FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2020] FCA 1543

File number:	VID 181 of 2020
Judgment of:	**MURPHY J**
Date of judgment:	22 October 2020
Catchwords:	**CONSUMER LAW** – agreed contraventions of the *National Consumer Credit Protection Act 2009* (Cth) – principles applicable to making declarations and imposition of a civil penalty – appropriateness of agreed orders and declarations – declarations made and civil penalty imposed
Legislation:	*Competition and Consumer Act 2010* (Cth) s 75(1) *Fair Work Act 2009* (Cth) s 499, 500, 556 *Federal Court of Australia Act 1976* (Cth) s 21 *National Consumer Credit Protection Act 2009* (Cth) ss 5, 47, 115, 117, 128, 129, 130(1), 131, 133(1)(b), 133(2)(b), 166(1), 166(3), 167, 175
Cases cited:	*Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd* [2017] FCA 602 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 *Australian Competition and Consumer Commission v Leahy Petroleum (No 2)* [2005] FCA 254 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2)* [2012] FCA 629 *Australian Securities and Investments Commission v ANZ* [2018] FCA 155 *Australian Securities and Investments Commission v Axis International Management Pty Ltd* [2009] FCA 852; (2009)

	178 FCR 485 *Australian Securities and Investments Commission v Channic Pty Ltd (No 5)* [2017] FCA 363 *CFMMEU v ABCC* [2019] FCAFC 201; (2019) 272 FCR 290 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1; [2010] FCAFC 39 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421; [1972] HCA 61 *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177 *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 *Singtel Optus v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 5)* (1981) 60 FLR 38 *Trade Practices Commission v CSR Limited* [1990] FCA 762; (1991) ATPR 41-076 *Trade Practices Commission v Stihl Chainsaws (Aust) Pty Ltd* (1978) ATPR 40-091 *Trade Practices Commission v TNT Australia Pty Limited* (1995) ATPR 41-375
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ORDERS

VID 181 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)** Defendant

ORDER MADE BY: **MURPHY J**

DATE OF ORDER: **22 OCTOBER 2020**

FOR THE PURPOSES OF THIS ORDER:

(a) '20 January 2017 CLI' means the credit limit increase of $8000, from $27,100 to $35,100, applied by CBA to the Harris Credit Contract on 20 January 2017;

(b) 'Application' means the pre-filled application form, completed and submitted to CBA by Harris in early 2017, by which Harris applied to take- up CBA's invitation to Harris apply to increase his credit card limit from $27,100 to $35,100;

(c) 'Assessment' means the assessment of whether the Harris Credit Contract would be unsuitable if CBA increased the credit limit of that contract (as per the Application) as conducted by CBA prior to its provision of the 20 January 2017 CLI;

(d) 'CBA' means Commonwealth Bank of Australia ACN 123 123 124;

(e) 'CBA credit card' means Harris' CBA credit card which was referrable to the Harris Credit Contract;

(f) 'CLI' means credit limit increase;

(g) 'CLI invitation' means the letter from CBA to Harris of 1 December 2016 inviting him to apply to increase his credit card limit on the Harris Credit Contract from $27,100 to $35,100;

(h) 'Harris' means Mr David Harris;

(i) 'Harris Credit Contract' means the credit contract between CBA and Harris by which Harris had a CBA credit card;

(j) 'Problem Gambler Notification' means the notification given by Harris to CBA on 21 October 2016 that:

(i) Harris considered himself to have a gambling problem;

(ii) Harris' requirements and objectives in relation to the CLI included that he wished to cease being a problem gambler before accepting any CLI invitation; and

(iii) Harris was using the Harris Credit Contract for gambling expenses, of which CBA was also aware.

THE COURT DECLARES THAT:

1. In respect of the Harris Credit Contract, CBA contravened s 130(1) of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) by, before making the Assessment and in the circumstances of the Problem Gambler Notification:

(a) failing to comply with s 130(1)(a) of the NCCP Act by failing to make reasonable inquiries of Harris' requirements and objectives in relation to the Harris Credit Contract, namely:

(i) reasonable inquiries as to whether Harris still considered himself to no longer be a problem gambler; and

(ii) such other inquiries as were reasonably required further to information arising from the inquiries referred to in the subparagraph above; and

(b) failing to comply with s 130(1)(c) of the NCCP Act by failing to take reasonable steps to verify Harris' financial situation, namely:

(i) reasonable steps to verify whether Harris was still using his CBA credit card to pay for gambling expenses, and the extent to which he was doing so and had done so since the Problem Gambler Notification; and

(ii) such other steps to verify Harris' financial situation as were reasonably required further to information arising out of the verifications referred to in the subparagraph above.

2. In respect of the Harris Credit Contract, CBA contravened s 128(d) of the NCCP Act in that before providing the 20 January 2017 CLI to Harris, CBA failed to make the

inquiries and verifications as required by s 130(1) of the NCCP Act as respectively detailed in declarations 1(a) and (b) above.

3. In respect of the Harris Credit Contract, CBA contravened s 131(1) of the NCCP Act by failing to assess the Harris Credit Contract as unsuitable if the 20 January 2017 CLI was made as it was likely that the Harris Credit Contract with the CLI would not meet Harris' requirements or objectives which were to cease being a problem gambler before accepting any CLI invitation (noting that Harris continued to have a gambling problem at the time of the Assessment).

4. In respect of the Harris Credit Contract, CBA contravened s 133(1) of the NCCP Act by subsequently providing the 20 January 2017 CLI to Harris in circumstances where the Harris Credit Contract with the 20 January 2017 CLI was unsuitable as it as likely that it would not meet Harris' requirements or objectives as set out in declaration 3 above.

5. By each of the contraventions referred to in declarations 1 to 4 above, CBA contravened s 47(1)(d) of the NCCP Act.

THE COURT ORDERS THAT:

1. Within 30 days of the order, CBA pay to the Commonwealth of Australia a pecuniary penalty of $150,000 in respect of CBA's conduct declared to be contraventions of:
   (a) s 130(1) of the NCCP Act, as referred to in declaration 1 above;
   (b) s 128(d) of the NCCP Act, as referred to in declaration 2 above;
   (c) s 131(1) of the NCCP Act, as referred to in declaration 3 above; and
   (d) s 133(1) of the NCCP Act, as referred to in declaration 4 above.
2. The Defendant pay the Plaintiff's costs of and incidental to the proceeding.

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

REASONS FOR JUDGMENT

MURPHY J:

1 In this proceeding the applicant, the Australian Securities and Investments Commission (**ASIC**), alleges that the respondent, Commonwealth Bank of Australia (**CBA**) contravened ss 128(d), 130(1), 131(1), 133(1) and 47(1)(d) of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**). The allegations relate to a credit limit increase provided by CBA to a customer, David Harris, on 20 January 2017, which increased the credit limit on his CBA credit card from $27,100 to $35,100. CBA offered and then made the credit limit increase after Mr Harris informed it in October 2016 that he was a problem gambler and did not wish to increase his credit limit until he was able to get his gambling under control. CBA admits the contraventions and the underlying conduct by way of a Statement of Agreed Facts and Admissions (the **agreed facts and admissions**) and the parties provided submissions as to the appropriate relief.

2 For the reasons I explain it is appropriate to make declarations in the form proposed by the parties and to impose a pecuniary penalty in the sum of $150,000.

THE FACTS

3 I have drawn the following from the agreed facts and admissions.

4 Since February 2014 Mr Harris has worked as a roofer. In that year he obtained his first credit card from CBA, with a credit limit of $10,000. He was earning approximately $70,000 a year until June 2017 when his salary increased to $77,000 a year.

5 In about April or May 2015, Mr Harris began to gamble beyond his means. He transferred cash advances from his CBA credit card to his CBA transaction account and thus used his CBA credit card to pay for his gambling. It was common for him to "max out" his card by using the full credit limit and then paying off the balance in lump-sum amounts over time.

6 In the course of 2015, Mr Harris obtained two further credit cards from CBA, with credit limits of $7,000 and $8,000 respectively. On 26 November 2015, CBA wrote to Mr Harris inviting him to apply for a credit limit increase to $12,100 in respect of his first credit card, which he did, thus taking his combined credit limit to $27,100.

7 On 13 April 2016, Mr Harris consolidated his three CBA credit cards into a single credit card, so that the balances of the accounts for the second and third cards were transferred to the first

credit card and the accounts for the second and third cards were closed. The credit limit on the first credit card was increased to $27,100.

8 On 21 October 2016, during a telephone call to CBA about an unrelated matter, a CBA staff member informed Mr Harris that he was conditionally approved for a further credit limit increase. During the course of that conversation, Mr Harris said:

(a) "I do not really understand why they've offered me that considering they know, clearly see that I use it for gambling and stuff like that";

(b) "I think that it's pretty bad of them to offer me that when I clearly have a gambling problem";

(c) "Really they should look at that and go, clearly right, he gambles, so we are not going to give him any more money";

(d) "[a]t one point I had three credit cards and they let me max them out and then put it all into one ... and then offered me more money"; and

(e) in response to a statement from the CBA staff member that he should decline the conditionally approved credit limit increase in light of his disclosure that he had a gambling problem, "I wouldn't decline it yet, I am going to increase it but not just yet I want to sort my gambling stuff out first".

9 By that conversation, Mr Harris notified CBA that he was using his credit card to fund gambling expenses, that he considered himself to have a gambling problem and that he wished to cease being a problem gambler before accepting any credit limit increase invitation (the **Problem Gambler Notification**).

10 CBA did not formally record the fact of the Problem Gambler Notification, and it was not passed through to CBA's credit decisions systems.

11 On 31 October 2016, CBA sent Mr Harris a letter inviting him to apply for a further credit limit increase, to take his credit card limit up to $32,100. CBA did not consider the Problem Gambler Notification when assessing whether to make that offer.

12 On 1 December 2016, CBA sent Mr Harris a further letter inviting him to apply to increase his credit card limit, this time up to $35,100. At that time, $8,000 was the maximum credit card limit offered by CBA. CBA's letter of invitation included a pre-filled application form which allowed Mr Harris to take up the invitation by ticking boxes to confirm that:

(a) he wished to increase his credit limit to $35,100;

(b) he was employed;

(c) his job paid at least $106,000 per year before tax;

(d) after tax and expenses he had at least $1,053 left each month to repay the credit card; and

(e) he did not expect anything to change which would make it difficult to make repayments.

Again, CBA did not consider the Problem Gambler Notification when assessing whether to make that offer.

13 In early 2017, Mr Harris, by ticking the pre-filled application boxes, took up the invitation to increase the credit limit on his CBA credit card.

14 On 20 January 2017, CBA assessed and approved the application for a credit limit increase to $35,100 (the **Assessment**). CBA did not take account of the Problem Gambler Notification for the purposes of the Assessment. Nor did it make any further inquiries of Mr Harris beyond those matters in the prefilled application form.

15 Following the credit card limit increase, Mr Harris continued to "max out" his credit card and then sought to pay it off over time. In the period between 21 January 2017 and 20 June 2017 he incurred the following gambling expenditure on his CBA credit card:

(a) $11,147 (approx.) between 21 January 2017 and 17 February 2017;

(b) $1,760 (approx.) between 18 February 2017 and 20 March 2017;

(c) $6,090 (approx.) between 21 March 2017 and 21 April 2017;

(d) $38,870 (approx.) between 22 April 2017 and 22 May 2017; and

(e) $47,882 (approx.) between 23 May 2017 and 20 June 2017.

16 Between 21 July 2017 and 18 August 2017 Mr Harris failed to pay the minimum repayment of $699 on his credit card, on which he had run up a balance of $35,706.91. As at that date, if he incurred no additional charges on his credit card and each month he paid only the minimum repayment it would have taken him 137 years and 10 months to pay off the balance, which amount included estimated interest charges of $267,234.

17 As a result of his gambling problem Mr Harris incurred substantial gambling expenditure during the period 1 April 2015 to around August 2017. He was only able to continue to pay

off his credit card because he worked extended periods without rest days, working 6 to 7 days a week, in physically demanding work as a roofer. He was also reliant on winnings from gambling and a loan from his employer to pay his credit card debts. Mr Harris became mentally and physically tired from the amount of work he was required to perform and began to have difficulty sleeping. He was prescribed sleeping tablets and he began to suffer from depression and anxiety. He was prescribed antidepressants and he sought treatment from a psychologist.

18 CBA was not responsive to Mr Harris' difficulties. In approximately August 2017 a CBA staff member called Mr Harris to ask why he was not making repayments. In that telephone call Mr Harris raised a complaint with CBA including by referring to the Problem Gambler Notification. He pointed out that even after that notification CBA had continued to offer him credit limit increases. After about three weeks Mr Harris had still not heard anything from CBA in relation to this complaint. That led him to lodge a second complaint with CBA by telephone.

THE ADMITTED CONTRAVENTIONS

19 Section 128 of the NCCP Act relevantly provides:

> **Obligation to assess unsuitability**
>
> A licensee must not:
>
> …
>
> (b) increase the credit limit of a credit contract with a consumer who is the debtor under the contract; …
>
> on a day (the ***credit day***) unless the licensee has, within 90 days (or other period prescribed by the regulations) before the credit day:
>
> …
>
> (d) made the inquiries and verification in accordance with section 130.

20 Relevantly, s 128 prohibited CBA from entering into the credit contract with Mr Harris *unless* it had made the inquiries and undertaken the verification steps required by s 130. As I explain, CBA admits that it did not do so.

21 Section 130(1) of the NCCP Act relevantly provides:

> **Reasonable inquiries etc about the consumer**
>
> *Requirement to make inquiries and take steps to verify*
>
> (1) For the purposes of paragraph 128(d), the licensee must, before making the assessment:

(a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract;

…

(c) take reasonable steps to verify the consumer's financial situation;

…

Relevantly, the assessment under s 130 required the licensee to determine whether the credit contract will be unsuitable for the consumer if the credit limit is increased: s 129(b).

22 A contravention of s 130(1)(a) arises where a person holding a Australian Credit Licence (**licensee**)(which CBA did at all material times) makes an assessment as to whether the credit contract will be unsuitable for the consumer if the credit limit is increased, without first making reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract. A contravention of s 130(1)(c) arises where a licensee makes an assessment as to whether the credit contract will be unsuitable for the consumer if the credit limit is increased, without first taking reasonable steps to verify the consumer's financial situation.

23 CBA admits contravening ss 130(1)(a) and (c). It admits that before making the Assessment in relation to the Harris Credit Contract, it was required to make reasonable inquiries about Mr Harris' requirements and objectives and to take reasonable steps to verify Mr Harris' financial situation. Because of the Problem Gambler Notification it was required to: (a) make reasonable inquiries as to whether Mr Harris considered himself no longer to be a problem gambler; (b) take reasonable steps to verify whether Mr Harris was still using his CBA credit card to pay for gambling expenses and the extent to which he was and had done so since the Problem Gambler Notification; and (c) to then make or take such other inquiries or steps as reasonably required following receipt of that information. CBA admits that in contravention of ss 130(1)(a) and (c), before making the Assessment, it failed to undertake the required inquiries and verifications.

24 Section 131 of the NCCP Act relevantly provides:

When credit contract must be assessed as unsuitable

Requirement to assess the contract as unsuitable

(1) The licensee must assess that the credit contract will be unsuitable for the consumer if the contract will be unsuitable for the consumer under subsection (2).

Particular circumstances when the contract will be unsuitable

(2) The contract will be unsuitable for the consumer if, at the time of the assessment, it is likely that:

…

(b) the contract will not meet the consumer's requirements or objectives if the contract is entered or the credit limit is increased in the period covered by the assessment;

…

25 Relevantly, a contravention of s 131(1) arises where the licensee does not assess the credit contract to be unsuitable if at that time the contract would not meet the consumer's requirements or objectives if the credit limit was increased in the period covered by the assessment: s 131(2)(b). CBA admits that the Harris Credit Contract with the increased credit limit was unsuitable for Mr Harris at the time of the Assessment, in that it was unlikely that it would meet Mr Harris' requirements or objectives. In particular, having regard to the Problem Gambler Notification, his requirements and objectives in relation to the credit limit increase were that he wished to not be a problem gambler before he accepted an invitation to increase his credit limit, and he continued to have a gambling problem at the time of the Assessment. CBA admits that it contravened s 131(1) of the NCCP Act.

26 Section 133(1) of the NCCP Act relevantly provides:

Prohibition on entering, or increasing the credit limit of, unsuitable credit contracts

Prohibition on entering etc. unsuitable contracts

(1) A licensee must not:

…

(b) increase the credit limit of a credit contract with a consumer who is the debtor under the contract;

if the contract is unsuitable for the consumer under subsection (2).

When the contract is unsuitable

(2) The contract is unsuitable for the consumer if, at the time it is entered or the credit limit is increased:

…

(b) the contract does not meet the consumer's requirements or objectives;

…

27 Section 133(1)(b) prohibited CBA from increasing the credit limit applicable under the Harris Credit Contract if the credit contract would then be unsuitable by operation of s 133(2)(b). Section 133(2)(b) provides that the credit contract is unsuitable if at the time the credit limit is

increased, the contract does not meet Mr Harris' requirements or objectives. CBA admits that in providing the credit limit increase to Mr Harris, in circumstances where the Harris Credit Contract was unsuitable for the reasons explained, it contravened a 133(1).

28 Section 47(1)(d) of the NCCP Act relevantly provides:

> **General conduct obligations of licensees**
>
> *General conduct obligations*
>
> (1) A licensee must:
>
> …
>
> (d) comply with the credit legislation; …

For the purposes of s 47(1)(d) 'credit legislation' includes the NCCP Act: s 5(1).

29 A contravention of s 47(1)(d) is established when a licensee fails to comply with a provision of the NCCP Act, and, as I have said, CBA admits that it did not comply with ss 128(d), 130(1)(a) and (c), 131(1) and 133(1) of that Act. It therefore admits that it contravened s 47(1)(d).

DECLARATORY RELIEF

30 ASIC seeks declarations as to CBA's contraventions of ss 128(d), 130(1)(a) and (c), 131(1), 133(1) and 47(1)(d) of the NCCP Act. CBA accepts that the declarations sought by ASIC should be made.

31 Section 166(1) of the NCCP Act provides that within six years of a person contravening a civil penalty provision, ASIC may apply to the court for a declaration that the person contravened the provision. Importantly, s 166(2) provides that the court *must* make the declaration if it is satisfied that the person has contravened the provision. Section 166(3) requires that the declaration specify the court that made the declaration; the civil penalty provision that was contravened; the person who contravened the provision; and the conduct that constituted the contravention.

32 Having regard to the agreed facts and admissions I am satisfied that CBA has contravened ss 128(d), 130(1)(a) and (c), 131(1), 133(1) and 47(1)(d) of the NCCP Act. The Court must therefore make declarations specifying the matters set out in s 166(3). I have made declarations in the form of the draft minutes provided.

33 It would be appropriate to make the declarations sought even if s 166 of the NCCP Act did not apply. Pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) the Court has a wide discretionary power to grant declaratory relief. It is undesirable to fetter the exercise of the discretion by laying down rules as to the manner of its exercise, but ordinarily three requirements must be satisfied before a declaration should be made: see *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421; [1972] HCA 61 at 437-438 (Gibbs J); *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448 (Lord Dunedin):

(a) the question must be a real and not a hypothetical or theoretical one;

(b) the applicant must have a real interest in raising it; and

(c) there must be a proper contradictor, that is, someone who has a true interest to oppose the declaration sought.

34 Each of those requirements is satisfied. There is a real question as to whether CBA's conduct contravened the NCCP Act, which contraventions are established by the agreed facts and admissions. ASIC has a real interest in seeking the declarations by reason of its role as a regulator. There is a proper contradictor as CBA has an interest in opposing the relief, notwithstanding its admissions. The declarations are appropriate because they will record the Court's disapproval of the conduct; vindicate the concerns of relevant consumers; assist ASIC in carrying out the duties as conferred on it by the NCCP Act; assist in clarifying the law; and make clear to other would-be contraveners that such conduct is unlawful: see generally *Australian Securities and Investments Commission v* ***Axis International Management*** *Pty Ltd* [2009] FCA 852; (2009) 178 FCR 485 at [26]-[31] and [42]; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [77]-[79].

35 As Gilmour J said in *Axis International Management* (at [42]):

> The courts have for a considerable period consistently concluded that it is appropriate for ASIC to take civil proceedings for declaratory relief in respect of past events, even if there is no risk of repetition, where the outcome may establish that the conduct complained of was wrongful and thereby mark the court's and the community's disapproval of it and may deter other wrongdoers.

PECUNIARY RELIEF

36 CBA admits that it contravened:

(a) s 128(d) of the NCCP Act by its provision of credit limit increase on 20 January 2017 (by which the credit card limit was increased $8,000 from $27,100 to $35,100) without first making the required inquiries and verification under s 130(1) of the NCCP Act;

(b) s 130(1)(a) and (c) of the NCCP Act by failing to undertake, before making the Assessment, such inquiries and verifications as were required in the circumstances existing by reason of the Problem Gambler Notification;

(c) s 131(1) of the NCCP Act by failing to assess the Harris Credit Contract to be unsuitable for Mr Harris, when it was likely that it would not meet Mr Harris' requirements or objectives if the credit limit was increased; and

(d) s 133(1) of the NCCP Act by increasing the credit limit of the Harris Credit Contract when the contract was unsuitable for Mr Harris because it did not meet his requirements or objectives.

Each of those provisions is a civil penalty provision. CBA also admits contravening s 47(1)(d) which is not a civil penalty provision.

The parties' joint position

37 The parties jointly seek orders requiring CBA to pay a pecuniary penalty fixed in the amount of $150,000.

38 As I said in *Australian Competition and Consumer Commission v **Acquire** Learning & Careers Pty Ltd* [2017] FCA 602 at [46]-[48]:

> It is settled that it is appropriate for a regulator in civil proceedings to make submissions on penalties and/or the penalty range: *Commonwealth v Director, Fair Work Building Industry Inspectorate*; *CFMEU v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46 (***Fair Work***) at [61] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). In that case the plurality said (at [64]) that:
>
> > …it is consistent with the purposes of civil penalty regimes… and therefore with the public interest, that the regulator take an active role in attempting to achieve the penalty which the regulator considers to be appropriate and thus that the regulator's submissions as to the terms and quantum of a civil penalty be treated as a relevant consideration.
>
> The plurality also said that it was desirable that the Court accept the parties' submissions on penalties, where it is satisfied that the penalty is appropriate in all the circumstances. Their Honours said (at [47]) that, where a particular figure cannot necessarily be said to be more appropriate than another, the Court should not depart from the submitted figure merely because "it might otherwise have been disposed to select some other figure". Their Honours went on to say (at [58]) that:

> 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, for the reasons identified in *Allied Mills*, highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty.**
>
> (Emphasis added.)
>
> There is an important public policy involved in the Court accepting appropriate agreed penalties. It promotes the predictability of outcomes in civil proceedings, encourages corporations to acknowledge contraventions and avoids lengthy and complex litigation which in turn frees the Court to deal with other matters and ACCC officers to attend to other investigations: *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 291 (Burchett and Kiefel JJ); *ACCC v Australia and New Zealand Banking Group Ltd* [2016] FCA 1516 at [97] (Wigney J); *Fair Work* at [46].

39 Even so, notwithstanding the parties' agreement, it is for the Court to determine whether to impose a pecuniary penalty and, if so, the quantum of any pecuniary penalty that should be ordered.

The statutory provision

40 The discretion to be applied in setting a pecuniary penalty must be guided, first, by the applicable statutory provision. Section 167 of the NCCP Act (as in force at the relevant time) relevantly provides:

> **Court may order person to pay pecuniary penalty for contravening civil penalty provision**
>
> *Application for order*
>
> (1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for an order that the person pay the Commonwealth a pecuniary penalty.
>
> *Court may order person to pay pecuniary penalty*
>
> (2) If a declaration has been made under section 166 that the person has contravened the provision, the court may order the person to pay to the Commonwealth a pecuniary penalty that the court considers is appropriate (but not more than the amount specified in subsection (3)).
>
> *Determining amount of pecuniary penalty*
>
> (3) The pecuniary penalty must not be more than:
>
> (a) if the person is a natural person—the maximum number of penalty units referred to in the civil penalty provision; or
>
> (b) if the person is a body corporate, a partnership or multiple trustees—5 times the maximum number of penalty units referred to in the civil penalty

provision.

Note: This Act treats partnerships and multiple trustees as if they were persons (see sections 14 and 15).

…

41 Section 167(2) confers a discretionary power on the Court to impose a pecuniary penalty that the Court "considers appropriate", uninformed by any other specific statutory criteria upon which that discretionary judgment might be made, such as for example in s 76(1) of the *Competition and Consumer Act 2010* (Cth).

The maximum penalty

42 Each of ss 128(d), 130(1)(a) and (c), 131(1) and 133(1) provides a maximum penalty of 2,000 penalty units. But pursuant to s 167(3)(b) (as in force at 20 January 2017), for a body corporate such as CBA, the maximum penalty (at the time of the contraventions) was five times that, being 10,000 penalty units. In early 2017, the quantum of a penalty unit was $180.00. Accordingly, the maximum penalty for each civil penalty contravention is $1.8 million.

43 The maximum penalty is not just a limit on power, it provides "a statutory indication of the punishment for the worst type of case, by reference to which the assessment of the proportionate penalty for other offending can be made, according to the will of Parliament": ***Pattinson*** *v Australian Building and Construction Commissioner* [2020] FCAFC 177 at [62] (Allsop, White and Wigney JJ, with whom Besanko and Bromwich JJ agreed). In ***Markarian*** *v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [31] Gleeson CJ, Gummow, Hayne and Callinan JJ observed:

> …careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

The importance of deterrence

44 The task of determining an appropriate penalty is to be undertaken in the light of the fact that the purpose of a civil penalty is primarily if not wholly protective. It is aimed at deterring non-compliance with the relevant regulatory provision, both specific to the contravener and in general to others who might be tempted to similarly contravene the statutory prescription. The purpose does not include retribution or rehabilitation: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [55] ***(Agreed***

Penalties case). The object is directed to the deterring of contraventions of the kind before the court, by fixing the penalty that is considered appropriate, by reference to the frame of reference or yardstick provided by the maximum penalty as set by Parliament: *Pattinson* at [98].

45 In ***Singtel Optus*** *v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [62]-[63] (Keane CJ, Finn and Gilmour JJ) at [57] explained:

> There may be room for debate as to the proper place of deterrence in the punishment of some kinds of offences, such as crimes of passion; but in relation to offences of calculation by a corporation where the only punishment is a fine, the punishment must be fixed with a view to ensuring that the penalty is not such as to be regarded by that offender or others as an acceptable cost of doing business.
>
> …
>
> Generally speaking, 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.

Their Honours said (at [68]) that:

> The Court must fashion a penalty which makes it clear to [the contravener], and to the market, that the cost of courting a risk of contravention of the Act cannot be regarded as [an] acceptable cost of doing business.

The latter comments were approved by French CJ, Crennan, Bell and Keane JJ in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 at [64].

46 Even so, in seeking to deter, a penalty must not be set so high as to be oppressive: *Trade Practices Commission v Stihl Chainsaws (Aust) Pty Ltd* (1978) ATPR 40-091 at 17,896 (Smithers J); ***NW Frozen Foods*** *Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 293 (Burchett J and Kiefel J, as her Honour then was); *Australian Competition and Consumer Commission v Leahy Petroleum (No 2)* [2005] FCA 254 at [9] (Merkel J).

47 In relation to specific deterrence, the requirement for it may be informed by the attitude of the contravener to the contraventions, both during the course of the contravening conduct and in the course of the enforcement proceeding.

The instinctive synthesis

48 The principles of sentencing for breach of the criminal law have played an important part in the development of the principles concerned with the imposition of civil penalties, including

in relation to the method of reaching the relevant amount of the penalty by a process of evaluation in the nature of an intuitive or "instinctive" synthesis: *Markarian* at [37]. McHugh J described this process (at [51]) as one in which:

> … the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.

49 In *Markarian* the plurality said at [27], [31] and [39] that:

(a) assessment of the appropriate penalty is a discretionary judgment based on all relevant factors but careful attention to maximum penalties will almost always be required;

(b) it will rarely be appropriate for a Court to start with the maximum penalty and proceed by making a proportional deduction from that maximum, and the Court should not adopt a mathematical approach of increments or decrements from a predetermined range, or assign specific numerical or proportionate value to the various relevant factors; and

(c) accessible reasoning is necessary in the interests of all, and, while there may be occasions where some indulgence in an arithmetical process will better serve this end, it does not apply where there are numerous and complex considerations that must be weighed.

Relevant considerations

50 A judgment setting an appropriate pecuniary penalty is discretionary and the Court must take into account all relevant considerations, and only relevant considerations: *Markarian* at [27]. A number of considerations have been identified as relevant in the case law, most of which can be traced back to the decision of French J in *Trade Practices Commission v CSR Limited* [1990] FCA 762; (1991) ATPR 41-076 at 52,152-52,153; see also: *NW Frozen Foods* at 292-4. These considerations were found to arise in a different statutory context to the present case, and some of them were mandatory considerations under the applicable statute. Even so, in my view they are also relevant in determining an appropriate penalty under s 167(2). They include:

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

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

(c) the circumstances in which the contravening conduct took place;

(d) the size of the contravening company and its financial position;

(e) the deliberateness of the contravention, the period over which it extended and whether the conduct was undertaken without regard to statutory obligations;

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

(g) whether the contravener has a corporate culture conducive to compliance;

(h) whether the contravener has shown a disposition to cooperate with the authorities responsible for enforcement of the relevant legislation;

(i) whether the contravening conduct was systematic, deliberate or covert; and

(j) whether the contravener has engaged in similar conduct in the past.

The significance of each factor to the appropriate penalty depends on the facts of the case: *Singtel Optus* at [57], and [62]-[63].

Section 175 of the NCCP and the course of conduct principle

51 Section 175 of the NCCP provides:

> **Civil double jeopardy**
>
> If a person is ordered to pay a pecuniary penalty under a civil penalty provision *in relation to particular conduct*, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth in relation to *that conduct*.
>
> (Emphasis added in italics.)

This requires identification of the "particular conduct" identified in each contravention.

52 In *Australian Securities and Investments Commission v* ***Channic*** *Pty Ltd (No 5)* [2017] FCA 363 Greenwood J considered the application of s 175 in relation to contraventions of ss 117(1)(a), (b) and (c) and 115(1)(d) of the NCCP Act. Section 117 is similarly worded to s 130 and imposes obligations upon credit assistance providers similar to those imposed by s 130 upon credit providers. Section 115 is similarly worded to s 128, and operates in a similar fashion although applying to credit assistance providers. His Honour considered the contraventions under s 117(a), (b) and (c) were each of a different class, but considered it appropriate to group them together so as to constitute a single contravention for the purpose of determining an appropriate penalty: *Channic* at [77].

53 His Honour further considered that each of the contraventions of s 117(1) gave rise to the failure to comply with s 115(1), because the defendant provided credit assistance without complying with s 117(1). His Honour accepted ASIC's submission that the defendant was not liable to a further pecuniary penalty concerning the contravention of s 115(1) in respect of the same conduct giving rise to non-compliance with s 117(1). It seems that his Honour took the view that the contravention of s 115(1) concerned the same "particular conduct" for the purposes of s 175.

54 In ***ASIC v ANZ*** [2018] FCA 155, Middleton J considered contraventions of ss 128(a) and (d), and 130(1) of the NCCP Act. His Honour found that for each relevant credit contract the "particular conduct" giving rise to the contravention of s 128(a) and (d) was the same as that giving rise to the contravention of s 130(1)(c). His Honour said (at [28]):

> Whether by operation of the common law, or as a result of the operation of s 175 of the Act, ANZ should be liable to be ordered to pay a pecuniary penalty only in respect of one contravention for each of the relevant contracts.

55 In referring to the operation of the common law his Honour was referring to the "course of conduct" principle. That principle was explained in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1; [2010] FCAFC 39 at [39], [41]-[42] (Middleton and Gordon JJ) in the following terms:

> The 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.
>
> …
>
> In other words, where two offences arise as a result of the same or related conduct that is not a disentitling factor to the application of the single course of conduct principle but a reason why a Court *may* have regard to that principle, as one of the applicable sentencing principles, to guide it in the exercise of the sentencing discretion. It is a tool of analysis which a Court is not compelled to utilise.
>
> A Court is not compelled to utilise the principle because, as Owen JA said in *Royer* [2009] WASCA 139 at [28], "[d]iscretionary judgments require the weighing of elements, not the formulation of adjustable rules or benchmarks". The exercise of the sentencing discretion does not fall to be exercised in a vacuum. It is a matter of judgment to be exercised according to the facts of each case and having regard to conflicting sentencing objectives: McHugh J in *AB v The Queen* (1999) 198 CLR 111 at [14].
>
> (Emphasis in original.) (Citations omitted.)

56 As Beach J observed in *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 at [24]-[25] (endorsed in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 at [141] per Jagot, Yates and Bromwich JJ), the course of conduct principle does not have paramountcy in the process of assessing an appropriate penalty, and it cannot of itself unduly fetter the proper application of the provision allowing the imposition of a civil penalty or operate as a de facto limit on the penalty to be imposed for contraventions. Its application must be tailored to the circumstances.

57 Ultimately, the question is one of discretion in coming to the correct penalty and the course of conduct principle is a guide for use where it is appropriate.

58 Although they arrived at the same endpoint in terms of the proposed pecuniary penalty the parties took differing approaches to the number of contraventions. ASIC approached the question on the basis that there were three classes of contravention but accepted, as in *Channic*, that for the purposes of penalty it was appropriate to treat them as one course of conduct and thus a single contravention.

59 CBA submitted that the contraventions of ss 131 and 133 of the NCCP Act involved the same "particular conduct"; and therefore fell within s 175 and required be treated as a single contravention. It contended that s 131 is given effect to by ss 128(c) and s 129, and that a credit provider is required, before granting a credit limit increase, to assess whether the credit contract with the credit limit increase would be unsuitable if certain circumstances apply. It said that s 133 prohibits a credit provider from granting a credit limit increase if the contract with the credit limit increase would be unsuitable if those same circumstances apply.

60 On CBA's argument if the credit limit increase was not granted, neither s 131 nor s 133 would apply, and where the credit limit increase is granted it argued that there must always be a breach of both sections. Hence, it contended the "particular conduct" covered by both sections is the granting of the credit limit increase where the relevant circumstances applied, and hence the contraventions must be treated as a single contravention for the purposes of a pecuniary penalty. It said that analysis is apparent from the operation of ss 131(1) and 133(1) and consistent with the decision in ***CFMMEU v ABCC*** [2019] FCAFC 201; (2019) 272 FCR 290 at [13]-[14] (Bromberg, Wheelahan and Snaden JJ).

61 In *CFMMEU v ABCC* the Full Court was considering the effect of s 556 of the *Fair Work Act 2009* (Cth) (**FWA**), for the purposes of ordering a pecuniary penalty, in relation to contraventions of ss 499 and 500 of the FWA. Section 556 of the FWA is materially indistinguishable from s 175 of the NCCP Act and thus the reasoning in relation to the meaning and operation of "particular conduct" is applicable in relation to s 175.

62 The Full Court said (at [13]-[14]):

> The respondent's contention is that significance needs to be given to the word "particular" in the phrase "particular conduct" and that the use of "particular" supports the contention that "conduct" whenever used in s 556, is necessarily referring to the same conduct. To that point we would agree. The word "particular" in s 556 is used to reinforce that the conduct being addressed by s 556 is the same conduct throughout. However, what the respondent suggests is that when s 556 uses that expression, it means all of, or the whole of, the conduct in respect of which "a person is ordered to pay a pecuniary penalty under a civil remedy provision".
>
> We disagree. Commonly and as is the fact in this case in relation to the contraventions of s 500, contravention of a civil remedy provision may be constituted by a range of conduct made up by a number of different acts or omissions. When a pecuniary penalty is imposed for a contravention, each of those acts or omissions involved in the contravention will be the subject of the pecuniary penalty if a pecuniary penalty is imposed. So much is recognised by the phrase "in relation to" in s 556. The purpose of that phrase is to make it clear that the provision is addressing "particular conduct" that is the subject of the penalty imposed, and not necessarily all of or the whole of the conduct for which the penalty was imposed. Where that particular conduct is the subject of a pecuniary penalty, s 556 requires that that particular conduct not be the subject of a further pecuniary penalty.

63 I do not accept CBA's contention that the "particular conduct" which is the subject of the contravention of s 131(1) is the same "particular conduct" which is the subject of the contravention of s 133(1). Thus s 175 does not require that the contraventions of those provisions must be treated as a single contravention for the purposes of penalty.

64 In *CFMMEU v ABCC* the refusal to get off a crane was the "particular conduct" for the purpose of the contravention of s 499 of the FWA and thus engaged s 556: at [15]-[16]. The Full Court concluded that the refusal to get off a crane was "a part of and was subsumed by the whole of the conduct the subject of a contravention of s 500" (which was constituted by climbing on the crane; refusing to get off the crane; using insulting language; and engaging in abusive behaviour). In those circumstances the Court found that s 556 of the FWA required that the particular conduct the subject of the s 500 contravention (for which a penalty was ordered) precluded the s 499 contravention (the refusal to get off the crane) from being treated as

susceptible to a penalty. Consequently, the contraventions of ss 500 and 499 were to be treated as a single contravention.

65 That, however, provides little support for CBA's argument in the present case. Section 175 requires identification of the "particular conduct" identified in each contravention; it does not dictate that *any* overlap in the particular conduct will give rise to the application of s 175 such that the Court must determine any civil penalty on the basis of a single contravention.

66 CBA's contentions seem to go as far as to suggest that because there was or may be an overlap in the particular conduct underpinning the admitted contravention of s 131(1) with the conduct underpinning the admitted contravention of s 133(1), then pursuant to s 175, for the purposes of penalty, the two contraventions must be treated as a single contravention. I do not consider the "particular conduct" in relation to the contravention of s 131(1) is the same "particular conduct" as in relation to the contravention of s 133(3).

67 The "particular conduct" to which s 175 refers is the constituent acts or omissions that a wrongdoer has committed - that is what the wrongdoer *actually did*. It refers to the constituent physical acts or omissions and does not include "any necessary elements of character or circumstance that, when added to those acts or omissions, constitute the particular contravention". So much is made clear in *CFMMEU v ABCC* at [17]-[26].

68 Sections 131(1) and 133(1) are relevantly concerned with different conduct. Section 131(1) is concerned with the obligation on the licensee to make the assessment that the credit contract will be unsuitable for the consumer on the basis that one of the matters in s 131(2) exists as at the date of assessment. A failure to assess a credit contract as unsuitable where one or more of the matters in s 131(2) exist constitutes a contravention of s 131(1), exposing the licensee to a civil penalty. Section 133(1) is concerned with the actual provision of a credit contract or actual increase of a credit limit to a consumer which is unsuitable (though for near identical matters as prescribed in s 131(2)). A licensee might contravene s 131(1) where it failed to assess the credit contract as unsuitable (on the basis that it involved a credit limit increase), but the licensee would not contravene s 133(1) if it did not go on to increase the credit limit. Alternatively, a licensee might contravene s 133(1) by providing a credit contract to a consumer which was unsuitable, but not contravene s 131(1) because it had in fact assessed the credit contract to be unsuitable.

69 Section 131 – appearing as it does in "Division 3—Obligation to assess unsuitability" – and s 133, which appears in "Division 4 – Prohibition on entering, or increasing the credit limit of, unsuitable credit contracts", reflects a Parliamentary intention to distinguish between anterior obligations on licensees to make assessments of suitability of the provision of credit or further credit and any subsequent decision to make the credit contract or increase the credit limit. As I note above, it is not inexorably the case that a contravention of either provision will result in contraventions of both.

70 I consider the conduct in which CBA engaged which underpins the contraventions falls into three classes:

(a) *first*, the contraventions found in relation to s 130(1)(a) and (c) of the NCCP Act are:

(i) failing to comply with s 130(1)(a) by failing to make reasonable inquiries about Mr Harris' requirements and objectives in relation to the Harris Credit Contract; and

(ii) failing to comply with s 130(1)(c) by failing to take reasonable steps to verify Harris' financial situation.

The "particular conduct" in relation to those contraventions was CBA's failure to make reasonable inquiries and failure to take reasonable steps to verify the relevant information it had obtained. The particular conduct in relation to the contravention of s 128(d) falls into the same class as it is also based in CBA's failure to make the inquiries and verification required by s 130;

(b) *second*, the contravention found in relation to s 131(1) was CBA's failure to assess the Harris Credit Contract as unsuitable if the credit limit increase was made as it was likely that the Harris Credit Contract with the CLI would not meet Harris' requirements or objectives. The "particular conduct" was the failure by CBA to *assess* the Harris Credit Contract as unsuitable (s 131(1)) because it did not meet Mr Harris' requirements or objectives (s 131(2)). It was not the failure to make inquiries and to verify the relevant information. Unlike the position in *CFMMEU and ABCC* the particular conduct underpinning the contravention of s 131(1) was not "a part of and…subsumed by the whole of the conduct the subject of a contravention of" s 130; and

(c) *third*, the contravention found in relation to s 133(1) was the subsequent provision of the credit limit increase to Mr Harris in circumstances where the Harris Credit Contract with

the credit limit increase was unsuitable as it was likely that it would not meet Harris' requirements or objectives. CBA was prohibited from increasing the credit limit applicable under the Harris Credit Contract if the contract was unsuitable for him (pursuant to s 133(2)) as it did not meet his requirements or objectives. The "particular conduct" was *actually providing* the credit limit increase when the Harris Credit Contract was unsuitable with such an increase. It was not the failure to make inquiries and to verify; nor was it the failure to assess the credit contract as unsuitable. Again, the particular conduct underpinning the contravention of s 133(1) was not "a part of and…subsumed by the whole of the conduct the subject of a contravention of" s 131(1), or of s 130(1).

71 I am not persuaded that the overlap or interrelationship of the particular conduct which constitutes a contravention of s 131(1) and the particular conduct which constitutes a contravention of s 133(1) means that, for the purposes of imposition of a pecuniary penalty, by operation of s 175 they must be treated as a single contravention.

72 Nothing however turns on this issue. While the "particular conduct" in each contravention is largely not the same, I accept ASIC's contention that there is a sufficient relationship between the legal and factual elements of each of the contraventions that, by operation of the course of conduct principle, it is appropriate to treat the conduct as constituting a single contravention for the purpose of determining an appropriate penalty.

The parity principle

73 The parity principle provides that, all other things being equal, similar contraventions should incur similar penalties. However, as the Full Court in *NW Frozen Foods* cautioned (at 295), "other things are rarely equal where contraventions of the Trade Practices Act are concerned." There are many difficulties associated with setting penalties by reference to penalties previously imposed for contraventions in differing circumstances or in circumstances where some of the facts are similar but others are not: *Singtel Optus* at [60] approving the observation of Middleton J in *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238 at [215].

The totality principle

74 This principle requires that the entirety of the underlying contravening conduct be considered to determine whether a penalty is just and appropriate as a whole. The underlying rationale of

the principle is to ensure that the proposed penalty is proportionate when the contraventions are viewed collectively: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2)* [2012] FCA 629 at [138]-[139]. It operates as a final check to ensure that the penalties imposed are just and appropriate overall: *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 5)* (1981) 60 FLR 38 at 40; *Trade Practices Commission v TNT Australia Pty Limited* (1995) ATPR 41-375 at 40,169.

CONSIDERATION REGARDING PECUNIARY RELIEF

75 For the reasons I explain, I am satisfied that a pecuniary penalty of $150,000 is an appropriate remedy in the circumstances of the present case. That is not to say that an argument could not be advanced for a different penalty; it could. But as the High Court observed in the *Agreed Penalties case* (at [47]), fixing the quantum of a civil penalty is not an exact science and where a particular figure falls within a permissible range and cannot necessarily be said to be more appropriate than another, the Court should not depart from the submitted figure merely because "it might otherwise have been disposed to select some other figure": *NW Frozen Foods* at 291. It is consistent with principle and desirable in practice for the Court to accept the parties' proposal.

Deterrence

76 CBA is a major Australian bank with significant financial resources. Many of the other major credit providers in the Australian market are also large and well resourced. As at 16 March 2020 CBA was the second largest listed company in Australia by market capitalisation, which was approximately $117.47 billion. As at 30 June 2019 it reported a net profit of $8.571 billion after-tax and its total assets exceeded $900 billion.

77 Looked at through that lens only, it could reasonably be argued that a pecuniary penalty of $150,000 is unlikely to operate as a deterrent to CBA or to other large credit providers, and deterrence, both specific and general, is the principal if not the only objective of imposition of a civil penalty. But regard must also be had to proportionality. As the Full Court said in *Pattinson* at [109]:

> Proportionality is relevant not because a notion of retribution is being expressed or manifested in a free-standing principle, but because of a balance in the reaching of an "appropriate" penalty between an "insistence" on deterrence and an "insistence" on not imposing more than is reasonably necessary (*NW Frozen Foods*) as part of the reasonable and lawful exercise of judicial power (cf *Banerji*) in respect of a contravention before the court and in furtherance of the object of deterrence of

contraventions of like kind.

78 The considerations relevant to fixing an appropriately deterrent penalty include all relevant circumstances, particularly the nature and gravity of the offending conduct. In the present case the contraventions stem back to the single failure of a single bank employee to report the Problem Gambling Notification and there is no evidence of systemic failure. ASIC did not point to any other similar or related case. The offending conduct relates to an increase in Mr Harris' credit limit by $8,000 when he already had a $27,100 limit, in circumstances where he was a problem gambler before the increase and when ASIC did not suggest that his subsequent gambling expenditure can all be said to result from the credit increase. Further, it seems likely that the losses suffered by Mr Harris as a result of the contraventions, not all of his gambling losses, have been remediated by CBA. Taking into account the remediation CBA is likely to have suffered a loss through its offending conduct, even before the penalty. There was no involvement by senior management in the contraventions and they were not deliberate or covert. With contraventions of this nature and gravity the aims of specific and general deterrence are likely to be served by a penalty of $150,000, which is substantial in the circumstances. It is unlikely to be seen as merely an acceptable cost of doing business.

79 It is also relevant that since 1 July 2018 credit providers are no longer entitled to make credit limit increase invitations. CBA has not made any credit limit increase invitations since that date and as a result it is unlikely that the circumstance of the present case could be repeated. CBA argued that not only is it not possible for this conduct to occur again due to legislative change, the circumstances that arose in the case of Mr Harris were unique and represent no ongoing risk of CBA failing to comply with this responsible lending obligations more generally. CBA and other credit providers continue to assess credit contracts including for the purposes of credit card limits and they continue to provide credit limit increases. In my view there remains a need to ensure that CBA and other credit providers take their responsible lending obligations seriously and have in place adequate processes and systems to meet those obligations.

The nature of the contravening conduct

80 The conduct was not systematic, deliberate or covert. Essentially, it involved one failure to formally record the fact of the Problem Gambling Notification and therefore to pass it through to CBA's credit decision systems. It also, though, points to an absence of proper systems. Aside from the conversation with the bank employee in which that notification was given, there is no

evidence that CBA was or should have been aware prior to that conversation of Mr Harris' gambling problem. There is no suggestion by ASIC that, other than through that Problem Gambling Notification, CBA was obliged to monitor his transactions outside of the Assessment required for the credit limit increase.

81 The failure occurred in the context that in the three month period prior to the credit limit increase on the Harris Credit Contract, CBA had approved 71,800 credit limit applications from customers who were pre-assessed to be eligible to apply for a credit limit increase. CBA had procedures in place that were intended to ensure compliance with its responsible lending obligations under the NCCP Act, but those procedures did not make formal provision for responses to problem gambler notifications.

82 Nor was the conduct deliberate in a real sense. CBA was responsible for the procedures and systems that failed to respond to the Problem Gambler Notification, and those systems were inadequate, as demonstrated by the contraventions. But CBA did not intend the outcomes derived from the inadequacies of those systems; that is, it did not intend the contraventions. ASIC does not suggest that the conduct was covert.

83 It is also relevant to note that the CBA employee who received the Problem Gambler Notification was placed in an unusual position. Her response to being informed by Mr Harris that he was a problem gambler was to tell him that in light of his disclosure he should decline the credit limit increase. Mr Harris however told the bank employee: "I wouldn't decline it yet, I am going to increase it but not just yet I want to sort my gambling stuff out first." The employee could reasonably have thought there was little cause for concern because Mr Harris did not intend to increase his credit limit until his gambling was under control.

The extent of the conduct and its impact

84 It is common ground between the parties that the contravening conduct was serious and had a deleterious effect on Mr Harris. Between 1 April 2015 and 20 January 2017 Mr Harris incurred expenditure of approximately $271,820 on his CBA transaction account and credit cards, the majority of which was gambling expenditure incurred as a result of his gambling problem. At the time he was earning approximately $70,000 before tax without overtime. Of course, not all of that expenditure was losses. Mr Harris also had wins through his gambling and he used that, in part, in relation to his credit card debts.

85 Mr Harris informed CBA of his gambling problem by way of the Problem Gambling Notification in the telephone conversation on 21 October 2016. CBA did not formally record the fact of the Problem Gambling Notification and it was not passed through to CBA's credit decision systems. On two occasions later in 2016 (31 October 2016 and 1 December 2016) CBA invited Mr Harris to increase his credit card limit and on the second occasion, in early 2017, he took up the invitation made on 1 December 2016 for an increase of $8,000.

86 Mr Harris' gambling expenditure on his CBA credit card increased dramatically from late April 2017. From 22 April to 22 May 2017 Mr Harris spent approximately $38,870 and from 23 May to 20 June 2017 he spent approximately $47,882. Mr Harris continued to "max out" his credit card, and continued to have difficulties in repaying his credit card debts. Ultimately that led to him suffering health problems including insomnia, anxiety and depression. Then, when Mr Harris complained about having been offered further credit limit increases notwithstanding the Problem Gambling Notification, CBA did nothing.

87 It is, however, also relevant that the contraventions all relate to the $8,000 credit limit increase provided by CBA in January 2017. Prior to that he had a credit card limit of $27,100. Mr Harris was a problem gambler before the credit limit increase and there is no suggestion that his out-of-control gambling and the level of his gambling expenditure was caused by that increase. That is, there is no evidence that it was the additional $8000 credit increase that prompted Mr Harris to continue to gamble, or that the increase was the sole or dominant reason for the loss and other harm he suffered. It did however allow him to gamble *further* beyond his means as he had a further $8,000 available on his credit card which he continued to "max out".

Corrective Measures

88 CBA has taken certain corrective measures both directed to Mr Harris and more generally.

89 In relation to Mr Harris, on 11 January 2018, CBA finalised a hardship arrangement with him which included CBA agreeing to reduce his credit card debt by $10,000 (which at the time was $34,982) and for him to pay the debt by monthly instalments. On 7 February 2018, CBA agreed to a further $1,000 reduction in Mr Harris' credit card debt, and on 28 March 2018 CBA agreed to a further reduction of $13,090 to Mr Harris' credit card debt. I note in this context that on 22 March 2018 Mr Harris gave evidence about the credit limit increase and his situation before the Royal Commission into the Banking, Superannuation and Financial Services Industry (the

Banking Royal Commission). In total CBA has forgiven $24,090 of Mr Harris' credit card debt.

90 More generally CBA has introduced a series of measures intended to address issues associated the problem gambling and it has also introduced broader measures with a view to assisting customers to manage their credit card expenditure.

Whether senior management was involved

91 ASIC does not submit that senior management was involved in the contraventions.

Disposition to cooperate with the authorities

92 The facts and circumstances underlying the present proceeding came to light when they were the subject of a case study before the Banking Royal Commission. CBA made complete admissions at the first opportunity to all the allegations contained in the Concise Statement, and by agreeing to the declaratory relief sought by ASIC. ASIC accepts that is appropriate to take account of CBA's disposition to cooperate with it.

The number of contraventions

93 For the reasons previously explained, for the purposes of penalty it is appropriate to treat the contraventions as a single course of conduct.

The parity principle

94 ASIC took the Court to the decision in *ASIC v ANZ* but in my view the facts of that case are quite different to those of the present case. Having regard to the different facts I garnered little assistance from the decision. Amongst other things, that case concerned 12 credit contracts with 12 different consumers whereas the present case concerns a contract with a single consumer; in that case ANZ had some knowledge as to the inadequacies of its inquiries and verifications and the possibility that fraudulent documents could be used in the relevant process, whereas in the present case ASIC does not submit that CBA had such knowledge; in that case the contraventions were repeated and occurred over a protracted period, whereas in the present case they were not repeated; in that case there was a failure to ensure that relevant policies were complied with and management were aware of certain issues, whereas the present case is different.

The totality principle

95 ASIC submits that, applying the totality principle, a penalty of $150,000 is appropriate. Standing back, and using this principle as a final check to ensure that the penalty is just and appropriate overall, I accept that submission.

CONCLUSION

96 Having regard to all the matters above I am satisfied that penalty of $150,000 is appropriate in the circumstances of the case. I have made orders in the form of the draft minutes provided, including an order for CBA to pay ASIC's costs of and incidental to the proceeding.

I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Murphy.

Associate: 

Dated: 22 October 2020