FEDERAL COURT OF AUSTRALIA

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

File number:	VID 806 of 2020
Judgment of:	**O'BRYAN J**
Date of judgment:	26 November 2021
Catchwords:	**CONSUMER LAW** – misleading conduct – admitted contraventions of ss 12DA(1) and 12DB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 1041H(1) of the *Corporations Act 2010* (Cth) – pecuniary penalties sought by plaintiff not opposed by defendant – whether quantum of penalty appropriate – whether form of declarations appropriate
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA(1), 12DB(1), 12GBA, 12GBB *Corporations Act 2001* (Cth) s 1041H(1) *Federal Court of Australia Act 1976* (Cth) s 21
Cases cited:	*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; 60 IPR 296 *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274 *Australian Competition and Consumer Commission v Gallop International Group Pty Ltd* [2019] FCA 1514; 138 ACSR 395 *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd* [2019] FCA 676; 371 ALR 396

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 MSY Technology Pty Ltd (2012) 201 FCR 378

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

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36

Australian Competition and Consumer Commission v Signature Security Group Pty Ltd [2003] FCA 3; ATPR 41-908

Australian Competition and Consumer Commission v Telstra Corporation Ltd (2010) 188 FCR 238

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

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2020) 278 FCR 450

Australian Competition and Consumer Commission v Valve Corporation (No 3) [2016] FCA 196; 337 ALR 647

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

Australian Securities and Investments Commission v Adler [2002] NSWSC 483; 42 ACSR 80

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd [2019] FCA 1932; 140 ACSR 561

Australian Securities and Investments Commission v GE Capital Finance Australia [2014] FCA 701

Australian Securities and Investments Commission v MLC Nominees Pty Ltd [2020] FCA 1306; 147 ACSR 266

Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) (2018) 266 FCR 147

Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45

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

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

Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199

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

Hili v The Queen (2010) 242 CLR 520

IMF (Australia) Ltd v Sons of Gwalia Ltd [2004] FCA 1390; 211 ALR 231

Markarian v The Queen (2005) 228 CLR 357

McDonald v Australian Building and Construction Commissioner [2011] FCAFC 29; 202 IR 467

National Exchange Pty Ltd v Australian Securities and Investments Commission [2004] FCAFC 90; 49 ACSR 369

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

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191

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

Selig v Wealthsure Pty Ltd (2015) 255 CLR 661

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

Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177

Trade Practices Commission v CSR Ltd [1990] FCA 762; ATPR 41-076

Trade Practices Commission v TNT Australia Pty Ltd (1995) ATPR 41-375

Trivago NV v Australian Competition and Consumer Commission [2020] FCAFC 185; 384 ALR 496

Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49; 151 ACSR 407

Division:	General Division
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Number of paragraphs:	129
Date of hearing:	15 November 2021
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Solicitor for the Plaintiff:	Australian Securities and Investments Commission
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Solicitor for the Defendant:	King & Wood Mallesons

ORDERS

VID 806 of 2020

IN THE MATTER OF LA TROBE FINANCIAL ASSET MANAGEMENT LTD ACN 007 332 363

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**LA TROBE FINANCIAL ASSET MANAGEMENT LTD (ACN 008 332 363)** Defendant

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

DATE OF ORDER: **26 NOVEMBER 2021**

THE COURT DECLARES THAT:

1. The defendant contravened ss 12DA(1) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 1041H(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) by representing, during the following periods:
   (a) 1 April 2017 to 14 August 2020 regarding advertisements on the defendant's website in respect of the 48 Hour Account (being the investment option in the La Trobe Australian Credit Fund (ASRN 088 178 321) (**Fund**) known as the "48 hour Account", "Classic 48 hour Account" or "Classic Notice Account");
   (b) 1 April 2017 to 25 January 2020 regarding advertisements in newspapers in respect of the 48 Hour Account;
   (c) 24 June 2019 to 21 August 2020 regarding advertisements on the defendant's website in respect of the 90 Day Account (being the investment option in the Fund known as the "90 Day Notice Account"); and
   (d) 12 July 2019 to 25 January 2020 regarding advertisements in newspapers in respect of the 90 Day Account,

   that a person who invested funds in the 48 Hour Account or the 90 Day Account would be entitled to withdraw from the investment option within, respectively, 48 hours or 90 days of providing a withdrawal notice, whereas:

(a) while the Fund was liquid within the meaning of s 601KA of the Corporations Act, subject to its duties under the Corporations Act, the defendant had up to 12 months to satisfy a withdrawal notice in relation to either of those investment options; and

(b) had the Fund become not liquid, a member of the Fund invested in either of those investment options would have been entitled to withdraw only in accordance with any withdrawal offer made by the defendant.

2. The defendant contravened ss 12DA(1) and 12DB(1)(e) of the ASIC Act and s 1041H(1) of the Corporations Act by representing:

(a) during the period 16 May 2019 to 19 May 2020 regarding advertisements on the defendant's website; and

(b) on 1 December 2019 regarding advertisements in *Money* magazine,

that any capital invested in the Fund would be "stable", in the sense of there being no risk of substantial loss of that capital, whereas a person who invested in the Fund could substantially lose the capital invested.

THE COURT ORDERS THAT:

3. The defendant pay to the Commonwealth of Australia an aggregate pecuniary penalty in the amount of $750,000 in respect of the contraventions of s 12DB(1) of the ASIC Act referred to in declarations 1 and 2.

4. The defendant pay the plaintiff's costs of the proceeding, fixed in the sum of $120,000.

5. The proceedings otherwise be dismissed.

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 its originating process and concise statement filed on 18 December 2020, the plaintiff (**ASIC**) alleged that the defendant (**La Trobe**) contravened ss 12DA(1) and 12DB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 1041H(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) by engaging in certain conduct in its capacity as the responsible entity of a registered managed investment scheme called the La Trobe Australian Credit Fund (ASRN 088 178 321) (**Fund**).

2 The parties have reached agreement as to the terms on which they seek the resolution of the proceeding. To that end, the parties filed:

(a) joint submissions dated 29 September 2021;

(b) an amended Statement of Agreed Facts dated 4 November 2021 (**Agreed Facts**), setting out the facts agreed between the parties pursuant to s 191 of the *Evidence Act 1995* (Cth) and the admissions made by La Trobe; and

(c) proposed orders setting out the relief (including as to penalty) which the parties submit is appropriate and should be granted in the proceeding, recognising that the grant of such relief is in the discretion of the Court.

3 On the basis set out in the Agreed Facts, La Trobe admits that it contravened ss 12DA(1) and 12DB(1)(i) of the ASIC Act and s 1041H(1) of the Corporations Act during the period:

(a) 1 April 2017 to 14 August 2020 regarding advertisements on La Trobe's website in respect of the investment option in the Fund known as the "48 hour Account", "Classic 48 hour Account" or "Classic Notice Account" (**48 Hour Account**);

(b) 1 April 2017 to 25 January 2020 regarding advertisements in newspapers in respect of the 48 Hour Account;

(c) 24 June 2019 to 21 August 2020 regarding advertisements on La Trobe's website in respect of the investment option in the Fund known as the "90 Day Notice Account" (**90 Day Account**); and

(d) 12 July 2019 to 25 January 2020 regarding advertisements in newspapers in respect of the 90 Day Account,

by representing that a person who invested funds in the 48 Hour Account or the 90 Day Account would be entitled to withdraw from the investment option within, respectively, 48 hours or 90 days of providing a withdrawal notice, and not expressing in a sufficiently prominent manner that:

(a) while the Fund was liquid within the meaning of s 601KA of the Corporations Act, subject to its duties under the Corporations Act, La Trobe had up to 12 months to satisfy a withdrawal notice in relation to either of those investment options; and

(b) had the Fund become not liquid, a member of the Fund invested in either of those investment options would have been entitled to withdraw only in accordance with any withdrawal offer made by La Trobe.

4 La Trobe also admits that it contravened ss 12DA(1) and 12DB(1)(e) of the ASIC Act and s 1041H(1) of the Corporations Act:

(a) during the period 16 May 2019 to 19 May 2020 regarding advertisements on La Trobe's website; and

(b) on 1 December 2019 regarding advertisements in *Money* magazine,

by representing that any capital invested in the Fund would be "stable", in the sense of there being no risk of substantial loss of that capital, and not expressing in a sufficiently prominent manner that a person who invested in the Fund could substantially lose the capital invested.

5 The proposed orders provide for:

(a) declarations of the admitted contraventions by La Trobe pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and, in the case of contraventions of s 12DB(1) of the ASIC Act, pursuant to s 12GBA of that Act;

(b) the payment by La Trobe of a pecuniary penalty in the amount of $750,000 pursuant to s 12GBB of the ASIC Act; and

(c) the payment by La Trobe of ASIC's costs in the amount of $120,000.

6 The parties' proposed orders raise two principal questions: first, whether the form of declarations proposed by the parties appropriately states the admitted contraventions of the law; and second, whether the aggregate penalty proposed by the parties is appropriate having regard to all relevant facts and circumstances.

Statutory prohibitions

7 At all relevant times, s 12DA(1) of the ASIC Act provided:

> A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

8 Section 12DB(1) of the ASIC Act relevantly provided:

> A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
>
> …
>
> (e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits; or
>
> …
>
> (i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy …
>
> …

9 Section 1041H(1) of the Corporations Act provided:

> A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

10 Section 12DA(1) of the ASIC Act and s 1041H(1) of the Corporations Act are in similar terms and the same principles apply to both provisions: *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 at [4]. Further, although the language used in s 12DB(1) of the ASIC Act ("false or misleading") is not identical to that in s 12DA(1) and s 1041H(1) ("misleading or deceptive"), there is no material difference between those expressions in terms of their legal application: see *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14] per Gordon J; *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147 at [2263] per Beach J; *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; 147 ACSR 266 at [47] per Yates J.

11 The central question arising under each provision is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter): see *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 at [98] per O'Bryan J, citing *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 per Gibbs CJ; *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 200 per Deane and Fitzgerald JJ; *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at [98] (the Court); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***ACCC v TPG***) at [39] per French CJ, Crennan, Bell and Keane JJ.

12 Where the impugned conduct comprises the use of particular words accompanied by a disclaimer, it is necessary to ask whether the disclaimer (considered as part of the conduct, viewed as a whole) has the effect of erasing or dispelling the otherwise misleading or deceptive effects of the conduct: see *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 (***Downey***) at [82]-[83] per Keane JA, Williams JA and Atkinson J agreeing; *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196; 337 ALR 647 at [214] per Edelman J; *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd* [2019] FCA 676; 371 ALR 396 (***GlaxoSmithKline***) at [33] per Bromwich J; *Australian Competition and Consumer*

Commission v TPG Internet Pty Ltd (2020) 278 FCR 450 at [25] per Wigney, O'Bryan and Jackson JJ; *Trivago NV v Australian Competition and Consumer Commission* [2020] FCAFC 185; 384 ALR 496 at [194] per Middleton, McKerracher and Jackson JJ. Where there is a substantial disparity between the primary representation conveyed by particular conduct and the true position, a disclaimer must be very clear in order to erase or dispel the otherwise misleading effects of the primary representation: see *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 3; ATPR 41-908 at [27] per Stone J; *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90; 49 ACSR 369 at [55] per Jacobson and Bennett JJ; *Downey* at [83]; *GlaxoSmithKline* at [33].

Agreed facts and admitted contraventions

The Fund

13 The Fund is a registered managed investment scheme under Ch 5C of the Corporations Act. It invests in loans secured by first mortgages, as well as cash and deposits.

14 As noted above, La Trobe is, and has at all relevant times been, the responsible entity of the Fund. It holds an Australian Financial Services Licence (AFSL 222213), authorising it to operate registered managed investment schemes that hold deposits and mortgages for retail and wholesale clients.

15 At all relevant times, an interest in the Fund has been a "financial product" within the meaning of s 12BAA of the ASIC Act and s 764A of the Corporations Act: see ASIC Act, s 12BAA(1)(a) and (4); Corporations Act, s 764A(1)(b)(i). Since 26 October 2018, an interest in the Fund has also been a "financial service" within the meaning of s 12BAB of the ASIC Act: see ASIC Act, s 12BAB(1AA), which was inserted by Sch 11 to the *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth) with effect from 26 October 2018. Further, at all relevant times, in operating the Fund, La Trobe has provided a "financial service" within the meaning of s 12BAB of the ASIC Act and s 766A of the Corporations Act: see ASIC Act, s 12BAB(1)(d); Corporations Act, s 766A(1)(d).

16 A person could acquire an interest in the Fund (and thus become a member of the Fund) by making an investment in any of the Fund's investment options. La Trobe offers several different investment options to members of the Fund, including:

(a) at all relevant times, the 48 Hour Account; and

(b) since about 26 June 2019, the 90 Day Account.

17 In order to make an investment in the Fund, a person has been required to complete an application form which requires the person to nominate an investment in any one or more of the Fund's investment options and declare that they have received and read in full a copy of the Fund's product disclosure statement.

18 The asset allocation for each of the Fund's investment options is different and subject to review and monitoring by La Trobe. Decisions relating to asset allocation for the Fund's investment options are made by the Private Wealth Management division of the La Trobe Financial Group, of which La Trobe is a part. The Private Wealth Management division's primary functions include implementing the Fund's liquidity risk management framework. In making asset allocation decisions, the Private Wealth Management division has regard to, among other things, the prevailing economic circumstances and anticipated liquidity requirements, including investor redemption requests.

19 Funds invested in the 48 Hour Account and 90 Day Account have been invested (on a pooled basis) in loans secured by first mortgages, as well as cash and deposits. At different times, different proportions of the funds in the 48 Hour Account and 90 Day Account were invested in cash and deposits and first mortgages. Thus, on 29 February 2020:

(a) 26.5% of funds in the 48 Hour Account were invested in cash and deposits and 73.5% of funds in that investment option were invested in first mortgages; and

(b) 16.2% of funds in the 90 Day Account were invested in cash and deposits and 83.8% of funds in that investment option were invested in first mortgages.

20 By contrast, on 1 April 2020, following the advent of the COVID-19 pandemic (which was declared as such by the World Health Organisation on 11 March 2020):

(a) 86.2% of funds in the 48 Hour Account were invested in cash and deposits and 13.8% of funds were invested in first mortgages; and

(b) 32.3% of funds in the 90 Day Account were invested in cash and deposits and 67.7% of funds were invested in first mortgages.

21 The adjustments to the asset allocations the subject of the preceding paragraph were made by La Trobe in response to the COVID-19 pandemic, to ensure that sufficient cash holdings were available to meet investor redemption requests in a period of extreme market volatility and maintain appropriate cash levels in that event.

22 At all relevant times, the constitution of the Fund (**Constitution**) has set out the rights of members to withdraw funds invested in the Fund.

23 Before 21 August 2020, cl 20 of the Constitution relevantly provided as follows:

> **Members' Right to Withdrawal**
>
> 20.1 Members have no rights to withdraw from the Scheme, wholly or partly, otherwise than in accordance with this Constitution.
>
> 20.2 A Member who wishes to make a request to withdraw some or all of the Member's funds from the Scheme may do so in any manner or form approved by the RE from time to time and, while the Scheme is Liquid, the RE must give effect to that request within the time and in the manner set out in this clause 20.
>
> …
>
> **While Scheme is Liquid**
>
> 20.4 Clauses 20.5, 20.6 and 20.7 apply only while the Scheme is Liquid.
>
> 20.5 A Member has the following withdrawal rights:
>
> (a) Member has the right to withdraw from the Classic 48 hour Account by giving written notice to the RE. Subject to any existing rights of a Member, the RE will satisfy a withdrawal notice within 12 months after it receives the notice or at such earlier time as the RE may determine is reasonably practicable having regard to its ability to realise for value any of the relevant Assets and to the best interests of Members;
>
> (b) Member has the right to withdraw from the 90 Day Notice Account by giving written notice to the RE. Subject to any existing rights of a Member, the RE will satisfy a withdrawal notice within 12 months

after it receives the notice or at such earlier time as the RE may determine is reasonably practicable having regard to its ability to realise for value any of the relevant Assets and to the best interests of Members;

…

When Scheme is not Liquid

20.8 Clauses 20.9, 20.10, 20.11 and 20.12 apply while the Scheme is not Liquid.

20.9 While the Scheme is not Liquid, a Member may withdraw from the Scheme in accordance with the terms of any current withdrawal offer made by the RE in accordance with the provisions of the Law regulating offers of that kind. If there is no withdrawal offer currently open for acceptance by Members, a Member has no right to withdraw from the Scheme.

20.10 The RE is not at any time obliged to make a withdrawal offer.

…

Whether or not the Scheme is Liquid

20.13 Clauses 20.14, 20.15, 20.16, 20.17, 20.18, 20.19, 20.20, 20.21 and 20.22 apply whether or not the Scheme is Liquid.

20.14 The RE may withhold or suspend any right of Members to withdraw, in whole or in part, from the Scheme or from any one or more of the Investment Options, while and for so long as the RE is reasonably of the view that it is necessary to do so in order for the RE to comply with its obligations under the Law, including, but not limited to, its obligation to treat Members holding interests of the same class equally, and Members who hold interests of different classes fairly.

24 Under cl 1.1 of the Constitution, the "Law" was defined as the Corporations Act and its subordinate legislation, the term "Liquid" was defined as having the same meaning as in the Law, the "Scheme" was defined as the Fund, and the "RE" was defined as the responsible entity of the Fund, namely La Trobe.

25 Thus, before 21 August 2020:

(a) while the Fund was liquid within the meaning of s 601KA of the Corporations Act, subject to its duties under the Corporations Act, La Trobe had up to 12 months to satisfy a withdrawal notice in relation to either the 48 Hour Account or the 90 Day Account; and

(b) had the Fund become not liquid, a member of the Fund invested in either of those investment options would have been entitled to withdraw only in accordance with any withdrawal offer made by La Trobe.

48 Hour Account and 90 Day Notice Account representations

26 In the period from 1 April 2017 to 21 August 2020, La Trobe marketed the Fund in a variety of ways throughout Australia, including in newspapers and magazines, on television and radio, and on its website (www.latrobefinancial.com.au). Examples of marketing material were in evidence.

27 The following features of the marketing material in respect of the 48 Hour Account can be noted.

28 First, the name of the investment option, which included the phrase "48 hour Account", was (as would be expected) prominently displayed in the marketing material. The name carried the obvious implication that investments made in that option could be withdrawn on 48 hours' notice.

29 Second, the marketing material on La Trobe's website contained the following text in a reasonably prominent form:

> **Our Classic 48 hour Account invests in mortgage assets, Australian cash and other credit instruments.**
>
> It offers competitive variable rates of return, monthly interest payments and access to your funds generally within 2 business days of written withdrawal notice*
>
> Try comparing us to our competitors. You'll be surprised at what we can do for you
>
> - variable returns paid monthly - interest calculated daily
> - funds available generally within 2 business days of written withdrawal notice*
> - no entry or exit fees
> - personal service from our investment specialists
> - the security of a manager with over 65 years' experience
> - minimum investment $1,000

30 In the first version of the website in evidence (used from about 1 April 2017 to about 9 November 2017), the asterisk that followed the words "withdrawal notice" referenced a note at the bottom of the page in fine print which stated:

> Please refer to the disclaimers link on this page for full disclaimers.

31 In the second version in evidence (used from about 9 November 2017 to about 12 June 2020), the asterisk was replaced by a "hash" symbol (#) which referenced a note at the bottom of the page in fine print which stated:

> While we have 12 months under the Fund's Constitution within which to honour your redemption request if there is insufficient liquidity in this Account at the time of your request, we will make every endeavour to honour your redemption request from your Classic 48 hour Account within 2 business days. There has never been a case in the history of this Account, since 1999, when we have not honoured a redemption request on time due to a lack of liquidity.

32 I infer that the "disclaimers link", referenced in the fine print of the first version of the website contained a statement to similar effect as the second note reproduced above (which I will refer to as the **qualification**).

33 The third version of the website in evidence (used from about 12 June 2020 to about 14 August 2020) was in a slightly different format, although it contained similar statements, and the "hash" symbol referenced a slightly amended version of the qualification in fine print.

34 Third, various forms of newspaper advertisements were in evidence. Each of them referenced "La Trobe financial", listed a number of investment options including the "48 hour" option, and stated the current interest rate for that investment option followed by a "hash" symbol referencing the qualification.

35 The marketing material in respect of the 90 Day Account was in a similar form, save that all references to 48 hours or 2 business days were to 90 days.

36 La Trobe admits that, in its marketing of the Fund at the times and in the manner described above, La Trobe represented to consumers that a person who invested funds in the 48 Hour Account or the 90 Day Account would be entitled to withdraw from the investment option within, respectively, 48 hours or 90 days of providing a withdrawal notice (respectively, the **48**

Hour Account representation and the **90 Day Account representation**). In my view, the admission is properly made. The use of the names "48 hour" and "90 days" for the investment options conveys those representations, in the context of the marketing material as a whole.

37 La Trobe made the 48 Hour Account representation:

(a) during the period 1 April 2017 to 14 August 2020, on pages of La Trobe's website where La Trobe:

(i) described the 48 Hour Account using the phrases "48 hour", "48 hour Account" or "Classic 48 hour Account"; and

(ii) until 19 May 2020, described that investment option as providing "Easy access to cash" or "Easy access to your cash"; and

(b) during the period 1 April 2017 to 25 January 2020, in newspaper advertisements where La Trobe described the 48 Hour Account using the phrase "48 hour" or "48 hour Account".

38 La Trobe made the 90 Day Account representation:

(a) during the period 24 June 2019 to 21 August 2020, on pages of La Trobe's website where La Trobe:

(i) described the 90 Day Account as the "90 Day Notice Account"; and

(ii) until 19 May 2020, described that investment option as providing "Easy access to your cash"; and

(b) during the period 12 July 2019 to 25 January 2020, in newspaper advertisements where La Trobe described the 90 Day Account using the phrase "90 Day Notice" or "90 Day Notice Account".

39 As described above, La Trobe's website and the newspaper advertisements included qualifications concerning the rights of investors to withdraw their investments within 48 hours or 90 days respectively. However, La Trobe admits that those disclaimers were not sufficiently prominent to dispel the representations referred to above concerning the withdrawal entitlement.

40 The 48 Hour Account representation and the 90 Day Account representation were likely to lead a person exposed to them into error because, before 21 August 2020:

(a) while the Fund was liquid within the meaning of s 601KA of the Corporations Act, subject to its duties under the Corporations Act, La Trobe had up to 12 months to satisfy a withdrawal notice in relation to either the 48 Hour Account or the 90 Day Account; and

(b) had the Fund not become liquid, a member of the Fund invested in either of those investment options would have been entitled to withdraw only in accordance with any withdrawal offer made by La Trobe.

41 La Trobe's conduct was conduct:

(a) in trade or commerce and in relation to financial services, within the meaning of s 12DA(1) of the ASIC Act;

(b) in trade or commerce and in connection with the supply or possible supply of financial services, within the meaning of s 12DB(1) of the ASIC Act; and

(c) in relation to a financial product or a financial service, within the meaning of s 1041H(1) of the Corporations Act.

42 The representations referred to above were representations about the existence or effect of a right within the meaning of s 12DB(1)(i) of the ASIC Act.

43 La Trobe admits that, by engaging in this conduct during the periods identified above, it:

(a) made false or misleading representations in contravention of s 12DB(1)(i) of the ASIC Act; and

(b) engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act and s 1041H(1) of the Corporations Act.

Capital Stable representation

44 In its marketing of the Fund, La Trobe used the descriptive phrase "capital stable". The following statements appeared on La Trobe's website during the period 16 May 2019 to 19

May 2020 under the tab "Investors" (the text below is formatted in a manner that approximates the formatting of the website):

> Capital stable investment in every economic cycle…
>
> **Investors**
>
> **You don't need complexity to achieve returns. Join 35,000 other Investors in Australia's leading $2.8 billion Credit Fund.**
>
> As an investor you have a number of choices about where to place your money. La Trobe Financial provides you with a managed fund solution for your investment needs. As the Investment Manager we originate and manage investment assets in our Credit Fund on your behalf. You are paid monthly income distributions - and receive your capital sum upon expiry of your chosen investment term.
>
> There are a few other things that you need to know about our Credit Fund. We're not a bank, so an investment in our Credit Fund is not a bank deposit. You risk losing some or all of your capital. The return of your capital, if you want to withdraw your investment, is dependent on the liquidity of the Investment Account that you have chosen, and in particular, borrowers repaying their loans. You should also remember that past performance is not a reliable indicator of future performance. The rates of return from our Credit Fund are not guaranteed and are determined by its future revenue, so you may receive lower returns than you expected.
>
> Finally, it's important for you to read the Product Disclosure Statement for our Credit Fund before you make any investment decision, and you should consider carefully whether or not investing in our Credit Fund is appropriate for you.

45 On about 1 December 2019, La Trobe caused a one page advertisement to be published in *Money* magazine. In the centre of the page, the following statements appeared in a reasonably prominent typeface:

> **Australia's *Best of the Best* – 11 years in a row**
>
> Interest rates have never been lower. So, how can you make your money work harder?
>
> La Trobe Financial has been helping Australians build wealth for seven decades and has been judged Australia's *Best of the Best* – 11 years in a row by *Money* magazine.
>
> To invest with the Best and enjoy capital stable returns with La Trobe Financial, call **13 80 10** or visit latrobefinancial.com

46 At the foot of the page, a disclaimer appeared in fine print which included the following statements:

> Returns on our investments are variable and paid monthly. Past performance is not a reliable indicator of future performance. The rates of return from the Credit Fund are

> not guaranteed and are determined by the future revenue of the Credit Fund and may be lower than expected. Investors risk losing some or all of their principal investment. An investment in the Credit Fund is not a bank deposit. Withdrawal rights are subject to liquidity and may be delayed or suspended. …

47 La Trobe admits that, by using the phase "capital stable", it represented that any capital invested in the Fund would be "stable" in the sense of there being no risk of substantial loss of that capital (the **capital stable representation**). Again, in my view, the admission is properly made. The ordinary meaning of the phrase "capital stable" is that the capital invested would not decrease in value or be lost.

48 La Trobe made that representation:

(a) during the period 16 May 2019 to 19 May 2020 on the page of La Trobe's website described above; and

(b) on 1 December 2019, in the advertisement in *Money* magazine described above.

49 As described above, the website pages and magazine advertisement included disclaimers relating to the risks associated with investing in the Fund. However, La Trobe admits that those disclaimers were not sufficiently prominent to dispel the capital stable representation.

50 The capital stable representation was likely to lead a person exposed to it into error because a person who invested in the Fund could substantially lose capital invested.

51 La Trobe's conduct was conduct:

(a) in trade or commerce and in relation to financial services, within the meaning of s 12DA(1) of the ASIC Act;

(b) in trade or commerce and in connection with the supply or possible supply of financial services, within the meaning of s 12DB(1) of the ASIC Act; and

(c) in relation to a financial product or a financial service, within the meaning of s 1041H(1) of the Corporations Act.

52 The capital stable representation was a representation about the performance characteristics or benefits of an interest in the Fund within the meaning of s 12DB(1)(e) of the ASIC Act.

53 La Trobe admits that, by engaging in this conduct during the periods identified above, it:

(a) made false or misleading representations in contravention of s 12DB(1)(e) of the ASIC Act; and

(b) engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act and s 1041H(1) of the Corporations Act.

Declaratory Relief

54 This Court has a broad discretionary power to make declarations of right under s 21 of the FCA Act.

55 As observed by the Full Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 (***ABCC v CFMEU***) at [90], 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. However, the Full Court also stated (at [93]):

> 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 the regulator's claim that the respondent contravened the provisions, assist the 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; (2007) ATPR 42-140 at [6], and the cases there cited; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [95].

56 I am satisfied that ASIC, as a regulator under the ASIC Act and the Corporations Act, has a real interest in seeking declaratory relief. Declaratory relief serves to record the Court's disapproval of the contravening conduct, vindicate ASIC's claim that La Trobe contravened the relevant statutory provisions and deters other entities from contravening the ASIC Act and the Corporations Act. As the entity declared to have contravened the law, La Trobe has an interest in opposing the relief, notwithstanding its admissions and agreement: *IMF (Australia) Ltd v Sons of Gwalia Ltd* [2004] FCA 1390; 211 ALR 231 at [47] per French J; *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [30] per Greenwood, Logan and Yates JJ.

57 As discussed further below, since 13 March 2019, the Court also has the power under s 12GBA of the ASIC Act to make a declaration that a person has contravened a "civil penalty provision". Under s 12GBA(3), the Court must make the declaration if it is satisfied that the person has contravened the provision. A "civil penalty provision" is defined in s 12GBA(6) of the ASIC Act to include "a provision of Subdivision D (other than section 12DA)", which includes s 12DB. Accordingly, in so far as the declarations concern contraventions of s 12DB(1) of the ASIC Act in the period on and after 13 March 2019, the declarations are made under s 12GBA of the ASIC Act as well as s 21 of the FCA Act.

58 The Court is not bound by the form of the declarations proposed by the parties and must determine for itself whether the form is appropriate. As stated by the High Court in *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [89], 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; 60 IPR 296 per Dowsett J at [260].

59 For the following reasons, I consider that the form of declarations proposed by the parties is not appropriate and requires amendment.

60 In relation to the 48 Hour Account representation and the 90 Day Account representation, the parties sought a declaration to the effect that La Trobe contravened the relevant provisions of the ASIC Act and the Corporations Act by representing that a person who invested funds in the 48 Hour Account or the 90 Day Account would be entitled to withdraw from the investment option within, respectively, 48 hours or 90 days of providing a withdrawal notice, *and not expressing in a sufficiently prominent manner that that entitlement was subject to the following qualifications*:

(a) while the Fund was liquid within the meaning of s 601KA of the Corporations Act, subject to its duties under the Corporations Act, the defendant had up to 12 months to satisfy a withdrawal notice in relation to either of those investment options; and

(b) had the Fund become not liquid, a member of the Fund invested in either of those investment options would have been entitled to withdraw only in accordance with any withdrawal offer made by the defendant.

61 The form of declaration proposed by the parties effectively postulates that, had La Trobe expressed the above qualifications in a prominent manner, no contravention of the law would have occurred. However, the proceedings do not concern those postulated facts, which are entirely hypothetical (and necessarily uncertain in meaning). The proceedings concern the events that occurred and which are the subject of the admitted contraventions. The declaration proposed by the parties would involve the Court giving an advisory opinion (that prominent qualifications would have overcome the misleading conduct), which is impermissible: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438 per Gibbs J; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 per Mason CJ, Dawson, Toohey and Gaudron JJ. For that reason, I consider that the declaration should be framed in the conventional manner that identifies the representation and the reason that the representation was misleading.

62 The declaration proposed by the parties in respect of the capital stable representation suffered from the same vice. The parties sought a declaration to the effect that La Trobe contravened the relevant provisions of the ASIC Act and the Corporations Act by representing that any capital invested in the Fund would be "stable", in the sense of there being no risk of substantial loss of that capital, and *not expressing in a sufficiently prominent manner that a person who invested in the Fund could substantially lose the capital invested*. Again, that form of declaration effectively postulates that, had La Trobe expressed the above qualification in a prominent manner, no contravention of the law would have occurred. It is not permissible for the Court to make a declaration to that effect in circumstances where that question is not resolved by the proceeding and is hypothetical (and uncertain in meaning). The declaration should be framed in the conventional manner, identifying the representation and the reason that the representation was misleading.

Pecuniary Penalties

Jointly proposed penalty

63 ASIC seeks pecuniary penalties against La Trobe in respect of the admitted contraventions of s 12DB(1) of the ASIC Act, and the parties have jointly proposed an aggregate penalty of $750,000. That proposed penalty comprises:

(a) an aggregate penalty of $400,000 in respect of the contraventions of s 12DB(1)(i) arising from the 48 Hour Account representation;

(b) an aggregate penalty of $200,000 in respect of the contraventions of s 12DB(1)(i) arising from the 90 Day Account representation; and

(c) an aggregate penalty of $150,000 in respect of the contraventions of s 12DB(1)(e) arising from the capital stable representation.

64 As the majority observed in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (***FWBII***) at [46] (French CJ, Kiefel, Bell, Nettle and Gordon JJ):

> [T]here is an important public policy involved in promoting predictability of outcome in civil penalty proceedings and that the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers. As was recognised in *Allied Mills* and authoritatively determined in *NW Frozen Foods*, such predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention.

65 Their Honours went on to say at [58]:

> … 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.

66 The Court may adopt an agreed penalty if it considers it an appropriate amount, even if it "might otherwise have been disposed to select some other figure": *FWBII* at [47] quoting *NW Frozen*

Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285 at 291 per Burchett and Kiefel JJ.

67 However, as noted by the Full Court in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; 151 ACSR 407 at [125], the Court must be persuaded that the penalty proposed by the parties is appropriate and the agreement of the parties cannot bind the Court in any circumstances to impose a penalty which it does not consider to be appropriate. The Full Court further observed that (at [129]):

> … in considering whether the proposed agreed penalty is an appropriate penalty, the Court should generally recognise that the agreed penalty is most likely the result of compromise and pragmatism on the part of the regulator, and to reflect, amongst other things, the regulator's considered estimation of the penalty necessary to achieve deterrence and the risks and expense of the litigation had it not been settled: *Fair Work* at [109]. The fact that the agreed penalty is likely to be the product of compromise and pragmatism also informs the Court's task when faced with a proposed agreed penalty. The regulator's submissions, or joint submissions, must be assessed on their merits, and the Court must be wary of the possibility that the agreed penalty may be the product of the regulator having been too pragmatic in reaching the settlement: *Fair Work* at [110].

68 It is necessary to consider the penalty proposed by the parties with those principles in mind.

Applicable statutory provisions

69 The provisions of the ASIC Act governing the imposition of penalties have altered during the period of the contravening conduct (1 April 2017 to 21 August 2020). Accordingly, it is necessary to have regard to more than one set of provisions.

70 In the first period of contravening conduct from 1 April 2017 until 12 March 2019, s 12GBA provided as follows:

> **12GBA Pecuniary penalties**
>
> (1) If the Court is satisfied that a person:
>
> (a) has contravened a provision of Subdivision C, D or GC (other than section 12DA); or
>
> (b) has attempted to contravene such a provision; or
>
> (c) has aided, abetted, counselled or procured a person to contravene such a provision; or

(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or

(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) has conspired with others to contravene such a provision;

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.

(2) In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:

(a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and

(b) the circumstances in which the act or omission took place; and

(c) whether the person has previously been found by the Court in proceedings under this Subdivision to have engaged in any similar conduct.

71 Subsection 12GBA(3) stipulated the maximum penalty to be imposed "for each act or omission to which the section applies". In relation to contraventions of s 12DB(1), subs 12GBA(3) stipulated that the maximum penalty for a body corporate was 10,000 penalty units and for an individual was 2,000 penalty units. The Commonwealth penalty unit was $180 between 25 September 2015 and 30 June 2017 and was $210 between 1 July 2017 and 30 June 2020.

72 Section 12GBA was replaced by a suite of provisions governing the imposition of penalties which were introduced by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth), which took effect from 13 March 2019 (and which were further amended in a minor respect by the *Treasury Laws Amendment (2019 Measures No 3) Act 2019* (Cth). The new provisions are applicable to contravening conduct occurring on or after that date (see ss 322 and 327 of the ASIC Act). The relevant provisions are as follows:

12GBA Declaration of contravention of civil penalty provision

Application for declaration of contravention

(1) ASIC may apply to a Court for a declaration that a person has contravened a civil penalty provision.

(2) ASIC must make the application within 6 years of the alleged contravention.

Declaration of contravention

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

…

Meaning of civil penalty provision

(6) The following provisions are ***civil penalty provisions***:

…

(b) a provision of Subdivision D (other than section 12DA);

…

12GBB Pecuniary penalty orders

Application for order

(1) ASIC may apply to a Court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.

(2) ASIC must make the application within 6 years of the alleged contravention.

Court may order person to pay pecuniary penalty

(3) If a declaration has been made under section 12GBA 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 section 12GBC).

(4) An order under subsection (3) is a ***pecuniary penalty order***.

Determining pecuniary penalty

(5) In determining the pecuniary penalty, the Court must take into account all relevant matters, including:

(a) the nature and extent of the contravention; and

(b) the nature and extent of any loss or damage suffered because of the contravention; and

(c) the circumstances in which the contravention took place; and

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

…

12GBC Maximum pecuniary penalty

The pecuniary penalty must not be more than the pecuniary penalty applicable to the contravention of the civil penalty provision.

12GBCA Pecuniary penalty applicable

Pecuniary penalty applicable to the contravention of a civil penalty provision—by an individual

(1) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by an individual is the greater of:

(a) 5,000 penalty units; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3.

Pecuniary penalty applicable to the contravention of a civil penalty provision—by a body corporate

(2) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by a body corporate is the greatest of:

(a) 50,000 penalty units; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

Contrary intention

(3) This section applies in relation to a contravention of a civil penalty provision by an individual or a body corporate unless there is a contrary intention under this Act in relation to the penalty applicable to the contravention. In that case, the ***penalty applicable*** is the penalty specified for the civil penalty provision.

…

12GBCE Meaning of benefit derived and detriment avoided because of a contravention of a civil penalty provision

> The ***benefit derived and detriment avoided*** because of a contravention of a civil penalty provision is the sum of:
>
> (a) the total value of all benefits obtained by one or more persons that are reasonably attributable to the contravention; and
>
> (b) the total value of all detriments avoided by one or more persons that are reasonably attributable to the contravention.

73 The Commonwealth penalty unit was $210 between 1 July 2017 and 30 June 2020 and was increased to $222 with effect from 1 July 2020.

Applicable principles

74 The determination of an appropriate penalty for contravening conduct involves a discretionary judgment. The principles applicable to the exercise of the discretion have been stated in many cases. The following is a summary of those principles.

75 First, the Court may impose a penalty in respect of each contravention, subject to the maximum penalty which is stated to apply to such contravention.

76 Second, the penalty to be imposed is a penalty that the Court considers appropriate.

77 Third, s 12GBA(2) of the ASIC Act, as in force until 12 March 2019, requires the Court, in determining the appropriate penalty, to take into account four specific matters and all other relevant matters. The four specific matters are: (i) the nature and extent of the act or omission; (ii) any loss or damage suffered as a result of the act or omission; (iii) the circumstances in which the act or omission took place; and (iv) whether the person has previously been found by a court, in proceedings under Subdiv G, Div 2, Pt 2 of the ASIC Act, to have engaged in any similar conduct. Section 12GBB(5) of the ASIC Act, as in force from 13 March 2019, is in materially the same form.

78 As to "all other relevant matters", in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; ATPR 41-076 (***CSR***), in the context of a contravention of provisions of Pt IV of the *Trade Practices Act 1974* (Cth) (since renamed the *Competition and Consumer Act 2010* (Cth)), French J listed a number of matters potentially relevant to the assessment of penalty under s 76 of that Act. Those factors have become known as the "French factors" and have been referred to on many occasions in the assessment of civil penalties including under the ASIC Act: see

Australian Securities and Investments Commission v GE Capital Finance Australia [2014] FCA 701 at [70]; *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 at [125]-[126]. The factors are:

(a) the size of the contravening company;

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

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

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

(e) whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention;

(f) whether the contravener has engaged in similar conduct in the past; and

(g) the financial position of the contravener.

79 The French factors are neither exhaustive of potentially relevant matters to be considered nor "a rigid catalogue or checklist of matters to be applied in each case": *ABCC v CFMEU* at [101].

80 Fourth, in considering the sufficiency of a proposed civil penalty, regard must ordinarily be had to the maximum penalty for the reasons stated (in a criminal sentencing context) in *Markarian v The Queen* (2005) 228 CLR 357 (***Markarian***) at [31]: 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 other relevant factors, a yardstick. However, as stated by the Full Federal Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 (***Reckitt Benckiser***) at [156], care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. It will rarely be appropriate for a court to start with the maximum penalty and proceed by making a proportional deduction from the maximum (*Markarian* at [31]), and the Court should not adopt a

mathematical approach of applying additions or deductions from a predetermined range, or attributing specific values to the relevant factors: *Markarian* at [37].

81 In determining the appropriate penalty for a multiplicity of civil penalty contraventions, the Court may have regard to two common law principles that originate in criminal sentencing: the "course of conduct" principle and the "totality" principle: *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 (***Yazaki Corporation***) at [226]. Under the "course of conduct" principle, the Court considers whether the contravening acts or omissions arise out of the same course of conduct or the one transaction, to determine whether it is appropriate that a "concurrent" or single penalty should be imposed for the contraventions: *Yazaki Corporation* at [234]. The principle guards against the risk that the respondent is punished twice in respect of multiple contravening acts or omissions that should be evaluated, for the purposes of assessing an appropriate penalty, as a lesser number of acts of wrongdoing: *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1 at [39], per Middleton and Gordon JJ. However, as noted by the Full Court in *Yazaki Corporation* (at [227]), it is not appropriate or permissible to treat multiple contravening acts or omissions as just one contravention for the purposes of determining the maximum limit dictated by the relevant legislation. Accordingly, the maximum penalty for the course of conduct is not restricted to the prescribed statutory maximum penalty for each contravening act or omission: *Reckitt Benckiser* at [141]; *Yazaki Corporation* at [229]-[235]. The "totality" principle operates as a "final check" to ensure that the penalties to be imposed on a wrongdoer, considered as a whole, are just and appropriate and that the total penalty for related offences does not exceed what is proper for the entire contravening conduct in question: *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40,169; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [132].

82 Fifth, the principal object of imposing pecuniary penalties in civil proceedings is deterrence, both to deter repetition of the contravening conduct by the contravener (specific deterrence) and to deter others who might be tempted to engage in similar contraventions (general

deterrence): *ACCC v TPG* at [65] per French CJ, Crennan, Bell and Keane JJ; *FWBII* at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ and at [110] per Keane J. In *FWBII*, the plurality (at [55]) stated that the purpose of civil penalties "is primarily if not wholly protective in promoting the public interest in compliance", endorsing the view of French J in *CSR* at [40]:

> The principal, and I think probably the only, object of the penalties … is to attempt 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 Act.

83 The penalty should therefore be fixed with a view to ensuring that the amount is not such as to be regarded by the contravener or others as an acceptable cost of doing business: *ACCC v TPG* at [66] (per French CJ, Crennan, Bell and Keane JJ) citing *Singtel Optus v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 (***Singtel Optus***) at [62]-[63] (per Keane CJ, Finn and Gilmour JJ).

84 Sixth, in common with criminal sentencing, determining a civil penalty usually involves multi-factorial decision-making, identifying and balancing all the factors relevant to the contravention, and where the result is arrived at by a process of "instinctive synthesis" of the relevant factors: *Reckitt Benckiser* at [44]. It necessarily follows that the penalties imposed in other cases can only be of limited analogical value: *Singtel Optus* at [60] citing *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238 at [215]. If any comparison to a previous case is undertaken,the relevant enquiry is not to ensure numerical consistency, but to ensure consistent application of principle: see *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29; 202 IR 467 at [23]-[25] per North, McKerracher and Jagot JJ, citing *Hili v The Queen* (2010) 242 CLR 520 at [48]-[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Relevant considerations in this case

Nature, extent and circumstances of the contraventions

85 The nature, extent and circumstances of the contravening conduct is a mandatory statutory consideration in the assessment of penalty and is a primary consideration in the assessment of an appropriate penalty. In that context, the parties' submissions with respect to the nature and

circumstances of the contravening conduct were surprisingly brief. I consider that the following matters are significant.

86 First, the contravening conduct concerned the supply of a financial service comprising an investment product. The investment product was open to the public. There was a minimum investment amount for an investment in the 48 Hour Account or the 90 Day Account. The minimum investment amount for the 48 Hour Account was $1,000 in the period to about 1 November 2017 and thereafter was $10. Since about 26 June 2019, the minimum investment amount for the 90 Day Account has been $10. Thus, those investment options were available to a wide cross-section of the community and, inevitably, with varying levels of financial sophistication. As at 31 December 2020, the Fund had 49,510 registered investors (45.7% of which La Trobe classified as "retail" investors) and approximately $5.345 billion in funds under management.

87 Second, the misleading conduct was serious and had very considerable potential to mislead the public about the characteristics of the investment options named the 48 Hour Account or the 90 Day Account. La Trobe admits that its marketing of those investment options conveyed a representation that the investor would be entitled to withdraw from the investment option within, respectively, 48 hours or 90 days of providing a withdrawal notice. That representation was incorrect. The true position was that under the Fund's Constitution, while the Fund was liquid, La Trobe had up to 12 months to satisfy a withdrawal notice and, had the Fund become not liquid, an investor would have been entitled to withdraw only in accordance with any withdrawal offer made by La Trobe. Thus the true position was vastly different to the impression conveyed by La Trobe's marketing material. It should be acknowledged that La Trobe's marketing material in respect of the 48 Hour Account or the 90 Day Account included disclaimers which sought to qualify the representations. However, La Trobe has admitted that the disclaimers did not dispel the misrepresentations otherwise conveyed by the marketing material. While the disclaimers are to be taken into account in the assessment of the nature and circumstances of the contravening conduct, the deployment of ineffective disclaimers does not carry much weight in the overall assessment of penalty.

88 The capital stable representation had similar potential to mislead the public about the characteristics of La Trobe's investment options. As admitted by La Trobe, the capital stable representation conveyed that any capital invested in the Fund would be "stable" in the sense of there being no risk of substantial loss of that capital. That representation was incorrect. The true position was that an investor could substantially lose the capital invested. Again, it should be acknowledged that La Trobe's marketing material in connection with the capital stable representation included disclaimers which sought to qualify the representation. However, La Trobe has admitted that the disclaimers did not dispel the misrepresentation and, for that reason, the disclaimers do not carry much weight in the overall assessment of penalty.

89 Third, in relation to the extent of the contravening conduct, the misrepresentations were made:

(a) on various pages of La Trobe's website, over the period between 1 April 2017 and 21 August 2020; and

(b) in advertisements published in several newspapers, and in *Money* magazine, over the period between 1 April 2017 to 1 January 2020.

90 Where a representation is made on a website, a separate representation is made – and thus a separate contravention of s 12DB(1) arises – each time a person accesses the relevant page of the website: see *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 (***Bet365***) at [12]-[13]; *Australian Competition and Consumer Commission v Gallop International Group Pty Ltd* [2019] FCA 1514; 138 ACSR 395 at [288] per Charlesworth J. The parties submitted that it is not known precisely how many times the relevant pages of La Trobe's website were accessed during the periods when those pages conveyed the representations giving rise to the admitted contraventions of s 12DB(1). However, each of the relevant pages was accessible by members of the public through the whole of the period when those representations were conveyed:

(a) in the case of the 48 Hour Account representation, the relevant period was 1 April 2017 to 14 August 2020 – a period of more than three years;

(b) in the case of the 90 Day Account representation, the relevant period was 24 June 2019 to 21 August 2020 – a period of about 14 months; and

(c) in the case of the capital stable representation, the relevant period was 16 May 2019 to 19 May 2020 – a period of about one year.

91 Similarly, where a representation is made in a newspaper or magazine advertisement, a separate representation is made – and thus a separate contravention of s 12DB(1) arises – in respect of each person who reads the advertisement: *Bet365* at [16]-[17]. The parties submitted that it is not known precisely how many copies of the relevant advertisements were distributed. However, the advertisements appeared in many different publications (several with national circulations) on multiple occasions throughout the following periods:

(a) in the case of the 48 Hour Account representation, the relevant period was 1 April 2017 to 25 January 2020 – a period of about two years and nine months;

(b) in the case of the 90 Day Account representation, the relevant period was 21 July 2019 to 25 January 2020 – a period of about six months; and

(c) in the case of the capital stable representation, the advertisement appeared on 1 December 2019.

92 In those circumstances, it is not possible to identify the number of contraventions of s 12DB(1) that occurred. The parties submitted that it is appropriate for the Court to proceed on the basis that La Trobe engaged in three distinct categories of contravention:

(a) making the 48 Hour Account representation on its website and in newspaper advertisements;

(b) making the 90 Day Account representation on its website and in newspaper advertisements; and

(c) making the capital stable representation on its website and in *Money* magazine.

93 The parties further submitted that each of the above categories of contraventions could be characterised as a separate course of conduct for the purposes of assessing an appropriate penalty. I accept that submission having regard to the facts that:

(a) each of the categories of representations is distinct from each other category of representations; and

(b) within each category of representations, the relevant conduct was substantially the same as between the website and the print advertisements and was substantially the same across the whole of the period for which the representations were made.

94 However, as noted earlier, the maximum penalty for each course of conduct is not restricted to the prescribed statutory maximum penalty for each contravening act or omission.

95 The fourth matter to be noted, that also bears upon the extent of the contravening conduct, is the quantum of funds invested in the Fund, and in the 48 Hour Account and the 90 Day Account investment options, during the contravening period. The quantum of funds invested gives an indication of the extent of commerce potentially affected by the contravening conduct.

96 It was an agreed fact that, in the period from 1 January 2017 to 30 August 2020, 21,313 persons invested in the Fund comprising total new investments of approximately $6.932 billion. That fact is not directly relevant to the contravening conduct. In so far as investments in the Fund may have been caused, to some extent, by the capital stable representation, the agreed period of contravention in respect of that representation was 16 May 2019 to 19 May 2020. More relevantly, in the period from 1 January 2017 to 30 August 2020, approximately 8,331 persons invested funds in the 48 Hour Account and the total amount of new investments by those persons was approximately $2.978 billion. In the period from 24 June 2019 to 30 August 2020, approximately 1,517 persons invested funds in the 90 Day Account, and the total amount of new investments by those persons was approximately $322 million.

97 The parties submitted, and I accept, that it is not known how many of the persons who invested in the Fund during the relevant period did so having accessed the relevant pages of La Trobe's website or having read the relevant print advertisements. However, because the representations were made on La Trobe's website, and in widely available print publications, the parties accepted, and I infer, that they are likely to have come to the attention of retail investors. The parties referred to the possibility that the misrepresentations may not have been operative at the "point of sale" as investors may have examined the Constitution and discovered the true position before making an investment in the Fund. I accept that that is a possibility, but I place little weight on that prospect in the absence of detailed evidence concerning the means by which investments are made in the Fund and the likelihood of a document, such as the Fund's

Constitution, being read by a potential investor in the Fund. Further, even if the misrepresentations were not operative at the "point of sale", the contravening conduct nevertheless had considerable potential to cause harm by drawing consumers into La Trobe's "marketing web": see *ACCC v TPG* at [50].

Loss or damage resulting from the contraventions

98 ASIC makes no allegation in this proceeding that any consumer suffered loss or damage as a result of La Trobe's contraventions. Since 1999, when the Fund commenced operating as a registered managed investment scheme, La Trobe has never failed to meet a withdrawal request from the 48 Hour Account within the 48 hour timeframe due to a lack of liquidity. Similarly, since the commencement of the 90 Day Account on 26 June 2019, La Trobe has never failed to meet a withdrawal request from the 90 Day Account within the 90 day timeframe due to a lack of liquidity. Neither has the Fund become illiquid (within the meaning of the Corporations Act) nor delayed or suspended redemptions at any stage. Further, in respect of the 48 Hour Account and the 90 Day Account investment options, La Trobe has never failed to return a member's capital in full upon redemption and no member has suffered any loss of capital at any stage.

Previous contraventions by La Trobe of a similar nature

99 La Trobe has not previously been found by a court to have engaged in any similar conduct.

Size and financial position of La Trobe

100 La Trobe is a wholly owned subsidiary of La Trobe Financial Pty Ltd. The La Trobe Financial Group annual report for the year ended 30 June 2020 records that La Trobe Financial Pty Ltd and its subsidiaries had:

(a) net revenue of $233,473,000 in 2020 and $154,864,000 in 2019; and

(b) profits of $83,581,000 in 2020 and $60,011,000 in 2019.

Deliberateness of the conduct

101 ASIC makes no allegation in this proceeding that, when La Trobe engaged in the contravening conduct, it deliberately or intentionally set out to mislead consumers. However, the

contravening conduct cannot be described as accidental or inadvertent. The conduct involved the deliberate use of financial product descriptions (48 hours, 90 days and capital stable) that conveyed a clear impression (with respect to the period in which funds may be withdrawn and the security of the capital invested) which, in the circumstances of the Fund, were incorrect.

Compliance program and involvement of senior management

102 The marketing the subject of this proceeding was subject to a compliance program which included review and approval prior to publication by:

(a) two of the Fund's Senior Compliance Officer, Chief Legal Counsel, separate legal counsel or the compliance team; and

(b) from 5 December 2018, a Fund senior executive, being the Chief Investment Officer, the Deputy Chief Investment Officer or another executive of the Private Wealth Management Division in their absence.

103 These compliance and approval measures continue to apply in respect of all advertisements regarding the Fund published or distributed by La Trobe.

Level of cooperation with ASIC

104 In the period July to December 2017, ASIC undertook inquiries of La Trobe in relation to the marketing of the Fund, in respect of which La Trobe cooperated and made changes to its marketing materials in an effort to resolve the issues raised by ASIC.

105 In particular, disclaimers as to redemption requests appearing in:

(a) the relevant web pages from about 9 November 2017 onwards; and

(b) in the relevant newspaper and magazine advertisements from 7 October 2017 onwards,

were implemented by La Trobe following a process of consultation with ASIC throughout the period July to December 2017, including written correspondence, meetings and telephone discussions, in which:

(a) ASIC raised concerns in correspondence dated 18 July 2017 in relation to the 48 Hour Account representation;

(b) La Trobe proposed disclaimers to address those concerns, which were then the subject of discussions and correspondence between representatives of La Trobe and ASIC throughout August and September 2017;

(c) ASIC provided comments on the proposed disclaimers and in an email of 29 September 2017 stated that it had no further comments to make at that time in relation to the disclaimers;

(d) in a telephone discussion between representatives of ASIC and La Trobe on 8 November 2017, ASIC raised concerns that the proposed disclaimers had not yet been implemented on La Trobe's website and may not be appearing in La Trobe's published advertisements;

(e) by email of 8 November 2017, La Trobe confirmed to ASIC that the proposed changes to the La Trobe website were expected to be implemented the following day and that all advertisements that were now being submitted by La Trobe for publication included the proposed disclaimers; and

(f) by email of 20 November 2017, ASIC stated:

> We do not have any further comments on the website at this time and La Trobe should proceed to make the proposed changes as soon as possible.
>
> As previously outlined, our comments have focused only on the specific issues we raised with you. It is the obligation of La Trobe to to [sic] ensure the website and promotional material complies with the requirements of the Corporations Act and ASIC Act. ASIC also reserves the right to take action should we consider it appropriate, necessary or in the public interest to do so.

106 The next time at which ASIC made inquiries of La Trobe in relation to matters the subject of this proceeding was in the period March to August 2020. In that period, ASIC undertook further inquiries of La Trobe in relation to marketing of the Fund, including raising for the first time La Trobe's use of the phrase "capital stable". During the course of those inquiries, La Trobe made further changes in an effort to resolve the issues raised by ASIC, including by no later than August 2020:

(a) making changes to the disclaimer appearing on La Trobe's website;

(b) changing the name of the 48 Hour Account to the "Classic Notice Account"; and

(c) ceasing (since 15 June 2020) to use the phrase "capital stable" in any of its marketing materials.

107 In a letter dated 3 August 2020, ASIC stated, among other things, "ASIC welcomes the open and constructive discussions that have taken place to date. However, ASIC's role as a regulator is not to approve the advertising of products marketed by La Trobe … Ultimately, the nature and content of La Trobe's advertising is a matter for La Trobe."

108 The parties agreed that since the proceedings against La Trobe were commenced in December 2020, La Trobe has cooperated with ASIC and has assisted with the efficient and cost-effective resolution of the proceeding by making the admissions contained in the Agreed Facts and consenting to the relief set out in the proposed orders.

109 Having regard to the circumstances outlined above, the parties submitted that both prior to and following the institution of these proceedings, La Trobe has demonstrated a disposition to cooperate with ASIC in relation to the contraventions. I accept that submission, and would go further. The Agreed Facts show a very high level of cooperation with ASIC on the part of La Trobe and demonstrate a commendable attitude toward legal compliance. This is a significant factor in assessing the penalty proposed by the parties, which I return to below.

ASIC use of the phrase "capital stable"

110 The parties placed some reliance on the fact that, at all relevant times, ASIC has described a "Capital stable fund" on its moneysmart.gov.au consumer information website as:

> A fund that invests across a range of asset classes but with a significant portion in defensive assets such as fixed interest investments and cash and a small portion in growth assets such as shares and property. This type of fund aims to provide a moderate level of income with some capital growth.

111 At all relevant times, funds invested in the 48 Hour Account and 90 Day Account have been invested in loans secured by first mortgages, as well as cash and deposits.

112 The parties' submissions did not make clear how those facts affected the Court's assessment of La Trobe's conduct and the appropriate penalty. There was no agreed fact that the asset classes in which funds were invested through the 48 Hour Account and 90 Day Account were equivalent, in terms of capital stability, to the asset classes described by ASIC on its moneysmart.gov.au consumer information website. La Trobe admitted that the capital stable representation made by it was misleading. There was no agreed fact, and no submission was

made, that La Trobe considered that it was appropriate, and not misleading, to use the "capital stable" phrase by reason of the manner in which ASIC used that phrase. For those reasons, I place no weight on those facts.

113 Nevertheless, it was an agreed fact that when ASIC raised its concerns with respect to the capital stable representation, La Trobe ceased using that phrase in its marketing materials within a matter of months.

Conclusion on the appropriate penalty

114 The parties submitted that during the relevant period, the maximum pecuniary penalties for a contravention of s 12DB(1) by a corporation were as follows:

(a) from 1 April 2017 to 30 June 2017, $1.8 million;

(b) from 1 July 2017 to 12 March 2019, $2.1 million;

(c) from 13 March 2019 to 30 June 2020, $10.5 million; and

(d) from 1 July 2020 to 20 August 2020, $11.1 million.

115 That submission was not entirely accurate. In the period from 13 March 2019, s 12GBCA provided that the maximum penalty was the greatest of:

(a) 50,000 penalty units; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention – that amount multiplied by 3; and

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units – 2.5 million penalty units.

116 The Agreed Facts did not contain anything that addressed the question whether La Trobe (or any other person) derived benefits or avoided detriments because of the contravening conduct.

Accordingly, it is not possible for the Court to apply s 12GBCA(2)(b) in determining the maximum penalty.

117 The Agreed Facts stated that La Trobe's net revenue for the financial year ended 30 June 2019 was $154,864,000 and for the financial year ended 30 June 2020 was $233,473,000. It is reasonable to estimate the amounts determined in accordance with s 12GBCA(2)(c)(i) as varying between approximately $15.5 million and $23.3 million respectively. In those circumstances, the amount determined in accordance with s 12GBCA(2)(c)(ii) is inapplicable.

118 It follows that, contrary to the parties' submission, the maximum pecuniary penalty for a contravention of s 12DB(1) in the period following 13 March 2019 was in excess of $15 million.

119 The 48 Hour Account representation was made in the period from 1 April 2017 to 14 August 2020 – that is, for a period of about two years before 13 March 2019, and a period of about one year and five months after that date.

120 The 90 Day Account representation was made in the period from 24 June 2019 to 21 August 2020 – that is, entirely in the period after 13 March 2019.

121 The capital stable representation was made in the period from 16 May 2019 to 19 May 2020 – that is, entirely in the period after 13 March 2019.

122 While acknowledging the relevance of the statutory maximum penalties, I accept the parties' submission that there is no meaningful overall maximum penalty given the potential number of individual contraventions and the time over which they occurred: *Reckitt Benckiser* at [157].

123 La Trobe engaged in three distinct courses of conduct, or categories of contraventions, by making three categories of representations on its website and in its print advertisements: the 48 Hour Account representation, the 90 Day Account representation and the capital stable representation. The misleading conduct was serious and had very considerable potential to mislead the public about the characteristics of the investment options – both as to the entitlement to withdraw funds and the risk of loss of capital invested. Each of the representations was made over periods ranging from about one year to more than three years,

in a variety of different media that were all accessible by the general public. Further, the misleading conduct potentially affected investment decisions involving very large sums of money. Those factors would suggest a substantial penalty is required in order to achieve the objectives of specific and general deterrence.

124 There are, however, mitigating factors. La Trobe has not previously been found by a court to have engaged in similar conduct. ASIC makes no allegation that La Trobe's conduct caused any consumers to suffer loss, or that La Trobe deliberately or intentionally set out to mislead consumers. At all relevant times, the marketing conducted on La Trobe's website and in La Trobe's newspaper and magazine advertisements was subject to a compliance program. La Trobe has demonstrated cooperation with ASIC, both in connection with the exchange of correspondence that took place in 2017 and in connection with the resolution of this proceeding. In particular, La Trobe cooperated with ASIC from an early stage in relation to this proceeding, before ASIC was put to the expense of filing evidence. Further, in the period from June to August 2020, La Trobe made further changes to the marketing of the Fund, and the Constitution, with the result that it ceased engaging in the conduct that is the subject of this proceeding.

125 The mitigating factors suggest that the objective of specific deterrence is not a material factor in this case. However, I consider that the objective of general deterrence remains a very significant factor. There is a large public interest in ensuring that the marketing and promotion of financial products, particularly in relation to important characteristics of financial products such as the entitlement to withdraw funds and the risk of loss of capital invested, is accurate and not misleading. Parliament's concern to ensure that such marketing is accurate and not misleading is demonstrated by the significant maximum penalties that may be imposed for single contraventions of s 12DB(1) of the ASIC Act. In normal circumstances, the conduct the subject of this proceeding, involving three courses of contravening conduct affecting a large quantity of financial investments and continuing for a lengthy period, would warrant a penalty well in excess of the penalty proposed by the parties, indeed many multiples of that penalty.

126 The parties' joint proposal as to penalties raises a serious question whether the penalties are appropriate and should be accepted by the Court. Apart from one factor, I would not have been

prepared to accept the parties' proposal in this case. The factor is an unusual one. As described above, it appears that ASIC corresponded with La Trobe in relation to its marketing in the period July to December 2017 and then again in the period March to August 2020. In response to concerns raised by ASIC on each occasion, La Trobe altered its marketing. ASIC then indicated that it had no further comments. That correspondence was not in evidence. However, the implication from the Agreed Facts is that, as a result of its correspondence with ASIC, La Trobe understood that ASIC had no concerns in relation to the matters that are the subject of this proceeding. It is, of course, the responsibility of La Trobe to ensure that its marketing complies with the requirements of the ASIC Act. ASIC has no responsibility to advise corporations in relation to such matters and expressions of opinion by ASIC do not operate as a defence to a contravention. Nevertheless, I consider that ASIC's correspondence with La Trobe in relation to the marketing that is the subject of this proceeding is relevant to the assessment of the proposed penalty. Given the modest level of penalty jointly sought by ASIC, I infer that ASIC accepts that its correspondence with La Trobe caused La Trobe to believe that ASIC had no concerns in relation to its marketing. That is relevant to the assessment of La Trobe's overall culpability for the contraventions, particularly the deliberateness of the contraventions and its attitude toward legal compliance.

127 Not without considerable hesitation, I am prepared to accept the penalties jointly proposed by the parties as appropriate in all the circumstances.

Conclusion and costs

128 In conclusion, I consider that the form of declarations proposed by the parties is not appropriate and I will make declarations in what I consider is a standard form. I will also impose an aggregate pecuniary penalty in the amount proposed by the parties.

129 La Trobe has agreed to pay ASIC's costs in the amount of $120,000. The parties submitted that no other order as to costs should be made. I will therefore make orders for costs in that fixed amount.

I certify that the preceding one hundred and twenty nine (129)

numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate: 

Dated: 26 November 2021