FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited [2023] FCA 1150

File number:	VID 285 of 2022
Judgment of:	**BEACH J**
Date of judgment:	26 September 2023
Catchwords:	**CORPORATIONS –** provision of financial services – regulatory proceedings – proceedings brought concerning contraventions of s 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 47 of the *National Consumer Credit Protection Act 2009* (Cth) – false or misleading representations concerning the price of cash advances made using ANZ credit cards – failure to engage in credit activities efficiently, honestly and fairly – assessment of pecuniary penalties and other relief – financial services laws – orders and declarations
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BA, 12DB, 12GBA, 12GBB, 12GBC, 12GBCA, 12GBCE, 322 *Corporations Act 2001* (Cth) ss 761A, 912A, 912B *National Consumer Credit Protection Act 2009* (Cth) s 47 *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth)
Cases cited:	*Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 *Australian Competition and Consumer Commission v Murray Goulburn Co-Operative Co Ltd* [2018] FCA 1964 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (No 4) (in liq)* (2020) 148 ACSR 511 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 3)* [2020] FCA 1421 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* (2022) 164 ACSR 428

Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq) (2017) 348 ALR 525

Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq) (2012) 88 ACSR 206

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2020] FCA 790

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2022] FCA 1422

Australian Securities and Investments Commission v La Trobe Financial Asset Management Ltd (2021) 158 ACSR 363

Australian Securities and Investments Commission v National Australia Bank Ltd (2022) 164 ACSR 358

Australian Securities and Investments Commission v National Australia Bank Ltd (No 2) [2023] FCA 1118

Australian Securities and Investments Commission v Westpac Securities Administration Ltd (2019) 272 FCR 170

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

Australian Securities and Investments Commission v Westpac Banking Corporation (No 3) (2018) 131 ACSR 585

Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus) (2022) 407 ALR 1

Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation (2020) 148 ACSR 247

Comité Interprofessionnel du Vin de Champagne v Powell (2015) 330 ALR 67

Flexopack SA Plastics Industry v Flexopack Australia Pty Ltd (2016) 118 IPR 239

State Street Global Advisors Trust Company v Maurice Blackburn Pty Ltd (No 2) (2021) 164 IPR 420

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Sub-area:	Regulator and Consumer Protection
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Counsel for the Plaintiff:	Dr O Bigos KC and Mr M Hosking
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Solicitor for the Defendant:	Herbert Smith Freehills

ORDERS

VID 285 of 2022

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)** Defendant

ORDER MADE BY: **BEACH J**

DATE OF ORDER: **26 SEPTEMBER 2023**

THE COURT DECLARES THAT:

1. From 27 May 2016 to 16 November 2018, ANZ, in trade or commerce, and in connection with the supply of financial services, made false or misleading representations on ANZ's internet banking platform, mobile application and ATMs (**Key ANZ Channels**) with respect to the price of cash advances made using an ANZ consumer credit card product listed in Appendix 1, and therefore contravened s 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), in circumstances where:

   (a) a deposit was made into a customer's credit card account but was not yet processed (**Deposit**); and

   (b) the Key ANZ Channels displayed:

      (i) the customer's "Available Funds", "Available", "Available Balance" or "Avail Bal" (**Available Funds**) as including the amount of the Deposit and as being above the customer's credit card limit; and

      (ii) the customer's "Current Balance", "Current", "Account Balance" or "Balance" (**Current Balance**) as including the amount of the Deposit and as being positive; and

   (c) the terms and conditions which governed the credit card product provided that, if the customer's credit card account was in credit at the time ANZ processed the cash advance, that credit amount would offset the amount of the cash

advance in the calculation of the fee and the customer may not be charged interest for the cash advance,

by representing that the customer could, at that time, make a cash advance of up to the amount by which the customer's Available Funds exceeded the customer's credit card limit without incurring fees or interest in relation to such cash advance whereas, in fact, if the cash advance was processed before the Deposit, the Deposit did not offset the amount of the cash advance in the calculation of the fee, and in some cases interest was charged.

2. From 17 November 2018 to 18 April 2021, ANZ, in trade or commerce, and in connection with the supply of financial services, made false or misleading representations on Key ANZ Channels with respect to the price of cash advances made using an ANZ Rewards Travel Adventures Card account opened on or after 17 November 2018, and therefore contravened s 12DB(1)(g) of the ASIC Act, in circumstances where:

   (a) a deposit was made into a customer's credit card account but was not yet processed (i.e. the Deposit); and

   (b) the Key ANZ Channels displayed:

      (i) the customer's Available Funds as including the amount of the Deposit and as being above the customer's credit card limit; and

      (ii) the customer's Current Balance as including the amount of the Deposit and as being positive; and

   (c) the terms and conditions which governed the credit card product provided that, if the customer's credit card account was in credit at the time ANZ processed the cash advance, that credit amount would offset the amount of the cash advance in the calculation of the fee and the customer may not be charged interest for the cash advance,

   by representing that the customer could, at that time, make a cash advance of up to the amount by which the customer's Available Funds exceeded the customer's credit card limit without incurring fees or interest in relation to such cash advance whereas, in fact, if the cash advance was processed before the Deposit, the Deposit did not

offset the amount of the cash advance in the calculation of the fee, and in some cases interest was charged.

3. From April 2018 to 23 September 2021, in circumstances where there was a risk that customers would misapprehend the circumstances in which fees and interest were charged on cash advances made on Key ANZ Channels using an ANZ consumer credit card product listed in Appendix 1, ANZ failed to do all things necessary to ensure that the credit activities authorised by its credit licence were engaged in efficiently, honestly and fairly, and therefore contravened s 47(1)(a) of the *National Consumer Credit Protection Act 2009* (Cth) by:

   (a) not amending the labels that it used to display a customer's "Available Funds" and "Current Balance" on the Key ANZ Channels until September 2021;

   (b) amending its letters of offer in November 2018 (except for customers who opened an ANZ Rewards Travel Adventures Card account from that time) and its fees and charges booklet in September 2018 in a way that was not sufficient to make clear to customers the circumstances in which fees would be charged for cash advances;

   (c) not amending its letters of offer for customers who opened an ANZ Rewards Travel Adventures Card account from November 2018 until April 2021;

   (d) reversing in September 2019 the amendments made by ANZ in September 2018 to its fees and charges booklet, with the result that between September 2019 and September 2021 the letters of offer and the fees and charges booklet contained inconsistent descriptions of the circumstances in which fees would be charged for cash advances; and

   (e) not removing all descriptions of the term "Available Funds" from its website in June 2018 and reinstating two web pages containing that description in July 2019 which appeared until July 2020 and October 2021 respectively.

AND THE COURT ORDERS THAT:

4. Within 30 days, ANZ pay to the Commonwealth a pecuniary penalty of $15 million in respect of ANZ's conduct declared to be contraventions of s 12DB(1)(g) of the ASIC Act.

5. Within 30 days, ANZ pay ASIC's costs of and incidental to the proceeding.

Appendix 1 – Relevant ANZ consumer credit card products

ANZ Low Rate MasterCard
ANZ First Low Interest Visa
ANZ Platinum
ANZ Low Rate
ANZ Rewards Platinum
ANZ Rewards
ANZ Low Rate MasterCard Platinum
ANZ First Free Days
ANZ Frequent Flyer
ANZ Frequent Flyer Visa Platinum
ANZ Frequent Flyer Gold
ANZ Rewards Travel Adventures
ANZ Rewards Black
ANZ Frequent Flyer Black

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

REASONS FOR JUDGMENT

BEACH J

1 Australia and New Zealand Banking Group Ltd has admitted contraventions of s 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 47(1)(a) of the *National Consumer Credit Protection Act 2009* (Cth) in connection with representations made on key ANZ channels being ANZ's internet banking platform, mobile applications and ATMs with respect to the price of cash advances made using certain ANZ consumer credit cards.

2 This morning I made various declarations and orders concerning such contraventions, and these are my reasons for doing so.

3 The parties put before me several statements of agreed facts and admissions setting out inter-alia facts that are taken not to be disputed by the parties for the purposes of s 191(2) of the *Evidence Act 1995* (Cth).

4 ANZ admits that from 27 May 2016 to 16 November 2018 in relation to the price of cash advances made using certain ANZ consumer credit card products, and from 17 November 2018 to 18 April 2021 in relation to the price of cash advances made using a further card account opened on or after 17 November 2018, it made false or misleading representations on the key ANZ channels, and thereby contravened s 12DB(1)(g) of the ASIC Act.

5 Further, ANZ admits that from April 2018 to 23 September 2021, in circumstances where there was a risk that customers would misapprehend the circumstances in which fees and interest were charged on cash advances made on key ANZ channels using an ANZ consumer credit card, ANZ failed to do all things necessary to ensure that the credit activities authorised by its credit licence were engaged in efficiently, honestly and fairly, and therefore contravened s 47(1)(a) of the Credit Act. Let me focus on what was said to be a lack of efficiency or fairness.

6 First, ANZ did not amend the labels that it used to display a customer's available funds and current balance on the key ANZ channels until September 2021.

7 Second, ANZ amended its ANZ consumer credit card product letters of offer in November 2018, except for customers who opened an ANZ Rewards Travel Adventures Card account from that time, and amended its ANZ Personal Banking Fees and Charges Booklet (the booklet) in September 2018 in a way that was not sufficient to make clear to customers the circumstances in which fees would be charged for cash advances.

8 Third, ANZ did not amend its letters of offer for customers who opened an ANZ Rewards Travel Adventures Card account from November 2018 until April 2021.

9 Fourth, ANZ reversed in September 2019 the amendments it made in September 2018 to the booklet, with the result that between September 2019 and September 2021 the letters of offer and the booklet contained inconsistent descriptions of the circumstances in which fees would be charged for cash advances.

10 Fifth, ANZ did not remove all descriptions of the term "available funds" from its website in June 2018 and reinstated two web pages containing that description in July 2019 which appeared until July 2020 and October 2021 respectively.

11 Now on the basis of the admitted contraventions it is said that I should make the following declarations and order.

12 First, it is said that declarations of contravention of s 12DB(1)(g) of the ASIC Act and s 47(1)(a) of the Credit Act should be made.

13 Second, it is said that a pecuniary penalty should be imposed in the amount of $15 million.

14 Now before proceeding further I should make one comment concerning the use of the so-called innovative device of concise statements, as the present case was commenced with one such statement.

15 In simple factual cases where the real contest is say a point of construction on an insurance policy or some other straight-forward legal point, concise statements are desirable and can more than adequately take the place of proper pleadings.

16 But where there is substantial factual complexity involving circumstances or transactions over a lengthy time frame, which facts are contested, the use of a concise statement should be confined to its valuable triaging function only. And this applies all the more so in civil penalty proceedings if a large number of contraventions and a serious factual contest are involved, where both the underlying facts and the number and characterisation of the alleged contraventions need to be identified with precision rather than utilising a superficial narrative form.

17 I have had the advantage of reading Derrington J's nicely equilibrated discussion on the use and abuse of concise statements in *Australian Securities and Investments Commission v National Australia Bank Limited (No 2)* [2023] FCA 1118 at [30] to [39], and at the least agree

with what he has said. But I would go even further in being even less generous and sympathetic than he is as to their use in complex contexts. But none of this troubled me in the present matter as procedures were put in place at an early stage which facilitated and ultimately led to the parties' agreement as to the relevant facts, for which they should be commended.

Contraventions of the ASIC Act and the Credit Act

18 Let me begin with some of the agreed facts.

19 ANZ consumer credit cards primarily facilitate customers making purchases, but can also be used to make cash advances. A cash advance includes any use of a credit card or credit card account for obtaining cash or for something reasonably similar to obtaining cash.

20 During the period from 27 May 2016 to 23 September 2021 (the relevant period), ANZ consumer credit card customers were able to make cash advances through multiple channels including, relevantly, the key ANZ channels, which I have previously identified as ANZ's internet banking platform, mobile applications and ATMs.

21 During the relevant period, ANZ provided to each customer who established an ANZ consumer credit card account a consumer credit card letter of offer, which contained terms relating to the relevant consumer credit card product, and the "ANZ Conditions of Use", which contained further terms relating to the consumer credit card product.

22 Further, ANZ made available to customers with ANZ consumer credit card accounts the booklet, which set out information in respect of the fees and charges for ANZ's products.

23 During the period from 27 May 2016 to 16 November 2018, and also during the period from 17 November 2018 to 18 April 2021 for ANZ Rewards Travel Adventures Card accounts opened on or after 17 November 2018, the letters of offer in respect of ANZ's consumer credit card products said:

> A 2% fee or the minimum fee set out below, whichever is greater, will be charged if you obtain a cash advance from your credit card account. An ATM operator fee may also apply.
>
> - If the account (based on transactions processed by ANZ) is in credit balance at the time we process the cash advance, the credit amount will offset the amount of the cash advance in the calculation of the 2% fee.
>
> …

24 During the relevant period, the ANZ Conditions of Use in respect of ANZ's consumer credit card products said:

> You may avoid being charged interest on a cash advance if your credit card account is in credit (by at least the amount of the cash advance) at the time of the cash advance.
>
> Your account may be in credit if, for example, you have previously paid more off your account than you owe.

25 During the period from 27 May 2016 to September 2018, and during the period from September 2019 to September 2021, the booklet contained a statement substantially the same as the statement in the letters of offer that I have just set out.

26 Now during the relevant period, ANZ employed two core systems relevant to credit card transactions.

27 The first was the Core Transaction Management (CTM) system. The CTM system controlled the amounts displayed to consumer credit card customers on the key ANZ channels.

28 The second was the Vision Plus system. The Vision Plus system processed transactions performed on credit card accounts at the end of the day or on the next business day. The Vision Plus system processed debits before credits.

29 The effect of these two systems was that amounts displayed to ANZ consumer credit card customers on the key ANZ channels by the CTM system could include transactions that had not yet been processed by the Vision Plus system.

30 During the relevant period, the key ANZ channels displayed two amounts to ANZ consumer credit card customers using certain labels. One field displayed was available funds, that is, the amount of funds able to be used by the customer in making any credit card transaction, including any unutilised portion of the customer's credit limit. Another field displayed was current balance, that is, the amount of the customer's account balance, which could be a negative balance, indicating the amount of the credit limit the customer had utilised, a zero balance, indicating that the full amount of the credit limit was unutilised, or a positive balance, indicating that the balance was an amount above the fully unutilised credit limit.

31 During the relevant period, these amounts were displayed on the key ANZ channels using various labels, but from 21 September 2021 different labels applied.

32 When a customer made certain types of deposits to their credit card account, the CTM system immediately increased the amounts displayed on the key ANZ channels as the customer's available funds and current balance by the amount of that deposit. At that time, such a deposit had not yet been processed by the Vision Plus system.

33 During the period from 27 May 2016 to 16 November 2018 in respect of the ANZ consumer credit card products, and during the period from 17 November 2018 to 18 April 2021 in respect of ANZ Rewards Travel Adventures Card accounts opened on or after 17 November 2018, in circumstances where a deposit was made to an ANZ consumer credit card account, the CTM system caused the key ANZ channels to display the customer's available funds as including the amount of the deposit and as being above the customer's credit card limit, and to display the customer's current balance as including the amount of the deposit and as being positive.

34 If a cash advance was then made from the account and the cash advance was processed by the Vision Plus system prior to the deposit, the amount of the deposit did not offset the amount of the cash advance in the calculation of any cash advance fee, and the customer may have been charged interest including on the cash advance fee or cash advance amount.

35 A cash advance fee was charged by ANZ when, at the time the cash advance was processed by the Vision Plus system, the cash advance amount was greater than any processed credit in the account.

36 Let me now turn to the contraventions.

Section 12DB(1)(g) of the ASIC Act

37 Section 12DB(1)(g) relevantly provided that:

> 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:
>
> …
>
> (g) make a false or misleading representation with respect to the price of services;
>
> …

38 Although the language used in s 12DB(1)(g) ("false or misleading") is different to that used elsewhere in the ASIC Act such as s 12DA(1) or s 1041H(1) of the *Corporations Act 2001* (Cth) ("misleading or deceptive"), there is no material difference between those expressions.

39 I have addressed the relevant principles concerning cognate provisions of the Australian Consumer Law in *Comité Interprofessionnel du Vin de Champagne v Powell* (2015) 330 ALR 67 at [169] to [178] in the following terms:

> It is appropriate to state a number of non-contentious principles applicable to the

present case.

[T]here is no meaningful difference between the words and phrases "misleading or deceptive", "mislead or deceive" or "false or misleading"; see *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14] per Gordon J and *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* (2014) 317 ALR 73 at [40] per Allsop CJ.

[W]here the issue is the effect of conduct on a class of persons such as consumers (rather than identified individuals to whom a particular misrepresentation has been made or particular conduct directed), the effect of the conduct or representations upon ordinary or reasonable members of that class must be considered (*Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at [102] and [103]). This hypothetical construct avoids using the very ignorant or the very knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful. Further, the objective characteristics that one attributes to ordinary or reasonable members of the relevant class may differ depending on the medium for communication being considered. There is scope for diversity of response both within the same medium and across different media.

…

[C]onduct is misleading or deceptive or likely to mislead or deceive if it has the tendency to lead into error (*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [39] per French CJ, Crennan, Bell and Keane JJ). But conduct causing confusion or wonderment is not necessarily co-extensive with misleading or deceptive conduct (*Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 at [8] per French CJ, Crennan and Kiefel JJ).

[T]he question is whether there was a real but not remote chance or possibility that the relevant conduct was misleading or deceptive or likely to mislead or deceive. To assess this one looks at the potential practical consequences and effect of the conduct.

[I]t is not necessary to show actual deception. Relatedly, it is not necessary to adduce evidence from persons to show that they were actually misled or deceived.

[T]here must be a sufficient nexus between the impugned conduct or apprehended conduct and the consumer's misconception or deception. As was said in *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1 at [51] by French, Heerey and Lindgren JJ:

> The characterisation of conduct as "misleading or deceptive or likely to mislead or deceive" involves a judgment of a notional cause and effect relationship between the conduct and the putative consumer's state of mind. Implicit in that judgment is a selection process which can reject some causal connections, which, although theoretically open, are too tenuous or impose responsibility otherwise than in accordance with the policy of the legislation.

Subject to one qualification, the error or misconception must result from the respondent's conduct and not from other circumstances for which the respondent was not responsible. But conduct that exploits or feeds into and thereby reinforces the pre-existing mistaken views of members of the relevant class may be misleading or deceptive or likely to mislead or deceive…

[C]onduct that is merely transitory or ephemeral where any likely misleading impression is likely to be readily or quickly dispelled or corrected does not constitute

conduct that would infringe [s 29] (*Knight v Beyond Properties Pty Ltd* (2007) 242 ALR 586 at [58] per French, Tamberlin and Rares JJ).

40 See also my discussion in *Flexopack SA Plastics Industry v Flexopack Australia Pty Ltd* (2016) 118 IPR 239 at [259] to [277] and *State Street Global Advisors Trust Company v Maurice Blackburn Pty Ltd (No 2)* (2021) 164 IPR 420 at [703] to [746].

41 Now in circumstances where, first, a deposit was made into a customer's credit card account but was not yet processed, second, the key ANZ channels displayed the customer's available funds as including the amount of the deposit and as being above the customer's credit card limit, and displayed the customer's current balance as including the amount of the deposit and as being positive, and third, the terms and conditions which governed the credit card product provided that if the customer's credit card account was in credit at the time ANZ processed the cash advance that credit amount would offset the amount of the cash advance in the calculation of the fee and the customer may not be charged interest for the cash advance, ANZ represented that the customer could, at that time, make a cash advance of up to the amount by which the customer's available funds exceeded the customer's credit card limit without incurring fees or interest in relation to such cash advance.

42 In fact, in those circumstances, if the cash advance was processed before the deposit, the deposit did not offset the amount of the cash advance in the calculation of any cash advance fee, and in some cases, interest was charged.

43 Now it is not in dispute that such a representation was made in trade or commerce and in connection with the supply or possible supply of financial services, within the meaning of s 12DB(1), and was a representation with respect to the price of services within the meaning of s 12DB(1)(g).

44 I note that in order to fall within s 12DB(1)(g), the relevant representation must be with respect to the price of services. The word "price" is defined in s 12BA(1) as including "a charge of any description". The word "services" is relevantly defined in that provision as including "any rights … benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce".

45 By reason of these matters, and based upon the statements of agreed facts and ANZ's various admissions, the following may be concluded.

46 First, from 27 May 2016 to 16 November 2018, in trade or commerce, and in connection with the supply of financial services, ANZ made false or misleading representations on the key ANZ channels with respect to the price of cash advances made using an ANZ consumer credit card, and therefore contravened s 12DB(1)(g).

47 Second, from 17 November 2018 to 18 April 2021, in trade or commerce, and in connection with the supply of financial services, ANZ made false or misleading representations on the key ANZ channels with respect to the price of cash advances made using an ANZ Rewards Travel Adventures Card account opened on or after 17 November 2018, and therefore contravened s 12DB(1)(g).

48 Further, a separate contravention of s 12DB(1)(g) arose each time a customer made a cash advance and was charged a cash advance fee in the circumstances outlined.

49 Let me turn to the Credit Act contraventions.

Section 47(1)(a) of the Credit Act

50 Section 47(1)(a) of the Credit Act required the holder of an Australian credit licence to "do all things necessary to ensure that the credit activities authorised by the credit licence are engaged in efficiently, honestly and fairly".

51 Section 47(1)(a) is in the same terms as s 912A(1)(a) of the Corporations Act and so the interpretation of the latter is relevant to the interpretation of the former.

52 Now there is a line of authority in this Court holding, in my view correctly, that the words "efficiently, honestly and fairly" must be read as a compendium describing a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty (*Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* (2012) 88 ACSR 206 at [69] to [70] per Foster J; *Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq)* (2017) 348 ALR 525 at [191]; *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147 at [2347]; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 at [506], [517] to [518]; *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* (2022) 407 ALR 1 at [60], [64] to [66]; *Australian Securities and Investments Commission v National Australia Bank Ltd* (2022) 164 ACSR 358 at [350] to [351] per Derrington J;

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2022] FCA 1422 at [147] per Downes J).

53 Let me also set out what I said in *ASIC v AGM Markets (No 3)* at [508] to [510], [520] to [522] and [528] expanding upon some of the concepts in the composite phrase:

> Third, the word "efficient" refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate. Inefficiency may be established by demonstrating that the performance of a licensee's functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect.
>
> Fourth, it is not necessary to establish dishonesty in the criminal sense. The word "honestly" may comprehend conduct which is not criminal but which is morally wrong in a commercial sense.
>
> Fifth, the word "honestly" when used in conjunction with the word "fairly" tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound.
>
> …
>
> Let me say something about "fairly". Judges applying s 912A(1)(a) have usually not sought to define "fairly" except to explain its structural setting in the composite phrase. This is unsurprising. And of course no dictionary definition could be adequate for the task given the intrinsic circularity with such definitions. For example, take the *Macquarie Dictionary* definition. First, the concept of "free from injustice" is question begging and conclusionary. It adds little to elucidate "fairly". Second, the phase "that which is legitimately sought, pursued, done, given etc." is also question begging. No content is given to what is legitimate. There is irremediable circularity unless legitimacy simply incorporates other statutory or common law/equitable normative standards of behaviour. Third, the phrase "proper under the rules" is also devoid of content unless "proper" means "in compliance with". Fourth, if one construes "fair" to include "free from dishonesty", then this all just suggests that the phrase "efficiently, honestly and fairly" should be read compendiously.
>
> Could you convincingly define "fairly" by what it lacks? To say that fairly means free from bias, free from dishonesty, etc, is to stipulate necessary negative conditions. And to do so may give you some boundary conditions. But no positive conditions are stipulated. No content is given, let alone sufficient conditions. But to stipulate negative conditions may not be unhelpful.
>
> Should "fairly" only be viewed from the perspective of an investor, borrower or other person interacting with the licensee? No. Fairness is to be judged having regard to the interests of both parties. Other statutory provisions may be designed to tilt the scales, but not s 912A(1)(a) and the statutory composite norm it enshrines. Disproportionate emphasis should not be given to what is the third part of a composite phrase in a manner which creates unsatisfactory asymmetry in favour of those with whom the licensee deals. This section is not a back door into an "act in the [best] interests of" obligation. Other specific provisions of the Act nicely fulfil that role. There is nothing to indicate that s 912A(1)(a) was to have that bias.
>
> …
>
> In summary, in my view it is not justifiable to take one word from a composite phrase,

artificially elevate its significance and read it in a manner asymmetrically in favour of an investor.

54 Now I have put to one side the obiter observations of two of the three judges in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170. My reasons for doing so are set out in *ASIC v AGM Markets (No 3)* at [513] to [519] where I said:

> On the question of the proper construction of s 912A(1)(a), my attention has been drawn to various observations made by the Full Court in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* that I discussed earlier in the context of financial product advice. But several points should be noted.
>
> First, before the trial judge, Westpac did not question the statements of principle propounded by ASIC which in essence applied the principles discussed by Foster J.
>
> Second, ASIC's three appeal grounds in that matter rather concerned s 766B(3); ASIC's notice of appeal was tendered before me in order to properly identify the s 766B(3) points that had been raised and that I have discussed earlier in my reasons. Further, to the extent that s 912A(1)(a) was raised by Westpac on any cross-appeal, as I say the parties' positions on construction seem to have been in substance as before the trial judge.
>
> Third, some members of the Full Court queried whether the phrase "efficiently, honestly and fairly" should be read compendiously (O'Bryan J at [422]-[426]). But as this was not decided by at least a majority, I am bound to apply the single judge decisions unless I consider them to be plainly wrong, which I do not.
>
> Fourth, Allsop CJ said (at [172]):
>
> > Words such as 'efficiently', 'honestly' and 'fairly' and a composite or compendious phrase or expression such as 'efficiently, honestly and fairly' do not admit of comprehensive definition. Certainly a degree of articulation of instances or examples of conduct failing to satisfy the phrase will be helpful and of guidance, as will an articulation or description of the norms involved.
>
> With respect, I agree with that statement. He then went on to say (at [173]):
>
> > The provision is part of the statute's legislative policy to require social and commercial norms or standards of behaviour to be adhered to. The rule in the section is directed to a social and commercial norm, expressed as an abstraction, but nevertheless an abstraction to be directed to the 'infinite variety of human conduct revealed by the evidence in one case after another.' (See *Gummow WMC*, 'The Common Law and Statute' in *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999) at 18-19.)
>
> Now neither Jagot J nor O'Bryan J went so far. With respect, I prefer to view s 912A(1)(a) as enshrining a statutory norm to be read conformably with s 760A and the other provisions of the Corporations Act and the ASIC Act, of course to be applied to an infinite variety of corporate delinquency and self-interested commerciality. But to say this is not to deny that it may implicitly pick up some aspects of what some might identify as social and commercial norms, although reasonable minds might differ as to where to ground such an otherwise free-floating concept.

55 Conduct may fail to meet the statutory expression even if it cannot be described as dishonest, and a breach of the standard is not limited to conduct that is morally wrong in the commercial sense. Similarly, a finding of contravention can be made even where it is not shown that the contravener engaged in intentional wrongdoing. A contravention is determined by reference to objective circumstances.

56 It is well established that the words "efficiently, honestly and fairly" indicate that, amongst other things, the services are to be provided with competence in complying with relevant statutory obligations (*ASIC v Camelot Derivatives* at [69] to [70]; *ASIC v AGM Markets (No 3)* at [507]). The requirement of efficiency has been recognised as requiring that the licensee is adequate in performance, produces the desired effect, and is capable, competent and adequate (*ASIC v Camelot Derivatives* at [69] to [70]; *ASIC v AGM Markets (No 3)* at [508]).

57 Further, a contravention of the "efficiently, honestly and fairly" standard does not require a contravention of a separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise. The statutory standard itself is the source of the obligation.

58 Now having regard to ANZ's conduct described earlier and based upon the agreed facts, the following may be noted.

59 From 27 May 2016 to 23 September 2021, there was a risk that customers would misapprehend the circumstances in which fees and interest would be charged on cash advances made on the key ANZ channels using an ANZ consumer credit card product.

60 From at least July 2015, ANZ had received complaints that contained references to the charging of cash advance fees.

61 In February 2018, the Financial Ombudsman Service (FOS) wrote to ANZ identifying a possible systemic issue relating to the circumstances in which cash advance fees were charged, and stating that FOS would be reviewing whether ANZ's terms and conditions were sufficiently clear to establish the circumstances in which a cash advance fee would be charged.

62 In March 2018, ANZ undertook initial analysis in relation to the possible systemic issue identified by FOS which related to the terms and conditions around cash advances. In April 2018, ANZ commenced an internal investigation into that issue.

63 In early April 2018, ANZ notified ASIC of a potential issue relating to the display of funds deposited to customers' accounts and the possible charging of fees and interest. ANZ admits

that from April 2018 it could have taken steps to mitigate the risk that customers would misapprehend the circumstances in which fees and interest were charged on cash advances made on the key ANZ channels using an ANZ consumer credit card product.

64 In June 2018, ANZ informed ASIC that it had removed all descriptions of the term "available funds" from its website. However, some instances of that description were inadvertently not removed until January 2019, and two web pages containing that description were either not removed or reinstated in July 2019. Those two web pages were later identified and removed in July 2020 and October 2021, respectively.

65 In September 2018, ANZ made changes to the description of the circumstances in which a cash advance fee would be charged in the booklet.

66 On 17 November 2018, ANZ made changes to the description of the circumstances in which a cash advance fee would be charged in its letters of offer, except in respect of ANZ Rewards Travel Adventures Card accounts opened on or after 17 November 2018.

67 In September 2019, ANZ inadvertently reversed the amendments made in September 2018 to the booklet, with the result that, between September 2019 and September 2021, the letters of offer and the booklet contained inconsistent descriptions of the circumstances in which fees were charged on cash advances made on the key ANZ channels using most ANZ consumer credit card products. In respect of customers who held an ANZ Rewards Travel Adventures Card product that had been opened on or after 17 November 2018, no inconsistency was created between the booklet and the letter of offer until 19 April 2021. That is because, for ANZ Rewards Travel Adventures Card accounts opened on or after 17 November 2018, the amendment to the letter of offer referred to above was not implemented.

68 On 19 April 2021, ANZ made further changes to its letters of offer. At that time, ANZ amended the letters of offer for ANZ Rewards Travel Adventures Card accounts.

69 ANZ amended the labels that it used to display a customer's available funds and current balance on the key ANZ channels in September 2021.

70 In summary and on the basis of the above narration, from April 2018 to 23 September 2021, in circumstances where there was a risk that customers would misapprehend the circumstances in which fees and interest were charged on cash advances made on key ANZ channels using an ANZ consumer credit card product, ANZ failed to do all things necessary to ensure that the

credit activities authorised by its credit licence were engaged in efficiently, honestly and fairly, and therefore contravened s 47(1)(a).

71 First, it did not amend the labels that it used to display a customer's available funds and current balance on the key ANZ channels until September 2021.

72 Second, it amended its letters of offer in November 2018, except for customers who opened an ANZ Rewards Travel Adventures Card account from that time, and amended its booklet in September 2018 in a way that was not sufficient to make clear to customers the circumstances in which fees would be charged for cash advances.

73 Third, it did not amend its letters of offer for customers who opened an ANZ Rewards Travel Adventures Card account from November 2018 until April 2021.

74 Fourth, it reversed in September 2019 the amendments made by it in September 2018 to the booklet, with the result that between September 2019 and September 2021 the letters of offer and the booklet contained inconsistent descriptions of the circumstances in which fees would be charged for cash advances.

75 Fifth, it did not remove all descriptions of the term "Available Funds" from its website in June 2018 and reinstated two web pages containing that description in July 2019 which appeared until July 2020 and October 2021 respectively.

76 Generally, it is accepted that ANZ failed to act "efficiently" or "fairly" as those terms are used in the composite phrase and so contravened s 47(1)(a) given its conjunctive form.

The proper approach to the parties' joint position

77 I have discussed this in *ASIC v Westpac (Omnibus)* at [100] to [102] and refer to what I said there.

78 Now there is no single appropriate penalty. Rather, there is a permissible range of penalties within which no particular figure can necessarily be said to be more appropriate than another. The permissible range is determined by all the relevant facts and consequences of the contravention and the contravener's circumstances. And where the penalty proposed by the parties is within the permissible range, I should not depart from the submitted figure merely because I might have been disposed to select another figure.

Declarations

79 I have discussed this in *ASIC v Westpac (Omnibus)* at [103] to [107] and refer to what I said there.

80 Now since 13 March 2019, s 12GBA(3) of the ASIC Act has required the Court to make a declaration of contravention of a civil penalty provision in certain circumstances. Section 12GBA(3) applies only where the conduct constituting the contravention of the provision occurred "wholly" on or after 13 March 2019 (s 322 of the ASIC Act).

81 More generally, there is utility in making declarations which set out the particular contraventions found and the basis for the penalties ordered. Declarations are appropriate to record the Court's disapproval of the conduct and to make clear to other would-be wrong-doers that such conduct is unlawful. So, they serve the purpose of general deterrence.

82 Now on the basis of the various statements of agreed facts and admissions I am satisfied that ANZ has contravened s 12DB(1)(g) of the ASIC Act and s 47(1)(a) of the Credit Act, and I will make declarations accordingly in the form submitted which are well drawn and not overly elaborate.

Civil penalties - statutory provisions

83 Let me turn now to the question of penalty, which the balance of these reasons addresses.

84 Now during the relevant period, s 12DB(1)(g) of the ASIC Act was a civil penalty provision.

85 Until 13 March 2019, the maximum penalty for a contravention of s 12DB(1)(g) by a body corporate was 10,000 penalty units (see the then s 12GBA(3)).

86 By amendments made by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) that commenced on 13 March 2019, the size of the maximum penalty for a contravention of s 12DB(1)(g) by a body corporate increased, but only where the conduct constituting the contravention of the provision occurred wholly on or after 13 March 2019 (s 322).

87 Since 13 March 2019, s 12GBB(3) has provided that after a declaration is made under s 12GBA, the Court may order the person to pay a pecuniary penalty that the Court considers appropriate, but not more than the amount specified in s 12GBC.

88 Section 12GBC provides that the pecuniary penalty must not be more than the pecuniary penalty applicable to the contravention, which is determined in accordance with s 12GBCA. Under s 12GBCA(2), for a body corporate, the maximum pecuniary penalty for the contravention of a civil penalty provision is the greatest of: (a) 50,000 penalty units; (b) if the Court can determine the "benefit derived and detriment avoided" because of the contravention (as defined in s 12GBCE), that amount multiplied by three; and (c) either 10% of the annual turnover of the body corporate for the 12 month period ending at the month when the contravention occurred or began, or 2.5 million penalty units (if 10% of the annual turnover is greater than an amount equal to 2.5 million penalty units).

89 Now in this proceeding, only a relatively small number of contraventions of s 12DB(1)(g) occurred wholly on or after 13 March 2019. They concern customers who, on or after 13 March 2019, opened an ANZ Rewards Travel Adventures Card account, were provided with ANZ's relevant terms and conditions, and made a cash advance on that account in the circumstances described above.

90 Now under both the previous penalty regime (see the then s 12GBA) and the new penalty regime (s 12GBB), if the Court is satisfied that a person has contravened s 12DB, the Court can order that person to pay a pecuniary penalty that the Court determines to be appropriate, subject to the applicable maximum.

91 Under both regimes, in determining the appropriate penalty amount the Court must have regard to all relevant matters including, broadly stated, the nature and extent of the contravention and any loss or damage suffered as a result of the contravention, the circumstances in which the contravention took place, and whether the person has previously been found by a court to have engaged in any similar conduct. The precise language is contained in the then s 12GBA(2) for the previous penalty regime, and in s 12GBB(5) for the new penalty regime.

92 Let me turn to the Credit Act. Prior to 13 March 2019, s 47(1)(a) was not a civil penalty provision.

93 Further, as the conduct constituting ANZ's contravention of s 47(1)(a) did not occur wholly on or after 13 March 2019, no civil penalty has been sought in respect of that contravention (*National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) sch 8, cl 3).

94 Nevertheless, I agree with the parties that the facts that gave rise to the contravention of s 47(1)(a) of the Credit Act may be taken into account when considering the penalty for the contraventions of s 12DB(1)(g) of the ASIC Act insofar as they are a feature of that contravening conduct and inform the nature and seriousness of the contraventions.

Penalty principles

95 In summary, I agree that a total pecuniary penalty of $15 million is appropriate for ANZ's contraventions of s 12DB(1)(g). Let me elaborate on my reasoning and begin with the question of deterrence.

96 In *ASIC v Westpac (Omnibus)*, I said at [125] to [129]:

> Let me say something at this point on deterrence.
>
> The primary purpose for the imposition of a pecuniary penalty under civil penalty regimes is deterrence, both specific and general. The pecuniary penalty imposed must operate to deter the particular contravener who is before the Court from taking future action of a similar kind and also to deter others from doing the same.
>
> The penalty "must be at a level that a potentially-offending corporation will see as eliminating any prospect of gain. … It is in this way that the statutory object of ensuring the contravention is not regarded as a mere cost of doing business is achieved" (*ASIC v Westpac (No 3)* at [98]).
>
> In considering the extent to which the penalty achieves deterrence, it is relevant to have regard to a contravener's size and financial position. In this respect, where the contravener is a distinct legal entity within a broader corporate structure, it is appropriate to take into account that broader structure in assessing deterrence, including where the contravener is part of a much larger, internally coordinated and wealthy corporate group. In that regard, the particular importance of the size and resources of the Westpac corporate group in setting penalties for entities within it is self-evident.
>
> The process of fixing a pecuniary penalty under civil penalty regimes proceeds by way of intuitive synthesis. This calls for a discretionary value judgment based on all relevant factors. The court undertakes a balancing exercise of all the relevant factors, including aggravating and mitigating factors, to ascertain the most appropriate penalty in the case before it. A court should also have regard to prescribed maximum penalties.

97 It is well established that deterrence, in its two dimensions of specific and general deterrence, is the primary purpose of civil penalties. But moving beyond this and the statutorily mandated matters to consider, what other factors are relevant?

Relevant factors

98 Clearly, the following *French* factors are relevant to assessing what is an appropriate penalty:

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

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

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

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

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

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

(g) whether the contravener has shown a disposition to co-operate with the authorities responsible for the enforcement of the ASIC Act in relation to the contravention and taken steps to remediate.

99 The *French* factors may be augmented or elaborated on (see *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585 at [49]) to include:

(a) the existence within the contravener of compliance systems, including provisions for and evidence of education and internal enforcement of such systems;

(b) remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention;

(c) whether the directors of the company were aware of the relevant facts and, if not, what processes were in place at the time or put in place after the contravention to ensure their awareness of such facts in the future;

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

(e) whether the company has disgorged any profit or benefit received as a result of the contravention or made reparation.

100 I also said in *ASIC v Westpac (Omnibus)* at [123]:

> Further to factor (l) above **[see [99(e)] in the present context]**, a voluntary remediation program that is effective and provides adequate financial compensation to persons affected by the contravention and ameliorates loss or damage otherwise suffered by consumers is a mitigating circumstance in relation to the assessment of penalty. Further, coupled with other factors, a voluntary remediation program can be one aspect of evidence of a corporate culture that is likely to be conducive to compliance and demonstrative of contrition, and so may warrant a reduction in penalty. But although

> an effective remediation program may be a mitigating factor on penalty, a willingness to remediate by a financial service licensee who provides financial services to retail clients (and any assessment as to whether that willingness reflects a culture conducive to compliance or contrition) must be considered in the context where that licensee is required by s 912B of the Corporations Act to have arrangements for compensating clients for loss or damage suffered because of breaches of the relevant obligations by the licensee or its representatives.

101 The process of having regard to the various relevant factors in deriving a penalty figure is one of intuitive synthesis (*Australian Competition and Consumer Commission v Murray Goulburn Co-Operative Co Ltd* [2018] FCA 1964 at [36]; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 4)* (2020) 148 ACSR 511 at [47]). The process requires a consideration of all factors taken together.

102 But of course the appropriateness of the amount of a penalty must be assessed by reference to the specific civil penalty provision which has been contravened in light of its context and purpose, and the objects of the relevant statute as a whole.

Maximum penalties

103 The plurality in *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 considered that the statutory maximum penalty "is 'but one yardstick that ordinarily must be applied', and must be treated 'as one of a number of relevant factors'" (at [54]) to inform the assessment of a penalty of appropriate deterrent value.

104 The plurality rejected an approach that "[treated] the statutory maximum [penalty] as implicitly requiring that contraventions be graded on a scale of increasing seriousness, with the maximum to be reserved exclusively for the worst category of contravening conduct" (at [49]).

105 I made other references to the plurality's views in *ASIC v Westpac (Omnibus)* at [130] and [131] as follows:

> … [T]he plurality's discussion concern[ed] their rejection of the Full Federal Court's "notion of proportionality" (as the plurality described it) in the decision under appeal and the Full Federal Court's approach to the statutory maximum and their focus on the circumstances of the contravention(s) at the expense of the circumstances of the contravener. As the plurality said (at [57]):
>
> > …both the circumstances of the contravener and the circumstances of the contravention may be relevant to the assessment of whether the maximum level of deterrence [scil maximum penalty] is called for.
>
> So, "the maximum penalty is intended by the Act to be imposed in respect of a contravention warranting the strongest deterrence within the prescribed cap" (at [58]). And in that regard, one does not "ascertain the extent of the necessity for deterrence by reference exclusively to the circumstances of the contravention" (at [58]).

106 Now under s 2B of the *Acts Interpretation Act 1901* (Cth), "penalty unit" in relation to a civil penalty provision is defined as having the meaning given in s 4AA of the *Crimes Act 1914* (Cth). At the times relevant to this proceeding, the relevant penalty unit value was for contraventions that occurred on or before 30 June 2017, $180 (*Crimes Legislation Amendment (Penalty Unit) Act 2015* (Cth), sch 1, items 2 and 5), for contraventions that occurred on or after 1 July 2017 and on or before 30 June 2020, $210 (*Crimes Amendment (Penalty Unit) Act 2017* (Cth), sch 1, items 1 and 3), and for contraventions that occurred on or after 1 July 2020, $222 (see Notice of Indexation of the Penalty Unit Amount dated 14 May 2020 (*Crimes Act 1914* (Cth), s 4AA(8)).

107 It follows that for contraventions subject to the former penalty regime, the maximum penalty for each contravention that occurred between 27 May 2016 and 30 June 2017 was $1.8 million, the maximum penalty for each contravention that occurred between 1 July 2017 and 30 June 2020 was $2.1 million, and the maximum penalty for each contravention that occurred on or after 1 July 2020 was $2.22 million.

108 For the small number of contraventions subject to the new penalty regime, the maximum penalty is either $525 million, being for contraventions that occurred between 13 March 2019 and 30 June 2020, or $555 million, being for contraventions that occurred between 1 July 2020 and 18 April 2021. Now ANZ's annual turnover in each 12-month period since 13 March 2019 has been sufficiently high that 10% of that figure is greater than an amount equal to 2.5 million penalty units.

109 The precise number of contraventions in this case cannot be ascertained from ANZ consumer credit card accounts data. For the purposes of its remediation program, ANZ has sought to identify potentially affected consumer credit card accounts by assuming, in favour of customers, that any deposit made to a customer's account was the first transaction of the day, that the cash advance followed that deposit, and that there were no intervening transactions. If one or more of those assumptions did not in fact occur in respect of a particular account, the scenario described earlier may not have arisen and if so, no contravention would have occurred.

110 ANZ identified through its remediation program approximately 186,000 potentially affected accounts. But only a proportion of these accounts involved an agreed contravention by ANZ. The contraventions concern cash advances on key ANZ channels and do not include transactions on non-ANZ channels. Over the period June 2016 to July 2022, approximately 34% of cash advance transactions were completed on ANZ retail channels including key ANZ

channels, and approximately 66% were completed on non-ANZ channels. The precise number of accounts remediated by ANZ, which involved cash advance transactions on key ANZ channels, has not been quantified.

111 But clearly it is nevertheless appropriate to proceed on the basis that a large number of contraventions of s 12DB(1)(g) have occurred.

112 Given that approach, and having regard to the period of time over which the contraventions occurred and the maximum penalty size for contraventions, including contraventions comprising conduct that occurred wholly on or after 13 March 2019, there is no meaningful overall maximum penalty (*ASIC v AGM Markets (No 4)* at [39], [40] and [64]; *Australian Securities and Investments Commission v La Trobe Financial Asset Management Ltd* (2021) 158 ACSR 363 at [122] per O'Bryan J; *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790 at [65]).

Multiple contraventions

113 The admitted contraventions of s 12DB(1)(g) comprise a large number of separate contraventions as part of one or two courses of conduct over a period from May 2016 to April 2021. As from 17 November 2018 onwards, the only customers who were potentially affected were customers who opened an ANZ Rewards Travel Adventures account on or after that date.

114 Now multiple contraventions may be treated as one or more courses of conduct where there is an interrelationship between the legal and factual elements of each of the offences. But whether separate contraventions should be treated as a course of conduct is an evaluative question having regard to the factual circumstances.

115 As to the course of conduct principle, in *ASIC v Westpac (No 3)* I said at [131] to [134]:

> Now the ASIC Act does not contain any express limitation requiring a course of conduct involving multiple acts or omissions to be treated as a single contravention or to otherwise limit the penalty payable in relation to the contraventions. But rather than imposing separate penalties for each relevant act or omission I may, in an appropriate case, apply the "course of conduct" principle where there is a sufficient interrelationship between the legal and factual elements of the acts or omissions constituting the contraventions. This principle was explained in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1 at [39] and [41] to [42].
>
> The principle can apply when imposing penalties for multiple contraventions of the ASIC Act. But using this tool of analysis to group contraventions does not make the maximum penalty for one contravention the maximum penalty for a course of conduct as a whole where that course of conduct comprises many separate contravening acts.

Further, the principle does not restrict the Court's discretion as to the amount of penalty to be imposed for the course of conduct. Further, the Court is not obliged to apply the principle if the resulting penalty fails to reflect the seriousness of the contravention.

Generally, the principle does not have paramountcy in the process of assessing an appropriate penalty. It cannot operate as a de facto limit on the penalty to be imposed and it cannot unduly fetter the proper application of s 12GBA of the ASIC Act.

In this regard, I repeat what I said in *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 at [21] to [25] to the following effect:

> In determining the appropriate penalty for multiple contraventions, there are two related principles to consider: the "totality" principle and the "course of conduct" principle.
>
> As I have explained, the totality principle requires that the total penalty for related offences not exceed what is proper for the entire contravening conduct involved taking into account *all* factors. The principle operates to ensure that the penalties to be imposed, considered as a whole, are just and appropriate.
>
> Contrastingly, the "course of conduct" principle gives consideration to whether the contraventions arise out of the same course of conduct to determine whether it is appropriate that a single overall penalty should be imposed that is appropriate for the course of conduct. It has a narrower focus. The principle was explained in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461 at [39] per Middleton and Gordon JJ:
>
> > It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. 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. That requires careful identification of what is "the same criminality" and that is necessarily a factually specific inquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions. (emphasis in original)
>
> But even if the contraventions are properly characterised as arising from a single course of conduct, I am not obliged to apply the principle if the resulting penalty fails to reflect the seriousness of the contraventions. The principle does not restrict my discretion as to the amount of penalty to be imposed for the course of conduct. Further, the maximum penalty for the course of conduct is not restricted to the prescribed statutory maximum penalty for any *single* contravening act or omission (i.e. $1.1 million); the respondents' submission to the contrary is rejected.
>
> Further, the "course of conduct" principle does not have paramountcy in the process of assessing an appropriate penalty. It cannot of itself operate as a *de facto* limit on the penalty to be imposed for contraventions of the ACL. Further, its application and utility must be tailored to the circumstances. In some cases, the contravening conduct may involve many acts of contravention that affect a very large number of consumers and a large monetary value of commerce, but the conduct might be characterised as involving a single course

> of conduct. Contrastingly, in other cases, there may be a small number of contraventions, affecting few consumers and having small commercial significance, but the conduct might be characterised as involving several separate courses of conduct. It might be anomalous to apply the concept to the former scenario, yet be precluded from applying it to the latter scenario. The "course of conduct" principle cannot unduly fetter the proper application of s 224.

116 Further, I said in *ASIC v Westpac (Omnibus)* at [135] to [138]:

> There are several matters to note.
>
> First, whilst contraventions arising from separate acts ordinarily attract separate penalties, where there is an inter-relationship between the factual and legal matters of two or more contraventions it may be appropriate to group them as a single course of conduct, so as to avoid double punishment in respect of the relevant acts or omissions that comprise the multiple contraventions. But the course of conduct principle is no more than a tool of analysis and does not restrict the Court's discretion as to the amount of the penalty to be imposed…
>
> Second, where there have been discrete episodes, each involving deliberation, then such a grouping may be inapposite, even if they reflect a common theme, strategy or model.
>
> Third, even a single strategy involving a single or substantially consistent form of conduct might deny such a grouping where the conduct is directed towards numerous recipients. Further, it is not necessarily the case that a "failure of process" which has an impact at different times, upon different people, at different locations or involving different staff of a defendant must be treated in a global way, though the totality principle may still apply.

117 Now in the present case, and as the parties have pointed out, ANZ's contraventions of s 12DB(1)(g) can be analysed as involving one course of conduct spanning the whole of the period from 27 May 2016 to 18 April 2021. But two courses of conduct may also be a justifiable framework with the first occurring from 27 May 2016 to 16 November 2018, and concerning each of the ANZ consumer credit card products, and the second occurring from 17 November 2018 to 18 April 2021, and concerning only ANZ Rewards Travel Adventures Card accounts opened on or after 17 November 2018.

118 For present purposes, I will adopt the singular framework, but nothing turns on my selection.

119 Now where multiple contraventions are treated as a single course of conduct, it does not follow that the maximum penalty for the course of conduct is limited to the maximum penalty for a single contravention, or that I must impose the cumulative total of each of the penalties. Rather, the course of conduct principle is a tool to assist in arriving at the appropriate penalty. I retain a discretion to impose the penalty that best reflects the seriousness of the conduct taken as a whole.

120 Let me deal with what I would describe as another aggregation question.

121 In determining the appropriate penalty for multiple contraventions, regard should be had to the totality principle, as a final consideration of whether the cumulative total of the penalty is just and appropriate and not excessive having regard to the totality of the relevant contravening conduct.

122 In *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* (2020) 148 ACSR 247 at [69] I said:

> … [T]he totality principle must be applied. Where multiple separate penalties are to be imposed upon a particular wrongdoer, the totality principle requires me to make a final check of the penalties to be imposed on a wrongdoer, considered as a whole. It will not necessarily result in a reduction. But in cases where the cumulative total of the penalties to be imposed would be too low or too high, one can alter the final penalties to ensure that they are just and appropriate (*Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at [53] per Goldberg J). Further, I would note here that the concept of proportionality overall can be a cognate boundary condition.

123 In this case, whether ANZ's contraventions of s 12DB(1)(g) are conceived of as one or two courses of conduct and in any event applying the totality principle, a pecuniary penalty of $15 million is appropriate in view of the nature and circumstances of the contraventions and the other factors relevant to the assessment of penalty which I will discuss further in a moment. Let me deal with one other matter before I discuss the application of the principles.

Parity

124 On the question of parity, in *ASIC v Westpac (Omnibus)* I said at [140]:

> Let me also say something about parity. Now differences in the facts and circumstances which underlie different cases mean that there is usually little to be gained by comparing the penalties imposed in other litigation. The parity principle is a doctrine developed in criminal law, the purpose of which is to ensure that like offenders are treated in a like manner. Otherwise, the consistency that is sought is consistency in the application of principle. So, whilst consideration of analogous cases may provide guidance, in all but the co-offender scenario or analogues thereof it is conceptually problematic to look at penalties in other cases to calibrate a figure in the present case when all that one has from the other cases are single point determinations produced by opaque intuitive synthesis. Deconvolution analysis of the single point determinations in order to work out the causative contribution of any particular factor is unrealistic.

The application of the penalty principles

125 In summary, in respect of the admitted contraventions of s 12DB(1)(g), the proposed total pecuniary penalty of $15 million in my view is appropriate. Let me identify some key relevant matters.

126 First, ANZ engaged in a large number of contraventions of s 12DB(1)(g) as part of one course of conduct over a period from May 2016 to April 2021. The majority of the contraventions occurred over a period of about two and a half years from May 2016 to November 2018, but those in relation to the ANZ Rewards Travel Adventures Card accounts occurred over a period of about five years from May 2016 to April 2021. The nature of the conduct involved ANZ making false or misleading representations about the charging of fees and interest for cash advances on consumer credit card accounts in the specific circumstances described above.

127 Second, ANZ's contraventions of s 12DB(1)(g) affected a large number of customers, but it has put in place a remediation program.

128 Now I note that s 912B of the Corporations Act, when read together with the requirement in s 912A(1)(c) for financial services licensees to comply with the financial services laws, and with paragraph (c) of the definition of "financial services law" in s 761A that includes s 12DB, required ANZ to have arrangements for compensating persons for loss and damage suffered because of contraventions of s 12DB by ANZ or its representatives.

129 The payments made by ANZ as part of its remediation program totalled approximately $8.35 million, which sum includes payments made to customers affected by the admitted contraventions of s 12DB(1)(g). I should say at this point and as the parties put to me that it is appropriate to proceed on the basis that the value of the remediation payments made by ANZ can stand as an approximation of the losses to customers who may have been affected by ANZ's contravening conduct, and, on that basis, as an approximation of the gains to ANZ in respect of that conduct.

130 Now the amount paid by ANZ in remediation payments includes amounts paid in respect of cash advance fees that were charged, as well as amounts to reflect interest charged on that fee and the loss of the use of money for a period of time.

131 The majority of remediation payments were made over the period from June 2019 to March 2021, and the final cohort was remediated by December 2021.

132 In addition to the remediation program referred to, ANZ is to establish a new remediation program for the period from 17 November 2018 to 23 September 2021. This remediation program will be designed to remediate certain customers who held an ANZ consumer credit card product and, in respect of the relevant period, were charged a cash advance fee in the circumstances described. ANZ intends to commence this remediation program in October 2023 and will report to ASIC about the progress of the remediation program.

133 Third, in considering whether a penalty is sufficient to achieve specific deterrence, it is relevant to consider the size and financial resources of the contravener. ANZ is one of Australia's major banks and largest listed companies. It reported a statutory profit of $7.119 billion (after tax) for the financial year ending 30 September 2022. As at 30 September 2022, ANZ's market capitalisation was approximately $68.170 billion.

134 Fourth, ASIC does not allege that ANZ's senior management were involved in the contraventions of s 12DB(1)(g). Further, ASIC does not allege that ANZ deliberately set out to mislead customers.

135 Fifth, there were shortcomings in ANZ's compliance arrangements.

136 In February 2018, FOS notified ANZ of a possible systemic issue, and ANZ confirmed the existence of the scenario in June 2018. ANZ did not correct the false or misleading representations for the majority of affected customers until November 2018, and did not correct the false or misleading representations for ANZ Rewards Travel Adventures Card customers who opened their account on or after 17 November 2018 until April 2021. And between November 2018 and 23 September 2021, ANZ failed to adequately address the risk that customers would misapprehend the circumstances in which fees and interest were charged on cash advances made on key ANZ channels using an ANZ consumer credit card product.

137 But I accept that the following features of ANZ's compliance arrangements can be put in mitigation.

138 After FOS identified in February 2018 a possible systemic issue arising from the circumstances in which ANZ charged cash advance fees, ANZ undertook initial analysis in relation to the issue, and in April 2018 commenced an internal investigation into that issue.

139 On 4 April 2018, ANZ notified ASIC of the relevant conduct, which was investigated by ASIC and subsequently resulted in this proceeding.

140 By August 2018, ANZ had undertaken data analysis to help identify potential changes to address the identified scenario, and from mid-September 2018, ANZ began notifying customers of the November 2018 changes to the letters of offer.

141 In November 2018, ANZ began the process of identification and remediation of potentially affected accounts, and remediation payments were made progressively, with the majority of payments made in the period from June 2019 to March 2021.

142 After November 2018, ANZ continued making changes to its terms, conditions and labels to make clearer the circumstances in which customers would be charged a cash advance fee.

143 Sixth, ANZ has engaged constructively with ASIC in the course of this proceeding. It participated in a mediation with ASIC after the negotiation and filing of the statement of agreed facts, but before ASIC filed any lay or expert evidence.

144 And it acknowledged liability in respect of the admitted contraventions during the course of the mediation, which resulted in the resolution of the proceeding without the need for a contested trial on liability.

145 Seventh, there are relevant prior contraventions by ANZ that I have taken into consideration. Moreover, the penalties previously imposed are consonant with the order of magnitude within which the penalty sought before me sits.

146 In *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 3)* [2020] FCA 1421, ANZ admitted that it contravened s 12CB(1) of the ASIC Act on 327,895 occasions by charging fees to customers in circumstances where it lacked a contractual entitlement to charge those fees and knew that the charging of the fees was at risk of being without contractual entitlement. In that case, ANZ also admitted that it contravened s 912A(1)(a) of the Corporations Act.

147 In *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* (2022) 164 ACSR 428, ANZ admitted that, within the period 10 December 2015 to 30 September 2021, ANZ contravened s 12DB of the ASIC Act on 71,461 occasions (from 10 December 2015 to 30 September 2021) and 84,407 occasions (from 10 December 2015 to 22 September 2020) by making false or misleading representations in respect of benefits to which customers who held "Breakfree" packages or offset accounts would receive. It also admitted that it contravened s 47(1)(a) of the Credit Act by failing to maintain adequate systems and

processes to ensure certain benefits were provided to customers who held "Breakfree" packages or offset accounts.

148 Eighth, ANZ has expressed sufficient regret and remorse for its offending.

Conclusion

149 Now I have taken into account the serious nature of the contravening conduct, including the fact that it occurred over a period of almost five years and involved a large number of contraventions.

150 But there are mitigating factors in this case including the changes that ANZ has made in an effort to address the contravening conduct, the remediation program referred to in the statements of agreed facts and the new remediation program referred to earlier, and ANZ's cooperation with ASIC.

151 Having regard to the agreed facts and admissions and applying the relevant principles, a total pecuniary penalty of $15 million is appropriate in this case and satisfies the principal objective of deterrence in its two dimensions of specific and general deterrence.

152 It is not necessary to approach the exercise of assessing the penalty to be imposed in this case by seeking to put a precise figure on each contravention, to arrive at a headline figure, and for a discount then to be applied before standing back and assessing the totality of the final sum arrived at. Rather, employing an intuitive synthesis based on all the factors set out above, I am satisfied that $15 million is an appropriate penalty.

153 For these reasons, I made the declarations and orders sought by the parties.

I certify that the preceding one hundred and fifty-three (153) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach.

Associate:

Dated: 26 September 2023