction which is consistent with that text. The parties' construction introduces uncertainty and a lack of clarity where none exists in the language actually used.

60 Third, the parties jointly submit that it is difficult to conceive how a level of knowledge which included the element of "would reasonably suggest that the determination is no longer appropriate" could be established or how the provision would be enforced. The parties submit that such a construction would be unwieldy, requiring proof that the person:

- (a) knew the event or circumstance; and
- (b) applying the definition of "appropriate" in s 994B(8), knew that the event or circumstance reasonably suggested that the TMD was such that it would not be reasonable to conclude that if the product were issued:
 - (i) to a retail client in accordance with the distribution conditions – it would be likely that the retail client is in the target market; or
 - (ii) to a retail client in the target market – it would likely be consistent with the likely objectives, financial situation and needs of the retail client.

61 I accept that the language of the provisions is "unwieldy", in the sense that when one has to insert a definition of "appropriate" which includes the lengthy sentence in s 994B(8) into what is already a lengthy phrase in subss 994C(4)(c) and 994C(5)(c), the result places demands on the reader's powers of concentration. That, however, is the case on either construction. The cumbersome nature of the statutory language is simply a feature of the drafting technique which

has been adopted. As to the submission that knowledge of all of the elements of para (c)(ii) creates difficulties in establishing a contravention or enforcing the provision, I simply do not understand the submission. I do not regard it as a particularly difficult factual issue to ascertain in the circumstances of a particular case whether the person knows (or ought reasonably to know) that an event or circumstance would reasonably suggest that the TMD is no longer appropriate in the defined sense. In the present case, the parties were able to reach agreement on those factual issues. When I suggested to senior counsel for ASIC that the parties' agreement as to the facts in the present case showed the issue is not that hard, I was simply told that the submission could not be put any higher (1.7.24 at T9.27–38). Why then, one may ask, was the submission ever made? There may, of course, be borderline and contested cases, but that is true of almost all factual issues which courts resolve routinely. ASIC is armed with very extensive investigative powers, and enjoys the rights to pre-trial discovery of documents and the cross-examination of witnesses which are available to any litigant. As ASIC ought to be aware, those processes are routinely used to establish questions of actual and constructive knowledge on the part of those whom ASIC suspects of (or alleges have engaged in) contraventions.

62 Fourth, the parties submit that the consequence of requiring knowledge of all the elements of para(c)(ii) would be that only the most serious or egregious conduct would be caught by the provisions, which is said to run counter to the express legislative intention of requiring a “customer-centric approach” in implementing the DDO regime. The parties submit that on the alternative construction (which I regard as the obviously correct construction) if a person in the organisation that has made the TMD, being the person responsible for monitoring review triggers, had no knowledge or understanding of the DDO regime, the organisation may be liable for a contravention of s 994C(4) (by reason of the “ought to have known” requirement), but could wholly avoid contravening the corresponding obligation to inform relevant product distributors imposed by s 994C(5). The parties submit that such a result runs counter to the discernible legislative intent in establishing the DDO regime. The parties submit that ss 994C(4) and (5) are complementary: subs (4) is concerned with ensuring that the issuer stops selling the product when a review has been triggered, and subs (5) requires the issuer to take steps to ensure that other persons involved in the distribution conduct cease engaging in that conduct, unless the TMD has been reviewed and there is a new TMD (if required). The parties submit that an approach that imposes significantly divergent knowledge requirements in respect of subs (4) and (5) is therefore inconsistent with a purposive approach to statutory construction and the DDO regime generally. Further, the parties submit that in circumstances

where the legislation is consumer-focused and is a form of consumer protection legislation, a beneficial construction should be preferred to one that limits the operation of the scheme and captures only the most serious conduct.

63 I reject those submissions. It is obvious that subss 994C(4)(c) and (5)(c) have divergent knowledge requirements. Subsection (4)(c) is satisfied where “the person knows, or ought reasonably to know” the specified matters. Subsection (5)(c) is confined to actual knowledge, by requiring that “the person knows” the relevant matters. It is obvious that the legislation intends to create a situation where a person may contravene subs (4) without actual knowledge of the relevant matters, but would not be liable under subs (5) because the person did not have that actual knowledge. That corresponds to a consistent pattern in the drafting of s 994C, whereby the provisions which create an offence (namely subss (3), (5) and (6)) require actual knowledge of the relevant matters, whereas the provisions which do not create an offence but which are civil penalty provisions are satisfied where the person either knows or ought reasonably to know the relevant matters (subss (4) and (7)). The fact that the provisions which create criminal offences are concerned with conduct which is more serious or egregious than provisions which merely give rise to civil penalties is an entirely natural and reasonable approach to legislative drafting. I do not see anything contrary to the legislative purpose in adopting that approach. While the overall legislative purpose may be described at a high level of generality as consumer protection, the particular purpose of subss 994C(4) and (5) is to impose a regime of remedial responses in circumstances where the person knows (or ought reasonably to know in the case of subs (4)) of certain matters which give rise to the need for a remedial response. It is fundamental to that purpose that the provisions should specify the nature and elements of the knowledge which trigger the requisite remedial response. There is no reason why the legislation should adopt a uniform standard as to the degree of knowledge (i.e actual or constructive) which is required in different provisions calling for different responses, with different consequences for contravention in terms of the civil and criminal law.

64 Fifth, the parties jointly submitted in their written submissions that there was nothing in the Revised Explanatory Memorandum that expressly assists the Court in interpreting these particular provisions, but submitted that the overarching legislative intention of a “customer-centric approach” assists in resolving what the parties referred to as the constructional choice. In developing that submission, the joint written submissions referred expressly to the Revised Explanatory Memorandum at [1.91]. It was at this point (if not earlier) that the parties’ submissions completely lost contact with any form of rationality. I have quoted from that

paragraph above. It is obvious that the very paragraph referred to by the parties in their joint written submissions did expressly deal with the very matter of construction raised by the parties, and did so in a manner which is plainly contrary to their submission. While senior counsel for American Express had the good sense to withdraw the submission upon [1.91] being drawn to his attention (T40.8–13), senior counsel for ASIC maintained the submission (T21.40–22.35), but ultimately withdrew it after I had provided the parties with an adjournment of over two hours to give proper consideration to the arguments that they were putting, and accepted that [1.91] meant the opposite of what ASIC had earlier submitted (T41.4–15).

65 Accordingly, I reject the parties’ joint submissions concerning this question of construction.

Construction of “first knew” in s 994C(4)(c)

66 There is an oddity in the drafting of s 994C(4)(c). The opening line of that paragraph specifies a condition to the operation of the subsection if “the person knows, or ought reasonably to know” that certain matters exist. They are expressed as alternatives because a person who ought reasonably to know something is a person who does not actually know that thing. However, after identifying those matters, the provision requires that “from as soon as practicable, but no later than 10 business days, after the person *first knew* of the occurrence of the review trigger, event or circumstance, the person must not engage in retail product distribution conduct in relation to the product” unless certain matters occur. One might have expected that italicised element of the provision to have referred to when the person “first knew or ought to reasonably to have known”, in order to correspond to the first line of para (c). That is the drafting technique used in s 994C(7), which begins as follows:

If a regulated person knows or ought reasonably to know that the person who made the target market determination for a financial product has taken steps referred to in subsection (5), the regulated person must, as soon as practicable, but no later than 10 business days, after the regulated person first became aware *or should have become aware* that the steps had been taken, cease to engage in retail product distribution conduct in relation to the product unless ... (emphasis added)

67 The question thus arises whether the words “first knew” in s 994C(4)(c) are to be construed as referring to actual or constructive knowledge, or only to actual knowledge. The former construction is supported by the overall context in which those words appear in para (c), because, unless “first knew” extends to when the person first ought reasonably to have known of the relevant matters, then the concept “ought reasonably to know” in the first line of para (c) would be incapable of giving rise to the prohibition set out in para (c) against engaging in retail product distribution conduct in relation to the product. That is clearly the case in relation to

para (c)(i), which applies if the person knows or ought reasonably to know that “a review trigger for the determination has occurred”. It is also the case in relation to para (c)(ii) once one construes the knowledge requirement relating to para (c)(ii) in its obvious meaning as extending to all the elements of para (c)(ii), and thus the expression “first knew of the occurrence of the ... event or circumstance” uses the words “event or circumstance” as a shorthand for all the elements of para (c)(ii). That construction is also clearly supported by the Revised Explanatory Memorandum at [1.91], to which I have referred above.

68 The latter construction (that is, that “first knew” refers only to actual knowledge), is supported by the fact that the word “knows” in the first line of para (c) is used as an alternative to “ought reasonably to know”, and therefore is used in contradistinction to constructive knowledge. The words “know” and “knew” should thus be presumed to bear the same meaning. The latter construction is also supported by the relative need for clarity and certainty in the meaning to be given to a civil penalty provision. Further, it may be thought that a construction of “first knew” which extends to constructive knowledge would require the insertion of the words “or ought reasonably to have known” and such judicial repair of legislation by filling gaps disclosed in legislation may be regarded as being beyond judicial power: *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at [38]–[40] (French CJ, Crennan and Bell JJ), [65] (Gageler and Keane JJ); *HFM043 v Republic of Nauru* [2018] HCA 37; (2018) 359 ALR 176 at [24] (Kiefel CJ, Gageler and Nettle JJ).

69 In my view, the words “first knew” in para (c) should be construed as meaning “first knew or ought reasonably to have known”. While there is a presumption that a word (or other parts of speech derived from the word) has the same meaning throughout an Act, and particularly within the same paragraph of a section of an Act, the presumption is not a strong one, and the strength of it must depend on the context in which the word appears. The point is lucidly explained by Mr Perry Herzfeld SC and Mr Thomas Prince in *Interpretation* (2nd ed, 2020) at [5.170]. In the present case, reading s 994C(4) as a whole, the context in which the words “first knew” appear strongly indicates that those words were intended to apply to both kinds of knowledge referred to in the opening line of para (c); that is, both actual and constructive knowledge. It is true that s 994C(7) provides clearer drafting but I do not regard it as essential that the words “first knew” must be followed by the words “or ought reasonably to have known” in order to express that meaning in the particular context of the provision.

70 As to the fact that the provision creates a civil penalty, and is therefore a kind of penal statute, it is now accepted that the old rule that penal or criminal statutes should be strictly construed has lost much of its importance, and that the ordinary rules of construction must be applied in determining the meaning of a penal statute. However, if the language of the statute remains ambiguous or doubtful then as a last resort the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences (or for that matter, civil penalty provisions): *Beckwith v The Queen* (1976) 135 CLR 569 at 576 (Gibbs J); approved by the High Court on a number of occasions as set out in Perry and Herzfeld, *Interpretation*, at [10.90], most recently in *R v A2* [2019] HCA 35; (2019) 269 CLR 507 at [52] (Kiefel CJ and Keane J, with whom Nettle and Gordon JJ agreed). In the present case, ordinary principles of construction yield a sufficiently clear meaning such that there is no room for the application of the principle of last resort of resolving any remaining ambiguity or doubt in favour of the subject.

71 Further, in my view the issue of construction is resolved by the proper construction of the actual words used in the provision, namely “first knew”, without the need to insert further words by a process of impermissible judicial repair by filling gaps disclosed in the legislation. Finally, as I have indicated, the Revised Explanatory Memorandum at [1.91] expressly conveyed the intention that the remedial conduct required by s 994C(4) was required to be undertaken as soon as practicable (but no later than 10 business days) after the relevant issuer “knew or ought to have known” that the determination may be inappropriate.

72 Having said that, it would be preferable for Parliament to tidy up the drafting of s 994C(4)(c) by adding after “first knew” the words “or ought reasonably to have known”. It is most unsatisfactory for a civil penalty provision to be so poorly drafted.

Conclusion on Contravention

73 It follows from the views that I have expressed as to the proper construction of subss 994C(4) and (5) that American Express did not contravene s 994C(4) on the basis of actual knowledge that an event or circumstance had occurred that would reasonably suggest that the TMDs were no longer appropriate. Further, American Express did not contravene s 994C(5) at all, given that s 994C(5)(c) relevantly requires actual knowledge of that matter. It will be recalled that it is an agreed fact that American Express did not have actual knowledge that the circumstance identified in SAFA [111] reasonably suggested that the TMDs were no longer appropriate: SAFA [114].

74 I have earlier stated my conclusion (consistently with the agreed position between the parties) that by 11 May 2022 American Express ought reasonably to have known that the matters set out in SAFA [111] constituted the occurrence of a circumstance that reasonably suggested that the TMDs were no longer appropriate. In those circumstances, American Express contravened s 994C(4) by not reviewing the TMDs for the DJs Cards or ceasing to issue the DJs Cards. It remains to determine the amount of civil penalty which is appropriate for that particular contravention, and to deal with the appropriate costs order.

Approach to agreed relief

75 The proper approach to civil penalty orders which are sought on an agreed basis was explained in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (*FWBII*). The High Court there reaffirmed the practice of acting upon agreed penalty submissions, as explained in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; (2004) ATPR 41–993.

76 In *FWBII*, French CJ, Kiefel, Bell, Nettle and Gordon JJ emphasised the “important public policy involved in promoting predictability of outcome in civil penalty proceedings” which “assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention”: at [46]. Their Honours went on to state at [58] (emphasis in original):

Subject to the court being sufficiently persuaded of the accuracy of the parties’ agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and ... highly desirable in practice for the court to accept the parties’ proposal and therefore impose the proposed penalty.

77 The regulator such as ASIC in a civil penalty proceeding is not a disinterested party, and its views concerning the appropriate penalty are a relevant consideration in determining whether the proposed penalty is appropriate: *FWBII* at [60]. That being the case, the Court’s determination of whether the Agreed Penalty is appropriate ought properly take account of ASIC’s informed view regarding the effects of contraventions of the nature admitted by American Express, and the level of penalty necessary to achieve compliance: at [60].

78 In the present case, I have rejected the parties’ joint submission that American Express contravened s 994C(5), because I have rejected as untenable the construction of s 994C(5) on

which that joint submission depends. In those circumstances, I need not consider Agreed Penalty A, and will confine my reasons to the appropriateness of Agreed Penalty B.

79 In considering whether Agreed Penalty B of \$8,000,000 is an appropriate penalty, I bear in mind that there is no single appropriate penalty. Rather, there is a permissible range of penalties within which no particular figure can necessarily be said to be more appropriate than another: *Volkswagon Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; (2021) 284 FCR 24 at [127] (Wigney, Beach and O’Bryan JJ). The permissible range is determined by all the relevant facts and consequences of the contravention and the contravener’s circumstances. Where the penalty proposed by the parties is within the permissible range, the court will not depart from the submitted figure “merely because it might otherwise have been disposed to select some other figure”: *FWBII* at [47].

80 The total penalty of \$8 million is said by the parties to reflect a penalty of \$4.5 million for the contravention of s 994C(4) in relation to the DJs Amex Card and a penalty of \$3.5 million for the contravention of s 994C(4) in relation to the DJs Amex Platinum Card.

Section 1317G(1)(c) of the Act

81 Section 1317G(1)(c) of the Act provides relevantly that where a contravention is of a “financial services civil penalty provision” that is not an excluded Part 7.7A civil penalty provision, the Court may order a person to pay a pecuniary penalty if the contravention:

- (a) materially prejudices the interests of acquirers or disposers of the relevant financial products; or
- (b) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation, scheme or fund, the members of that corporation, scheme or fund; or
- (c) is serious.

Section 994C(4) is a financial services civil penalty provision: see s 1317E(3). The parties submit that the conduct here falls within subs (1)(c), namely it is “serious.”

82 As set out above, since October 2020, American Express was aware from its monthly Cancellations Working Group meetings of high cancelled application rates among customers who had applied for one of the DJs Cards at a David Jones store. The cancelled application rates were well above the 35% “target KPI cancellation rate” that was noted in the material circulated to the Cancellations Working Group: SAFA [95]–[97]. KPI in this context meant “key performance indicator”.

83 The Product Managers for the DJs Cards were not aware who was responsible for deciding when a review trigger had occurred or whether there was a relevant event or circumstance. Further, as they did not attend the monthly Cancellations Working Group meetings, the Product Owner (here, the Product Manager) was dependent upon the attendees of that group to notify him or her if the cancelled application rates were such that the TMDs ought to have been reviewed. In the circumstances, American Express failed to equip the staff members responsible for monitoring the TMDs with the information necessary to identify review triggers and relevant facts or circumstances and further failed to properly educate the Product Owner about their responsibilities in relation to the TMDs for the DJs Cards.

84 Moreover, although the in-store cancelled application rates for the Cards presented at the Cancellations Working Group meetings had significantly increased by December 2021, and by May 2022 were entrenched at higher rates despite steps being taken to try to address cancellations, the Director of the David Jones Alliance (who was aware of the DDO and review triggers under the TMDs, and who attended the meetings) did not consider at any point during the Relevant Period whether the monthly cancelled application rates were a review trigger or a relevant event or circumstance for the purposes of the DDO.

85 The parties do not submit that the conduct was deliberate, in the sense that it is not contended that there were any deliberate or knowing contraventions of the Act. However, the facts establish that American Express failed to put in place sufficient measures that would enable it to meet all of its regulatory obligations under the newly introduced DDO regime in respect of the DJs Cards. Although American Express implemented its DDO Project from June 2021 in order to seek to comply with its DDO obligations under the Act and prepare the TMDs that were in place from 5 October 2021, the structures it ultimately put in place in respect of the DJs Cards for identifying whether review triggers had occurred, or identifying relevant facts or circumstances, were inadequate. Those members of the David Jones Alliance who were formally responsible for monitoring the TMDs were not aware of their obligations, and those who were aware of the relevant facts and circumstances failed to take action in respect of those matters.

86 In my view, American Express's contravention was plainly serious. The seriousness of American Express's failures is informed by the following:

- (a) The application cancellation rates were objectively high in nature, having reached 60%, and had clearly become entrenched. American Express was aware of that fact and knew

by 11 May 2022 that the actions taken to address these rates were not working and yet it continued to distribute the product.

- (b) It was no longer reasonable to conclude that if the DJs Cards were issued to retail clients in-store, it would be likely that the retail clients were in the target market or, if the retail clients were in the target market, the DJs Cards were likely consistent with their likely objectives, financial situation and needs.
- (c) There was a large number of consumers who continued to apply for the DJs Cards during the Contravening Period.

The Appropriate Amount of the Penalty

87 The purpose of a civil penalty regime is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the relevant Act by the deterrence, specific and general, of further contraventions: *Australian Building and Construction Commission v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 at [9], [15] and [31] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 at [87] (Keane, Nettle and Gordon JJ). The penalty must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 at [66] (French CJ, Crennan, Bell and Keane JJ); *Pattinson* at [17]. In other words, those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [63] (Keane CJ, Finn and Gilmour JJ). However, the penalty should not be greater than is necessary to achieve the object of deterrence, and severity beyond that is oppression: *Pattinson* at [40].

88 Subject to the particular statutory scheme, retributive justice has no part to play in determining the appropriate civil penalty and the statutory maximum penalty does not implicitly require that contraventions be graded on a scale of increasing seriousness, with the maximum to be reserved exclusively for the worst category of contravening conduct. The statutory discretion is not constrained in this way: *Pattinson* at [49], [51]. Considerations of deterrence, and the protection of the public interest, may justify the imposition of the maximum penalty where it

is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind: *Pattinson* at [50].

89 Although the DJs Cards are no longer sold, American Express continues to operate in the credit card industry and is the subject of DDOs in respect of other cards it issues. That being the case, considerations of specific deterrence are relevant. The DDO regime is consumer-focused and, as with other sections of the Act, is intended to ensure that consumers receive appropriate financial products. Accordingly, general deterrence is an important element in assessing the appropriate penalty. Any penalty needs to be sufficient to deter other product issuers and distributors from contravening the DDO provisions of the Act.

90 The majority in *Pattinson* considered that the statutory maximum penalty is but one yardstick that ordinarily must be applied, and must be treated as one of a number of relevant factors to inform the assessment of a penalty of appropriate deterrent value: at [53]–[55]. Their Honours rejected an approach by which the statutory maximum penalty was required to be reserved exclusively for the worst category of contravening conduct: at [10] and [49]–[51]. However, their Honours emphasised that there should be “some reasonable relationship between the theoretical maximum and the final penalty imposed”, the relationship of reasonableness being established by reference to a need for deterrence having regard to the circumstances of the contravener and the circumstances of the contravention: at [10], [53]–[55].

91 At all relevant times, s 1317G(4) of the Act provided that the maximum penalty for each contravention was the greater of:

- (a) \$11,100,000 (being 50,000 penalty units);
- (b) three times the benefit derived or detriment avoided because of the contravention; and
- (c) 10% of annual turnover for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision (capped at 2.5m penalty units or \$555,000,000).

For the years ended 31 December 2021 and 31 December 2022, American Express reported total revenue of \$1,091,200,000 and \$1,466,800,000, respectively. The contravention of sub-994C(4) occurred from 25 May 2022 to 5 July 2022. For the purpose of the maximum penalty, 10% of annual turnover is \$146,680,000 for the year ended 31 December 2022. Accordingly, the maximum penalty for a single contravention is approximately \$146 million.

92 Where there is an interrelationship between the factual and legal elements of two or more contraventions, consideration might be given to whether or not it is appropriate to impose a single overall penalty for that course of conduct: *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 3)* [2017] FCA 1018 at [36] (Beach J). As Moore, Middleton and Gordon JJ expressed the matter in *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 at [39] (emphasis in original), the course of conduct principle:

recognises that where there is an interrelationship between *the legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is “the same criminality” and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.

93 As their Honours said in *Cahill* at [41], however, the principle is only a tool of analysis which can, but need not, be used in any give case in order to ensure an appropriate deterrent effect. As Lee J expressed the point in *Australian Competition and Consumer Commission v Equifax Australia Information Services and Solutions Pty Ltd* [2018] FCA 1637 at [86], the principle is:

merely a discretionary tool or analytical expedient along the way to determining an appropriate penalty. A precise allocation of the number of courses of conduct is not some sort of calculus which results in various outcomes, depending upon the characterisation of the contravening conduct, as falling into one or other of the identified courses of conduct.

94 The course of conduct principle would have had a significant role to play if I had found contraventions of both s 994C(4) and s 994C(5) to be established. In those circumstances, the parties submitted that the four contraventions should be viewed as involving two courses of conduct: one concerning the DJs Amex Cards and the other concerning the DJs Amex Platinum Card. However, as I have concluded that no contravention of s 994C(5) is established, there are only two courses of conduct, namely the contravention of s 994C(4) in respect of each of the two kinds of card. Agreed Penalty B of \$8 million represents a reduction of about 25% from Agreed Penalty A to reflect the fewer number of contraventions while still retaining its deterrent quality.

95 The parties submit that the following penalties for each course of conduct are appropriate:

- (a) \$4.5 million in respect of the contravention of s 994C(4) regarding the DJs Amex Card;
- and

- (b) \$3.5 million in respect of the contravention of s 994C(4) regarding the DJs Amex Platinum Card.

The parties submit, and I accept, that a higher penalty in respect of the contraventions concerning the DJs Amex Card is appropriate having regard to the greater potential for consumer harm associated with the provision of that credit card, given its distribution in greater volumes proportionate to the distribution of the DJs Amex Platinum Card.

96 The totality principle requires the Court to review the “aggregate” penalty to ensure that it is just and appropriate, and not out of proportion to the contravening conduct considered “as a whole” or the “totality of the relevant contravening conduct”: *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 at [272] and [308] (Wigney J). It involves a “final overall consideration of the sum of the penalties determined” by consideration of all the relevant factors, and requires the Court to make a final check of the penalties to be imposed on a wrongdoer, considered as a whole: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* [1997] FCA 450; (1997) 145 ALR 36 at 53 (Goldberg J). The totality principle will not necessarily result in a reduction from the penalty that would otherwise be imposed. In cases where the Court considers that the cumulative total of the penalties to be imposed would be too low or too high, the Court should alter the final penalties to ensure that they are just and appropriate: *Australian Safeway Stores* at 53. The totality principle is distinct from the course of conduct principle in performing a check at the end of the reasoning process.

97 In fixing a pecuniary penalty, the Court will engage in an “intuitive or instinctive synthesis” of all the relevant matters by weighing together all relevant factors, rather than engage in a sequential, mathematical process: *Markarian v R* [2005] HCA 25; (2005) 228 CLR 357 as applied to civil penalty proceedings in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at [6] (Allsop CJ).

98 Section 1317G(6) of the Act mandates a number of factors for the Court’s consideration in determining a pecuniary penalty, including relevantly:

- (a) the nature and extent of the contravention;
- (b) the nature and extent of any loss or damage suffered because of the contravention;
- (c) the circumstances in which the contravention took place; and

- (d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in similar conduct.

99 In addition to the need for general and specific deterrence, the factors relevant to the exercise of the Court's determination of an appropriate penalty, as drawn from the authorities, include:

- (a) the extent to which the contravention was the result of deliberate or reckless conduct by the corporation, as opposed to negligence or carelessness;
- (b) the number of contraventions, the length of the period over which the contraventions occurred, and whether the contraventions comprised isolated conduct or were systematic;
- (c) the seniority of officers responsible for the contravention;
- (d) the capacity of the defendant to pay, but only in the sense that whilst the size of a corporation does not of itself justify a higher penalty than might otherwise be imposed, it may be relevant in determining the size of the pecuniary penalty that would operate as an effective specific deterrent;
- (e) the existence within the corporation of compliance systems, including provisions for and evidence of education and internal enforcement of such systems;
- (f) remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention;
- (g) whether the directors of the corporation were aware of the relevant facts and, if not, what processes were in place at the time or put in place after the contravention to ensure their awareness of such facts in the future;
- (h) any change in the composition of the board or senior managers since the contravention;
- (i) the degree of the corporation's cooperation with the regulator, including any admission of an actual or attempted contravention;
- (j) the impact or consequences of the contravention on the market or innocent third parties;
- (k) the extent of any profit or benefit derived as a result of the contravention; and
- (l) whether the corporation has been found to have engaged in similar conduct in the past.

See *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790 at [68] (Beach J), and see *Pattinson* at [18]–[19].

100 That list of factors should not be regarded as a rigid catalogue of matters for attention as if it were a legal checklist; the Court’s task remains to determine what is an appropriate penalty in the circumstances of the particular case: *Pattinson* at [19]. The matters of particular relevance in the present case are as follows.

101 As to the nature and extent of the contravention, the contravening conduct did not occur over a protracted period of time. The contraventions occurred between 25 May 2022 and 5 July 2022, a period of 41 days. This is a matter that mitigates the contravening conduct.

102 As to the knowledge and involvement of senior management, the contravention arose from American Express’s failure to implement adequate systems to ensure compliance with the DDO scheme and to equip their staff to understand and act in accordance with the company’s obligations under Part 7.8A of the Act. Accordingly, this is not a matter in which senior management were directly involved in a deliberate contravention of the Act. Nonetheless, the Director of the David Jones Alliance was aware of the DDO and the review triggers under the TMDs, and also attended the meetings of the Cancellations Working Group, and was aware of the high cancelled application rates for the DJs Cards. Accordingly, in addition to the overall organisational failures within American Express, it is relevant that the person responsible for the David Jones Alliance also failed to pay attention to the regulatory requirements under the DDO and American Express did not have in place sufficient checks to ensure that it was able to comply with its obligations.

103 As to the nature and extent of any loss or damage suffered because of the contravention, the DDO regime was introduced with the objective of promoting the provision of suitable financial products to consumers. The regime is consumer-focused and intended to sharpen the focus of issuers on the suitability of financial products for consumers, including by requiring identification of the target market.

104 There is no evidence of quantifiable financial loss suffered by consumers as a result of the contravention in this case. However, American Express’s conduct was contrary to some of the objectives of the regulatory regime. While American Express took steps to seek to comply with the DDO regime prior to it being introduced, it failed to act in accordance with it in respect of the DJs Cards. American Express’s failure arose in circumstances where there were very high cancelled application rates (as high as 60% by the end of the Relevant Period), those cancelled application rates were entrenched despite steps being taken to try to improve them, and the actions taken by American Express to address the cancelled application rates were not working.

Further, “attrition” (in the sense of cancelled Card applications) was flagged as an issue of concern prior to the creation of the TMDs and American Express was aware of the reasons for the cancellations of Card applications. High cancellation rates for DJs Cards applied for in a David Jones store could, and ultimately did by 11 May 2022, reasonably suggest that the TMDs were no longer appropriate. If so many customers were cancelling their applications for the DJs Cards, it would not be reasonable to conclude that if the DJs Cards were issued to a retail client in-store in accordance with the distribution conditions, it would be likely that the retail client was in the target market, or if the retail client was in the target market, it would likely be consistent with the likely objectives, financial situation and needs of the retail client.

105 The failure to recognise that the cancelled application rates were a circumstance that reasonably suggested that the TMDs were no longer appropriate meant that no steps were taken to cease issuing the DJs Cards or to review the TMDs until 5 July 2022. Although this circumstance only culminated in May 2022 and persisted for a relatively short period of time, it effectively meant that during this period the DJs Cards were being distributed in circumstances that reasonably suggested inappropriate target market determinations were in place.

106 In the Contravening Period, American Express (SAFA [124]):

- (a) received 4,146 in-store applications for the DJs Cards, which comprised 3,634 applications for the DJs Amex Card and 512 applications for the DJs Amex Platinum Card; and
- (b) issued 830 DJs Cards (which were applied for in-store), which comprised 689 DJs Amex Cards and 141 DJs Amex Platinum Cards.

107 Accordingly, a large number of consumers continued to apply for the DJs Cards during the Contravening Period even after American Express ought reasonably to have known of the circumstance that reasonably suggested that the TMDs were no longer appropriate. American Express’s failure to cease issuing the DJs Cards in-store in the circumstances referred to above exposed some customers to potential harm from obtaining a financial product that may not have been appropriate to all of their needs and objectives: SAFA [128].

108 As to financial gain, the evidence which is the subject of a suppression order under s 37AF of the *Federal Court of Australia Act 1976* (Cth) establishes that American Express did not make a significant profit from the contravention. However, the nature and extent of the benefits received by American Express have no bearing on the harm caused to the integrity of the market

for financial products (including the potential harm caused to consumers) resulting from a failure to comply with a legislative regime introduced for the purpose of ensuring that financial products are appropriately designed and distributed.

109 As to the size of the contravening company, the size and financial position of American Express are set out at paragraphs [129] to [130] of the SAFA. The company earns substantial revenue from its role as a card issuer, payments acquirer and network operator. Its total revenue in calendar years 2021 and 2022 was between \$1 billion and \$1.5 billion, although it made net losses in those years of \$58.5 million and \$5.6 million respectively. In calendar year 2022, its revenue from “fees, spread and other income” was \$460 million.

110 Where, as here, the maximum penalty is determined by reference to a company’s annual turnover, the legislature has embedded this consideration within the variable maximum penalty. I am therefore mindful of the need to avoid double-counting, by imposing either a greater or lesser penalty based on the financial circumstances of the contravening company in addition to having regard to the maximum penalty for the offence.

111 As to whether the company has a corporate culture conducive to compliance with the Act, American Express’s failures relate to the implementation of the TMDs for the DJs Cards, in particular, by way of monitoring the ongoing appropriateness of the TMDs for the DJs Cards, and thus in ensuring ongoing compliance with the DDO regime in respect of the DJs Cards. Nonetheless, American Express undertook the DDO Project and developed the TMDs for the DJs Cards in accordance with its obligations under the Act. Further, American Express created the DDO Product Owner Guide that included information regarding the DDO and the requirements and contents of a TMD and held sessions with Product Owners explaining the design and distribution obligations and the DDO Product Owner Guide: SAFA [90]. Accordingly, during the Relevant Period, American Express demonstrated some level of commitment towards complying with the DDO regime.

112 As to cooperation, contrition and remedial steps, cooperation with authorities in the course of investigations and subsequent proceedings can properly reduce the penalty that would otherwise be imposed. The reduction reflects the fact that such cooperation increases the likelihood of cooperation in future cases in a way that furthers the object of the legislation, frees up the regulator's resources thereby increasing the likelihood that other contraveners will be detected and brought to justice, and facilitates the course of justice: see *FWBII* at [46].

113 In addition to engaging constructively with ASIC in relation to its voluntary information request, ceasing to offer the DJs Cards on 5 July 2022, and instructing David Jones to cease all in-store distribution of the DJs Cards from 5 July 2022, American Express admitted the contravention prior to the hearing on liability, allowing the hearing to be vacated and cooperated with ASIC in agreeing to the SAFA, which contains admissions contrary to its interests. If anything, American Express went too far in its cooperation with ASIC, by admitting contraventions of s 994C(4) and (5) on the basis of an untenable construction of para (c)(ii) in each of those provisions, as discussed above. Its cooperation also extended to providing ASIC with additional material to allow further facts to be included in the SAFA: SAFA [132].

114 Prior to the Contravening Period, since April 2022, American Express has undertaken work to update its DDO program, including (SAFA [133]):

- (a) publishing a dedicated DDO Review Trigger Policy, which establishes clear processes for the enhanced monitoring of relevant data points, clear escalation protocols and decision ownership for identifying review triggers and conducting a review of the TMD, identifying key stakeholders and decision makers. American Express's internal audits are conducted against this policy;
- (b) establishing a dedicated monthly DDO Forum which is attended by Product Owners and other key stakeholders and which reviews specific product metrics, distribution channels and other product related matters. The DDO Forum specifically considers potential review triggers, in accordance with the American Express DDO Review Trigger Policy. Product Owners are also required to prepare the metrics related to their product, and present those metrics at the DDO Forum and stakeholders are given the opportunity to discuss those metrics. DDO metrics are also presented quarterly at the Compliance Committee;
- (c) establishing a dedicated Complaints Forum which includes consideration of complaint categories and products for DDO compliance;
- (d) completing a comprehensive review and update of all existing TMDs, including the revision of relevant Critical Assessment Questionnaires; and
- (e) conducting new, company-wide training on DDO and targeted product owner training, to ensure DDO competency within all relevant teams.

These remedial measures, as well as American Express’s admissions, are evidence of contrition in respect of the contraventions and are mitigating factors.

115 As to any prior contraventions of the Act, American Express has not previously been found to have contravened any relevant laws: SAFA [131].

Conclusion as to appropriate penalties

116 Having regard to the facts and admissions set out in the SAFA and SSAFA, the considerations set out above, and the statements of legal principle in the authorities regarding the purpose of civil penalties, ASIC and American Express submit, and I accept, that appropriate pecuniary penalties in this case would be imposed in a total amount of \$8 million. Without seeking to oversimplify the multifactorial process of instinctive synthesis that is to be undertaken in reaching the appropriate penalty, the parties jointly submit, and I accept, that an aggregate penalty of this order reflects the degree of deterrence that must be achieved (both specific and general) in setting the penalties for the contravention of the new DDO regime with its consumer-centric and protective focus, while also bringing to bear the factors in mitigation. That is, a penalty of this order ensures it has a “sting” sufficient to deter both repetition by American Express and contravention by other providers of financial products, and one that goes beyond being a mere “cost of doing business”.

117 Agreed Penalty B may be viewed as comprising \$4.5 million for the contravention concerning the DJs Amex Card and \$3.5 million in respect of the contravention relating to the DJs Amex Platinum Card. It is appropriate that the penalty imposed for the contravention reflects the overall circumstance of the contravention. The key difference between the penalties for the contravention of s 994C(4) relating to the DJs Amex Card and the contravention of s 994C(4) concerning the DJs Amex Platinum Card is the greater potential for consumer harm associated with the provision of the DJs Amex Card. This arises having regard to the number of DJs Amex Cards applied for and issued compared to the DJs Amex Platinum Cards. For that reason, the parties jointly submit, and I accept, that the penalty for the contravention concerning the DJs Amex Card should be higher than that for the contravention relating to the DJs Amex Platinum Cards.


118 A total penalty of \$8 million appropriately reflects the nature and extent of American Express’s contravention. Applying the totality principle as a “final check”, Agreed Penalty B is an aggregate sum that is just, appropriate and proportionate to the contravention admitted by American Express. Together with the declarations to be made by the Court, a total penalty of

\$8 million puts a price on the contravention that is appropriate to deter both repetition by American Express and contravention by other providers of financial products.

Costs

119 The parties seek an order that American Express pay ASIC's costs of and incidental to the proceeding in the agreed sum of \$200,000. That order seems to me reasonable and justified. That order was sought in the joint submissions dated 21 May 2024, which were made in preparation for the initial hearing on 27 May 2024. Accordingly, the amount is not affected by the fact that, at that hearing, the parties requested an adjournment of about a month together with a further hearing on 1 July 2024 in order to give further thought to their respective positions. If the agreed costs order had increased by reason of the need for the adjourned hearing, I would not have ordered that American Express pay the amount of the increase.

I certify that the preceding one hundred and nineteen (119) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 19 July 2024