# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Firstmac Limited (Penalty Hearing) [2025] FCA 12

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| File number(s): | QUD 467 of 2022 |
| Judgment of: | **DOWNES J** |
| Date of judgment: | 24 January 2025 |
| Catchwords: | **CORPORATIONS** – established contraventions of s 994E(3) of the *Corporations Act 2001* (Cth) concerning design and distribution obligations relating to financial products for retail clients – dispute as to quantum of penalty – whether defendant was objectively reckless and 'courted the risk' of engaging in unlawful conduct – where defendant has made changes to its systems and processes |
| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) s 33<br>*Corporations Act 2001* (Cth) ss 760A, 912A, 912C, 994B, 994C, 994E, 1317G |
| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68; [2017] FCAFC 113<br>*Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13<br>*Australian Communications and Media Authority v Clarity1 Pty Ltd (No 2)* (2006) 155 FCR 377; [2006] FCA 1399<br>*Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* (2002) 190 ALR 169; [2002] FCA 559<br>*Australian Competition and Consumer Commission v ACM Group Ltd (No 3)* [2018] FCA 2059<br>*Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312; [2017] FCAFC 159<br>*Australian Competition and Consumer Commission v HJ Heinz Company Australia Limited (No 2)* [2018] FCA 1286<br>*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181 |

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| | *Australian Competition and Consumer Commission v SmileDirectClub LLC* [2022] FCA 1343<br>*Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243; [2018] FCAFC 73<br>*Australian Securities and Investments Commission v American Express Australia Limited* [2024] FCA 784<br>*Australian Securities and Investments Commission v Bit Trade Pty Ltd (No 2)* [2024] FCA 1422<br>*Australian Securities and Investments Commission v Firstmac Limited* [2024] FCA 737<br>*Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2021) 156 ACSR 614; [2021] FCA 1008<br>*Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1; [2010] FCAFC 39<br>*Couch v Attorney-General (No 2) (on appeal from Hobson v Attorney-General)* [2010] 3 NZLR 149; [2010] NZSC 27<br>*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20<br>*Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076<br>*Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24; [2021] FCAFC 49 |
| Division: | General Division |
| Registry: | Queensland |
| National Practice Area: | Commercial and Corporations |
| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
| Number of paragraphs: | 96 |
| Date of hearing: | 18 & 19 December 2024 |
| Counsel for the Plaintiff: | Mr A Harding SC with Mr D Blazer |
| Solicitor for the Plaintiff: | Maddocks |
| Counsel for the Defendant: | Mr R Dick SC with Ms E Bathurst and Ms D Tay |
| Solicitor for the Defendant: | King & Wood Mallesons |

# ORDERS

**QUD 467 of 2022**

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| **BETWEEN:** | **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**<br>Plaintiff |
| **AND:** | **FIRSTMAC LIMITED**<br>Defendant |

**ORDER MADE BY:** **DOWNES J**

**DATE OF ORDER:** **24 JANUARY 2025**

**THE COURT ORDERS THAT:**

1. Pursuant to s 1317G(1) of the *Corporations Act 2001* (Cth) and within 60 days, the defendant pay to the Commonwealth of Australia a pecuniary penalty in the amount of $8,000,000 in respect of its contraventions of s 994E(3) of that Act which were the subject of the declaration made in this proceeding on 22 July 2024.
2. The defendant pay the plaintiff's costs of the proceeding as agreed or, failing agreement, to be taxed.

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

# REASONS FOR JUDGMENT

## DOWNES J:

### Synopsis

1 The relevant factual background appears in *Australian Securities and Investments Commission v Firstmac Limited* [2024] FCA 737 (**liability judgment** or **LJ**). These reasons assume familiarity with the liability judgment, and I will adopt the defined terms used in that judgment.

2 The sole area of dispute in the second phase of this proceeding is the quantum of the civil penalty to be imposed on Firstmac. ASIC seeks a penalty of $25 million. Firstmac accepts that a penalty is warranted, and can be imposed, but contends that it should be in the range of $3 million to $6 million, and that the amount of $4 to $4.5 million is appropriate.

3 The evidence adduced in the liability hearing is relied upon in the penalty hearing. ASIC further relies on the affidavits of Gina Louise Wilson sworn 20 August 2024 and 19 September 2024. Firstmac further relies on the affidavit of Simon Chun dated 5 September 2024 and the affidavits of James Neil Austin dated 10 September 2024, 1 November 2024 (except for the third sentence of [12], which was not read) and 12 December 2024.

4 For the reasons that follow, I consider that an appropriate pecuniary penalty in this case is the amount of $8 million.

### Relevant Law

5 Section 1317G(1) of the *Corporations Act 2001* (Cth) provides that a court may order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention of a civil penalty provision if, relevantly:

> (a) a declaration of contravention of the civil penalty provision by the person has been made under section 1317E; and
>
> (b) the contravention is of a financial services civil penalty provision (other than one that is excluded pursuant to subsection (1A)); and
>
> (c) the contravention either:
>
> (i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or
>
> (ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation, scheme or fund, the members of that corporation, scheme or fund; or
>
> (iii) is serious.

6 On 22 July 2024, I made a declaration that Firstmac contravened s 994E(3) of the *Corporations Act,* which is a civil penalty provision pursuant to s 1317E. The contravention is plainly serious, and Firstmac does not dispute that the Court's discretion to award a civil penalty is enlivened.

7 Section 1317G(6) of the *Corporations Act* provides that, in determining the pecuniary penalty, the Court must take into account "all relevant matters", including (relevantly):

(1) the nature and extent of the contravention;

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

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

(4) whether the person has previously been found by a court to have engaged in similar conduct.

8 The scope of the power to impose civil pecuniary penalties was considered by the High Court in *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13. The following principles are derived from the reasons of the plurality:

(1) subject to the particular statutory scheme, "the purpose of a civil penalty is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the Act by the deterrence of further contraventions of the Act": [9], [15];

(2) there is no place for a 'notion of proportionality' in a civil penalty regime, being a notion drawn from the criminal law that a penalty must be proportionate to the seriousness of the conduct that constituted the contravention, and nor should the maximum penalty be reserved for only the most serious examples of the offending (subject to the terms of the statute): [10];

(3) civil penalties must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business: [17];

(4) the factors identified by French J (as his Honour then was) in *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152–52,153 (as set out below) are possible relevant considerations which inform the assessment of a penalty of appropriate deterrent value. However, these should not be considered a "legal checklist" and the court's task remains to determine what is an "appropriate" penalty in the circumstances of the particular case: [18]–[19], [54];

(5) another relevant factor is the maximum penalty which might be imposed, albeit it must be balanced with all other relevant factors: [52];

(6) the power to impose a penalty is to be exercised judicially, that is, fairly and reasonably having regard to the subject matter, scope and purpose of the legislation: [40];

(7) the penalty imposed should be "proportionate" in the sense that it strikes a reasonable balance between deterrence and oppressive severity: [41], [46];

(8) a court which is empowered to impose an "appropriate" penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the legislation: [48], [71];

(9) considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against future contraventions of a like kind: [50].

9 The factors identified by French J in *CSR* were:

> 1. The nature and extent of the contravening conduct.
> 2. The amount of loss or damage caused.
> 3. The circumstances in which the conduct took place.
> 4. The size of the contravening company.
> 5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
> 6. The deliberateness of the contravention and the period over which it extended.
> 7. Whether the contravention arose out of the conduct of senior management or at a lower level.
> 8. 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.
> 9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

10 These 'French factors' are relevant to the determination of civil penalties under s 1317G of the *Corporations Act*: see, for example, *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2021) 156 ACSR 614; [2021] FCA 1008 at [19]–[23] (O'Bryan J).

11 The ‘course of conduct’ principle, the ‘parity principle’ and the ‘totality principle’ are ‘analytical tools’ which assist the Court in the determination of what may be considered reasonably necessary to achieve deterrence in setting a civil penalty: see *Pattinson* at [45].

12 The ‘course of conduct’ principle provides that consideration should be given to whether multiple contraventions arise out of the same course of conduct or the one transaction, to determine whether it is appropriate that a concurrent or single penalty be imposed: *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243; [2018] FCAFC 73 at [234] (Allsop CJ, Middleton and Robertson JJ). This operates to ensure that where there is an interrelationship between the legal and factual elements of two or more offences, the offender is not punished twice for what is essentially the same criminality: see *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1; [2010] FCAFC 39 at [39] (Middleton and Gordon JJ), cited with approval in *Yazaki* at [234]; see also *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68; [2017] FCAFC 113 at [148] (Dowsett, Greenwood and Wigney JJ). The application of the ‘course of conduct’ principle requires “an evaluative judgment in respect of the relevant circumstances”: see *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312; [2017] FCAFC 159 at [425] (Middleton, Beach and Moshinsky JJ).

13 The ‘parity principle’ is applied to ensure that, other things being equal, persons committing the same contravention receive the same punishment; that is, there should be consistency as between contraveners in comparable circumstances: see *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* (2002) 190 ALR 169; [2002] FCA 559 at [40] (Finkelstein J).

14 Finally, the ‘totality principle’ operates as a final check prior to imposition of a penalty, whereby a court considers whether the aggregate penalty to be imposed is just and appropriate for the conduct when viewed as a whole: *Australian Competition and Consumer Commission v ACM Group Ltd (No 3)* [2018] FCA 2059 at [37] (Griffiths J).

**General and specific deterrence**

15 For the following reasons, a substantial penalty is necessary to achieve general deterrence in this case.

16 There is a public interest in ensuring compliance with the DDO. The objectives of Chapter 7 of the *Corporations Act* (which contains the DDO) are set out in s 760A. The 'main object' in s 760A(aa), which was inserted by the amending legislation that introduced the DDO, is "the provision of suitable financial products to consumers of financial products". From this, it can be inferred that the DDO's purpose is consumer protection by requiring product issuers and distributors to adopt a customer-centric approach to the design and distribution of financial products, thereby increasing the likelihood that suitable financial products are provided to consumers. By contravening s 994E(3), Firstmac did not further this purpose. Rather, Firstmac's conduct fell short of the standard required by the DDO and increased the risk of harm to consumers to whom the High Livez PDS was inappropriately distributed: LJ [176], [193] and [209]. The penalty imposed on Firstmac must be such that it deters other distributors of financial products from engaging in similar conduct which contravenes the DDO and is inapposite to its objectives.

17 Relatedly, there is a need to ensure that the penalty is not seen by other large corporations as a mere 'cost of doing business'. In other words, those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20 at [63] (Keane CJ, Finn and Gilmour JJ). Other companies in the financial services industry in Australia will likely be aware of the penalty imposed on Firstmac in this case. As such, the penalty in this case will provide guidance to market participants as to the likely implications of contravening this provision. In this context, it is essential that the penalty imposed is beyond an amount that might be seen as an acceptable 'cost of doing business', especially for a company of Firstmac's size and resources.

18 Finally, Firstmac did not have in place adequate systems, policies, practices and procedures to address identified or reasonably identifiable risks of retail product distribution conduct which was inconsistent with the High Livez TMD: LJ [188]. General deterrence requires that the penalty demonstrates that contraventions resulting from inadequate systems, policies, practices and procedures have serious consequences, particularly where they involve large lenders and create risk for a significant number of consumers.

19 A substantial penalty is also necessary to achieve specific deterrence. That is for the following reasons.

20 A greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather than to adhere to its preferred policy than will be necessary to persuade a poorly resourced contravenor that its unlawful policy preference is not sustainable: *Pattinson* at [60]; see also *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24; [2021] FCAFC 49 at [154] (Wigney, Beach and O'Bryan JJ). Having said that, the penalty should not be greater than is necessary to achieve the object of deterrence, and severity beyond that is oppression: see *Pattinson* at [40]. Further, retributive justice has no part to play in determining the appropriate civil penalty: see *Pattinson* at [39].

21 Firstmac is a large, well-resourced company and one of Australia's largest non-bank lenders. Mr Austin gave evidence that Firstmac is one of the largest residential mortgage-backed securities (**RMBS**) issuers in Australia as at 2024 and that the net interest margin of its mortgage portfolio is the source of the majority of Firstmac's revenue. Firstmac reported a total operating income for the relevant period of between $143 million and $166 million, with a consolidated net profit after tax of between $50.3 million and $74.9 million. In 2022 and 2023, Firstmac had net assets of more than $232 million. It employs approximately 613 staff members and has its own in-house compliance and legal functions.

22 Although High Livez was wound up in December 2024, Firstmac is a distributor of other financial products and has ongoing obligations to comply with the DDO in relation to those products, and any other financial product it might elect to distribute in the future. Given Firstmac's size and financial position, a significant penalty is necessary to ensure specific deterrence by avoiding the possibility that Firstmac may perceive a civil penalty as an acceptable 'cost of doing business'.

**The nature and extent of the contraventions**

23 The nature and extent of the contraventions is the subject of detailed analysis in the liability judgment (to which I have had regard for the purposes of this judgment). The following matters are for emphasis only.

24 From 5 October 2021 to about April 2022, Firstmac engaged in 115 contraventions of the DDO by sending 115 separate emails to retail clients attaching the High Livez PDS (that is, sending the High Livez Documents): see LJ [165] and [167]. On or about 29 August 2022, Firstmac sent 751 letters to TD Holders, of which 716 were "retail clients", attaching the High Livez PDS (that is, sending the High Livez Information), which resulted in 716 contraventions: see LJ [168].

25 Contrary to Firstmac's submissions that it engaged in two contraventions, Firstmac engaged in a total of 831 contraventions of s 994E(3) of the *Corporations Act*. That is because each occasion on which an email or a letter was sent constituted a separate instance of retail product distribution conduct within the meaning of s 994E(3)(c), being the last element which needed to be proven by ASIC for a contravention of s 994E(3) to be established.

26 That is an extensive number of contraventions over a significant period of time, with the first tranche of contraventions occurring over a period of seven months and the later contraventions occurring approximately ten months after the commencement of the DDO.

27 Having said that, each of those 831 contraventions arose from just two courses of conduct or two transactions, being (respectively) (1) the sending of the High Livez Documents and (2) the sending of the High Livez Information. There was a close interrelationship between the legal and factual elements of the contraventions relating to each of the High Livez Documents. As for the High Livez Information, the unchallenged evidence of Mr Gration was that a single decision was made to send each of the letters, which conduct occurred on the same day. Other than each recipient's identity, the legal and factual elements concerning these contraventions are identical. Accordingly, the 'course of conduct' principle operates such that a concurrent or single penalty will be imposed for the contraventions that arose out of each of the two courses of conduct. Otherwise, the result would be wholly disproportionate.

**The nature and extent of loss or damage suffered as a result of the contraventions**

28 The actual loss suffered as a result of the contravening conduct was negligible. Only one TD Holder who received the impugned communications invested in High Livez and that customer suffered a loss of about $184.71 (on an initial investment of $50,000.00). However, there is no finding or even evidence that this particular investor decided to invest in High Livez as a result of the Distribution Conduct.

29 The negligible amount of actual loss or damage suffered, which was not established to be as a result of the contravening conduct, is a factor which weighs in favour of a lower penalty.

30 Notwithstanding this, conduct exposing customers to the risk of financial harm is in itself a harm or detriment which is relevant to the quantum of any penalty: see *Westpac* at [66].

31 Firstmac accepts that, in circumstances where an investment in High Livez was not capital guaranteed, there was a risk that an investor in High Livez could lose a part of their investment. However, Firstmac submits that the risk of harm was low because the likelihood of a High

Livez investor suffering a significant capital loss was "not substantial". It submits that this is because High Livez mainly invested in asset-backed securities which would be medium term RMBS with a minimum risk assessment of 'Category 3' or 'Investment Grade', such that High Livez was not a 'high risk' product; being a matter which ASIC accepts.

32 However, even though it was not a 'high risk' product, past performance is not indicative of future performance and, at the time of the contraventions, the direction and degree of unit price fluctuations in High Livez was unknown and could not be predicted with certainty. Indeed, the evidence established that the High Livez unit price *was* prone to fluctuation. As at 9 August 2022, the High Livez fund's one year percentage 'growth return' was *negative* 2.87%. For a customer with a capital guaranteed objective, *any* loss of capital would be contrary to that objective. For these reasons, I do not accept that that High Livez was a 'low risk' product.

33 Nor do I accept that the risk of harm was reduced because of disclosures in the High Livez PDS and on its website, as Firstmac submits. A reason for the introduction of the DDO was identified shortcomings in the existing PDS disclosure regime.

34 In terms of a reduction of risk, Firstmac also points to the ability of customers to speak to Ms Dean. However, given my findings that (*inter alia*) Ms Dean was not trained in the DDO requirements or the High Livez TMD (LJ [122]) and that if a customer did not ask the correct questions, they would not be told about the inappropriateness of High Livez for a person with a capital guaranteed objective and/or short investment timeframe objective (LJ [159(9)]), this fact carries little force in the overall analysis.

35 For these reasons, the risk of harm to the TD Holders was a moderate one, which supports a more substantial penalty being imposed.

**The circumstances in which the contraventions took place**

36 The circumstances in which the contraventions took place have been addressed in detail in the liability judgment (to which I have had regard). The following matters are for emphasis only:

(1) From about 2012, Firstmac adopted a cross-selling strategy of marketing and distributing investments in High Livez to TD Holders, and the Distribution Conduct occurred in the context of that strategy: LJ [68]. However, there was a real chance (that is, a real possibility) that some of the TD holders who were the recipients of the Distribution Conduct were outside of the target market for High Livez: LJ [190].

(2) Firstmac was aware that investors, or potential investors, who held a capital guaranteed objective and/or a short investment timeframe objective were, at all relevant times, prescribed 'red' (namely, as *not* in the target market for High Livez) in the High Livez TMD: LJ [156].

(3) It was Ms Dean's practice to send out emails to TD Holders at around the time of maturity of their Firstmac Term Deposits which attached, amongst other things, the TD Maturity Instructions Form and a High Livez PDS. This was part of a deliberate strategy to target them and encourage them to convert their term deposit holdings into High Livez. These emails were sent to TD Holders without modification to their content or their attachments regardless of whether Ms Dean had spoken to the TD Holder or not. This occurred even if, in a discussion with that TD Holder, Ms Dean formed the view that they wanted a product with a government guarantee, and even if they had a short term investment timeframe, an investment timeframe of less than three years, or they had told her that they were not interested in High Livez: LJ [159].

(4) It was not part of Ms Dean's role, as far as she understood it, to obtain from the customer information as to whether they did or did not fall within the target market as defined in the High Livez TMD, and it was never communicated to her that this was part of her role. Indeed, she never had regard to the High Livez TMD when performing her role, and was not instructed to have regard to it: LJ [159].

(5) Prior to the relevant period, Mr Austin, Mr Gration and Ms Cunningham were aware of the requirements of the DDO: LJ [174]. In particular, Mr Austin and Mr Gration had reviewed the consultation paper issued by ASIC in around December 2019, some time prior to the introduction of the DDO on 5 October 2021: LJ [158].

(6) Despite this awareness, when the DDO commenced, Firstmac did not have in place adequate systems, policies, practices and procedures to address identified or reasonably identifiable risks of retail product distribution conduct which was inconsistent with the High Livez TMD: LJ [188].

(7) In particular, at all relevant times from 27 July 2021, Ms Cunningham and Mr Austin knew that Firstmac needed a written policy that set out the reasonable steps Firstmac would take in distribution of High Livez pursuant to the DDO. From September to about 20 October 2021, Ms Cunningham prepared a written policy, being the PDDO. The PDDO was not finalised before the commencement of the DDO on 5 October 2021

and, during the relevant period, the PDDO was never distributed (to staff) within Firstmac: LJ [163].

(8) Further, Ms Cunningham was responsible for training staff at Firstmac regarding any relevant regulatory changes and developments. Despite that, at all relevant times, she provided no training to any Firstmac staff in respect of the DDO or the High Livez TMD: LJ [166].

(9) Mr Austin, Mr Gration and Ms Cunningham considered the target market for High Livez as set out in the High Livez TMD and considered whether the TD Holders fell within that target market: LJ [100]. All three individuals formed the view that TD Holders were likely to be in the target market for High Livez: LJ [102]–[104]. Mr Austin considered that some TD Holders may fall outside of that target market but that Firstmac's existing measures were sufficient to ensure that any individuals outside the target market would be made aware of this fact: LJ [102]. Mr Gration shared that view: LJ [102].

(10) Mr Austin, Mr Gration and Ms Cunningham took into account at the relevant time what they understood to be the ways in which any TD Holders who did not fall within the target market would be protected from making an unsuitable investment in High Livez, such as the ability to speak to Ms Dean, the disclosures in the High Livez PDS, and the High Livez TMD being available on the Firstmac website: LJ [105].

(11) Due to a breakdown in communication with Ms Dean, who was the primary point of contact for TD Holders and High Livez investors, Firstmac (by Mr Austin and Mr Gration) was not aware of the actual processes and procedures that Ms Dean was following when dealing with potential High Livez investors, including when engaging in their consideration of the steps Firstmac should take to comply with s 994E(3): LJ [159]–[161].

(12) Firstmac undertook a review of its cross-selling strategy following the introduction of the DDO with a view to ensuring that it remained appropriate, although that review was inadequate because it did not reveal Ms Dean's processes and procedures and nor did it identify the reasonable steps which needed to be taken to comply with s 994E(3): LJ [179].

37 In summary, Firstmac took some positive steps to attempt to comply with the DDO: see, for example, LJ [106] and [169]. However, its overall conduct *increased* the risk that the High

Livez PDS would be distributed to a person who fell outside the target market for High Livez: LJ [176]. The ultimate conclusion reached at LJ [209] was as follows:

> The steps which Firstmac took were wholly inadequate to meet the statutory obligation imposed by s 994E(3)(d). Although it recognised that there was a possibility that some of the TD Holders who would be the recipients of the Distribution Conduct may have held either or both a capital guaranteed objective and a short investment timeframe objective and were therefore outside of the target market for High Livez, the steps which Firstmac took following that recognition fell far short of the standard of behaviour expected of a reasonable person in its position. This is especially when one has regard to the steps which were reasonably able to be taken by Firstmac, as referred to above, and which steps would have either eliminated or minimised the likelihood that the High Livez PDS was sent to a person who fell outside the target market for High Livez.

**Whether Firstmac has engaged in similar conduct**

38 Firstmac has not been found to have previously contravened s 994E(3) or any of the other similar regulatory obligations to which it is subject under the *Corporations Act* or otherwise. However, this is a neutral factor because Firstmac's contraventions of the DDO began at the time that the DDO commenced, namely 5 October 2021.

**Additional relevant matters**

***Involvement of senior management***

39 Firstmac accepts that its senior management were involved in the contravening conduct. The evidence established that Firstmac's executive team, which included Mr Gration and Mr Austin, was responsible for providing the "ultimate approval for the distribution, sale and marketing" of High Livez.

40 The involvement of Ms Cunningham, as Audit and Compliance Manager, is also relevant. Ms Cunningham held an important, senior role within Firstmac.

41 In respect of their specific involvement in the conduct which resulted in the contraventions:

(1) Mr Austin and Ms Cunningham were involved in the preparation of the High Livez TMD and Mr Gration was also aware of the content of it: LJ [156];

(2) Mr Austin, Mr Gration and Ms Cunningham considered the target market for High Livez as set out in the High Livez TMD and considered whether the TD Holders fell within that target market: LJ [100];

(3) Ms Cunningham, Mr Austin and Mr Gration knew (or ought to have known) that there was a realistic possibility that some TD Holders may have held a capital guaranteed

objective and/or a short investment timeframe objective: LJ [157]. Mr Gration and Ms Cunningham recognised that there was a real possibility that some of the TD Holders may not fall within the target market for High Livez: LJ [105];

(4) Mr Austin and Mr Gration considered the steps required to be undertaken by Firstmac so as to comply with s 994E(3). Their consideration was inadequate because they were not aware of all of the facts referred to in LJ [159] regarding Ms Dean's actual practices: LJ [160]. In circumstances where only a small number of people within Firstmac were involved with the High Livez financial product, this demonstrates an obvious breakdown in communication within the organisation: LJ [160];

(5) Mr Austin and Ms Cunningham knew that a written policy (or framework) that set out the reasonable steps Firstmac would take in distribution of High Livez pursuant to the DDO was needed, but did not cause one to be created: LJ [163] and [174]. Further, the generic written policy which Ms Cunningham did prepare was wholly deficient, was never finalised, and was never distributed within Firstmac: LJ [163]–[164], [174]–[176] and [186];

(6) Ms Cunningham was responsible for the training of relevant staff, and failed to deliver any training: LJ [166] and [176].

***Whether Firstmac 'courted the risk'***

42 As to the High Livez Documents, ASIC submits that Firstmac was 'objectively reckless' and therefore 'courted the risk' as to whether its conduct would contravene the DDO. In *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181 at [136] (Jagot, Yates and Bromwich JJ), which is cited by Firstmac, the Full Court recognised that the concept of courting the risk can encompass objective recklessness.

43 ASIC submits that this conclusion follows from the following findings in the liability judgment:

(1) Firstmac's conduct fell far short of the standard of behaviour expected of a reasonable person in its position: LJ [174];

(2) the steps which Firstmac took were wholly inadequate to meet the statutory obligation imposed by s 994E(3)(d): LJ [209];

(3) the contraventions occurred in circumstances where Mr Austin, Mr Gration and Ms Cunningham were aware of the requirements of the DDO: LJ [174];

(4) even if Ms Dean did happen to speak to a TD Holder, that person was sent the High Livez PDS irrespective of whether they showed interest in that product and regardless of their expressed desire for a capital guarantee or short term investment timeframe: LJ [177];

(5) Firstmac knew of the risk that some of the recipients of the High Livez PDS may have held either or both a capital guaranteed objective and a short investment timeframe objective and were therefore outside of the target market for High Livez: LJ [190], [194], [209];

(6) no adequate written policy was prepared, and nor were relevant staff trained in the DDO or TMD, as addressed above; and

(7) there were steps reasonably able to be taken by Firstmac which would have either eliminated or minimised the likelihood that the High Livez PDS was sent to a person who fell outside the target market for High Livez: LJ [209].

44 In *Australian Competition and Consumer Commission v HJ Heinz Company Australia Limited (No 2)* [2018] FCA 1286 at [25], which is cited by ASIC, White J stated that "objective recklessness describes the state of mind in which persons engage in conduct causing harm *without* appreciating that their conduct involves an *obvious risk* of that harm being caused" (emphasis added). His Honour also noted that it has been described as "the practical equivalent of a high level of negligence", referring to the decision of *Couch v Attorney-General (No 2) (on appeal from Hobson v Attorney-General)* [2010] 3 NZLR 149; [2010] NZSC 27. In that case, Tipping J stated at [100]:

> The English language encompasses two distinct states of mind within the single concept of recklessness. The law also recognises the distinction. **A person may be described as reckless who does not appreciate an obvious risk of causing harm and proceeds to cause the harm without appreciation of the risk. This is what in law is known as objective recklessness. It is the practical equivalent of a high level of negligence**. On the other hand, a person may appreciate the risk of causing harm and proceed nevertheless deliberately to run that risk and end up causing the harm. That is subjective recklessness. Subjective recklessness is generally seen as more culpable and deserving of punishment than objective recklessness. In the case of subjective recklessness there is a conscious appreciation of the risk that one's conduct may cause harm and a deliberate decision to run that risk. The greater the risk and the greater the harm which is likely to ensue, the more culpable the person's conduct will be and the more appropriate it may be to describe it as outrageous.
>
> (Emphasis added.)

45 In summary, if there is an obvious risk of harm which is not appreciated, and a person proceeds to cause harm, they have been objectively reckless. This is to be distinguished from the

situation where a person in fact appreciates that there is a risk of harm, but proceeds to engage in the conduct regardless (with the latter being a more aggravating factor and described as subjective recklessness).

46 To meet this aspect of ASIC's case, Firstmac submits that it (by Mr Austin and Mr Gration) did not know all of the facts that constituted the contraventions; that the DDO was new legislation which had not been the subject of judicial guidance; and that it turned its mind to the manner in which it would comply with the DDO and believed that it was compliant with the DDO. In this regard, the following findings provide context to these submissions:

(1) Mr Austin formed the view that some TD Holders may fall outside the target market: LJ [102];

(2) Mr Austin formed the conclusion that Firstmac's existing measures were sufficient to ensure that any individuals outside the target market for High Livez would be made aware of this fact, and he had a discussion with Mr Gration who shared the same view: LJ [102];

(3) Mr Gration and Ms Cunningham took into account at the relevant time what they understood to be the ways in which any TD Holders who did not fall within the target market would be protected from making an unsuitable investment in High Livez: LJ [105];

(4) Mr Austin and Mr Gration were not aware of the actual processes and procedures being followed by Ms Dean, which were different from what they had understood: LJ [159]–[161].

47 Firstmac sought to distinguish this case from the facts in *Reckitt Benckiser*. However, as ASIC submits, the Full Court determined whether Reckitt Benckiser had courted the risk, including by reference to objective recklessness, without stating any legal principle, and so this decision is of limited utility.

48 While the findings relied upon by Firstmac demonstrate that it did not intend to contravene the DDO, it is the case that Firstmac's conduct fell "far short" of the standard of behaviour expected of a reasonable person in its position (LJ [174]), and the steps which Firstmac took were "wholly inadequate" to meet the statutory obligation imposed by s 994E(3)(d): LJ [209].

49 The contraventions occurred in circumstances where Firstmac was aware of the requirements of the DDO (LJ [174]), and was aware there was a real chance (that is, a real possibility) that

some of the TD Holders who were the recipients of the Distribution Conduct may have held either or both a capital guaranteed objective and a short investment timeframe objective and were therefore outside of the target market for High Livez: LJ [190], [194], [209]. There was an obvious risk of harm to those consumers through contravention of the DDO which Firstmac failed to appreciate.

50 Thus, contrary to Firstmac's submissions, the findings in the liability judgment support a finding of 'objective recklessness' such that Firstmac did 'court the risk' when it sent the High Livez Documents.

51 As to the High Livez Information, ASIC's initial position was that Firstmac 'courted the risk' in the sense that it was actually aware of the potential unlawfulness of the conduct engaged in by it during the relevant period and which is the subject of the findings in the liability judgment. However, that submission was withdrawn during reply on the second day of the penalty hearing, with the consequence that many of the submissions made by both sides on the topic of Firstmac's actual awareness were rendered otiose.

52 ASIC submitted in the alternative, which submission was maintained, that Firstmac was 'objectively reckless' and therefore 'courted the risk' as to whether its conduct in sending the High Livez Information would contravene the DDO.

53 As to the High Livez Information, the following chronology of events provides important context.

54 Two notices were issued to Firstmac on 18 March 2022 – one was a notice pursuant to s 912C of the *Corporations Act* (**March s 912C notice**) and the other was a notice pursuant to s 33 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) (**March s 33 notice**) (together, the **March 2022 notices**).

55 The March s 912C notice required Firstmac to provide a written statement "containing the information about the financial services business carried on by you" as specified in a three page schedule. That schedule sought information about High Livez generally, as well as the marketing strategies for High Livez. In particular, it sought a description of "any process of analysis or assessment carried out by [Firstmac], and any related decision-making and governance processes adopted by [Firstmac], relating to [its] distribution, sales or marketing of [High Livez] to customers who currently or previously held a term deposit".

56 As to the March s 33 notice, its stated purpose was "ensuring compliance with section 912A of the [*Corporations Act*]". By the notice, Firstmac was required to produce books referred to in a two page schedule with two annexures, including books containing "Distribution Information", which was defined to include matters in relation to High Livez such as steps taken under s 994E of the *Corporations Act* to ensure consistency with the High Livez TMD. By [3(c)] of that notice, Firstmac was required to produce books detailing any consideration by it of what distribution method would be appropriate and what additional arrangements need to be put in place that are reasonably likely to result in sales of High Livez being consistent with the High Livez TMD.

57 On 18 March 2022, Ms Cunningham sent the March 2022 notices to Mr Austin and others within Firstmac. Mr Austin responded to Ms Cunningham that same day, stating, "I assume ASIC are taking issue with marketing [High Livez] to maturing TD investors. Is there any compliance issue with this?".

58 On 18 March 2022, Ms Cunningham forwarded the March 2022 notices to external legal advisers, and a telephone meeting was held with those advisers and any or all of Mr Austin, Mr Gration, Ms Cunningham and Ms Powell on 21 March 2022.

59 On 23 March 2022, Ms Cunningham sent Mr Austin a news alert from Investor Daily with the title "ASIC concerned consumers being misled by marketing of managed funds". That article refers to a public statement released by ASIC that it has commenced surveillance into the marketing of managed funds and is seeking out "misleading performance and risk representations" in promotional material due to concerns that consumers are being misled. Along with a copy of the article, Ms Cunningham's email stated "[m]aking a bit more sense", to which Mr Austin replied "[y]es, provides very good background".

60 During the penalty hearing and by reference to the article, Mr Austin referred to the March 2022 notices as being "a broad fishing expedition" and "not specifically DDO", although he also accepted that Firstmac's reasonable steps obligation was "part of the review" and that he understood this at the time: T16.21–45; T17.16–37. He accepted that, at the time that he read the March 2022 notices and approved the response to them, he was aware that the March s 33 notice covered Firstmac's compliance with its obligation to take reasonable steps to ensure that the distribution of High Livez was consistent with the High Livez TMD, and that the reasonable steps obligation was one to which Firstmac was subject under the DDO: T19.35–43.

61 Mr Austin also gave evidence that "[the March 2022 notices] largely covered three areas, which [were] letters to maturing deposit holders, digital marketing, and… the investment assets of the fund. This press release then discussed that ASIC was looking into digital marketing and where that created perhaps false or misleading messages to retail investors. So that formed up our view": T33.45–34.

62 By April 2022, Firstmac ceased all digital marketing and the sending of letters to maturing term deposit holders.

63 A further notice under s 33 of the ASIC Act was issued on 9 September 2022, by which ASIC notified Firstmac that it was conducting an investigation "… of suspected contraventions of section 994E(3) of the [*Corporations Act*] by [Firstmac] in connection with the Firstmac High Livez Target Market Determination during the period from 5 October 2021 and ongoing".

64 By the time that the second s 33 notice was issued, the High Livez Information had been sent (being on or around 29 August 2022).

65 Mr Austin's evidence at the liability hearing was that while Firstmac was "under the lens of an ASIC investigation" at the time the High Livez Information was sent, the reason for ASIC's investigation was unknown: T380.1–2 and T382.26–27, 31–34. At the penalty hearing, Mr Austin baulked at the use the of the word "investigation", stating that he knew there was a "review" underway by ASIC (on the basis that he understood at the time of giving this evidence that investigation means litigation) and "we did not know whether [it] would go any further than [Firstmac's] response": T19.20–26. Pausing there, nothing turns on whether the March 2022 notices were part of an investigation or a review by ASIC.

66 As to why the High Livez Information was sent, Mr Austin held a real concern that High Livez was "effectively going into a soft unwind" which could become "terminal for our fund". He considered that Firstmac needed to find a way to market High Livez in a manner which attracted new investors (which was the purpose of sending the High Livez Information, being a form of advertising of High Livez).

67 In evidence was an exchange of emails between Mr Austin and others about the manner in which Firstmac could be marketed, including with Ms Powell, the in-house lawyer. On 1 August 2022, Ms Powell wrote:

> I should add to my comments that the decision whether or not to market the fund to TD customers is a business decision. **We haven't advised ASIC or Perpetual that**

> **we would no longer market the fund to TD customers** – however, given that this was a focus of ASIC's investigation, and we don't know what conclusion they have come to on that point, **there is a level of risk in doing so while waiting for the outcome of ASIC's investigation**. The business may decide this is a risk worth taking in order to create leads.
>
> (Emphasis added.)

68 Notwithstanding the content of the email, Firstmac (by Mr Austin) thought (albeit it accepts incorrectly) that sending the High Livez PDS was the most compliant way to approach its marketing of High Livez, as Mr Austin attested both at the liability hearing [T373.16–19; T380.1–2 and T381.36–41] and penalty hearing [T34.25–29].

69 However, the status quo referred to at [43] above had not changed and further events had occurred since the High Livez Documents were sent which made the risk even more obvious – being the receipt of the March 2022 notices, which sought (*inter alia*) information about Firstmac's compliance with its obligation to take reasonable steps under the DDO, as well as the recognition and identification by Firstmac's in-house lawyer of there being a level of risk in marketing High Livez to TD Holders. However, it is apparent from Mr Austin's evidence, which I accept, that the risk was not appreciated by Firstmac, including for reasons associated with the media release issued by ASIC.

70 There was thus an obvious risk of harm to the recipients of the High Livez Information through contravention of the DDO which Firstmac failed to appreciate.

71 It follows that, contrary to Firstmac's submissions, the findings in the liability judgment support a finding of 'objective recklessness' such that Firstmac did 'court the risk' when it sent the High Livez Information.

***Extent of benefit received by Firstmac***

72 ASIC accepts that the benefit derived by Firstmac because of the contraventions is modest as the vast majority of recipients of the Distribution Conduct did not invest in High Livez. This is an understatement because, as to the single TD Holder which invested in High Livez, Firstmac received a management fee of only $150, which is a negligible amount.

73 ASIC also contends that the contravening conduct was part of a cross-selling strategy which delivered benefits to Firstmac indirectly, including furnishing Firstmac with a source of funds which it could then on-lend to the market. However, leaving aside the difficulty in quantifying such a benefit, including the extent to which it was received by reason of the contraventions, High Livez played a very small part in funding Firstmac's business, with High Livez funds

under management as at 31 July 2024 being $45 million compared to Firstmac's total funds under management being $17 billion.

***Whether corporate culture of compliance***

74 Firstmac did not have a corporate culture conducive to compliance. This can be readily inferred from the circumstances of Firstmac's contraventions of the DDO and, in particular, from the following matters:

(1) Firstmac failed to prepare and distribute an adequate written policy in respect of the DDO legislation in circumstances where both Ms Cunningham and Mr Austin knew that Firstmac needed a written policy which set out the reasonable steps Firstmac would take in distribution of High Livez pursuant to the DDO: LJ [163] and [174].

(2) None of the Firstmac staff, including Ms Dean, received training in the DDO or the High Livez TMD prior to the Distribution Conduct occurring: LJ [122] and [166]. Accordingly, it was not communicated to Ms Dean that part of her role was to obtain information from the customer as to whether they fell into the target market for High Livez: LJ [122].

(3) Firstmac did not adequately review its cross-selling strategy, nor did it identify the reasonable steps which needed to be taken by Ms Dean or others within Firstmac for the purposes of ensuring that Firstmac complied with s 994E(3): LJ [179].

***Whether display of contrition***

75 Firstmac has not issued any formal apology for its contraventions of s 994E(3). However, in this case, actions speak louder than words.

76 For the following reasons, Firstmac has demonstrated contrition and insight into the seriousness of its contravening conduct by taking significant steps to amend its operations, policies and procedures to ensure compliance with the DDO moving forward. That is the case even in circumstances where Firstmac determined that the High Livez fund would be wound up by December 2024 (a decision which will result in a loss of revenue to Firstmac).

77 Since the liability hearing, Firstmac has:

(1) restructured its operations to separate its audit and compliance functions and it has created an executive level role of Head of Risk and Compliance who reports directly to the CEO and 'Risk Committee'. Ms Cunningham has transitioned from her former role

of Audit and Compliance Manager to Head of Internal Audit, in which role she is responsible for overseeing the internal audit function, ensuring effective risk management, compliance with regulations and the integrity of financial and operational controls;

(2) engaged external consultants to provide training, including to Firstmac's board, senior executives and departmental managers;

(3) engaged external consultants to assist Firstmac to update its DDO Policy which is stored on an intranet system to which all Firstmac staff have access. Among other things, this policy sets out the steps Firstmac considers to be reasonable, and deals specifically with steps to be taken by Firstmac prior to the cross-selling of any product to an existing customer;

(4) prepared a control monitoring schedule which sets out the frequency of monitoring various activities undertaken across the business for compliance with the DDO, including sales calls, product development and engagement with third party brokers;

(5) required all staff and board members to complete online training on the updates to the DDO Policy and complete an assessment module, and provided specific face-to-face training to staff members in certain teams on the contents of the updated DDO Policy;

(6) (for the period prior to High Livez being wound up) updated the High Livez script in consultation with external advisors and updated the High Livez website so that visitors were required to answer knock-out questions before they were able to view information about High Livez.

78 The changes made by Firstmac are significant and reflect a genuine desire to comply with the DDO. This provides strong support for the imposition of a lower penalty than that sought by ASIC.

***Untested new legislation***

79 ASIC submits that Firstmac has not exhibited sufficient co-operation because it contested the liability hearing in respect of its reasonable steps obligations. However, Firstmac's contentions as to liability were not unarguable and I accepted some of its submissions as to the interpretation of s 994E(3) in the liability judgment: see, for example, LJ [48]. Further, given that s 994E(3) of the *Corporations Act* has not been the subject of judicial interpretation previously, Firstmac was entitled to test those contentions before the Court: see *Australian Communications and Media Authority v Clarity1 Pty Ltd (No 2)* (2006) 155 FCR 377; [2006]

FCA 1399 at [32]–[33] (Nicholson J). Finally, I consider that the penalty sought by ASIC is excessive having regard to all relevant matters. Thus, the opposition by Firstmac at both the liability and penalty stages was not unjustified and it does not support a higher penalty being imposed.

***Maximum penalty***

80 Given I have found that there were 831 contraventions of s 994E(3), the theoretical maximum penalty is $9.22 billion. While I have adopted a course of conduct analysis, I note that the maximum penalty for one contravention does not cap the penalty figure for a course of conduct: *Australian Competition and Consumer Commission v SmileDirectClub LLC* [2022] FCA 1343 at [44] (Anderson J). In any event, the amount of $9.22 billion is so disproportionately large that it is of little practical value, and senior counsel for ASIC accepted that that amount is not a yardstick.

***Parity***

81 Penalties imposed in other cases, especially under other legislative provisions, must be treated with caution.

82 Having said that, a potential comparator is *Australian Securities and Investments Commission v American Express Australia Limited* [2024] FCA 784 (Jackman J). There, American Express Australia Limited (**Amex**) was found to have contravened s 994C(4) of the *Corporations Act*, and a penalty of $8 million was imposed.

83 There are many similarities between the circumstances arising in *Amex* and that of the present case, namely:

(1) Amex was found to have taken some steps to seek to comply with the DDO regime prior to its introduction: *Amex* at [104];

(2) there was no evidence of quantifiable financial loss suffered by consumers as a result of the contravention: *Amex* at [104];

(3) the issue of harm was considered by reference to the potential harm to consumers: *Amex* at [95];

(4) Amex did not make a "significant profit" from the contravention: *Amex* at [108];

(5) Amex had taken steps to remediate and update its DDO program, which was considered to be evidence of contrition: *Amex* at [114];

(6) as to prior similar conduct, Amex had not been found to have contravened any relevant laws: *Amex* at [115];

(7) despite Amex having issued 830 credit cards resulting in 830 individual contraventions of the relevant provision, a course of conduct analysis was applied to result in a finding that there were two courses of conduct: *Amex* at [94], [106];

(8) it was not submitted that Amex engaged in "deliberate or knowing contraventions" of the *Corporations Act*: *Amex* at [85].

84 There are also differences between the two cases. For example, Amex is a significantly larger company than Firstmac. Further, the maximum penalty in *Amex* was $146 million per contravention (cf. $11.1 million in this case): *Amex* at [91].

85 ASIC submits that *Amex* is not a useful comparator because, unlike in this case, Amex's conduct did not involve senior management. However, in *Amex*, as in this case, it was found that senior management failed to pay attention to the regulatory requirements under the DDO and the checks within the company were insufficient to ensure that these obligations were complied with: *Amex* at [102].

86 Further, ASIC submits that Amex admitted liability and that this was a substantial mitigating factor which does not apply to this case. However, given that I have found that Firstmac was entitled to contest liability because the legislation was untested, I do not consider this to be a significant point of difference between the two cases.

87 Unlike *Amex*, I have found that Firstmac courted the risk, albeit on the basis that it was objectively reckless (which is a less aggravating factor than subjective recklessness).

88 Overall, given the many similarities between the circumstances of *Amex* and the present case, I consider that *Amex* is a useful comparator for the purposes of determining penalty.

89 The parties also cited the recent decision of *Australian Securities and Investments Commission v Bit Trade Pty Ltd (No 2)* [2024] FCA 1422 (Nicholas J) which involved "at least 1,160" contraventions by Bit Trade of s 994B(2) of the *Corporations Act*. As in *Amex*, a penalty of $8 million was imposed.

90 Unlike this case, the contraventions in *Bit Trade* occurred over a period of around 35 months, and concerned the "issuing, granting or making available a financial product" without first making a TMD: *Bit Trade* at [1]–[2], [30]–[31] and [45]. The financial product carried a very

high degree of financial risk: *Bit Trade* at [40]. There was only one course of conduct: *Bit Trade* at [71]. The Product was made available to customers without any consideration of the impact of the DDO regime, until after ASIC intervened: *Bit Trade* at [71].

91 Having regard to these significant differences, I do not consider that *Bit Trade* is a useful comparator for the purposes of determining the appropriate penalty.

**Conclusion and disposition**

92 Taking all of these matters into account, it is appropriate to make an order pursuant to s 1317G(1) of the *Corporations Act* that Firstmac pay a penalty to the Commonwealth of Australia in the amount of $8 million in respect of its contraventions of s 994E(3) which were the subject of the declaration made on 22 July 2024.

93 Notwithstanding that ASIC withdrew its case that Firstmac had actual awareness of the potential unlawfulness of its conduct in sending the High Livez Information, ASIC did not reduce the amount of the penalty sought by it (being $25 million). Such a penalty is excessive considering the matters identified in these reasons, especially that the legislation was untested. Further, a penalty of this magnitude would be oppressive having regard to Firstmac's size and financial position. Having said that, the penalty range proposed by Firstmac is insufficient when one has regard (in particular) to the degree of departure by Firstmac from its statutory duty, the fact that its conduct *increased* the risk that the High Livez PDS would be distributed to a person who fell outside the target market for High Livez, that the contraventions involved two courses of conduct, and that Firstmac was objectively reckless and thereby courted the risk.

94 Although I recognise that the risk of Firstmac engaging in conduct in breach of the DDO in the future has been lessened by the changes it has made to its processes and systems, it cannot be said that the risk has been removed completely, especially as the DDO continues to apply to Firstmac's operations. There is also a public interest in ensuring compliance with the DDO, which is intended to protect consumers. In my view, the objectives of specific and general deterrence will be achieved by imposing a penalty of $8 million.

95 Applying the totality principle as a final check, the amount of $8 million is just, appropriate and proportionate to the contraventions found in the liability judgment when viewed as a whole, and in the context of the further findings made in this judgment and Firstmac's size and financial position.

96 I will also order that Firstmac pay ASIC's costs to be agreed or, failing agreement, to be taxed.

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

Associate: 

Dated: 24 January 2025