FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited [2023] FCA 256

File number(s):	VID 694 of 2021
Judgment of:	**O'BRYAN J**
Date of judgment:	10 March 2023
Date of publication:	23 March 2023
Catchwords:	**CONSUMER LAW** – admitted contraventions of ss 31(1), 47(1)(a) and 47(1)(e) of the *National Consumer Credit Protection Act 2009* (Cth) – pecuniary penalties sought by applicant not opposed by respondent – whether form of declarations appropriate – whether quantum of penalties appropriate
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth), s 12GBA *Competition and Consumer Act 2010* (Cth) *Corporations Act 2001* (Cth), ss 912A, 1317E *Crimes Act 1914* (Cth), s 4AA *Crimes Amendment (Penalty Unit) Act 2017* (Cth), Sch 1, items 1 and 3 *Crimes Legislation Amendment (Penalty Unit) Act 2015* (Cth), Sch 1, items 2 and 5 *Federal Court of Australia Act 1976* (Cth), ss 21, 37AE, 37AF, 37AG, 43 *National Consumer Credit Protection Act 2009* (Cth), ss 5, 6, 7, 8, 9, Ch 2, ss 29, 31, 47, 110, 166, 167, 324, Sch 1 (*National Credit Code*) *National Consumer Credit Protection Regulations 2010* (Cth), reg 25
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 175 ALD 383 *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 12)* [2013] FCA 533 *Australian Competition and Consumer Commission*

(ACCC) v Cascade Coal Pty Ltd (No 1) [2015] FCA 607; 331 ALR 68

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2015] FCA 330; 327 ALR 540

Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union [2006] FCA 1730; ATPR 42-140

Australian Competition and Consumer Commission v Multimedia International Services Pty Ltd (2016) 243 FCR 392

A*ustralian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640

Australian Competition and Consumer Commission v Valve Corporation (No 5) [2016] FCA 741

Australian Competition and Consumer Commission v Yazaki Corporation (2018) 262 FCR 243

Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2) [2020] FCA 69; 377 ALR 55

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd [2018] FCA 155

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd [2022] FCA 125

Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3) (2012) 213 FCR 380

Australian Securities and Investments Commission v La Trobe Financial Asset Management Ltd [2021] FCA 1417

Australian Securities and Investments Commission v National Australia Bank Ltd [2020] FCA 1494

Australian Securities and Investments Commission v Warrenmang Ltd [2007] FCA 973; 63 ACSR 623

Australian Securities and Investments Commission v Westpac Banking Corporation (No 3) [2018] FCA 1701; 131 ACSR 585

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147

Commonwealth v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482

Computer Interchange Pty Ltd v Microsoft Corp (1999) 88

FCR 438

Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39; 269 ALR 1

Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 3) [2018] FCA 1395

Flight Centre Ltd v Australian Competition and Consumer Commission (No 2) (2018) 260 FCR 68

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421

Hogan v Australian Crime Commission (2010) 240 CLR 651

Markarian v The Queen (2005) 228 CLR 357

Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission [2022] FCAFC 170

Minister for Immigration and Border Protection v Egan [2018] FCA 1320

Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72; ATPR 41-993

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285

Re Chemeq Ltd; Australian Securities and Investments Commission v Chemeq Ltd [2006] FCA 936; 234 ALR 511

Rural Press Ltd v Australian Competition and Consumer Commission (2003) 216 CLR 53

Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; 287 ALR 249

Trade Practices Commission v CSR Ltd [1990] FCA 521; ATPR 41-076

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ORDERS

VID 694 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD** Respondent

ORDER MADE BY: **O'BRYAN J**

DATE OF ORDER: **10 MARCH 2023**

In these orders, "Schedule 1", "Schedule 2" and "Schedule 3" means Schedule 1, 2 and 3 respectively to the parties' statement of agreed facts and admissions tendered in the proceeding.

THE COURT DECLARES THAT:

1. In the period from March 2017 to March 2018, the Respondent (**ANZ**) contravened s 31(1) of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**) in relation to each of the 50 home loan applications referred to in Schedule 1, by:
   (a) engaging in a credit activity within the meaning of the Credit Act, namely carrying on a business of providing credit to which the National Credit Code applies; and
   (b) in the course of engaging in that credit activity, conducting business with the person referred to in column A of Schedule 1 in respect of that home loan application (**referrer**) where the referrer:
      (i) was also engaging in a credit activity within the meaning of the Credit Act, namely by providing information and/or documents to ANZ about the borrower the subject of the home loan application (beyond their name and contact details and a short description of the purpose for which they may want a provision of credit), and consequently providing credit assistance to the borrower or acting as an intermediary between ANZ and the borrower;
      (ii) did not hold an Australian Credit Licence authorising the referrer to engage in that credit activity; and
      (iii) by reason of sub-paragraphs (i) and (ii) above, contravened s 29 of the Credit Act.

2. In the period from November 2015 to March 2018, ANZ contravened s 47(1)(e) of the Credit Act by failing to take reasonable steps to ensure that its representatives complied with s 31(1) of the Credit Act, in that ANZ did not have adequate processes in place in connection with its Home Loan Introducer Program to ensure compliance with s 31(1) of the Credit Act.

THE COURT ORDERS THAT:

3. Pursuant to s 167(2) of the Credit Act, within 30 days ANZ pay to the Commonwealth an aggregate pecuniary penalty of $10 million in respect of ANZ's conduct declared to be contraventions of s 31(1) of the Credit Act.
4. ANZ pay the Applicant's costs of and incidental to the proceeding.
5. Pursuant to ss 37AF(1)(a) and (b)(iv) of the *Federal Court of Australia Act 1976* (Cth), the following information is to be kept confidential to the parties to this proceeding and their legal representatives and, until further order, will not be open to public inspection:
   (a) the names of the consumers in column B of Schedule 1; and
   (b) Schedules 2 and 3 in their entirety.

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

REASONS FOR JUDGMENT

O'BRYAN J

Introduction

1 By originating application dated 29 November 2021, as amended on 17 March 2022, the Australian Securities and Investments Commission (**ASIC**) alleged that Australia and New Zealand Banking Group Limited (**ANZ**) contravened ss 31, 47(1)(a) and 47(1)(e) of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**) in connection with ANZ's "Home Loan Introducer Program" (**HILP**). ASIC sought declaratory and injunctive relief, as well as pecuniary penalties, in respect of the alleged contraventions.

2 The parties reached agreement as to declaratory relief and pecuniary penalties that are sought jointly in the proceeding. On 20 December 2022, the parties filed a Statement of Agreed Facts and Admissions (**SAFA**) pursuant to s 191 of the *Evidence Act 1995* (Cth), joint written submissions on penalty and relief, and proposed orders. The following reasons draw on the parties' joint written submissions.

3 On the basis set out in the SAFA, ANZ admitted that it engaged in 50 contraventions of s 31(1) of the Credit Act between March 2017 and March 2018 in relation to the loan applications identified in Schedule 1 to the SAFA. ANZ admitted that it contravened s 31(1) in respect of each of those loan applications by:

(a) engaging in a credit activity within the meaning of the Credit Act, namely carrying on a business of providing credit to which the *National Credit Code* (contained in Sch 1 of the Credit Act) applies; and

(b) in the course of engaging in that credit activity, conducting business with the person referred to in column A of Schedule 1 to the SAFA in circumstances where the person referred to in that column contravened s 29 of the Credit Act because the person engaged in a credit activity without holding an Australian credit licence – that is, the person provided information and/or documents to ANZ about the borrower the subject of the home loan application (beyond their name and contact details and a short description of the purpose for which they may want a provision of credit), and consequently provided credit assistance to the borrower or acted as an intermediary between ANZ and the borrower.

4 On the basis set out in the SAFA, ANZ also admitted that, between November 2015 and March 2018, it did not have adequate processes and controls in place to address compliance risks associated with the HLIP in respect of s 31(1) of the Credit Act, which were relevantly the risk of ANZ's representatives accepting information and documents from unlicensed third parties beyond the consumer's name and contact details. ANZ admitted that it thereby contravened s 47(1)(e) of the Credit Act by failing to take reasonable steps to ensure that its representatives complied with s 31(1) of the Credit Act.

5 ANZ also admitted that, by contravening ss 31(1) and 47(1)(e) of the Credit Act as set out above, it contravened s 47(1)(a) of the Credit Act by failing to do all things necessary to ensure that the credit activities authorised by its Australian credit licence in respect of the HLIP were engaged in efficiently, honestly and fairly.

6 On the basis of the admitted contraventions, ASIC sought, and ANZ agreed to:

(a) declarations of contravention in respect of ss 31(1), 47(1)(a) and 47(1)(e) of the Credit Act, pursuant to s 166(2) of the Credit Act and s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**);

(b) a pecuniary penalty in the amount of $10 million in respect of the admitted contraventions of s 31(1) of the Credit Act, pursuant to s 167(2) of the Credit Act; and

(c) an order pursuant to s 43 of the FCA Act that ANZ pay ASIC's costs of and incidental to the proceeding.

7 At a hearing on 10 March 2023, I made orders substantially in the form proposed by the parties. These are my reasons for making those orders.

Relevant legislative provisions

8 Chapter 2 of the Credit Act contains a licensing regime for those seeking to engage in a "credit activity", as defined in the Credit Act.

9 Section 6 of the Credit Act provides that a person will engage in a "credit activity" if the person is a credit provider under a credit contract or carries on a business of providing credit to which the *National Credit Code* applies. A person will also engage in a "credit activity" if the person provides a "credit service", which is defined in s 7 as providing "credit assistance" to a consumer or acting as an "intermediary".

10 Section 8 of the Credit Act defines "credit assistance" as follows:

> A person provides ***credit assistance*** to a consumer if, by dealing directly with the consumer or the consumer's agent in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:
>
> (a) suggests that the consumer apply for a particular credit contract with a particular credit provider; or
>
> …
>
> (d) assists the consumer to apply for a particular credit contract with a particular credit provider;
>
> …

11 Section 9 of the Credit Act defined "acts as an intermediary" as follows:

> A person ***acts as an intermediary*** if, in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:
>
> (a) acts as an intermediary (whether directly or indirectly) between a credit provider and a consumer wholly or partly for the purposes of securing a provision of credit for the consumer under a credit contract for the consumer with the credit provider;
>
> …

12 Part 2-1 of Ch 2 of the Credit Act prohibits persons from engaging in credit activities and related activities without an Australian credit licence. The purpose of the prohibitions is to ensure that credit activities (as defined) are regulated by the Credit Act, and that those engaging in credit activities are subject to the requirements imposed on licensees under the Act. Relevantly, s 29(1) prohibits a person from engaging in a "credit activity" if the person does not hold an Australian credit licence authorising them to engage in the credit activity. Section 31(1), which is a civil penalty provision, provides that:

> (1) A licensee must not:
>
> (a) engage in a credit activity; and
>
> (b) in the course of engaging in that credit activity, conduct business with another person who is engaging in a credit activity;
>
> if, by engaging in the credit activity, the other person contravenes section 29 (which deals with the requirement to be licensed).

13 In substance, therefore, s 31(1) prohibits a licensee from engaging in a credit activity and, in the course of doing so, conducting business with a person who is also engaging in a credit activity without an Australian credit licence authorising them to do so. As observed by Lee J in *Australian Securities and Investments Commission v National Australia Bank Ltd* [2020] FCA 1494 (***ASIC v NAB***) (at [90]), the section seeks to ensure that the overall objectives of the credit regime are not frustrated by licensees engaging with unlicensed persons to subvert its intent.

14 Section 110(1)(b) of the Credit Act provides that the regulations may exempt a "credit activity" from certain provisions of the Credit Act. Relevantly, reg 25 of the *National Consumer Credit Protection Regulations 2010* (Cth) (**Credit Regulations**) exempts certain credit activities from the requirement in s 29 to hold an Australian credit licence. The exemptions include where a person (a referrer) refers a consumer to a licensee (such as a bank) which is able to provide a particular credit activity to the consumer (such as a home loan). The limits of the activities in which the referrer may engage are prescribed by reg 25. Relevantly, reg 25(2) allows a licensee to receive from an unlicensed person, and the unlicensed person to provide to a licensee, the name and contact details of a consumer and a short description of the purpose for which the consumer may want a provision of credit. ANZ sought to operate the HLIP on the basis of the exemption set out in reg 25(2). However, ANZ admitted that the exemption under reg 25 of the Credit Regulations was inapplicable in respect of the 50 loan applications in issue in this proceeding. ANZ accepts that Mr Dharmasena and/or Ms Samaranayake in each case did not hold an Australian credit licence and engaged in conduct which exceeded the scope of the exempt credit activities under reg 25.

15 Part 2.2 of Ch 2 of the Credit Act regulated the issue of, and compliance with, Australian credit licences. The key aims of the licensing regime are to regulate credit industry participants and enhance consumer protection: *ASIC v NAB* at [83]. Further, the licensing regime assisted in ensuring that those who engage in "credit activity" are subject to the responsible lending requirements in Ch 3 of the Credit Act. In *ASIC v NAB* (at [85]), Lee J observed:

> Those requirements aim to protect consumers (both from conduct of lenders and from consumers making poor borrowing decisions) by imposing standards of behaviour on licensees prior to and when entering into a credit contract. The conduct requirements apply only to persons who are licensed under the National Credit Act (that is, holders of an ACL). Relevantly, licensees are required to test the suitability of the proposed credit contract and assess the consumer's ability to meet their financial obligations under the proposed credit contract. To do so requires direct dealings between the lender and the putative borrower, hence the prohibition on an unlicensed intermediary.

16 Section 47 of the Credit Act imposes general conduct obligations on licensees. At all material times, that provision relevantly provided as follows:

> (1) A licensee must:
>
> (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and
>
> (b) have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or its

representatives; and

(c) comply with the conditions on the licence; and

(d) comply with the credit legislation; and

(e) take reasonable steps to ensure that its representatives comply with the credit legislation; and

(f) maintain the competence to engage in the credit activities authorised by the licence; and

(g) ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence; and

(h) have an internal dispute resolution procedure that:

(i) complies with standards and requirements made or approved by ASIC in accordance with the regulations; and

(ii) covers disputes in relation to the credit activities engaged in by the licensee or its representatives; and

(i) be a member of an approved external dispute resolution scheme; and

(j) have compensation arrangements in accordance with section 48; and

(k) have adequate arrangements and systems to ensure compliance with its obligations under this section, and a written plan that documents those arrangements and systems; and

(l) unless the licensee is a body regulated by APRA:

(i) have available adequate resources (including financial, technological and human resources) to engage in the credit activities authorised by the licence and to carry out supervisory arrangements; and

(ii) have adequate risk management systems; and

(m) comply with any other obligations that are prescribed by the regulations.

17 Sections 47(1)(a) and (1)(e) of the Credit Act were not civil penalty provisions during the relevant period in this proceeding. It is for this reason that no penalty is sought in respect of the admitted contraventions of those provisions.

18 Section 324(1) of the Credit Act provides that any conduct engaged in on behalf of a body corporate by, *inter alia*, a director, employee or agent of the body within the scope of the person's actual or apparent authority is taken, for the purposes of the Credit Act, to have been engaged in also by the body.

Agreed facts and admitted contraventions

19 The following is a summary of the relevant facts set out in the SAFA.

Loan applications

20 Since at least 2006, ANZ has had a program which is currently known as the HLIP. Through the HLIP, ANZ receives from third parties with which it has an "introducer agreement" (**introducers**), referrals of consumers for the purpose of the consumers making a home loan application with ANZ. If ANZ approves a referred consumer's home loan application, and the consumer draws down a qualifying home loan, the introducer is eligible to be paid a commission by ANZ, assessed as a percentage of the amount of the qualifying home loan. The introducers with whom ANZ had introducer agreements included persons who did not hold an Australian credit licence, such as accountants or real estate agents.

21 The introducer agreements generally used by ANZ, and specifically used by ANZ with respect to the introducers relevant to this proceeding, were in a standard form and provided, among other things, that:

(a) the introducer was not a representative of ANZ within the meaning of s 5 of the Credit Act; and

(b) the introducer must not take part in the preparation, submission or execution of loan applications, loan agreements or security documents for loans or any related documents.

22 In the ordinary course of events, an introducer would provide a copy of their referral form to a consumer to complete with the consumer's name, signature and date, and the consumer would provide the completed form to ANZ when making a home loan application.

23 The proceeding as commenced by ASIC concerned 74 home loan applications made between June 2016 and April 2018. Of those 74 applications, 50 are the subject of admissions of contravention by ANZ and the remaining 24 are no longer the subject of an alleged contravention. Each of the 50 home loan applications, made between April 2017 and March 2018, were from consumers referred to ANZ by two introducers with which ANZ had introducer agreements. The first was Gold Star Services Pty Ltd (**Gold Star**), which operated a cleaning business and was controlled by Hasitha Dharmasena. The second was Amila Dharmasena t/as Sight Creations, who carried on an interior design and building inspection services business. Mr Dharmasena and Ms Dharmasena are brother and sister. In respect of each of the 50 loan applications, ANZ paid a commission to the introducer. Of the commissions paid to Ms Dharmasena, most of those sums were transferred by her to Mr Dharmasena.

24 In respect of each of the 50 loan applications, Mr Dharmasena and/or Ms Samaranayake provided to Lasitha Amarasooriya, a senior personal banker employed by ANZ, information in relation to the application that went beyond the consumer's name and contact details. Though different in each case, that information included payslips, identification documents, contracts of sale and signed loan documents. Some of the documents provided in relation to certain loan applications were false or contained details that were false.

25 By engaging in the conduct described above, Mr Dharmasena and/or Ms Samaranayake engaged in a credit activity by providing a "credit service" to the consumer in respect of each loan application within the meaning of s 7 of the Credit Act. The relevant credit service constituted either the provision of "credit assistance" to a consumer within the meaning of s 8, or acting as an "intermediary" within the meaning of s 9. As neither Mr Dharmasena nor Ms Samaranayake held an Australian credit licence, by engaging in that conduct they contravened s 29 of the Credit Act.

26 The conduct of Mr Amarasooriya in conducting business with Mr Dharmasena and Ms Samaranayake in connection with the 50 loan applications is taken to be conduct of ANZ by operation of s 324(1) of the Credit Act.

27 ANZ admitted that by reason of the above conduct, it contravened s 31(1) of the Credit Act on 50 occasions in respect of each of the relevant loan applications.

HLIP processes and controls

28 ANZ further admitted that, between November 2015 and March 2018, the processes and controls that it had in place in relation to the HLIP were not adequate to ensure compliance with its obligations under s 31(1) of the Credit Act. In particular, during this period, there were weaknesses in ANZ's processes and controls for:

(a) introducer on-boarding and review;

(b) training of relationship owners and lenders;

(c) detecting non-compliance with the obligations of introducers; and

(d) oversight of the compliance risks associated with the HLIP.

Introducer on-boarding and review

29 During the relevant period, ANZ employees or mobile lending franchisees as "relationship owners" had primary responsibility for identifying potential introducers, managing the

preparation and submission of their application to enter into an introducer agreement with ANZ, and providing them with instructions and an explanation of their obligations under the Credit Act. There was limited oversight or monitoring by the HLIP Central Team of introducers with whom ANZ entered into agreements and their activities.

30 ANZ had a list of preferred industries for potential introducers. Prior to early 2018, ANZ did not periodically review or update that list. Further, ANZ did not require an obvious link between the potential introducer's industry and a customer buying a home.

31 ANZ undertook some on-boarding checks in respect of potential introducers, including checks against ASIC's banned and disqualified registers and internal fraud checks. However, these did not include police or bankruptcy checks for key individuals within a potential introducer business, or any requirement for an introducer outside the introducer industry list to be approved by a person or team responsible for the governance of HLIP or any central oversight of the approval of such introducers.

32 There was also a conflict of interest for relationship owners in respect of their responsibilities in relation to introducers, and the sales of home loans referred through the HLIP, as ANZ's remuneration structure provided the prospect of obtaining a variable remuneration that could be improved by maximising the number and value of home loan sales.

Training of relationship owners and lenders

33 ANZ employees or mobile lender franchisees were required to undertake training before becoming a relationship owner in the HLIP, comprising general lending training and a training module specific to the HLIP (**HLIP Training Module**). However, the HLIP Training Module was not mandatory for other ANZ employees or supervised persons who may have received referrals from introducers such as branch staff. Nor was it necessary for relationship owners to refresh their training after updates were made by ANZ to the HLIP Training Module.

Detecting non-compliance with introducers' obligations

34 ANZ had general processes and controls to monitor and detect misconduct or anomalies with home loan applications, as well as a dedicated fraud team (who investigated, for example, instances where ANZ received suspected false home loan documentation), and a separate "Group Integrity" team that investigated possible breaches of ANZ's policies and procedures. However, ANZ did not have a tailored process by which it monitored whether its representatives were accepting information and documents from introducers in relation to loan

applications beyond the consumer's name and contact details. In particular, ANZ did not have a process for contacting consumers who had been referred to ANZ by introducers to ascertain whether the introducer had submitted information or documents to ANZ in relation to a loan application beyond the consumer's name and contact details. Further, the referral form that the consumer was required to sign and submit to ANZ did not address how documents were to be provided to ANZ.

Oversight and reviews of the HLIP

35 The HLIP Governance Forum, which comprised members of the HLIP Central Team and other senior ANZ representatives, was responsible for overseeing the HLIP and monitoring its performance. The HLIP Governance Forum generally met monthly to review and consider, amongst other things, issues, risks and potential improvements to the HLIP. However, ANZ accepts that during the relevant period the HLIP Governance Forum did not have sufficient oversight of specific risks associated with the HLIP, including in relation to introducers exceeding their referrer role, and the absence of (or weaknesses in) controls to address those risks.

36 By failing to have adequate processes and controls in place between November 2015 and March 2018, and thereby failing to take reasonable steps to ensure that its representatives complied with s 31(1) of the Credit Act, ANZ admitted that it contravened s 47(1)(e) of the Credit Act.

Admitted contraventions of s 47(1)(a)

37 ANZ also admitted that it contravened s 47(1)(a) of the Credit Act by reason of its contraventions of ss 31(1) and 47(1)(e) of the Credit Act.

Declaratory relief

38 ASIC seeks (and ANZ agrees to) declarations in respect of the contraventions of ss 31(1), 47(1)(a) and 47(1)(e) of the Credit Act admitted by ANZ. For the following reasons, I made declarations in respect of the contraventions of ss 31(1) and 47(1)(e), but not in respect of s 47(1)(a).

Declaration of contravention of s 31(1)

39 In respect of the admitted contraventions of s 31(1) (which is a civil penalty provision), ASIC applied for declaratory relief under s 166 of the Credit Act. Section 166 of the Credit Act provides as follows:

166 Declaration of contravention of civil penalty provision

Application for declaration of contravention

(1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for a declaration that the person contravened the provision.

Declaration of contravention

(2) The court must make the declaration if it is satisfied that the person has contravened the provision.

(3) The declaration must specify the following:

(a) the court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;

(d) the conduct that constituted the contravention.

Declaration of contravention conclusive evidence

(4) The declaration is conclusive evidence of the matters referred to in subsection (3).

40 Three requirements of s 166 should be noted.

41 First, if the Court is satisfied that a person has contravened a civil penalty provision, the Court must make a declaration to that effect. The language of the section is mandatory, not discretionary. As observed by the Full Court in *Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission* [2022] FCAFC 170 (***Mayfair Wealth***) (at [184] in respect of the analogous s 12GBA of the *Australian Securities and Investments Commission Act 2001* (Cth)), the mandatory terms of the section necessarily overrides the discretionary considerations to which a court might otherwise have given weight in declining to make a declaration.

42 Second, the declaration must contain the particulars specified by subsection (3).

43 Third, the declaration is conclusive evidence of the matters referred to in subsection (3).

44 It follows from those requirements that the declaration made by the Court under s 166 should specify the conduct that constituted the contravention of s 31(1) with sufficient particularity to enable the declaration to fulfil the apparent purpose of subsection (4) – that is, being conclusive evidence of the matters specified in subsection (3): see *Australian Securities and Investments Commission v Warrenmang Ltd* [2007] FCA 973; 63 ACSR 623 per Gordon J (at [32] in relation to the analogous s 1317E of the *Corporations Act 2001* (Cth)). As the Full Court

observed in *Mayfair Wealth* (at [183] in respect of the analogous provisions of the *Australian Securities and Investments Commission Act 2001* (Cth)):

> Given the interrelationship between ss 12GBA and 12GBB, it is no doubt desirable for declarations made under s 12GBA to describe the contravening conduct with reasonable specificity. That has the benefit that, by virtue of s 12GBA(5), the declaration is conclusive evidence of the matters stated. It is also the case, as stated by the High Court in *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 at [89], that a declaration that a person has contravened a statutory prohibition should indicate the gist of the findings that identify the contravention. Declarations must be "informative as to the basis on which the Court declares that a contravention has occurred" and "should contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act": *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274 per Gordon J (at [83]). The declaration should accurately reflect the contravening conduct in a concise way: *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; (2003) 60 IPR 296 per Dowsett J at [260]. Within those parameters, though, the Court has a broad discretion in the framing of declarations.

45 As I observed in *Australian Securities and Investments Commission v La Trobe Financial Asset Management Ltd* [2021] FCA 1417 at [58], the Court is not bound by the form of declarations jointly proposed by the parties and must determine for itself whether the form is appropriate.

46 On the basis of the SAFA and the joint written submissions, I am satisfied that ANZ has contravened s 31(1) of the Credit Act. Accordingly, I am required by s 166 to make a declaration of contravention. However, I do not consider that the declaration proposed by the parties was in a form appropriate to be made by the Court. The form of declaration proposed by the parties was conclusory and failed to provide an adequate description of the contravening conduct. After hearing from the parties, I made the declaration set out in paragraph 1 to the orders made on 10 March 2023 which provides a succinct description of the contravening conduct.

Declarations of contravention of s 47(1)(a) and (e)

47 ASIC also seeks, and ANZ consents to, declarations in respect of the admitted contraventions of ss 47(1)(a) and (e).

48 During the relevant period, ss 47(1)(a) and (e) were not civil penalty provisions. As a result, s 166(2) of the Credit Act has no operation. However, the Court has a wide discretionary power to make declarations under s 21 of the FCA Act. ASIC relies on this power in seeking declarations in respect of the ss 47(1)(a) and (e) contraventions.

49 While the discretion conferred by s 21 of the FCA Act is broad, it should only be exercised where the question is real and not theoretical, the person raising it has a real interest to raise it, and there is a proper contradictor, being someone who has a true interest to oppose the declaration: see *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438 (Gibbs J).

50 The fact that the parties have agreed that a declaration of contravention should be made does not relieve the Court of the obligation to satisfy itself that the making of the declaration is appropriate: *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (***FWBII***) at [59]. The role of the Court is not merely to "rubber stamp" orders agreed between a regulator and a person who has admitted contravening a statute: *Re Chemeq Ltd; Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; 234 ALR 511 at [100] (French J); *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 3)* [2018] FCA 1395 at [74] (Wigney J); see generally *FWBII* at [31], [48], [58].

51 The making of declarations should have some utility: see *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (***Rural Press***) at [95] (Gummow, Hayne and Heydon JJ). However, this does not necessarily require a litigant to seek consequential relief in connection with the subject matter of the declaration: see, e.g. *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* (2012) 213 FCR 380 at [271] (Perram J); *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55 (***AMP Financial Planning***) at [143] (Lee J). In the context of proceedings brought by a regulatory body, declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate a regulator's claim that the respondent contravened the provisions, assist a regulator to carry out its duties, and deter other persons from contravening the provisions: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; ATPR 42-140 at [6] (Nicholson J), and the cases there cited.

52 I am satisfied that it is appropriate to make a declaration in respect of the admitted contravention of s 47(1)(e) of the Credit Act. As noted earlier, s 47(1)(e) stipulates that a licensee must take reasonable steps to ensure that its representatives comply with the credit legislation. Thus, in contrast to s 31(1), s 47(1)(e) is concerned with the processes and

procedures implemented by a licensee to ensure that its representatives comply with, amongst other things, the Credit Act. ASIC alleged, and ANZ admitted, that ANZ contravened s 47(1)(e) because ANZ did not have adequate processes in place in connection with the HLIP to ensure compliance with s 31(1) of the Credit Act. At the hearing on 10 March 2023, I made a declaration to that effect.

53 Conversely, I am not satisfied that it is appropriate to make a declaration in respect of the admitted contravention of s 47(1)(a) of the Credit Act. As noted earlier, s 47(1)(a) stipulates that a licensee must do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly. The admitted contravention, and the proposed declaration, was to the effect that ANZ contravened s 47(1)(a) by:

(a) contravening s 31 of the Credit Act; and

(b) failing to take reasonable steps to ensure that its representatives complied with s 31(1) of the Credit Act contrary to s 47(1)(e).

54 In other words, the admitted contravention of s 47(1)(a) and the proposed declaration merely repeated and relied on the contravening conduct admitted (and declared) in respect of ss 31(1) and 47(1)(e).

55 In *ASIC v NAB*, ASIC also invited the Court to make what could properly be described as repetitive or duplicative declarations. Justice Lee explained his concern with ASIC's approach as follows (at [112]):

> I remain aporetic about making the "repetitive" declarations sought by the regulator. As with all discretionary remedies, if no good purpose will be served by granting it, it should be refused: see *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896; (2017) 252 FCR 150 (at 158 [39] per Lee J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ). As NAB submits, the declarations sought add nothing in the quelling of this controversy. In circumstances such as this, the cautions recalled in *Ibeneweka v Egbuna* [1964] 1 WLR 219 (at 224–5 per Viscount Radcliffe, Lord Guest and Lord Upjohn) become relevant: "declarations are not lightly to be granted. The power should be exercised 'sparingly', with 'great care and jealousy', with 'extreme caution', with 'the utmost caution'". Gibbs J in *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 (at 438, with whom Walsh J agreed at 427, at 448 per Stephen J, at 450 per Mason J, and at 426 per McTiernan J), referring to *Ibeneweka* (at 225), said that "the undoubted truth" was "that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making."

56 At the hearing on 10 March 2023, I questioned ASIC as to the utility of making what appears to be a merely repetitive declaration. ASIC submitted that the declaration had utility in

establishing case law to the effect that conduct that contravenes the Credit Act (in this case s 31(1)) is also a contravention of the statutory licensing obligation in s 47(1)(a). I am not persuaded by that submission. First, a declaration of a contravention that is based only on an admission by a party has little if any precedential value, as it is not a decision that resolves a concrete dispute after contest in argument: see *Rural Press* at [62] (Gummow, Hayne and Heydon JJ). Second, it is uncontroversial that conduct that contravenes a provision of the Credit Act is also a contravention of the statutory licensing obligations in s 47(1). Section 47(1)(d) stipulates that a licensee must comply with the credit legislation. However, ASIC did not seek a declaration that ANZ had contravened s 47(1)(d).

57 It cannot be doubted that the stipulation in s 47(1)(a), that a licensee must do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly, is important. There is a body of case law in respect of the analogous provision in s 912A(1)(a) of the *Corporations Act 2001* (Cth), although there has been limited appellate consideration of the provision (there was limited discussion in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170). In my view, the question whether ANZ's conduct in this case constitutes a contravention of s 47(1)(a) is not free from doubt. The relationship between each of the paragraphs of s 47(1), and how paragraph (a) should be construed in light of the other paragraphs, may need consideration. An overly broad construction of paragraph (a), as propounded by ASIC, may render otiose the other paragraphs. In the circumstances of the present case, I am not willing to make a declaration of contravention of s 47(1)(a) solely on the basis of ANZ's admission and without contest. The admission has no practical consequences for ANZ as the admission, and proposed declaration, would be merely duplicative of the other admissions.

58 At the hearing, ASIC did not ultimately press for that declaration to be made.

Pecuniary penalties

Relevant statutory provisions

59 At all relevant times, s 167(2) of the Credit Act provided that, if a declaration has been made under s 166 that a person has contravened a civil penalty provision, the Court may order the person to pay to the Commonwealth a pecuniary penalty that the Court considers is appropriate. During the relevant period, s 31(1) of the Credit Act was a civil penalty provision.

60 In relation to the maximum penalty, at the time of the contraventions, s 167(3)(b) provided that, for corporations, the pecuniary penalty payable must not exceed 5 times the maximum number of penalty units referred to in the civil penalty provision. At the time of the contraventions, the maximum number of penalty units for a contravention of s 31(1) of the Credit Act was 2,000 units.

61 The value of penalty units is fixed by s 4AA of the *Crimes Act 1914* (Cth). At the times relevant to this proceeding, the relevant penalty unit value was $180 for contraventions that occurred before 30 June 2017, and $210 for contraventions that occurred on or after 1 July 2017: *Crimes Legislation Amendment (Penalty Unit) Act 2015* (Cth), Sch 1, items 2 and 5; *Crimes Amendment (Penalty Unit) Act 2017* (Cth), Sch 1, items 1 and 3.

62 Thirteen of the admitted contraventions that are the subject of this proceeding occurred either wholly or partly before 1 July 2017, and the remaining 37 contraventions occurred wholly on or after 1 July 2017. It follows that the maximum penalty for the admitted contraventions is:

(a) a total of $23.4 million for the 13 contraventions that occurred either wholly or partly before 1 July 2017; and

(b) a total of $77.7 million for the remaining 37 contraventions,

for a combined total of $101.1 million.

Applicable principles

63 The proper approach to civil penalties which are sought on an agreed basis is explained in *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) 71 FCR 285 (***NW Frozen Foods***) and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; ATPR 41-993. The plurality in *FWBII* (French CJ, Kiefel, Bell, Nettle and Gordon JJ) expressed the proper approach as follows (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.

64 The primary purpose of civil penalties is deterrence, both specific and general. The Court must seek to "put a price on contravention that is sufficiently high to deter repetition by the

contravenor and by others who might be tempted to contravene" the relevant statute: *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 175 ALD 383 (***Pattinson***) at [15], [17] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), citing *Trade Practices Commission v CSR Ltd* [1990] FCA 521; ATPR 41-076 (***CSR***) at [50] (French J). The penalty imposed should not be regarded by the contravenor or others as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [66] (French CJ, Crennan, Bell and Keane JJ), citing *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at [62]-[63] (***Singtel Optus***). It is a question of balancing the need for deterrence against the need to avoid an oppressive penalty: *NW Frozen Foods* at 293; *Pattinson* at [40].

65 In fixing a penalty, the Court should have regard to the maximum penalty prescribed by the legislature: see *Markarian v The Queen* (2005) 228 CLR 357. However, 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": A*ustralian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 (***Reckitt Benckiser***) at [155]-[156], cited with approval by the majority in *Pattinson* at [53]-[54]. In *Pattinson* (at [49]), the High Court rejected an approach whereby the Court seeks to grade contraventions on a "scale of increasing seriousness, with the maximum to be reserved exclusively for the worst category of contravening conduct".

66 A penalty should nonetheless be "proportionate" in the sense of striking "a reasonable balance between deterrence and oppressive severity" (*Pattinson* at [41], [46]-[47]). The question, therefore, is what is required to achieve deterrence in the specific circumstances of the case.

67 Although multiple contraventions may be treated as one or more "courses of conduct" where there is an interrelationship between the legal and factual elements of each of the offences, the "course of conduct" principle is a "tool of analysis" which can, but need not, be used in any given case: see *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1 at [39], [41] (Middleton and Gordon JJ); *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 at [234]-[235]; *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585 at [132] (Beach J).

68 In determining the appropriate penalty for multiple contraventions the Court will generally have regard to the "totality" principle, as a final consideration of whether the cumulative total

of the penalty is just and appropriate and not excessive having regard to the totality of the relevant contravening conduct: *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 at [272], [308] (Wigney J). It enables the Court to consider whether the final penalty is in proportion to the nature, quality and circumstances of the conduct involved.

69 The following factors have been recognised as generally relevant to the assessment of pecuniary penalties that may be imposed in a range of statutory contexts (including the *Competition and Consumer Act 2010* (Cth), the *Corporations Act 2001* (Cth), and the *Australian Securities and Investments Commission Act 2001* (Cth), to name a few):

(a) the nature, extent and circumstances of the contravening conduct;

(b) the deliberateness of the contravention and the period over which it was extended;

(c) whether the contravention arose out of the conduct of senior management or at a lower level;

(d) the amount of loss or damage caused by the contravening conduct;

(e) the extent of any profit or benefit derived as a result of the contravention;

(f) the size and financial position of the contravening company;

(g) whether the contravener has been found to have engaged in similar conduct in the past;

(h) whether the contravenor has a corporate culture conducive to compliance with the statute, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and

(i) whether the contravenor has shown a disposition to cooperate with the authorities responsible for the enforcement of the statute in relation to the contravention and taken steps to remediate persons who may have been harmed by the contravening conduct.

70 These factors are "possible relevant considerations" and not a "rigid catalogue of matters for attention", nor a "legal checklist": *Pattinson* at [19] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at [101].

71 The determination of a civil penalty usually involves a process of "instinctive synthesis" of the relevant matters: *Reckitt Benckiser* at [44]; see also *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 at [6]

(Allsop CJ). It is an "inexact science, not subject to rigidity in approach but guided by well-accepted factors": *AMP Financial Planning* at [159].

72 Differences in the facts and circumstances which underlie different cases mean there is usually little to be gained by comparing the penalties imposed in other cases where the facts differ: *Singtel Optus* at [60]; *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* (2018) 260 FCR 68 (***Flight Centre***) at [69]. However, this does not mean that penalties imposed in other cases are never relevant: *Australian Competition and Consumer Commission v Multimedia International Services Pty Ltd* (2016) 243 FCR 392 at [123] (Edelman J). Comparables may give the Court some broad guidance: *Flight Centre* at [69].

Relevant considerations in this case

Nature, extent and circumstances of the conduct

73 ANZ has admitted to 50 contraventions of s 31(1) of the Credit Act. Those contraventions occurred over the course of approximately 13 months (that is, between March 2017 and March 2018), and related to 50 home loan applications referred to ANZ during that period.

74 Each of the admitted contraventions involved ANZ conducting business with an unlicensed third party who was contravening s 29 of the Credit Act. ANZ's conduct involved the following features.

75 First, in respect of each of the loan applications set out in Schedule 1 to the SAFA, ANZ received documents and information in relation to the loan application from an unlicensed third party, beyond the consumer's name and contact details. The documents and information included documents such as payslips, bank statements, contracts of sale, and identification documents.

76 Second, in respect of each of the loan applications, ANZ paid a commission to an introducer:

(a) in respect of 14 of the loan applications, ANZ paid a commission to Gold Star in circumstances where Gold Star's representative, Hasitha Dharmasena (or his wife) had provided information to ANZ in relation to the application that went beyond the consumer's name and contact details; and

(b) in respect of the other 36 of the loan applications, ANZ paid a commission to Amila Dharmasena t/as Sight Creations in circumstances where Mr Dharmasena (or his wife) had provided information to ANZ in relation to the application that went beyond the

consumer's name and contact details. Ms Dharmasena transferred to her brother (Mr Dharmasena) most of the commissions paid to her, and ANZ's representative was aware that commissions were being shared by Ms Dharmasena with Mr Dharmasena.

77 Neither Mr Dharmasena nor his wife held an Australian credit licence at any relevant time.

78 Third, in respect of 22 of the 50 loan applications, ANZ's representative sent Mr Dharmasena (or his wife) communications and documents in respect of the loan applications.

79 By providing documents and information to ANZ in respect of each of the loan applications identified in Schedule 1 to the SAFA, Mr Dharmasena and/or his wife engaged in a credit activity by providing a "credit service" to the relevant consumer (borrower), within the meaning of s 7 of the Credit Act. By providing a credit service without an Australian credit licence, Mr Dharmasena and/or his wife contravened s 29 of the Credit Act.

80 By conducting business with unlicensed third parties who were contravening s 29 of the Credit Act, ANZ contravened s 31(1) of the Credit Act.

81 By conducting business with unlicensed third parties who were contravening s 29 of the Credit Act, ANZ exposed the relevant consumers to the risk of wrongful conduct by such persons, such as the provision of false or incomplete information. ANZ also exposed the consumers to a risk of entering into credit contracts that were not suitable for them. Further, by conducting business with unlicensed third parties who were contravening s 29 of the Credit Act, ANZ contributed to the undermining of the effectiveness of the licensing regime in the Credit Act.

82 The risk of wrongful conduct by unlicensed third parties eventuated in respect of 15 of the 50 loan applications that are the subject of this proceeding. In respect of those loan applications, payslips provided by Mr Dharmasena or his wife contained information that was falsified. A number of the falsified documents contained various details that were false.

83 Further, in relation to six of those 15 loan applications, the falsified payslips appear likely to have been relied on by ANZ in assessing the consumer's loan application. The parties submitted that the Court should regard these instances as being particularly serious.

84 Moreover, ANZ also admitted that, between November 2015 and March 2018, it did not have adequate processes and controls in place in connection with the HLIP to comply with its obligations under s 31(1) of the Credit Act. The details of the inadequacies in ANZ's processes and controls are summarised above.

Deliberateness of the conduct

85 The ANZ employee primarily involved in the contraventions of s 31(1) of the Credit Act knowingly received information from unlicensed third parties in circumstances where the third party engaged in conduct beyond the exemptions in reg 25 of the Credit Regulations. ANZ does not know whether its former employee deliberately engaged in conduct knowing that it would result in contraventions of the Credit Act.

Seniority of the persons involved

86 The ANZ employee primarily involved in the contraventions of s 31(1) of the Credit Act was employed by ANZ as a senior personal banker at a branch in regional Victoria. He had duties which included dealing with loan applications. None of the persons involved in the contraventions of s 31(1) of the Credit Act were "senior managers".

Any loss or damage caused

87 The parties did not submit that the contravening conduct caused any person loss or damage. Nevertheless, the parties submitted, and I accept, that ANZ's conduct exposed consumers to the risk of wrongful conduct by unlicensed third parties, such as the provision of false or incomplete information, and a risk of entering into credit contracts that were not suitable for them. Further, by conducting business with unlicensed third parties who were contravening s 29 of the Credit Act, ANZ contributed to the undermining of the effectiveness of the licensing regime in the Credit Act. The risk of wrongful conduct by unlicensed third parties did in fact eventuate in relation to 15 of the 50 loan applications that are the subject of this proceeding.

Profitability of the HLIP

88 The HLIP has been profitable for ANZ. Between March 2017 and March 2018, referrals made through the HLIP that resulted in a drawn home loan contributed approximately 7.6% of the 74,899 home loans made through ANZ's Australian branch network, and 2.7% of the total 213,587 home loans made by ANZ.

89 The total combined value of the loans resulting from the 50 loan applications set out in Schedule 1 to the SAFA (comprising the total amount drawn down by the relevant consumers) was approximately $26.8 million. ANZ estimates that the net profit after tax resulting from these 50 loan applications totalled approximately $554,000 as at 24 October 2022.

Size and resources of ANZ

90 ANZ is a major Australian bank and is one of the six largest listed companies by market capitalisation in Australia. ANZ reported a statutory profit of $7.119 billion (after tax) for the financial year ending 30 September 2022. As at 30 September 2022, ANZ's market capitalisation was approximately $68.170 billion.

Corporate culture conducive to compliance

91 ANZ did not identify the conduct that is the subject of its admitted contraventions of s 31(1) of the Credit Act until after it was informed by another bank about an individual suspected of being involved in loan fraud (who was not directly related to the conduct in question in this proceeding).

92 After receiving that notification, ANZ commenced an investigation in relation to certain ANZ employees involved in, among other things, the conduct that is the subject of the admitted contraventions of s 31(1) in this proceeding. ANZ subsequently terminated its HLIP relationship with Gold Star and Amila Dharmasena t/as Sight Creations and ended its employment relationship with Mr Amarasooriya.

93 The inadequacies in ANZ's systems and processes, which are detailed above, may have contributed to ANZ's contraventions of s 31(1) of the Credit Act.

94 Since the time of the contraventions of s 31(1) of the Credit Act that are the subject of this proceeding (ending in March 2018), ANZ has:

(a) implemented improvements to its processes and controls in relation to the HLIP;

(b) undertaken a remediation program;

(c) conducted, in relation to the HLIP, a business-led review in 2018, a review by the Internal Audit team in 2020, and a further targeted review by the Internal Audit team in 2022; and

(d) agreed with ASIC to undertake an assurance review of the HLIP, led by its Customer Fairness Advisor, Evelyn Halls, who will prepare a report to be provided to ASIC.

95 The changes made by ANZ to its processes and controls in relation to the HLIP include the following:

(a) from April 2017, employee remuneration structures have been changed, including for relationship owners, to include a balanced scorecard performance assessment for

variable remuneration where financial outcomes are considered alongside customer outcomes and risk outcomes and, since October 2019, ANZ has also reduced the volume of variable remuneration available to employees;

(b) in June 2018, the introducer industry list was updated to include only aligned industries, based on a connection between the industry and a consumer buying a home, and is subject to ongoing review by the HLIP Central Team;

(c) in June 2018, ANZ introduced police and bankruptcy checks for key individuals within prospective introducer companies prior to accreditation and at the time of an annual business review;

(d) in June 2018, an "Intermediary Due Diligence Team" was formed, whose tasks include conducting reviews on home loan applications submitted through intermediaries, which includes introducers, to detect potential fraud or misrepresentation;

(e) in February 2019, ANZ updated its annual business review attendance requirements, including so that all meetings are attended by a relationship owner with a branch manager or an independent senior representative;

(f) since February 2019, new questions in the review form have sought to elicit information regarding the referral practices of an introducer for the purpose of the annual business review;

(g) in February 2019, ANZ introduced a customer calling program, in which sample consumers referred by an introducer may be called and asked questions which assist ANZ in detecting non-compliance by an introducer with their limited referral role;

(h) since February 2019, the HLIP Central Team has conducted a detailed review of each introducer application and annual business review form;

(i) since February 2019, the HLIP Governance Forum has been provided with further information about risks associated with the HLIP, such as introducer non-compliance with their limited referral role, to improve its oversight of the program;

(j) since July 2019, HLIP training must be completed annually, including by branch staff, mobile lenders, branch and mobile lending managers, and coaching staff, with completion of online training modules monitored by ANZ, and since October 2020 HLIP training has been reviewed annually, including to ensure compliance with current legislation and regulations;

(k) since 1 July 2020, the design and operation of key controls within the HLIP have been subject to annual testing by an independent team, with the results reported to the HLIP Governance Forum;

(l) commencing from November 2021, the introducer agreements were amended to allow ANZ to recover commissions paid to introducers where it is established the introducer has engaged in misconduct or breached their obligations under the agreement; and

(m) since March 2022, consumers who are referred to ANZ by an introducer are required to give written acknowledgement that they will provide all documentation relating to their loan application directly to an ANZ lender.

96 ANZ continues to review its HLIP through internal business reviews, and reviews by its Internal Audit team. Reports from these reviews have been prepared in 2016, 2018, 2020 and 2022. The purpose of internal audit reviews is to assess the effectiveness of the controls associated with the HLIP, and to highlight areas for improvement, which will be addressed by the HLIP Central Team (with oversight from the HLIP Governance Forum). Certain inadequacies in ANZ's processes and controls in relation to the HLIP were identified by ANZ's internal audit team in September 2016, and in the course of the business led review conducted in April 2018. An internal audit report in 2020 identified ongoing issues concerning ANZ's processes and controls in relation to compliance risks associated with the HLIP. The 2020 report concluded that "the current control environment is not effectively mitigating key risks with significant weaknesses identified in the design and operating effectiveness of key controls". A targeted follow-up assessment was conducted by ANZ's Internal Audit team in 2022 in respect of certain issues arising from the 2020 audit. The 2022 report concluded that all of the issues raised in the 2020 review had been closed. The report noted that "[w]hile most of the components of the prior year issues have been addressed, there remains some elements that require further uplift to enhance HLIP's governance and monitoring mechanisms".

97 Within one month of the date on which the Court makes orders in this proceeding as to relief, ANZ has agreed to instruct its Customer Fairness Advisor, Evelyn Halls, to conduct a review of the HLIP. Ms Halls, formerly the Lead Ombudsman – Banking & Finance at the Australian Financial Complaints Authority, will be instructed to prepare a report within six months of receiving instructions. The report will, among other things, make recommendations to ANZ. The report will be considered by a senior, Level 1, Executive of ANZ who must, amongst other things, consider the recommendations and state what steps have been taken to give effect to

such recommendations. ANZ will provide a copy of Ms Halls' report and the Level 1 Executive's subsequent statement to ASIC.

Remediation

98 ANZ has undertaken a remediation program, which included some (but not all) of the loans the subject of this proceeding. That program was established in mid-2019. The proposed approach to the program was communicated to ASIC prior to the program's commencement, and ANZ provided updates to ASIC on its progress from time to time. Consumers were identified as within scope for contact as part of the remediation program where:

(a) the loan had been identified as potentially affected by suspected fraud;

(b) the loan had been identified as having been submitted by an ANZ employee or mobile lending franchisee owner who was terminated or disaccredited by ANZ due to suspected fraud or serious misconduct;

(c) ANZ did not reasonably consider that the consumer was complicit in the suspected fraud; and

(d) the consumer had been identified as having potentially suffered loss.

99 ANZ took steps to contact all home loan consumers within scope for contact as part of the remediation program. Where consumers engaged with ANZ in relation to the remediation program, ANZ worked with those consumers to consider their financial circumstances and identify whether the consumers were eligible for a remediation offer.

100 Nineteen of the loans resulting from the loan applications the subject of admissions by ANZ were identified as being in scope for contact as part of the remediation program. As at 25 October 2022:

(a) in respect of five of the loans, ANZ had completed its consumer contact plan and the consumer did not engage with the remediation program;

(b) in respect of 12 of the loans, after initial engagement with ANZ, the consumer did not engage further with the remediation program (for example, the consumer did not provide requested financial information to enable an affordability assessment to be carried out);

(c) in respect of one of the loans, ANZ remains in ongoing discussions with the consumer; and

(d) ANZ has finalised a remediation outcome in respect of one loan, which involved a lump sum payment to the consumers.

101 The remediation program undertaken by ANZ stands in its favour. It must be recognised, however, that s 48 of the Credit Act requires ANZ, as an Australian credit licence holder, to have arrangements for compensating persons for loss or damage suffered because of contraventions of the Credit Act by ANZ or its representatives.

Cooperation

102 On 30 April 2018, ANZ notified ASIC of the relevant conduct, and subsequently cooperated with ASIC in its resulting 3-year investigation. ANZ also engaged constructively with ASIC in the course of this proceeding, including by agreeing to an early mediation, and the making of admissions, which resulted in the resolution of the proceeding without the need for a trial on liability or relief. I accept that ANZ's cooperation should be treated as a mitigating factor.

Prior contraventions of the Credit Act

103 ANZ has admitted to conduct contravening the Credit Act in other, recent proceedings.

104 In February 2018, ANZ admitted that, by reason of the conduct of its former car lending business, Esanda, it contravened its responsible lending obligations under ss 128 and 130 of the Credit Act in respect of 12 car loan applications from three brokers: *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2018] FCA 155. The conduct giving rise to the contraventions in that case involved a failure to take reasonable steps to verify customer income in relation to payslips received from third party intermediaries holding an Australian credit licence, or relying on the exemption in reg 23 of the Credit Regulations.

105 In October 2022, ANZ admitted that it contravened ss 47(1)(a) and 47(1)(d) of the Credit Act in respect of its failure to provide certain benefits to customers who held offset transaction accounts or "Breakfree" packages with the bank: *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2022] FCA 125.

Contrition

106 ANZ has stated that it apologises to its customers for the conduct resulting in contraventions of s 31(1) of the Credit Act. ANZ has acknowledged and accepted responsibility for what

occurred. This is also reflected in ANZ's admissions in connection with ss 47(1)(a) and 47(1)(e) of the Credit Act.

Conclusion on penalty

107 Having regard to the facts and admissions set out in the SAFA, the considerations set out above and the applicable legal principles, I am satisfied that it is appropriate to impose an aggregate pecuniary penalty in the amount of $10 million.

108 Compliance with the licensing regime and the prohibitions on unlicensed conduct is essential to protect consumers and to regulate effectively the conduct of industry participants. The principal object of imposing a civil penalty in this case is to deter ANZ and other industry participants from engaging in the same or similar contravening conduct.

109 I accept that the contravening conduct was serious in nature, exposing consumers to significant risks which did, in some instances, eventuate. The conduct also took place over an extended period and affected a relatively large number of consumers. Moreover, inadequate systems and processes may have contributed to its occurrence. The contraventions of s 31(1) must also be viewed in the context of other contraventions of the Credit Act by ANZ admitted in proceedings in 2018 and 2022. However, I accept that ANZ has since taken steps to remedy its conduct by engaging with some of the affected consumers, and to improve its systems and processes to reduce the risk of such conduct occurring again. I accept that ANZ will continue to take steps to improve the operation of the HLIP, including the assurance review to be undertaken by Ms Hall. I also take into account the fact that ANZ has sought to cooperate with ASIC throughout, and the contrition expressed by ANZ in this proceeding.

110 Weighing all relevant factors, I am satisfied that the penalty proposed is sufficient to achieve deterrence.

Suppression order

111 The parties sought an order that, pursuant to ss 37AF(1)(a) and (b)(iv) of the FCA Act, the following information is to be kept confidential to the parties to this proceeding and their legal representatives and, until further order, will not be open to public inspection:

(a) the names of the consumers in column B of Schedule 1 to the SAFA;

(b) Schedules 2 and 3 of the SAFA in their entirety; and

(c) the net profit after tax figure referred to in paragraph 72 of the SAFA and paragraph 93 of the parties' submissions.

112 The exercise of the Court's power under s 37AF of the FCA Act to make a suppression order or non-publication order is controlled by two other statutory provisions. First, s 37AE provides that, in deciding whether to make a suppression order or non-publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. Second, s 37AG(1) stipulates the grounds on which a suppression order or non-publication order may be made, one of which is (relevantly) that the order is necessary to prevent prejudice to the proper administration of justice. It is apparent that the FCA Act proceeds on the basis that the administration of justice is ordinarily promoted by safeguarding the public interest in open justice, but as observed by Allsop CJ in *Minister for Immigration and Border Protection v Egan* [2018] FCA 1320 at [4]:

> Open justice is not an absolute concept, unbending in its form. It must on occasion be balanced with other considerations, including but not limited to considerations such as the avoidance of prejudice in the administration of justice…

113 It is apparent from the statutory provisions that the party seeking the order bears the onus of establishing the statutory criterion relied on. As observed by the High Court in *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [30]-[31] (with respect to the predecessor provision to s 37AG(1)(a) – s 50 – which was in substantially identical terms), "necessary" is a strong word and it is insufficient that the making of a suppression or non-publication order appears to be "convenient, reasonable or sensible". Numerous cases have confirmed that the threshold which an applicant for a suppression or non-publication order must satisfy is high and mere embarrassment, inconvenience, annoyance or unreasonable or groundless fears will not suffice: see for example *Computer Interchange Pty Ltd v Microsoft Corp* (1999) 88 FCR 438 at [16] (Madgwick J); *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 12)* [2013] FCA 533 at [7] (Perram J); *Australian Competition and Consumer Commission v Cascade Coal Pty Ltd (No 1)* [2015] FCA 607; 331 ALR 68 at [30] (Foster J); *Australian Competition and Consumer Commission v Valve Corporation (No 5)* [2016] FCA 741 at [8] (Edelman J).

114 At the hearing, I determined that a suppression order in respect of categories (a) and (b) above should be made. Column B of Schedule 1 to the SAFA contains the names of consumers who made the loan applications the subject of ANZ's admissions. Schedules 2 and 3 of the SAFA list each email communication that passed between Mr Dharmasena, Ms Samaranayake and

Mr Amarasooriya in respect of the relevant loan applications, including each attachment sent and received. The descriptions provided for each email or attachment in Schedules 2 and 3 also disclose the names of consumers and other personal details, such as residential or business addresses and passport information. I am satisfied that a suppression order in respect of those categories of information is necessary to prevent prejudice to the proper administration of justice. Disclosure of this information would reveal the identity and other personal information of consumers who are associated with, but not party to, this proceeding, which would thereby unnecessarily infringe their privacy.

115 Conversely, at the hearing I determined that a suppression order in respect of category (c) above should not be made. That category concerned the net profit after tax earned by ANZ from the 50 loan applications that are the subject of the contravening conduct. At the hearing, Counsel for ANZ submitted that the figure was confidential and commercially sensitive in circumstances where that information is not in the public domain and may be used by ANZ's competitors to its disadvantage. I am not persuaded that the net profit figure merits the protection of an order made pursuant to s 37AF(1)(b)(iv). The figure relates to the net profit earned on 50 home loans which are otherwise unidentified, save that the total value of the loans is disclosed. I am not persuaded that the disclosure of the net profit figure would subject ANZ to any commercial or competitive disadvantage.

Costs

116 ANZ has agreed to pay ASIC's costs of and incidental to the proceeding and I made an order for costs in the form proposed by the parties.

I certify that the preceding one hundred and sixteen (116) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate: E. French-Mullen

Dated: 23 March 2023