FEDERAL COURT OF AUSTRALIA

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

File number:	QUD 54 of 2021
Judgment of:	**DERRINGTON J**
Date of judgment:	22 September 2023
Catchwords:	**BANKING AND FINANCIAL INSTITUTIONS** – civil penalties – contravention of financial services laws – unconscionable conduct in contravention of *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) s 12CB(1) – whether the regulator has alleged one contravention or multiple – whether potential prejudice arising from a belated change in the number of contraventions alleged – principles concerning the articulation of the regulator's case for the imposition of civil penalties considered **BANKING AND FINANCIAL INSTITUTIONS** – pecuniary penalties – appropriate penalty to be imposed pursuant to *ASIC Act* s 12GBA – whether the unconscionable conduct was "deliberate" – whether the contravenor has previously been found to have engaged in any "similar conduct" – relevant considerations and principles explained – where the maximum available penalty is inadequate given the nature and extent of the contravening conduct, the circumstances in which it took place, and the need for specific and general deterrence – maximum penalty imposed **PRACTICE AND PROCEDURE** – concise statement – whether principles concerning the articulation of the regulator's case for the imposition of civil penalties apply differently where a concise statement is used in place of conventional pleadings – role of concise statement in civil penalty proceedings considered
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) *Competition and Consumer Act 2010* (Cth) *Corporations Act 2001* (Cth)
Cases cited:	*A & L Silvestri Pty Ltd v Construction, Forestry, Mining*

and Energy Union (2005) 248 ALR 247

Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788 (2021) 287 FCR 388

Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788 (2022) 97 ALJR 1

Anderson v Australian Securities and Investments Commission [2013] 2 Qd R 401

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (2018) 262 CLR 157

Australian Building and Construction Commissioner v Hall (2018) 261 FCR 347

Australian Building and Construction Commissioner v O'Halloran [2021] FCAFC 185

Australian Building and Construction Commissioner v Pattinson (2022) 274 CLR 450

Australian Communications and Media Authority v Jones (No 3) [2023] FCA 511

Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW) [2014] FCA 1135

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited (2015) 327 ALR 540

Australian Competition and Consumer Commission v DuluxGroup (Australia) Pty Limited (No 2) [2016] FCA 1286

Australian Competition and Consumer Commission v Lactalis Australia Pty Ltd (No 2) [2023] FCA 839

Australian Competition and Consumer Commission v Mazda Australia Pty Ltd (2021) 158 ACSR 31

Australian Competition and Consumer Commission v Mazda Australia Pty Ltd [2023] FCAFC 45

Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd (No 2) [2018] FCA 1125

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 5) [2016] FCA 167

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (2016) 340 ALR 25

Australian Federation of Air Pilots v Regional Express Holdings Ltd (2021) 290 FCR 239

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 3) [2020] FCA 1421

Australian Securities and Investments Commission v Australian Mines Limited [2023] FCA 9

Australian Securities and Investments Commission v Bettles [2020] FCA 1568

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2021] FCA 423

Australian Securities and Investments Commission v GE Capital Finance Australia, in the matter of GE Capital Finance Australia [2014] FCA 701

Australian Securities and Investments Commission v Mining Projects Group Ltd (2007) 164 FCR 32

Australian Securities and Investments Commission v National Australia Bank Limited (2017) 123 ACSR 341

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

Australian Securities and Investments Commission v National Australia Bank Limited [2021] FCA 1013

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

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

Betfair Pty Ltd v Racing New South Wales (2010) 189 FCR 356

Celand v Skycity Adelaide Pty Ltd (2017) 256 FCR 306

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

Cigarette & Gift Warehouse Pty Ltd v Whelan (2019) 268 FCR 46

Commissioner of Taxation v Ludekens (2013) 214 FCR 149

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

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (2015) 230 FCR 298

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543

Dare v Pulham (1982) 148 CLR 658

Director of Consumer Affairs Victoria v Dimmeys Stores Pty Ltd (2013) 308 ALR 296

Fair Work Ombudsman v Hu [2017] FCA 1081

Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486

Gould v Mount Oxide Mines Ltd (in liq) (1916) 22 CLR 490

Grochowski v Kearney [2020] FCA 1248

Heiko Constructions v Tyson (2020) 282 FCR 297

Hogan v Hinch (2011) 243 CLR 506

MacDonald v Australian Securities and Investments Commission (2007) 73 NSWLR 613

Meneses and Another v Directed Electronics OE Pty Ltd (2019) 273 FCR 638

Migration Agents Registration Authority v Frugtniet (2018) 259 FCR 219

Nobarani v Mariconte (2018) 265 CLR 236

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

Ruddock v Vadarlis (No 2) (2001) 115 FCR 229

Sabapathy v Jetstar Airways (2021) 283 FCR 348

Thomson v STX Pan Ocean Co Ltd [2012] FCAFC 15

Trade Practices Commission v Abbco Iceworks Pty Ltd (1994) 52 FCR 96

Trade Practices Commission v TNT Australia Pty Ltd [1995] ATPR ¶41,375

Transport Workers' Union of Australia v Registered Organisations Commissioner (No 2) (2018) 267 FCR 40

Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission (2021) 284 FCR 24

Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	157
Date of hearing:	6 June 2023
Counsel for the Plaintiff:	Mr S Couper KC with Mr S Seefeld
Solicitor for the Plaintiff:	Australian Government Solicitor
Counsel for the Defendant:	Mr N De Young KC
Solicitor for the Defendant:	Corrs Chambers Westgarth

ORDERS

QUD 54 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**NATIONAL AUSTRALIA BANK LIMITED ACN 004 044 937** Defendant

ORDER MADE BY: **DERRINGTON J**

DATE OF ORDER: **22 SEPTEMBER 2023**

THE COURT ORDERS THAT:

1. Within 30 days of the making of these orders, National Australia Bank Limited pay to the Commonwealth of Australia a pecuniary penalty in the amount of $2,100,000 (two million, one hundred thousand dollars) in respect of its conduct declared to be in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth).

2. Within 30 days of the making these orders, National Australia Bank Limited take all reasonable steps to cause to be published, at its own expense, a notice in the terms set out in Annexure A to these orders in Arial font no less than 10 point (Written Notice) by maintaining:

   (a) for a period of no less than 90 days, a link to a PDF and/or webpage copy of the Written Notice in an immediately visible area of National Australia Bank Limited's website homepage (https://www.nab.com.au) and news page (https://news.nab.com.au), ensuring that the link to the Written Notice is identified by text as follows: "Notice ordered by Federal Court in ASIC case against NAB about Periodic Payment Fees"; and

   (b) for a period of no less than 90 days, a link to a PDF copy of the Written Notice in a visible area of National Australia Bank Limited's secure online banking login page

(https://ib.nab.com.au/nabib/index.jsp?browser=correct), ensuring that the link to the notice is identified by text as follows: "Notice ordered by Federal Court in ASIC case against NAB about Periodic Payment Fees".

3. National Australia Bank Limited is to pay the Australian Securities and Investments Commission's costs of the proceedings.

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

Annexure A

Corrective Notice ordered by the Federal Court of Australia

The Federal Court found that in the period from January 2017 until July 2018 NAB continued to charge its customers periodical payment fees (PP Fees) in circumstances where it knew it had no contractual entitlement to charge those fees and omitted to inform its customers as to the wrongful charging or suggest that they review any such fees debited to their accounts.

On 22 September 2023, Derrington J of the Federal Court of Australia (in proceeding QUD 54 of 2021) ordered NAB to pay a pecuniary penalty of $2,100,000 to the Commonwealth of Australia for its unconscionable conduct in relation to the charging of PP Fees.

Customers who set up periodical payment arrangements with a NAB employee paid a recurring fee. There were exemptions to those fees, which NAB failed to apply for certain customers. NAB also charged certain customers a higher fee.

Between January 2017 and July 2018 (Relevant Period), the Court found NAB engaged in unconscionable conduct by continuing to charge PP Fees to customers in circumstances where it knew it had no contractual entitlement to do so and omitting to inform its customers of the wrongful charging, or suggest that they review any such fees debited to their accounts.

Over the Relevant Period, NAB wrongfully charged PP Fees on 74,593 occasions to personal and business banking customers totalling $139,845.90.

NAB has remediated almost all of the customers affected by the conduct described above. As at 17 September 2021, NAB had been unable to pay remediation to 72 affected customers in respect of $1,610.10 PP Fees that were charged incorrectly during the Relevant Period.

The Court ordered NAB to publish this Corrective Notice.

Further information

For further information, visit ASIC's media release here. [*to be hyperlinked*]

See the Court's judgment here. [*to be hyperlinked*]

REASONS FOR JUDGMENT

DERRINGTON J:

INTRODUCTION

1 By a decision handed down on 7 November 2022, this Court made a declaration at the suit of the Australian Securities and Investments Commission (ASIC) to the effect that National Australia Bank Limited (NAB) had engaged in unconscionable conduct in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the *ASIC Act*): *Australian Securities and Investments Commission v National Australia Bank Limited* (2022) 164 ACSR 358 (*ASIC v NAB*). The gravamen of NAB's conduct was its continuing to charge fees, in the period from January 2017 until July 2018, against the accounts of certain of its customers when it knew that it lacked any entitlement to do so, and its omitting to inform its customers of that wrongful charging or otherwise to suggest to its customers that they should check their accounts to ascertain whether any wrongful charges appeared. The central cause of the wrongful charging was NAB's inability to manage its own computer systems and its unwillingness to apply sufficient resources to remedy the problem in a timely manner.

2 These reasons deal with the penalty that is to be imposed as a consequence of NAB's contravention of s 12CB(1) of the *ASIC Act*, which has been assessed at $2.1 million. That is the maximum penalty that the legislation, as it existed at the time of the contravening conduct, permits the Court to impose in the circumstances of this case. Unfortunately, it is wholly inadequate when viewed against the nature of NAB's conduct, especially its disregard of its customers' rights over an extended period of time. In a context where NAB has been a repeat offender against the financial services legislation in this country and, as this case and others reveal, it appears to place a low priority on respecting the legal rights of its customers, a penalty several times the statutory maximum would have been far more appropriate.

BACKGROUND

3 The background to this matter is set out in *ASIC v NAB* and there is no need to repeat what was said there. It suffices to note that ASIC's action against NAB involved allegations of breaches of a number of civil penalty provisions of the *ASIC Act*, including an allegation of misleading or deceptive conduct in contravention of s 12DA and an allegation of the making of false and misleading representations in contravention of s 12DB. Those particular claims failed, though ASIC succeeded in establishing that NAB had contravened s 12CB(1) of the *ASIC Act*. In very

general terms, it was shown that NAB had become aware in late 2016 that it had been charging some of its customers fees for the making of periodic payments (PP Fees) when none were properly payable and, in other instances, been charging PP Fees at a higher rate that was permitted by the terms and conditions of its customers' accounts. Whilst NAB promptly set up internal investigations into these issues, which continued over time and eventually ascertained the identity of the persons adversely affected by its errant system, it was unable to determine how to remedy the system's dysfunctionality, short of shutting it down altogether. Eventually, after continuing to debit numerous accounts with unauthorised fees, or fees of an unwarranted magnitude, it determined in July 2018 that it ought to cease charging PP Fees on all accounts. The system was then, finally, turned off. In the preceding period of more than 18 months, NAB obviously prioritised the preservation of its own commercial position over its duties to its customers.

4 ASIC sought a declaration in relation to NAB's unconscionable conduct, which was granted in *ASIC v NAB* in the following terms:

> It is declared that in the period from January 2017 until July 2018, the National Australia Bank by its conduct of continuing to charge Periodic Payment Fees to customers in circumstances where it knew that it had no contractual entitlement to do so and omitting to inform its customers as to the wrongful charging or suggest that they review any such fees debited to their accounts, engaged in conduct in trade or commerce and in connection with the supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth).

5 Following the handing down of that decision, directions were made for the filing of submissions in relation to the appropriate penalty. A further hearing occurred in relation to that issue on 6 June 2023.

6 At that hearing, the main point of difference between the parties concerned NAB's assertion that there had been only a single contravention of s 12CB(1) of the *ASIC Act* in the period from January 2017 until July 2018 (the Contravening Period). ASIC contended that NAB had contravened that section each and every time that it had wrongfully charged a customer a PP Fee during the Contravening Period. This amounted to an allegation of approximately 75,000 contraventions. Given the significant impact that this issue has on the determination of the penalty, it is necessary to consider the applicable principles and the parties' competing positions in detail.

A SINGLE CONTRAVENTION OR MULTIPLE CONTRAVENTIONS?

7 In its written submissions on penalty, ASIC characterised NAB's contravening conduct as "wrongfully charging PP Fees on 74,593 occasions". It treated each occasion as amounting to a separate contravention of s 12CB(1), such that the maximum total penalty available to be imposed against NAB was over $130 billion.

8 NAB, in its written submissions, described this approach as "erroneous" and "undeveloped". It contended that the characterisation of each occasion of wrongful charging of PP Fees as a separate contravention was inconsistent with the manner in which ASIC had articulated and prosecuted its case at the liability stage of these proceedings. It submitted that ASIC should not now, at the penalty stage, be permitted to depart from the case that it had previously advanced.

9 Two questions arise from these submissions. First, to what extent will a regulator be constrained by, and be bound to adhere to, the terms in which it has articulated its case against an alleged contravenor in proceedings involving the potential imposition of a civil penalty. Secondly, in the context of these proceedings specifically, whether ASIC is properly to be restricted to a particular case that it has previously advanced in respect of liability.

To what extent is a regulator constrained by, and bound to adhere to, the terms in which it has articulated its case?

General principles in relation to the articulation of a regulator's case

10 It is axiomatic that a regulator must frame the case that it seeks to bring against an alleged contravenor with a degree of specificity, and must identify clearly the relief that it seeks in the event that its case is made out. As was said by the joint majority, comprising French CJ, Gummow, Hayne and Kiefel JJ, in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at 502 [25], when commenting on the inappropriateness of a regulator including irrelevant matters in its statement of claim:

> This is no pleader's quibble. It is a point that reflects fundamental requirements for the fair trial of allegations of contravention of law. It is for the party making those allegations (in this case ASIC) to identify the case which it seeks to make and to do that clearly and distinctly. The statement of claim in these matters did not do that.

11 To this can be added the views of the joint majority in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (*Fair Work*) at 505 [53] that:

> Civil penalty proceedings are civil proceedings and therefore an adversarial contest in which the issues and scope of possible relief are largely framed and limited as the

parties may choose …

12 It follows that, in a civil penalty proceeding, the regulator bears the initial — and, almost invariably, the predominant — responsibility for setting the boundaries of the matter. It formulates the case that the alleged contravenor must meet. So much was acknowledged by Keane J in *Fair Work* at 521 [103], where his Honour stated that:

> … in any civil proceedings, it is the right and duty of the plaintiff to mark out the extent of its claim against the defendant. The plaintiff's claim establishes the scope of the controversy to be resolved by the judgment of the court.

13 Where the case to be advanced is of a more serious kind, whether on account of the nature of the allegations made or the form of the relief sought, it is incumbent upon the regulator to define and prosecute the issues with especial diligence. A case in which the regulator seeks the imposition of a civil penalty against an alleged contravenor falls squarely within this category. It has been explained on numerous occasions in this Court that, in such cases, the regulator will be required to bring a particular degree of clarity and exactness to its pleadings and evidence. For instance, in *Commissioner of Taxation v Ludekens* (2013) 214 FCR 149, Allsop CJ, Gilmour and Gordon JJ observed at 156 – 157 [20] that:

> … In a proceeding seeking a civil penalty, it is important to recognise that a respondent is entitled to a fair trial which includes a clear and tolerably stable body of allegations of contraventions of law. The Commissioner, seeking a civil penalty against each respondent, was obliged to put his case clearly and distinctly: *Forrest v Australian Securities and Investments Commission* (2012) 86 ALJR 1183 at [25]. It requires a pleading (or other document) which states with sufficient clarity, subject, of course, to proper amendment, the facts said to constitute the cause of action or causes of action supporting the relief sought: *Forrest* at [27]. In satisfying that task, there may be a need for "facts or characterisations of facts to be pleaded in the alternative": *Forrest* at [27]. So much may be accepted. What is not permitted is the "planting [of] a forest of forensic contingencies" or altering the basis of the allegation of the alleged contraventions on a rolling basis.

14 Likewise, in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2015) 230 FCR 298, Logan, Bromberg and Katzmann JJ stated at 311 [63] – [65] as follows:

> 63 [A] civil suit for the recovery of a pecuniary penalty is a proceeding of a penal nature: *Naismith v McGovern* (1953) 90 CLR 336 at 341. In this class of case, it is especially important that those accused of a contravention know with some precision the case to be made against them. Procedural fairness demands no less. Furthermore, although the civil standard of proof applies, where (as here) the resolution of an issue exposes a respondent to a penalty, satisfaction on the balance of probabilities is not achieved by "inexact proofs, indefinite testimony, or indirect inferences": *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362. The *Evidence Act 1995* (Cth) now requires that the court take into account the nature of the cause of action in deciding whether it is satisfied that a party's case has been proved on the balance of probabilities: *Evidence Act*, s 140(2)(a).

> 64 Litigation is not a free for all. The overarching purpose of the civil practice and procedure provisions that apply in this Court is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible (*Federal Court of Australia Act 1976* (Cth) ("FCA Act"), s 37M). It would not be just to decide a case on a different basis than the way it was conducted. Nor would it be just to permit an applicant to change the nature of its case after the evidence has closed and its weaknesses pointed out, at least not without a formal application and the grant of leave, on terms if necessary.
>
> 65 The long and the short of it, then, is that, in a civil proceeding of a penal nature, a statement of claim must allege a contravention known to law and with a sufficient statement of material facts to alert a respondent to the case to be met. Nevertheless, where an applicant's pleading is ambiguous but a respondent has nonetheless meaningfully engaged with it in its defence, that engagement and the manner in which an applicant's case is consequentially opened and the trial conducted and defended can and ought to be considered in deciding whether a respondent has suffered any procedural unfairness. That is so even if there has been no formal application to amend the pleading. The obligations imposed on the Court and the parties by Pt VB of the FCA Act do not lead to any different conclusion.

15 This passage has been cited with apparent approval in several subsequent decisions of this Court: see, eg, *Celand v Skycity Adelaide Pty Ltd* (2017) 256 FCR 306, 331 – 332 [102]; *Cigarette & Gift Warehouse Pty Ltd v Whelan* (2019) 268 FCR 46, 47 [1]; *Sabapathy v Jetstar Airways* (2021) 283 FCR 348, 360 [39] – [41].

16 To similar effect are the observations of Tracey, Reeves and Bromwich JJ in *Australian Building and Construction Commissioner v Hall* (2018) 261 FCR 347 at 368 – 369 [49] – [50], focusing more specifically on the standard to which pleadings must be drafted in proceedings where civil penalties are sought to be imposed:

> 49 One of the main purposes of pleadings is to define the issues in dispute with sufficient clarity to enable the opposite party to understand the case he or she has to meet and to provide him or her with an adequate opportunity to prepare to meet that case: see *Dare v Pulham* (1982) 148 CLR 658 at 664 (Murphy, Wilson, Brennan, Deane and Dawson JJ). A concomitant of this principle is that a party is not entitled to depart from his or her pleaded case except if the parties have both deliberately chosen to conduct the dispute on a different basis. That principle was expressed in *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287 in the joint judgment of Mason CJ and Gaudron J as follows:
>
> > The function of pleadings is to state with sufficient clarity the case that must be met: *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In Liquidation)* [(1916) 22 CLR 490], per Isaacs and Rich JJ at 517. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. *The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and*

liabilities. See, e.g., *Browne v Dunn* [(1893) 6 R 76]; *Mount Oxide Mines* [(1916) 22 CLR 490 at 517-518].

(Emphasis added.)

50 In our view, these observations apply with even more force in a proceeding such as this where declarations of contravention of the FWA were sought against the respondents and civil penalties were sought to be imposed on them. Faced with those serious consequences, the respondents were entitled to be told clearly and precisely in the Commissioner's ASOC what case it was they had to meet and, unless they deliberately chose to allow the case to be conducted on a different basis, to direct their evidence and arguments to that case and that case alone. Plainly, this latter exception did not permit the Commissioner to make a significant addition to, or departure from, the pleaded case, in counsel's opening or closing submissions and then seek to justify that course by pointing to the respondents' failure to object as evidence of their acquiescence in that course. If that were the test, this departure from the basic requirements of procedural fairness would not occur by the deliberate choice of the party entitled to fair notice but rather at the self-serving behest of his or her opponent. If such an approach were permitted, the requirement to give fair notice would be made redundant, trial by ambush would become a legitimate tactic, and the issues in dispute at trial would become a movable feast. As well, the ability of a trial judge to manage the trial to ensure it fairly addressed the issues in dispute would be significantly eroded, if not entirely destroyed. So, too, would be the capacity of the trial judge to identify the issues he or she needed to decide.

17 Whilst these remarks were made in a slightly different circumstance to that in which a regulator pursues a corporate contravenor for breach of a civil penalty provision, there is no reason to treat them as being confined only to that specific context. The basic proposition that, in proceedings involving the potential imposition of a civil penalty, a respondent should be entitled to face a well-defined case could scarcely emerge more clearly from the jurisprudence of this Court. That proposition is no more than an expression of ordinary procedural fairness. Fundamentally, no person should be put at risk of loss without being accorded a proper opportunity to meet precisely the allegations that are levelled against them: *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490, 517. The fact that the party urging the imposition of the penalty is a regulator, who has experience in prosecuting comparable contraventions, and who can readily be assumed to be familiar with the legal landscape, only heightens the need for adherence to these principles.

18 It follows that the regulator's case must ordinarily have some quality of "rigidity" to it. The specific terms that it uses to articulate that case ought to be attributed a degree of significance that is apt to reflect the inherent seriousness of a suit for the recovery of a civil penalty. The boundaries that those terms establish for the case may therefore be policed assiduously by the Court, such that the regulator might not be permitted without good reason to stray beyond those boundaries in the absence of a formal application for amendment. Likewise, the Court may be

less inclined to permit a regulator to treat those terms as plastic or open textured so as to allow a case that has not been disclosed entirely openly from the outset to be raised belatedly in a manner prejudicial to the alleged contravenor.

19 It should nevertheless be borne in mind that the Court is not to approach these matters dogmatically. As pointed out by Logan J (with whom Collier J agreed) in *Heiko Constructions v Tyson* (2020) 282 FCR 297 at 313 [74], "pleadings are but the handmaiden of justice" and "whether or not procedural fairness has been denied by the loss of an opportunity to know and meet, by submissions and evidence, an adverse allegation is always a matter of practical evaluation in the circumstances of a given case". In this exercise of "practical evaluation", much may depend on the behaviour of the parties whilst the proceedings are on foot. It is, of course, possible for parties to move away from their pleadings and to choose to fight the case on issues identified at trial: *Dare v Pulham* (1982) 148 CLR 658, 664. Even in a civil penalty context, the Court should not hold parties to the literal meaning of their pleaded case in circumstances where such an approach would be unduly technical or restrictive: see, generally, *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 [13]. In a similar way, as a general proposition, mere infelicity of drafting will rarely be allowed to defeat a case on its merits if the merits have nevertheless been made apparent on the evidence without unfairness to the other party: *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356, 374 – 375 [55].

20 In this way, the regulator is neither counselled to achieve perfection nor forced to fight the proceedings with one hand behind its back. To the extent that it can be said to be under any "duty" in this context, it is a duty that only incrementally exceeds that borne by the ordinary litigant in a civil proceeding. This elevated duty befits the seriousness of the circumstances, and the regulator's experience and expertise within them.

The use of a concise statement

21 In these proceedings, ASIC articulated its case against NAB by way of concise statement. It submitted, essentially, that this forensic choice enabled it to advance its allegations against NAB in a narrative form and at a somewhat heightened degree of abstraction, notwithstanding the applicability of the aforementioned principles. So the submission went, if NAB was unsure of the case being advanced against it, it was entitled to seek further clarification and particularisation. Indeed, it was effectively *obliged* to do so if it wished later to allege that ASIC had attempted to change the nature of that case in relation to penalties.

22 In response, NAB submitted that its contention that ASIC had sought to allege multiple contraventions of s 12CB(1) only at the penalty stage of this matter was based on its review of several documents in the proceedings, of which the concise statement was but one. It was therefore unnecessary for it to demonstrate that the concise statement *in particular* bound ASIC to a specific case. In NAB's submission, it was therefore strictly unnecessary for the Court to address the question as to how rigorously the terms in which a regulator has articulated its case in a concise statement ought to be scrutinised.

23 While NAB's position can be accepted in part, the extent to which ASIC was bound to adhere to the terms of its concise statement in these proceedings was still a live issue, albeit not one that would likely prove decisive in and of itself. It is, therefore, appropriate to consider whether the general principles set out above apply in any different fashion in circumstances where a concise statement has been used in place of conventional pleadings.

24 At the outset, it must be acknowledged that concise statements have, since their introduction in this Court, been a relatively common feature of proceedings involving the potential imposition of civil penalties. For instance, a concise statement was used in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 (*ASIC v Westpac*) to seek, amongst other things, a pecuniary penalty pursuant to s 1317G(1E) of the *Corporations Act 2001* (Cth) (*Corporations Act*). None of the members of the Full Court queried the appropriateness of that course. Instead, the manner in which it was used by ASIC was described in neutral terms by Allsop CJ at 212 [185] as follows:

> The [amended concise statement (ACS)] was, of course, not a pleading. It is a document intended by the practice note to give a concise summary of the nature of the case alleged and the central issues involved. Its primary purpose is to facilitate effective case management and preparation for trial or mediation. Here the ACS was supported by a contemporaneous Particulars of Claim (PoC) of some 68 pages providing the detail of the case asserted. The ACS and PoC are to be read together to ascertain the issues tendered for trial.

25 Those remarks were adopted in the joint judgment of McKerracher and Colvin JJ in *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 (*Allianz v Delor Vue*) (overturned on other grounds in *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2022) 97 ALJR 1), where their Honours provided a thorough and erudite explanation of the nature and purpose of concise statements. ASIC placed a degree of reliance on that explanation in the course of the present hearing in relation to penalties. Notwithstanding the fact that *Allianz v Delor Vue* did not involve the potential imposition of a civil penalty, it appeared to be contended by ASIC, or was at least implicit in its submissions

on this point, that their Honours' observations were sufficiently general as to apply in the civil penalty context, and there was no reason in principle that they should not so apply. Assessing the merit of those contentions requires the reasons of McKerracher and Colvin JJ to be set out and considered in more detail.

26 Their Honours commenced their discussion of this point by recognising that the use of a concise statement is not intended merely to substitute the traditional form of pleading with a shorter form of pleading. The concise statement is a different type of document altogether: one that is intended "to enable the applicant to bring to the attention of the respondent and the Court the key issues and key facts at the heart of the dispute and the essential relief sought from the Court before any detailed pleadings": at 416 [140]. In this way, it facilitates case management at an early stage of the proceedings by allowing the Court to consider whether the matter ought to proceed on the basis of the concise statement without pleadings, whether pleadings ought to be used, or whether some other procedure should be adopted in order to expose the issues: at 416 – 417 [141]. If the first of those options is deemed most fitting, then the concise statement and any concise response can work to provide "fair disclosure of the nature of the case to be advanced" while other means are used, as the case progresses, to disclose more precise issues "to the extent considered to be appropriate in the interests of fairness": at 417 [144]. Accordingly, the concise statement and concise response will still perform part of the role served by traditional pleadings, but other documents and case management techniques might be called upon to complete the picture.

27 The most important aspect of their Honours' reasons for ASIC's purposes in the present case appeared at 418 – 419 [149], as follows:

> If a claim that is at the heart of the case that a party seeks to advance at the final hearing is not to be found in the concise statement then there will need to be an application for leave to amend that will be dealt with in accordance with the established procedural law as to late amendments to alter a case. However, where the nature of a claim is broadly disclosed by the concise statement, it is fundamental to the new approach of case management that a party cannot sit by passively and insist upon some strict curtailment of the case that may be run by reference to pleading rules. Both parties have a duty to expose the real issues. Where an issue is properly raised concerning the particular nature of an aspect of the concise statement then the party relying on that statement must assist in clarifying the position. And where an issue is expressed broadly in a concise statement and the other party considers that it will be unfair to its forensic preparation of the case for the issue to remain stated in such broad terms, then it behoves that party to seek clarification. The request may be met with the response that the clarification will be provided by affidavits and witness statements or the delivery of a statement of issues in due course. However, it may be the case that fairness dictates that earlier disclosure is required in which case the Court will make appropriate orders by way of case management. But what the party cannot do is save

> up its complaint that the case is stated too broadly until the conduct of the final hearing and then maintain that no detailed case can be run because no such case has been disclosed. To do so is to treat the concise statement as having the same character as a pleading which it is not. It is also to adopt a strategic and technical approach of a kind that is inconsistent with the obligation imposed upon parties and their lawyers by Pt VB of the *Federal Court of Australia Act*.

28 Parts of this passage have since been applied by O'Callaghan J in *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* (2021) 158 ACSR 31. In that case, the regulator sought declarations that the respondent company had contravened the *Australian Consumer Law* (being sch 2 to the *Competition and Consumer Act 2010* (Cth)) by making certain representations that were alleged to be misleading or deceptive. The respondent contended that the case advanced in the regulator's closing submissions was not that which it was on notice of having to meet, as set out in the regulator's amended concise statement. His Honour addressed these submissions at the outset of his reasons, finding at 40 – 41 [20] that "to the extent that the ACCC's case involved additional clarification or refinement of the case set out in its amended concise statement, those changes were flagged in opening". He proceeded to quote *Allianz v Delor Vue* at 41 [21] for the proposition that "concise statements perform a different role to pleadings. It is permissible, for example, for an applicant to refine its concise case in opening". This approach was described by Mortimer and Halley JJ, in their joint judgment on appeal, as "correct": *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2023] FCAFC 45 [120] – [121]. It is apparent from these decisions that the role traditionally served by a statement of claim, being to disclose the breadth and the detail of the applicant's case, may now permissibly be served in this Court by a concise statement and, if necessary, other supplementary documents or evidence.

29 The judgment of McKerracher and Colvin JJ was cited in support of a similar proposition more recently by Bromberg, Kerr and Wheelahan JJ in their joint judgment in *Australian Federation of Air Pilots v Regional Express Holdings Ltd* (2021) 290 FCR 239 at 282 [139], as follows:

> In this court, concise statements are sometimes employed in civil penalty proceedings: see, Employment and Industrial Relations Practice Note (E&IR-1) dated 20 December 2019 at [4.1] to [4.4]; *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 at [185] (Allsop CJ). A concise statements is not a pleading, and may not amount to a comprehensive statement of all the matters that must be established in order for a claim or defence to succeed. The allegations in a concise statement may be supplemented in other ways, including by making an order for pleadings, or particulars, or by statements of facts, issues and contentions, or by written opening submissions filed in advance of the hearing to expose the issues: *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at [144] (McKerracher and Colvin JJ).

30 Having regard to these remarks, and the recent case law of this Court more generally, the current zeitgeist is that a concise statement is a legitimate means by which a party, including a regulator, might articulate its case in a proceeding involving the potential imposition of a civil penalty.

31 However, a regulator ought to exercise a degree of care in adopting this course. A concise statement, in and of itself, has the potential to prove inapt to satisfy the requirements identified in this Court in relation to the articulation of a regulator's case, as set out above. It is, by nature, an awkward means by which the regulator might attempt to fulfil its obligation to set out clearly and precisely the case that the alleged contravenor must meet. So much is apparent from its description by McKerracher and Colvin JJ in *Allianz v Delor Vue* as a document that ought generally to be in a "brief narrative form", and which might permissibly define the issues only "broadly", such that a determination as to whether a case has been stated with sufficient clarity requires the Court to have "regard to th[e] whole of the case management process": at 416 [140], 418 – 419 [149], [151]. There is some arguable tension between this description and the remarks of the Full Court on other occasions that, in civil penalty cases, "a respondent is entitled to a fair trial which includes a clear and tolerably stable body of allegations of contraventions of law" and "it is especially important that those accused of a contravention know with some precision the case to be made against them".

32 More acute difficulties may arise where the regulator is proceeding against an individual respondent, as opposed to a corporation. As is well known, an individual who is alleged to have engaged in a contravention that exposes him or her to a civil penalty will be entitled to claim the privilege against self-exposure to a civil penalty, or "penalty privilege". That privilege applies in a curial setting to "protect a party from having to assist in the process of seeking to have a penalty imposed upon them", though it may be found to have a broader application as a matter of statutory construction: *Migration Agents Registration Authority v Frugtniet* (2018) 259 FCR 219, 234 – 235 [51]. Its fundamental purpose is to ensure "that those who alleged criminality or other illegal conduct should prove it": *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 559 [31], citing *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96, 129. Accordingly, it was explained by Moshinsky, Wheelahan and Abraham JJ in *Meneses and Another v Directed Electronics OE Pty Ltd* (2019) 273 FCR 638 at 660 [87] that:

> The penalty privilege may be invoked in judicial proceedings to resist a requirement that a defence be filed that complies with the rules of pleading, to resist an order for

> the filing of witness statements, to resist answering interrogatories, and to resist the production of documents by way of discovery, or in response to a notice to produce or subpoena.

33 The first of the points made in this passage is important. There is a long line of decisions in this Court, and others, recognising that penalty privilege will relieve an individual respondent from the need to deliver a defence that complies with the ordinary rules of pleading if those rules would operate to override the privilege: see, eg, *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32, 37 [12]; *MacDonald v Australian Securities and Investments Commission* (2007) 73 NSWLR 613, 619; *Anderson v Australian Securities and Investments Commission* [2013] 2 Qd R 401, 407 [20]; *Fair Work Ombudsman v Hu* [2017] FCA 1081 [12] – [13]; *Australian Building and Construction Commissioner v O'Halloran* [2021] FCAFC 185 [98]; *Grochowski v Kearney* [2020] FCA 1248 [3]. In this connection, in *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* (2005) 248 ALR 247, Gyles J explained relevantly at 251 [17] as follows:

> A personal respondent to a penalty proceeding is entitled to put the applicant to proof of its case. Such a respondent cannot be forced to make an admission and no solicitor acting for that person can be held responsible for not ensuring that a party plead in a way which goes further than this. In other words, such a respondent can decline to admit matters alleged against it. To the extent that the rules of pleading require to be modified to enable this to take place, that will be done. ...

34 It is somewhat difficult to reconcile the evident effect of these authorities with the statement of McKerracher and Colvin JJ in *Allianz v Delor Vue* (as extracted above) that, where the nature of a claim is broadly disclosed by the applicant's concise statement, "[b]oth parties have a duty to expose the real issues", such that a respondent is required to "seek clarification" and "cannot sit by passively and insist upon some strict curtailment of the case". Whatever the pertinence of those remarks may be in ordinary civil proceedings, they seem to be in apparent disharmony with the principle underlying claims of penalty privilege to the effect that those who allege illegal conduct should prove it.

35 For these reasons, it can be concluded that the general principles set out above in relation to the articulation of a regulator's case in a civil penalty proceeding do not apply in any materially different fashion in circumstances where a concise statement has been used in place of conventional pleadings. If a regulator elects to commence a civil penalty proceeding by the use of a concise statement, then it can be expected to draft that document diligently. The caution of McKerracher and Colvin JJ (at 419 – 420 [153]) that "a concise statement is not an excuse for laziness in analysis or vagueness or imprecision in expression" must be stressed

vehemently in this context — all the more so if the alleged contravenor is an individual. The regulator must also be prepared to supplement the concise statement with further material that is apt to disclose the full detail of its case, if necessary, like the "particulars of claim" used in *ASIC v Westpac*. Such a step should be taken not merely in the ordinary course of case management, but expeditiously, such that the alleged contravenor is informed proactively and at an early stage of the case brought against it. The alleged contravenor must, more so than the ordinary respondent in a civil proceeding, be entitled to take its opponent's case as it finds it: whilst it may be expected to seek clarification of patent ambiguity and to work to ascertain the real issues in dispute, it cannot reasonably be required to interrogate a concise statement that appears, on its face, to disclose a certain case merely for the purpose of ensuring that it will not be treated by the regulator, at some later stage, as in fact giving rise to another. Accordingly, whilst the taking of purely tactical or technical points is to be eschewed, the regulator's articulation of its case in a concise statement must still be understood to have a degree of "rigidity" to it, in the sense explained above.

36 None of this is intended to disparage the use of concise statements by regulators as a preliminary step in the commencement of civil penalty proceedings. It is merely to emphasise the potential complexities that might follow from the choice to proceed by that method, as opposed to a conventional pleading, and highlight some of the further procedural measures that the regulator might properly be expected to employ in order to afford the alleged contravenor the degree of procedural fairness that is required in circumstances of such heightened sensitivity. As pointed out by Thomas J in *Australian Communications and Media Authority v Jones (No 3)* [2023] FCA 511 at [68], the potential imposition of civil penalties is a "serious" matter, and there is no doubt that procedural fairness in that context requires the respondent to be made fully aware of the case that they must meet, but "the entitlement to procedural fairness does not mean that a statement of claim is required in lieu of a concise statement". To much the same effect, in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 5)* [2016] FCA 167, Edelman J commented in respect of a "fast track statement" (a document similar to a concise statement, prepared under the former Federal Court Practice Note "CM 8 — Fast Track") as follows at [8]:

> A fast track statement is intended to ensure that the dispute is presented in an efficient, cost effective, and expeditious manner and without unnecessary formality. It is a move towards a transparent, simple, plain English legal procedure. But it does not abandon natural justice. A party remains entitled to be informed of the essential allegations made against him or her, including the material facts upon which the allegations are based: *Federal Court Rules 2011* (Cth) r 16.02(1)(d). …

37 The ultimate consequence of this insistence on procedural fairness is that, in certain cases in the civil penalty context, it will be appropriate to resort to the use of a conventional statement of claim. The decision of Greenwood ACJ in *Australian Securities and Investments Commission v Bettles* [2020] FCA 1568 affords a ready example. In that case, the defendant sought orders that the regulator's concise statement and supplementary concise statement be struck out on the basis that they failed to make sufficiently clear the case asserted against him. Particular issue was taken with the general description of the alleged contravening conduct as "illegal phoenix activity". His Honour recognised that the case advanced by the regulator was "a very serious matter", and went on to note that it was therefore essential for the regulator to set out with precision all of the material facts necessary to establish the conduct that was alleged to contravene the relevant legislation: at [82] – [86]. The general description of the conduct as "illegal phoenix activity" was, for several reasons, inadequate. Having regard to the deficiencies in the concise statement and supplementary concise statement, his Honour concluded as follows at [131] – [132]:

> 131 The defendant is entitled to have a coherent pleading in the way discussed in these reasons.
>
> 132 It may be that a coherent pleading can be developed within the framework of a Concise Statement. However, it seems to me that the best way forward is for ASIC to file a Statement of Claim. The utility of the Concise Statement is not lost because it has caused a range of information to be framed which can usefully, no doubt, be relied upon in developing a pleading which addresses the methodology described in these reasons.

38 The point to be made by reference to that decision, and the broader collection of cases canvassed above, is that the use of a concise statement does not cause there to be any less an emphasis on procedural fairness in the context of a suit brought by a regulator for the recovery of a civil penalty. It does not lessen the degree of precision with which the regulator must advance its case. Nor does it give rise to any special expectation, over and above that which exists in a civil penalty proceeding commenced by an ordinary statement of claim, that the alleged contravenor will take steps positively to seek clarification of the case put against it. ASIC's submission to the contrary must be rejected.

39 Whilst the terms that ASIC has used in its concise statement might conceivably, as the authorities seem to suggest, be more susceptible to interpretation by reference to other documents in the proceedings than would be the same terms appearing in a pleading, those terms must still be understood as having the aforementioned quality of rigidity. They may establish boundaries to the case against NAB (or reinforce boundaries established by other

material in the proceedings) that cannot lightly be trespassed, and they will not readily be regarded as malleable enough to permit a case in relation to penalties to be run at this stage of the proceedings that was not openly disclosed prior to this point in time.

40 Against the backdrop of these principles, it is appropriate to turn to consider the specific terms that ASIC has used, in its concise statement and elsewhere, to articulate its case against NAB.

Is ASIC properly to be restricted to a particular case in respect of penalties?

41 NAB pointed to six matters in support of its contention that the case brought against it by ASIC involved only one contravention of s 12CB(1), being:

(a) the terms of the originating process;

(b) the terms of the concise statement;

(c) the evidence adduced and relied upon, and the written and oral submissions delivered, at the trial in respect of liability;

(d) the reasons delivered and the orders made in *ASIC v NAB*;

(e) a particular deficiency in ASIC's evidence as to the maximum amount of the penalty in these proceedings; and

(f) by way of comparison, ASIC's conduct in other proceedings in this Court.

42 Each of those matters may be explored in turn.

The originating process

43 The manner in which ASIC characterised the relief that it sought against NAB in its originating process suggested that the case that it advanced was for a single contravention of s 12CB(1) of the *ASIC Act*. Specifically, in paragraph 2 of the originating process, ASIC sought:

> 2. A declaration under s 21 of the FCA Act, and s 1101B of the Corporations Act that, by NAB's conduct from around January 2017 until July 2018 of:
>
> 2.1. continuing to charge PP Fees to customers in circumstances where it knew that it had no contractual entitlement to do so;
>
> 2.2. additionally or alternatively, failing to inform its customers about the wrongful charging of PP Fees, or suggest that customers review the PP Fees charged to their accounts;
>
> NAB:
>
> 2.3. engaged in conduct in trade or commerce and in connection with the supply or possible supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the ASIC Act; …

44 In this way, NAB was effectively alleged to have engaged in a single course of unconscionable conduct by "continuing to charge PP Fees", and/or by "failing to inform its customers about the wrongful charging of PP Fees, or suggest that customers review the PP Fees charged to their accounts". That course of conduct was alleged to have taken place throughout the Contravening Period, from around January 2017 to July 2018. The words "continuing" and "failing", in particular, suggested a single ongoing instance of unconscionable conduct throughout the Contravening Period. They do not clearly disclose any contention that each occasion of charging of PP Fees amounted to a separate instance of unconscionable conduct in contravention of s 12CB(1).

45 The declaratory relief sought by paragraph 3 was similarly framed as relating to a single course of conduct, taking place across the Contravening Period, by which NAB breached the obligation in s 912A(1)(a) of the *Corporations Act* to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly. There was no suggestion that this contravention occurred on each day that the conduct continued.

46 It is important to compare the wording of these paragraphs to that of paragraph 1 of the originating process, which sought declaratory relief in relation to NAB's alleged making of false or misleading representations in contravention of s 12DB(1)(i) of the *ASIC Act*, engaging in misleading or deceptive conduct in contravention of 12DA(1) of the *ASIC Act*, and breach of its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the *Corporations Act*. Those contraventions were said to arise in the following way:

> … between 20 July 2007 and 22 February 2019 (Relevant Period), including on 195,305 occasions between 25 February 2015 and 22 February 2019 (Penalty Period), on each occasion of charging or notifying the customer of the charging of a PP Fee, and in doing so representing in trade or commerce that it had a contractual entitlement to do so when it did not, the Defendant (NAB) on each occasion it made a representation …

47 It is apparent from this excerpt that ASIC specifically alleged that a separate contravention took place "on each occasion [NAB] made a representation". It contended that there were 195,305 such occasions, this being "each occasion of charging or notifying the customer of the charging of a PP Fee" during the identified "Penalty Period". That form of relief stands in stark contrast to the relief sought in paragraph 2 in relation to the unconscionable conduct.

48 It follows that it cannot be said that the originating process clearly and distinctly advanced a case to the effect that NAB engaged in a separate and distinct act of unconscionable conduct on each occasion that it wrongfully charged PP Fees in the circumstances identified, or failed to inform its customers of the wrongful charging. The contrary is true. As framed, the declaratory relief appears to have been sought for a single continuous course of unconscionable conduct.

The concise statement

49 ASIC's case was articulated in much the same way in its concise statement. It was specifically alleged that NAB had contravened the *ASIC Act* and the *Corporations Act* "on each occasion" that it had made a representation by either charging a PP Fee or notifying the charging of a PP Fee to a customer. By contrast, NAB was alleged to have engaged in unconscionable conduct only by "continuing" to charge PP Fees to customers, and/or by "failing" to inform its customers about the overcharging or to suggest that they review the PP Fees charged to their accounts. There was no clear suggestion that a contravention of s 12CB(1) occurred on each separate occasion that a PP Fee was wrongfully charged.

50 It is accordingly impossible to treat ASIC's concise statement as advancing, on its face, a case for the imposition of civil penalties for a large number of contraventions of s 12CB(1) across the Contravening Period. The natural and ordinary meaning of the words used in that document indicated that ASIC was alleging one course of unconscionable conduct based on the singular act of continuing to charge the PP Fees, and/or failing to inform customers about the potential overcharging of such fees.

51 Counsel for ASIC submitted that NAB's understanding of these documents was excessively narrow and gave the word "continuing" too much work to do. However, in accordance with the general principles set out above, NAB was entitled to attribute importance to the specific words chosen by ASIC and to treat them as defining the case that it had to meet. Those words are perfectly comprehensible and, on their face, disclose a case to the effect that there was a single contravention of s 12CB(1). Whilst it might conceivably be said that the use of the word "continuing" was not wholly inconsistent with a case alleging multiple contraventions, this proposition falls short of justifying a positive conclusion that such a case appeared clearly and distinctly in the concise statement. NAB cannot reasonably have been expected to perceive some ambiguity in the language of the originating process and concise statement (where, in reality, there was none), to envisage the specific possibility of a multiple contravention case

arising from that ambiguity, and on that basis then to seek clarification of the case from ASIC. It was entitled to take ASIC's case as it found it.

The evidence and submissions in relation to liability

52 In order to identify the precise boundaries of ASIC's case as disclosed in its evidence and submissions in relation to liability, some consideration must initially be given to the various time periods over which ASIC alleged that NAB's contravening conduct occurred.

53 In its concise statement, ASIC contended that NAB had wrongfully charged PP Fees between 20 July 2007 and 22 February 2019. It defined that period as the "Relevant Period". It defined the narrower period between 25 February 2015 and 22 February 2019 as the "Penalty Period", reflecting the fact that the applicable statutory limitation periods only allowed penalties to be imposed for contraventions that occurred within that timeframe: see *ASIC Act* ss 12GBA(2) and 12GBB(2). Both the Relevant Period and the Penalty Period are distinct from what has been defined in these reasons as the "Contravening Period", being the period from around January 2017 to July 2018. ASIC's case in respect of NAB's alleged representations concerned events and conduct taking place in the Penalty Period; its case in respect of NAB's unconscionable conduct concerned events and conduct taking place in the Contravening Period.

54 Importantly, in the course of the liability hearing, ASIC adduced and relied upon evidence of the number of instances of wrongful charging of PP Fees in both the Relevant Period and the Penalty Period. This evidence was recorded in an "amended statement of agreed facts". It was identified there that, in the former period, NAB had incorrectly charged PP Fees in relation to 1,608,575 periodical payment transactions, which reflected 2.61% of the total periodical payment transactions during that period. It was likewise identified that, in the latter period, NAB had incorrectly charged PP Fees on at least 195,305 occasions. Conspicuously, there was no similar analysis in the amended statement of agreed facts in relation to the number of occasions on which NAB wrongfully charged PP Fees during the Contravening Period. At best, one could perceive within the evidence relating to the Relevant Period that PP Fees were incorrectly charged on 72,641 occasions in 2017 and on 37,385 occasions in 2018. The number of contraventions now alleged by ASIC, 74,593, did not appear.

55 This inconsistency in the extent of the evidence supports the view that ASIC was concerned to demonstrate that NAB had contravened the *ASIC Act* and *Corporations Act* on multiple occasions by making certain representations during the Penalty Period, but was not concerned

to demonstrate multiple contraventions of the prohibition on unconscionable conduct in s 12CB(1) during the Contravening Period. If it had been running a multiple contravention case in respect of s 12CB(1), then it might reasonably have been expected to calculate and put into evidence the precise number of contraventions that it alleged had taken place in the Contravening Period. It did not do so in the course of the hearing as to liability.

56 ASIC's written opening submissions as to liability further entrenched the notion that its allegation of unconscionable conduct was founded upon a single continuous course of conduct. That conduct was framed as follows:

> ASIC contends that NAB contravened section 12CB(1) of the ASIC Act (unconscionable conduct) by continuing to incorrectly charge PP Fees from at least January 2017, when it knew PP Fees overcharging was occurring, until July 2018, when the monthly exception reporting process was implemented. ASIC further contends that NAB contravened section 12CB of the ASIC Act during this period by failing to inform its customers about the PP Fees overcharging or suggest that its customers review the PP Fees charged to their accounts.

57 The language of "continuing" and "failing" was in this way used once again, just as it was in the originating process and concise statement, to describe the contravening conduct. ASIC did not make any mention of a specific number of contraventions that it alleged had taken place during the Contravening Period. The clearest understanding of the language used in the submissions is that ASIC was alleging a single contravention, comprising a continuous course of unconscionable conduct across the Contravening Period.

58 That understanding is supported by several other passages in the submissions, including the following:

> The essence of ASIC's case is that NAB contravened section 12CB(1) of the ASIC Act by continuing to incorrectly charge PP Fees despite knowing that PP Fees overcharging was occurring. A further aspect of **this contravention** is failing to take any steps to inform its customers about the PP Fees overcharging or suggest that its customers review the PP Fees charged to their accounts. … Alternatively, ASIC submits that **the contravention** commenced at the end of October 2017 when NAB not only knew that PP Fees overcharging was occurring, it also had information as to the extent of that overcharging.
>
> …
>
> ASIC contends that the unconscionable conduct by NAB is properly regarded as commencing by January 2017 …
>
> …
>
> In ASIC's submission, the end of October 2017 is another key date. If it were not accepted that the unconscionable conduct commenced in January 2017 (as submitted above), ASIC submits that it commenced by at least the end of October 2017.

…

> A valid alternative approach is to recognise that continuing to charge PP Fees which NAB knew it was not entitled to charge, and which could have been switched off (either generally or for the specifically affected customers) amounts to unconscionable conduct. Further, it was open to NAB once it had identified the PP Fees overcharging to inform its customers so that they could identify any impact upon themselves. Despite having this information, NAB chose not to inform its customers. In ASIC's submission, these matters amount to **a contravention** of section 12CB(1) of the ASIC Act.
>
> (Emphasis added).

59 The emphasised words in this extract make rather plain that ASIC was alleging just one contravention of s 12CB(1) of the *ASIC Act*. The use of the singular form of the word, "contravention", is at odds with ASIC's contention at the penalty stage of these proceedings that there were in fact 74,593 contraventions.

60 If the allegation of a single contravention was not clear enough from these emphasised words, resort could readily be had to other parts of the extract to justify the same conclusion. The first, second and third paragraphs in the extract describe the unconscionable conduct as "commencing by", or having "commenced at" or "commenced by", a certain date. That language is apt to describe a single continuing course of unconscionable conduct. It is inapt to describe a scenario in which s 12CB(1) was breached on numerous occasions by individual occurrences of unconscionable conduct.

61 The last paragraph in the extract followed an analysis of NAB's conduct prior to and during the Contravening Period, including its increasing knowledge of the wrongful charging of PP Fees, its awareness of its ability to prevent that wrongful charging by disabling the system by which PP Fees were imposed, its ability to bring the wrongful charges to the attention of those customers whose accounts had been impacted or otherwise warn those customers of the possibility that they had wrongfully been charged, and its choice not to do so. In that sense, the final paragraph expressed a conclusion that was based on several matters persisting throughout the Contravening Period. There is little difficulty in understanding the allegation as being that the cumulative effect of these matters, over an extended period of time, amounted to a contravention of s 12CB(1). There is substantially more difficulty in taking from ASICs submissions the allegation that the provision was contravened on 74,593 occasions by specific instances of wrongful charging. The explicit characterisation of the events as amounting to "a contravention" of s 12CB(1) is telling.

62 It is, with respect, beyond reasonable argument that the unconscionable conduct case advanced by ASIC at the liability stage of these proceedings was, in broad terms, to the effect that NAB's continuous course of wrongdoing over a period of time, during which it was aware of certain matters, was worthy of admonition. Try as one might, it is impossible to detect any clear and distinct case that NAB engaged in unconscionable conduct on each occasion that it wrongfully charged PP Fees during the Contravening Period.

The reasons and orders in ASIC v NAB

63 In support of its contention that it was only required to meet a case alleging a single contravention of s 12CB(1) of the *ASIC Act*, NAB also directed attention to the terms in which the question of liability was determined in *ASIC v NAB*.

64 A ready starting point is the declaration made at paragraph 2 of the orders in that judgment, which was worded as follows:

> It is declared that in the period from January 2017 until July 2018, the National Australia Bank by its conduct of continuing to charge Periodic Payment Fees to customers in circumstances where it knew that it had no contractual entitlement to do so and omitting to inform its customers as to the wrongful charging or suggest that they review any such fees debited to their accounts, engaged in conduct in trade or commerce and in connection with the supply of financial services that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth).

65 It is apparent that the relief was granted in terms suggesting a single contravention of s 12CB(1) that was ongoing throughout the Contravening Period. This reflected the manner in which the case was put to the Court in the originating process, the concise statement and the written submissions, as set out above.

66 As set out in the reasons given in support of that declaratory relief, NAB's conduct was appropriately to be characterised as unconscionable due to a confluence of factors, including its knowledge of the nature and extent of the wrongful charging of PP Fees, its perpetuation of that wrongful charging, and its failure to inform its customers. The reasons are replete with references to NAB having been "aware" of the problem over a period of time, and the problem nevertheless having "continued" throughout that period. That further supports the view that ASIC's case concerned a single contravention of s 12CB(1) of the *ASIC Act*.

67 ASIC did not make any explicit submission that this Court should declare that NAB engaged in unconscionable conduct in breach of s 12CB(1) on each and every occasion during the Contravening Period that it wrongfully charged PP Fees. That would have been a substantially

different case. One might reasonably expect that, if such a case had been run, it could now be discerned at least somewhere in the judgment in *ASIC v NAB* or in the orders that followed. However, it does not seem to appear there at all.

A deficiency in ASIC's evidence as to the alleged maximum penalty

68 As noted above, in its written submissions in relation to penalties, ASIC claimed that NAB was liable to pay a pecuniary penalty for each of the 74,593 occasions on which PP Fees were wrongfully charged during the Contravening Period. As a result of the increase in the quantum of the penalty unit from $180 to $210 after 30 June 2017, ASIC submitted that the range of the maximum penalty available to be imposed against NAB was between approximately $134 billion and $156 billion.

69 It was pointed out by NAB that ASIC was unable to identify the precise amount of the maximum penalty, and could only offer a range, because there was no evidence as to the precise number of PP Fees that had wrongfully been charged by NAB from the commencement of the Contravening Period up to 30 June 2017 or the precise number of PP Fees that had wrongfully been charged from 1 July 2017 to the end of the Contravening Period. It was contended that this deficiency in the evidence was a consequence of ASIC not having alleged earlier in these proceedings that there were multiple contraventions of s 12CB(1) across the Contravening Period.

70 There is force in this submission. If the payment of a separate penalty for each occasion on which PP Fees were wrongfully charged had truly been part of ASIC's case in these proceedings, it would have been important to establish how many contraventions occurred prior to 1 July 2017 and how many occurred subsequently. This analysis was never undertaken.

71 Indeed, it was only in a "supplementary statement of agreed facts" filed on 1 February 2023, after the liability judgment was published, that it was even acknowledged that NAB had wrongfully charged PP Fees on 74,593 occasions in the Contravening Period. All of this tends to suggest that ASIC was not running a multiple contravention case prior to the penalty stage of these proceedings.

ASIC's conduct in other proceedings

72 NAB sought to support its contention that ASIC had failed to articulate a multiple contravention case sufficiently early in the proceedings by making reference to the manner in which ASIC had sought to prosecute contraventions of civil penalty provisions in other cases.

In particular, it referred to *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 3)* [2020] FCA 1421 (*ASIC v ANZ (No 3)*), where similar allegations involving the wrongful charging of PP Fees were made against a different respondent bank. There, however, in contrast to this case, it was expressly alleged that the bank contravened s 12CB(1) of the *ASIC Act* on each occasion that it wrongfully charged the fees. At paragraph [6] of his reasons, Allsop CJ extracted a passage from the statement of agreed facts in that case, which included the following expression of the relevant part of ASIC's case:

> By way of overview, in its Concise Statement dated 25 July 2019, ASIC alleged (among other things) that ANZ:
>
> …
>
> 3.2. contravened s 12CB(1) of the ASIC Act and s 912A(1)(a) of the Corporations Act by:
>
> 3.2.1. charging same-name fees to its customers on at least 1,340,087 occasions from 26 July 2013 when it knew that the charging of those fees was unlawful or was at risk of being unlawful: Originating Process, proposed declarations 2.1 and 3.1

73 NAB submitted that, if ASIC had intended to make an equivalent allegation in the present case, which commenced some months after *ASIC v ANZ (No 3)* was handed down, then it could readily have done so.

74 That submission can be accepted. The circumstances in *ASIC v ANZ (No 3)* are, perhaps, illustrative of the ease with which it is possible for a regulator to allege multiple contraventions of a civil penalty provision in a context not dissimilar to that at present. In turn, this might be taken to mean that the onus borne by ASIC, by which it was required to fashion its case clearly and distinctly, was not a particularly difficult one to discharge here. Its failure to do so is seemingly unexplained.

75 Reference was also made by NAB to the case of *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585 (*ASIC v Westpac (No 3)*), in which Beach J rejected an attempt by ASIC at the penalty stage of the matter to treat the allegations made against the bank as concerning numerous separate occurrences of unconscionable conduct. His Honour held that this approach was inconsistent with ASIC's pleaded case, inconsistent with the evidence, and inconsistent with his findings in the principal reasons: at 597 [65].

76 His Honour had particular regard to the specific terms used in ASIC's third further amended statement of claim in that case, leading him ultimately to conclude that the allegation of numerous contraventions was "outside its pleaded case" and that "the submission ASIC now makes to inflate the total quantum of Westpac's maximum liability is not open to it and should be rejected": at 600 [82]. As explained above, there is no reason to treat this analysis as foreign to the present case merely on account of the fact that ASIC has here used a concise statement.

77 In response to the submission that the bank would not suffer any prejudice if the case was understood as involving a greater number of contraventions, Beach J stated at 606 [106] that:

> … ASIC also says that Westpac would suffer no prejudice by its reconceptualisation, but I disagree. The course of evidence or conduct of the trial may have been different. In any event there is inherent prejudice in permitting ASIC to depart from how it ran its case.

78 That observation is consistent with the principles set out above in relation to the fair and proper articulation of a regulator's case. Those principles make clear that the case must have some degree of rigidity, such that the regulator will ordinarily be entitled only to seek the imposition of penalties for those contraventions that it has clearly and distinctly alleged and then established. It is not usually appropriate for it to contend for the first time at the penalty stage of the proceedings that what was effectively framed as an allegation of a single contravention at the liability stage should be dissected into an allegation of many contraventions, with a separate penalty to be imposed for each. The prejudice that will potentially arise from such a course is obvious.

79 Such prejudice is, however, not inevitable. For example, in *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd (No 2)* [2018] FCA 1125, Moshinsky J found at paragraphs [56] – [65] that, even though the regulator had in the course of the proceedings conveyed that it sought to establish only one contravention of the relevant statutory provision, it was open to it at the penalty stage to seek to establish a larger number of contraventions because there was reason to believe that, even if it had done so earlier, the respondent would not have run its case any differently. In the circumstances, his Honour held that the respondent would not suffer any prejudice if the Court was to consider whether there was a larger number of contraventions.

80 It ought to be emphasised that this conclusion was based on specific findings as to the breadth and effect of the existing evidence in those proceedings, and the nature of the case that the respondent was required to meet. In general, a respondent should have little difficulty in

establishing that it would have conducted its defence differently had it been aware that it stood accused of multiple contraventions of a civil penalty provision instead of just one. There are at least two related reasons for this.

81 The first stems from the fact that, as acknowledged above, the principles concerning the clear articulation of a regulator's case in a civil penalty proceeding are properly taken to reflect considerations of basic procedural fairness. As a general proposition, where procedural fairness has been denied, a submission that this could not possibly have made any difference to the outcome will rarely succeed: see *Transport Workers' Union of Australia v Registered Organisations Commissioner (No 2)* (2018) 267 FCR 40, 62 [109], citing *Nobarani v Mariconte* (2018) 265 CLR 236, 251 [48]. Where a regulator has belatedly attempted to increase the number of contraventions alleged in a civil penalty proceeding, particularly by a sizeable margin, there is accordingly little reason to subject to intense scrutiny the respondent's contention that it would have run its case differently had it received sufficient warning. It may, for instance, have made narrower or fewer concessions, or put on more or different evidence. From a practical perspective, it may have allocated the resources that it devoted to the proceedings differently, with an emphasis on some issues instead of others. Descending into the minutiae in order to examine critically these possibilities is an undue exercise in speculation, which is also apt to subvert the procedural fairness to which the respondent is properly entitled. That exercise ought, in most cases, to be avoided.

82 The second reason is one of policy. In accordance with the general principles set out above, in a civil penalty context, the regulator is under a duty to articulate its case clearly and to prosecute that case sensitively and diligently, given the seriousness of the relief sought. That duty would be undermined if it was accepted that a regulator could escalate its case substantially at the eleventh hour, and thereby cast upon the respondent the onus of proving that such an escalation would, if signalled earlier, have caused it to change its strategy in defence. Ambush of this nature has long been discouraged, and there is all the more reason to stress the Court's disapproval of such tactics in the civil penalty context. It carries with it the potential for public confidence in the legal system to be diminished by the perception that the Court has established liability on one basis, thereby lining the respondent up for the imposition of a penalty, before permitting the quantum of that penalty to be determined on another basis that is substantially more severe. The unfairness in such a scenario is striking. The potential harm to public confidence will doubtlessly be magnified if the Court accedes to a change in course that is not supported by any adequate explanation or justification.

83 In the circumstances of the present case, a moment's thought would reveal that a party facing a potential maximum penalty of $2.1 million would adopt a different approach to the litigation if that maximum was, early in the proceedings, revised to over $130 billion. For instance, it is more than likely that NAB would not have been as willing to forego its forensic advantages by allowing the matter to proceed on the basis of agreed facts. It may have put on more specific evidence as to its knowledge and its conduct on particular occasions that PP Fees were wrongfully charged during the Contravening Period, and in this way sought to reduce in a more piecemeal way the 74,593 contraventions now alleged by ASIC. It is unnecessary to speculate further as to what consequence these steps, or others, might have had for the ultimate outcome. The prejudice to NAB is sufficiently clear. There has been no explanation from ASIC as to why a multiple contravention case was not raised prior to the penalty stage. Instead, it seems to have submitted, or at the very least come close to submitting, that the multiple contravention case was immanent in its material all along. For the foregoing reasons, it demonstrably was not.

Conclusion on the nature of the case advanced

84 It is not possible to conclude that ASIC has clearly and distinctly advanced a case against NAB to the effect that it contravened s 12CB(1) of the *ASIC Act* on 74,593 occasions, such that it is exposed to a potential maximum penalty in excess of $130 billion.

85 For it now to be accepted that a multiple contravention case has been run from the outset of these proceedings, ASIC's originating process, concise statement, submissions and evidence, and the reasons and orders in *ASIC v NAB*, would have to be treated as having a considerable degree of malleability to them. There is no warrant for such an approach, particularly in the context of a suit brought by a regulator for the recovery of a civil penalty. The view more readily open is that ASIC has belatedly attempted to run a case in respect of penalties that departs in a material way from the case that it ran in respect of liability. The prejudice to NAB from the adoption of such an approach at this stage of the proceedings is clear, and is not answered either by the contention that it should proactively have clarified with ASIC earlier in these proceedings whether or not it had to meet a multiple contravention case, or the contention that it would not have run its defence any differently had it been given more advanced notice.

86 In accordance with the principles set out above, ASIC was obliged to ensure that the case it brought against NAB was articulated with precision. It set the boundaries for the matter. NAB was under no duty to question those boundaries when, on a plain reading of the material filed

by ASIC in these proceedings, they appeared to be clearly defined. In the absence of any application for amendment or express consent to a change in the nature of the case, the parties could expect those boundaries to be supervised closely by the Court. That is a reflection of the procedural fairness to which NAB is entitled as a respondent in a case involving the potential imposition of a civil penalty. That same entitlement to procedural fairness urges the conclusion that NAB would now be prejudiced if the Court was to countenance a belated attempt to increase the number of contraventions that it is alleged to have committed: there is sufficient basis to find that, had NAB been accused earlier in these proceedings of having contravened s 12CB(1) on 74,593 occasions, it would have adopted a different defensive strategy. This Court cannot be seen to permit what would effectively amount to an ambush by a regulator, without explanation or justification, the upshot of which is that the respondent is exposed to a penalty of substantially increased magnitude.

87 NAB was confronted at the outset of these proceedings with a claim that it committed a single contravention of s 12CB(1). A judgment as to liability was delivered on this basis. It is not possible now to entertain any wider case. In the result, there is no need to consider whether the 74,593 separate occasions of wrongful charging should be regarded as comprising a course of conduct.

THE APPROPRIATE PENALTY

88 The Court's power to impose a penalty for a contravention of s 12CB(1) of the *ASIC Act* is found in s 12GBA(1) and (2). At the relevant time, those provisions provided:

> **12GBA Pecuniary penalties**
>
> (1) If the Court is satisfied that a person:
>
> (a) has contravened a provision of Subdivision C, D or GC (other than section 12DA); or
>
> …
>
> the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.
>
> (2) In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:
>
> (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
>
> (b) the circumstances in which the act or omission took place; and
>
> (c) whether the person has previously been found by the Court in

> proceedings under this Subdivision to have engaged in any similar conduct.

89 It was not disputed that the expression, "in respect of each act or omission", in the chaussette to s 12GBA(1) referred to an act or omission constituting a contravention of a civil penalty provision of the *ASIC Act* referred to in paragraph (a) of that subsection: *ASIC v Westpac (No 3)* at 607 – 608 [112].

90 It was also not in contention that, during the Contravening Period, the maximum penalty that could be imposed on a corporation for a contravention of s 12CB(1) was 10,000 penalty units: *ASIC Act* s 12GBA(3). The parties agreed that, from 1 January 2017 to 30 June 2017, the value of a penalty unit was $180 and, thereafter, it was $210.

91 The consequence of that change in the amount of the penalty unit was that the maximum penalty for a contravention from the commencement of the Contravening Period through to 30 June 2017 was $1.8 million whilst, for the remainder of the Contravening Period, it was $2.1 million.

The principles relating to the assessment of an appropriate penalty

92 There was no dispute between the parties as to the relevant principles to be applied when assessing an appropriate penalty for a contravention of a civil penalty provision. The parties' submissions on that topic are substantially reflected in the recent decision in *Australian Competition and Consumer Commission v Lactalis Australia Pty Ltd (No 2)* [2023] FCA 839 at paragraphs [5] – [25], and there is no need to repeat them here.

The appropriate penalty in the present case

93 In the circumstances of this unusual case, it is also unnecessary to assay the range of matters that might ordinarily be relevant to the determination of an appropriate penalty. As it has been concluded that there was but one contravention, the maximum penalty that can be imposed is $2.1 million, attaching to that part of the contravention that occurred from 1 July 2017. In its written submissions, NAB accepted that a penalty in the amount of $2 million was appropriate in the present case on the basis that the maximum should be reserved for the most egregious of contraventions. One suspects that this submission might have been made to ameliorate the effect of its prior submission that it had committed only a single contravention since, had that prior submission been rejected, the penalty that might have been imposed would quite likely have been several multiples of $2 million. NAB was apparently cognisant of the fact that the maximum penalty that stood to be imposed for a single contravention would, objectively, seem

to be far too light. In furtherance of that attempted amelioration, in the course of oral submissions, it was suggested on behalf of NAB that the Court may quite legitimately adopt the maximum available figure of $2.1 million as the appropriate penalty.

94 Despite that acknowledgment, it must be kept in mind that the prescribed maximum penalty is not reserved solely for the most serious contravention. This topic was dealt with decisively in *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 (*Pattinson*), where a joint majority of the High Court held at 471 [49] – [51]:

> 49 The Full Court erred in treating the statutory maximum 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. Nothing in the text of s 546, or its broader context, requires that the maximum constrain the statutory discretion in this way.
>
> 50 This Court's reasoning in the Agreed Penalties Case is distinctly inconsistent with the notion that the maximum penalty may only be imposed in respect of contravening conduct of the most serious kind. 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 further contraventions of a like kind. Where a contravention is an example of adherence to a strategy of choosing to pay a penalty in preference to obeying the law, the court may reasonably fix a penalty at the maximum set by statute with a view to making continued adherence to that strategy in the ongoing conduct of the contravenor's affairs as unattractive as it is open to the court reasonably to do.
>
> 51 In regarding the statutory maximum penalty as having a role in a civil penalty context as some kind of graduated scale by which contraventions are to be categorised in order of seriousness and corresponding penalty, the Full Court attempted to transplant a concept of retributive justice, the origins of which are to be found in the criminal law, into a civil penalty regime in which retribution has no role to play. This "yardstick" understanding of the maximum penalty, with its focus on the objective seriousness or gravity of a contravention, is reminiscent of retributive notions of "just deserts" and the adage that the punishment should fit the crime.

95 Later, their Honours observed at 472 [55]:

> The second point is that the maximum penalty does not constrain the exercise of the discretion under s 546 (or its analogues in other Commonwealth legislation), beyond requiring "some reasonable relationship between the theoretical maximum and the final penalty imposed". This relationship of "reasonableness" may be established by reference to the circumstances of the contravenor as well as by the circumstances of the conduct involved in the contravention. That is so because either set of circumstances may have a bearing upon the extent of the need for deterrence in the penalty to be imposed. And these categories of circumstances may overlap.

96 Having regard to these principles, in the circumstances of the present case, it is appropriate that the maximum penalty be imposed.

97 It is true that, ultimately, the nature and extent of the loss or harm to consumers in this case was relatively small. Relevantly, the parties agreed that:

> In the period between 1 January 2017 and until July 2018, NAB wrongfully charged PP Fees on 74,593 occasions with a total value of $139,845.90 involving 2,888 personal banking customers and 513 business banking customers.

98 It is also true that, although 74,593 contraventions sounds like a large number of contraventions, it reflects only a small proportion of the total occasions on which PP Fees were charged by NAB during 2017 and 2018. Across 2017 as a whole, PP Fees were charged incorrectly in relation to 1.78% of period payment transactions. Across 2018, PP Fees were incorrectly charged in relation to 1.02% of periodic payment transactions. In this sense, the contraventions cannot be characterised, in relative terms, as extensive: see *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2021] FCA 423 [40].

99 Additionally, it can be accepted that the total value of the PP Fees that were wrongfully charged during the Contravening Period, that is $139,845.90, was not a large amount compared to the total value of the transactions in which NAB would ordinarily engage on a daily basis. It is also significant that nearly all of the customers that were overcharged have since been repaid the amounts that were wrongly deducted from their accounts. They were, at the same time, compensated for the loss of the use of their money by the payment of commercial interest for the period during which the money was absent from their accounts. In *ASIC v NAB*, at paragraph [1], I observed in this respect that NAB had "remedied the overcharging where it ha[d] been able to do so, and otherwise relinquished any benefit which it might have derived". It is also relevant that NAB has shown good faith in responding to its overcharging by remediating other customers for losses that they sustained in connection with transactions that took place outside of the Contravening Period. Pursuant to its remediation program, it had paid some $8.36 million to customers as at April 2022.

100 There are, however, several countervailing factors that require consideration. In particular, the contravention in this case took place in the context of NAB having become aware in 2016 that it was regularly deducting fees from its customers' accounts without authority. Whilst it took steps to investigate the cause and the extent of its wrongful actions, by the time that the Contravening Period commenced, it was well aware of those circumstances. Indeed, it was also well aware of its inability to prevent PP Fees from being charged wrongfully against its customers' accounts, short of shutting down the entire PP Fee system. The approach that it

chose to take during the Contravening Period was one that protected its commercial interests. It allowed the wrongful deductions to continue without informing its customers of the possibility that those deductions were affecting them. Rather than shut down its dysfunctional system, it was prepared to allow it to remain in place, to the detriment of its customers, for an extended period. It is worthy of remark that, in this time, no one within the bank formed the view that, regardless of the financial consequences, it was inappropriate to continue withdrawing money from customers' accounts in the absence of any authorising mandate.

101 It was these circumstances that rendered NAB's conduct unconscionable. It unjustifiably advanced its self interest whilst knowing that its customers were oblivious to the wrongful charging that was taking place. It deliberately and cynically took advantage of its customers' unawareness, and was prepared to allow the overcharging to continue whilst it searched, admittedly in good faith, but without any great diligence, for a solution. Such moral dereliction would seem to reflect an inherent sense of entitlement, possibly precipitated by a view that no real harm would come to the bank even if its conduct was detected. It is, perhaps, also a product of a corporate culture that places a low priority on the observance of the law and on respect for its customers' legal rights.

102 This suggests that NAB might only be deterred from engaging in similar conduct in the future if a substantial penalty was to be imposed. Regrettably, for the reasons set out above, that is not a possibility in the present case. The maximum penalty of $2.1 million is unlikely to have any real impact on the bank's future conduct.

103 In *ASIC v Westpac (No 3)*, Beach J recognised at 607 – 608 [112] – [116], in somewhat similar circumstances, that the maximum penalty available for engaging in unconscionable conduct in contravention of s 12CC of the *ASIC Act* (as it existed at the relevant time) was inadequate, but that ASIC was required to accept the reality of the legislative choice. The same is true in the present case. The penalty of $2.1 million is wholly inadequate as a consequence for the prolonged unconscionable conduct in which NAB engaged. However, given the terms of the legislation and the manner in which these proceedings were litigated, that is the highest amount available.

104 This conclusion substantially diminishes the utility of considering each of the various factors that have been identified in the case law as relevant to the determination of an appropriate pecuniary penalty. Having regard to the mandatory considerations expressed in s 12GBA(2) of the *ASIC Act* that are applicable in this case — including the nature and extent of the

contravening conduct, the loss or damage suffered as a result, and the circumstances in which it took place — it is appropriate to impose the maximum penalty of $2.1 million. Nevertheless, there is some value in addressing, at this juncture, certain specific issues to which attention was devoted in the parties' submissions.

The deliberateness of the conduct

105 An issue was raised as to whether it could be said that NAB's conduct was "deliberate" for the purposes of determining the appropriate penalty. NAB submitted that the only relevant inquiry, in this regard, was whether it had intended to contravene the *ASIC Act* in particular. In support of that submission, it relied upon the decision of Allsop CJ in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* (2015) 327 ALR 540 at 557 [74]. However, its submission does not accurately reflect what his Honour said in that case, which was (at 557 [74] – [75]):

> [74] No finding has been made that Coles intended to mislead or deceive consumers. The question is not, as the ACCC contends, whether Coles intended to engage in the conduct that in fact contravened the provisions in question. That is too low a threshold for it to be an aggravating factor in the penalty-setting process. Rather, the question is more appropriately whether it "courted the risk" of doing so.
>
> [75] In the liability judgment I said that the interpretation of the phrases was something about which minds could differ. What, however, seems to me to be evident from the impugned terminology alone is that there was tolerably clearly a debate to be had about calling par-baked bread fresh. To that extent a degree of risk was evident. This risk was patent and should have been appreciated by Coles' management.

106 This passage does not go so far as to support the proposition that NAB must have intended to breach the *specific* legislation that it was later alleged by the regulator to have contravened — that is, by having had in mind the requirements of that legislation at the time that it consciously chose not to abide by them. Rather, the passage simply recognises that the relevant inquiry is whether the contravenor "courted the risk" of contravening the statutory provisions in question. In other words, for the concept of "deliberateness" to function as an aggravating factor, the contravenor must at the relevant time be cognisant that its conduct is actually or potentially unlawful. It need not appreciate that it will be unlawful specifically because it contravenes the requirements of a certain piece of legislation. So much is made clear by the joint judgment of Jagot, Yates and Bromwich JJ in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 (*ACCC v Reckitt Benckiser*) at 58 [131], where it was said that:

> … if any degree of awareness of the actual or potential unlawfulness of the conduct is proved then, all other things being equal, the contravention is necessarily more serious. Such awareness may be able to be inferred from the very nature of the conduct or representations constituting the conduct. …

107 This paragraph was also cited by NAB in support of its submission that the critical question is whether the contravention *of the ASIC Act in particular* was deliberate. However, on its face, the passage does not support that submission. The question properly to be asked is whether the contravenor was aware, to any extent, of the actual or potential unlawfulness of the conduct. It does not need to have had in mind a particular rule or principle that its conduct would, or could, be found to contravene.

108 Here, NAB's conduct was deliberate in the basic sense that it intended every act and omission that was ultimately found to comprise part of the unconscionable conduct. It may be that its officers, including its senior personnel, did not turn their minds specifically to whether their conduct amounted to a breach of the *ASIC Act*. However, it must have been apparent to them that continuing to deduct PP Fees from their customers' accounts without authority, and failing to inform those customers that they were doing so or to suggest that they review their accounts, was likely to amount to a breach of at least some part of the financial services legislation in force in this country. It is not at all difficult to appreciate, as a matter of common sense, that it might be unlawful to take money from customers without authorisation, without their knowledge, and without affording them any chance to protect themselves. So much was acknowledged by Allsop CJ in *ASIC v ANZ (No 3)*, where he said at [45] that:

> It goes without saying that the Bank has no authority to take people's money out of their accounts if there is not a contractual foundation to do so. The proper characterisation of that, if known, is obvious; it is more than a breach of contract.

109 It can quite readily be inferred that NAB's contravention was deliberate in the sense that it "courted the risk" of breaking the law.

110 Ultimately, however, given the consequences that flow from the finding of only a single contravention in this case, there is little to be gained from seeking to ascertain with more precision the extent to which the conduct was deliberate or to characterise it with a more specific label such as "intentional", "reckless" or "wilfully blind": see, generally, *ACCC v Reckitt Benckiser* at 58 [131]. It suffices to say that the deliberateness of the conduct is a further factor justifying a penalty of $2.1 million.

The role of senior management

111 ASIC pointed to extent of the involvement of senior management in the contravening conduct as a matter that should substantially increase the quantum of the penalty imposed. In particular, it drew attention to the involvement of several persons who performed the role of "General Manager, Payments" during the Contravening Period. The relevant chain of authority was identified by ASIC as being that the General Manager, Payments reported to the Executive General Manager, who reported to the Group Executive, who in turn reported to the Chief Executive Officer of NAB. It contended that the General Manager, Payments knew from January 2017 that NAB was wrongfully charging PP Fees to some customers, and received updates on the progress of the investigation into the extent of that wrongful charging. That person also had authority to make decisions on proposed courses of action, such that they could be considered a senior management figure, and yet they failed to cease the wrongful charging or establish a process either to notify customers or to ask them to check their accounts.

112 NAB submitted in response, effectively, that the position was not so straightforward: the matters raised in ASIC's submissions needed to be considered "in the proper context of all the evidence relevant to this factor". However, with respect, it did not point to any evidence that gave a more favourable impression of the role of senior management in the contravening conduct.

113 It initially submitted that the officer with responsibility for the day-to-day conduct of the investigation into the wrongful charging of PP Fees during the Contravening Period, Ms Macalister, did not herself have authority to make the decision to shut down the system by which those fees were charged. However, it went on to acknowledge that "Ms Macalister reported to the General Manager, Payments" — and the General Manager, Payments *did* have such authority. There was accordingly a direct link in the chain of authority between the person who was, potentially, most informed about the overcharging issue and the person who was capable of fixing it.

114 NAB nevertheless submitted that, contrary to ASIC's contention, the General Manager, Payments did not know from January 2017 that NAB was wrongfully charging PP Fees to some customers. It submitted, instead, that this knowledge was acquired only in October 2017, when a specific cohort of customers who had in fact been charged incorrect PP Fees was first identified.

115 Two points can be made about this submission.

116 First, whilst it might be accepted that the full extent and nature of NAB's overcharging of customers had not been made apparent to senior management at the commencement of the Contravening Period, it is clear that those with the relevant degree of authority were at least generally aware of the issue by about that time. In January 2017, the role of General Manager, Payments was occupied by Ms Keetelaar. It is relevant to note her involvement in the investigation into the potential overcharging of PP Fees prior to that time, as recounted in *ASIC v NAB*:

> [70] In about December 2016, NAB commenced an investigation for the purpose of determining the extent to which PP Fees had been charged incorrectly, and to ultimately remediate impacted customers. To the best of NAB's knowledge the investigation was commenced at the direction of Ms Keetelaar and / or Mr Long.
> …
>
> …
>
> [75] The General Manager, Payments was ultimately responsible for management of the investigation and had authority to make decisions on proposed courses of action. Ms Keetelaar was in this role in December 2016, when the Payments team took over responsibility for the investigation …
>
> …
>
> [84] Between the end of October 2016 and January 2017, some of the correspondence between NAB employees about the identification and investigation of the PP Fees overcharging included:
>
> …
>
> 84.3 On 4 November 2016, a meeting was held between NAB employees in relation to the "PP Charging Issue" and considering a SERP, which included Ms Keetelaar, Mr Long and Mr Winkett.
>
> 84.4 On 8 November 2016, Ms Ruffell forwarded an email to Mr Long and Ms Keetelaar which recorded that NAB's revenue from PP Fees for the last four financial years (FY13 to FY16) was "64k an average of $15k per annum". On 14 November 2016, Mr Long sent an email in reply which relevantly stated: "Looking at recent numbers, may as well just waive the fee for all customers going forward. Revenue is not worth trying to control in my view ($30k pa)". Ms Keetelaar replied: "Agreed".

117 In this way, Ms Keetelaar was aware from a very early stage that there was some issue in relation to the incorrect charging of PP Fees. It was specifically suggested to her, on 14 November 2016, that PP Fees should be waived for all customers going forward. She agreed with that proposal, yet NAB did not cease to charge PP Fees until 22 February 2019. Against this background, NAB's submission that "[t]here is no evidence that the General Manager, Payments in fact had knowledge of the extent of overcharging '[f]rom January 2017'" seems to promote the taking of an unduly technical approach. The preferable view is that the person

with the authority necessary to take the critical step to resolve the issue was, by an early stage in the Contravening Period, in possession of information that was likely sufficient to justify the taking of that step.

118 Secondly, even if it was accepted that persons in positions of authority were in fact unacquainted with the overcharging issue at this early stage, that would merely illustrate a different problem within NAB's organisation. It would be remarkable for a bank to operate with such strict silos and hierarchies that, once it became known that its systems were incorrectly deducting money from its customers' accounts, the matter would not immediately be referred to a person in senior management with power to resolve the problem. Again, that would tend to suggest a culture in the bank whereby customers' legal rights were accorded a low priority.

119 Ultimately, nothing about the involvement of senior management in the contravening conduct militates against the imposition of the maximum penalty of $2.1 million. To the contrary, it would lend support to the imposition of a higher penalty, if it was available.

The adequacy of the compliance systems in place

120 Similar comments can be made in relation to the issue of the adequacy of the systems and processes that NAB had in place during the Contravening Period. ASIC submitted that the penalty should be increased due to the lack of "appropriate systems or processes in place to guide decision-making about appropriate courses of actions or considerations once the wrongful charging of PP Fees was identified", and because there was a lack of evidence that NAB had since made improvements to whatever systems and processes were in place. In response, NAB submitted that ASIC's contentions in relation to the systems and processes in place to "guide decision-making" once the wrongful charging was identified raised a new, unpleaded allegation. The focus at the liability trial, so it was said, had been on the dysfunctionality of the systems that NAB had in place to detect instances of overcharging and to ensure that further instances were prevented. NAB also submitted that there was no evidence to support ASIC's new contentions because no material had been adduced as to what systems and processes might effectively "guide decision-making" if wrongful charging was to occur again in the future. It alleged that the notion that any such "blanket" system or process could be devised was "mere assertion", as the appropriate response to any instance of overcharging or undercharging would have to be determined on a case-by-case basis.

121 It is true that there was no issue at the liability hearing as to the adequacy of the systems and processes used by NAB to guide decision-making after the identification of incorrect overcharging and that the focus was instead on the systems that might have prevented overcharging in the first place. Nevertheless, the evidence necessarily revealed a state of paralysis within NAB's management once the issue of the overcharging of PP Fees came to light. If it did have a system or process in place for the purpose of guiding decision-making in response to issues of this nature, such that persons in positions of authority could be informed of the circumstances and swiftly empowered or equipped to take remedial action, that system or process quite plainly failed at the critical time of the events at the centre of these proceedings. Self-evidently, the system or process was either unsuitable or deficient because, according to NAB's own submission, the General Manager, Payments only became fully aware of the extent of the issue concerning the wrongful charging of PP Fees in around October 2017, when a specific cohort of customers who had been overcharged was first identified. It is not apparent why, as NAB's submission seems to suggest, it was the identification of this cohort of persons that prompted the communication of the necessary information to the person in the appropriate position of authority. Whatever the explanation might be, it remains noteworthy that it took about 10 months for that person to become entirely conscious of the affair, and a further eight months for them to take the steps that were required to bring it to an end.

122 As NAB pointed out, ASIC did not succeed at the liability stage of these proceedings in relation to its claim that NAB had breached its obligation to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, as required by s 912A of the *Corporations Act*, by reason of its failure to have adequate systems and processes in place to address the potential issue of overcharging of PP Fees. However, that was only because ASIC set too high a standard by which to identify a breach of that provision. It asserted that NAB was required to have in place systems and processes to "ensure" that PP Fee overcharging did not occur. It was found that, even if NAB's systems and processes did not meet this standard, that would not prove a contravention of s 912A because to take the contrary view would suggest a counsel of perfection, too far exceeding the standards of commercial morality that might reasonably be expected in the provision of banking services: *ASIC v NAB* [364]. It was, however, held in *ASIC v NAB* at paragraph [358] that:

> … There was a complete failure of the systems and processes which was evidenced by significant, constant and persistent overcharging occurring undetected for a number of years as NAB has admitted. That over 1.6 million instances of overcharging occurred

> in relation to more than 3,400 accounts self-evidently discloses the inadequacies. Moreover, even when the overcharging was detected, the systems were insufficient to enable the bank to prevent further occurrences or to detect precisely where past overcharging had occurred.

123 Further defects in NAB's systems and processes were identified subsequently in those reasons.

124 Whilst the parties made nuanced submissions about the nature of the systems and processes in place and their relevance to the quantum of the appropriate penalty, the reality is that, whilst NAB's defective systems did not amount to a contravention of s 912A of the *Corporations Act*, they were inadequate to allow it to meet its commitments to its customers. Even if it is assumed that NAB did have some internal management arrangements by which it had intended to respond to issues such as the wrongful charging of PP Fees, those arrangements were either deficient or insufficiently robust to meet the circumstances of the present case. Again, that outcome it is reflective of a culture that places a low priority on customers' rights relative to the bank's own best interests.

125 Those observations may indicate some likelihood that similar problems will surface in the future, with the consequence that the penalty imposed in the present case should be calibrated with an emphasis on specific deterrence. This factor accordingly serves to justify the imposition of the maximum available penalty, though it simultaneously suggests that this maximum is woefully insufficient.

Other matters

126 Ultimately, the specific deterrent effect of the penalty in this case is somewhat of a moot point once it is acknowledged that the imposition of the maximum penalty available for a single contravention of s 12CB(1) is unlikely to have any significant impact on NAB, given its assets and revenues.

127 NAB nevertheless submitted that specific deterrence was not to be overemphasised as a factor relevant to the determination of the appropriate penalty in this case. It pointed to three matters in support of this submission, which may be addressed in turn.

128 First, it identified that it has undertaken remediation by making payments to its customers, which negated any financial benefit that it might otherwise have obtained from the contravention. That it no doubt a mitigating factor, as it makes NAB's overall conduct more tolerable than it would have been had it *not* made any attempt to disgorge the gains that it received from the wrongful charging of PP Fees. However, it does not go especially far in

reducing the need for specific deterrence. NAB was fully aware for some time that the system by which it imposed PP Fees was dysfunctional, in that certain customers were being charged fees when they should not have been, or were being overcharged. Instead of taking steps to prevent that from occurring, as it could quite readily have done, it allowed the system to continue operating while it investigated the problem, gathered data and mulled potential solutions. Shutting down the system altogether would necessarily have caused it to suffer a degree of financial detriment, and asking customers to check their accounts for instances of overcharging might have harmed its reputation, but these steps were clearly in the interest of its customers and were not difficult to take. Instead, NAB prioritised its own interests and continued to profit from the unauthorised deduction of fees from its customers' accounts. That is the heart of the impropriety in this case, and it suggests a pressing need for specific deterrence. That need is not significantly diminished by the fact that NAB ultimately returned the incorrectly charged fees to its customers. If that was to be considered a substantially exculpatory factor, then there would be little reason to take steps to ensure that similar conduct did not occur in future: harm could be caused, even over a prolonged period, so long as it was later remediated. An appropriate penalty should encourage the prevention of the conduct that would cause the harm in the first place.

129 Secondly, NAB submitted that its size and financial position, whilst relevant to the question of specific deterrence, must "operate in conjunction with the principle that the penalty should be proportionate to the seriousness of the conduct" — that proposition having been quoted from the judgment of Siopis J in *Australian Competition and Consumer Commission v DuluxGroup (Australia) Pty Limited (No 2)* [2016] FCA 1286 at paragraph [217]. However, with respect, his Honour's reference to the "seriousness" of the conduct in this passage must be viewed with scepticism. At paragraph [220] of the same case, his Honour went on to address this concept of "seriousness" in more detail as follows:

> I have found that the contravening conduct was serious, but that seriousness was at the lower to middling end of the seriousness, rather than at the higher end of serious contravening conduct. The penalty to be imposed should, therefore, be proportionate to that circumstance. The fact that Dulux is a well-resourced company will not mean that the Court will impose a higher penalty than is proportionate to the seriousness of the contravening conduct.

130 This reasoning seems to be inconsistent with what was said more recently by the joint majority of the High Court in *Pattinson*, particularly where their Honours recognised (at 471 [49]) that the Full Court below had fallen into error by "treating the statutory maximum 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". Since *Pattinson*, Colvin J has stated, straightforwardly, in *Australian Securities and Investments Commission v Australian Mines Limited* [2023] FCA 9 at paragraph [32] that "there is no place for the notion that the penalty must be proportionate to the seriousness of the conduct that constituted the contraventions".

131 NAB's submission therefore seems to draw upon an incorrect principle. In determining the extent to which its size and financial position should bear on the question of specific deterrence, there is no need to integrate or account for any inquiry into the seriousness of the conduct. The size and financial position of a contravenor has long been considered directly relevant to the objective of specific deterrence on the simple basis that "[w]hat would deter a small company might have little effect on a very large one": *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, 293, quoting *Trade Practices Commission v TNT Australia Pty Ltd* [1995] ATPR ¶41,375, 40,168.

132 NAB has net assets exceeding $866 billion. Its revenues are substantial. It need scarcely be said that, had the maximum penalty available in this case been higher, it would likely have been appropriate to impose a penalty several multiples of $2.1 million. As things are, it is difficult to accept that the maximum penalty in this case will carry the "sting" that is necessary to achieve a specific deterrent effect: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, 195 – 196 [116].

133 Thirdly, NAB pointed out that there is a need to strike a reasonable balance between "oppressive severity" and the level of specific deterrence required in this particular case. It made reference, in connection with the latter of these matters, to the fact that it had not acted in a cynical manner by treating the penalty as a "cost of doing business" and the fact that it had ceased charging PP Fees on 22 February 2019. So much might be accepted. However, given that the maximum penalty of $2.1 million could on no view be considered oppressive, this submission can have little bearing on the ultimate outcome in this case.

134 The next point to consider is whether NAB has previously committed similar contraventions. If it has, this will be an aggravating factor tending to suggest the imposition of a higher penalty: *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24, 46 [135]. This is a mandatory consideration in the determination of the appropriate penalty, as identified by s 12GBA(2)(c) of the *ASIC Act*, which asks specifically

whether the contravenor "has previously been found by the Court in proceedings under this Subdivision to have engaged in any similar conduct".

135 On this point, ASIC drew the Court's attention to two cases.

136 First, in *Australian Securities and Investments Commission v National Australia Bank Limited* (2017) 123 ACSR 341, Jagot J imposed a pecuniary penalty of $10 million against NAB for engaging in unconscionable conduct in contravention of the *ASIC Act* on a number of occasions in the period from December 2010 to October 2011 when its employees attempted to influence the Bank Bill Swap Reference Rate (BBSW) to the bank's benefit and to the detriment of counterparties. NAB was also found to have contravened s 912A(1)(a) and (f) of the *Corporations Act*, in that it failed to have adequate policies or procedures in place for the supervision and monitoring of its employees. Her Honour remarked relevantly as follows at 365 [115] (noting that a second respondent bank was found to have engaged in the same conduct in that case):

> That any employee performing these kinds of functions within a bank, let alone two pillars of Australia's banking system, could have conceived of manipulating the BBSW, and in fact attempted to do so repeatedly over such periods of time bespeaks fundamental failings in the culture, training, governance and regulatory systems of both NAB and ANZ. The public should be shocked, dismayed and indeed disgusted that conduct of this kind could have occurred. The conduct involved attempts to corrupt a fundamental component of the entire Australian financial system for mere short term commercial advantage. The conduct involved a repeated failure to fulfil what would generally be perceived as the most basic standards of honesty, fairness and commercial decency, let alone the standards that would properly be expected of these two banks. The conduct tends to undermine public confidence in the entirety of the Australian financial system.

137 Secondly, in *Australian Securities and Investments Commission v National Australia Bank Limited* [2021] FCA 1013, NAB admitted several contraventions of the *ASIC Act* and the *Corporations Act* by its conduct in:

(a) failing to give fee disclosure statements to a number of financial planning clients, and by charging ongoing fees to those clients when it was not entitled to do so;

(b) making false or misleading statements to clients in its fees disclosure statements, which contained incorrect information about ongoing fees paid by clients and/or services provided to them; and

(c) failing to establish and maintain documented policies, procedures and systems that were adequate to identify whether it had provided review services to clients in accordance

with ongoing service agreements and financial disclosure statements, and whether it was prohibited from charging ongoing fees to any particular client.

138 After recounting the relevant facts and principles in some detail, Davies J imposed a pecuniary penalty of $18.5 million. In doing so, her Honour observed that NAB's breaches of the civil penalty provisions involved an erosion of important consumer protection mechanisms, were "serious", and arose from "deficiencies in NAB's compliance systems and controls": at [100] – [101].

139 Both of these cases were "proceedings under this Subdivision", within the meaning of s 12GBA(2)(c) of the *ASIC Act*, in that the relevant penalties were sought pursuant to s 12GBA(1) (at least *inter alia*, in the latter case before Davies J).

140 NAB contended that these cases were nevertheless distinguishable and were "not meaningful" to the Court's analysis at present. It submitted that the concept of "similar conduct", as a factor to be taken into account in the determination of the appropriate penalty, was to be understood in the words used by Jacobson J in *Australian Securities and Investments Commission v GE Capital Finance Australia, in the matter of GE Capital Finance Australia* [2014] FCA 701 at paragraph [91] as "conduct which is similar to the conduct that is the subject of this proceeding". On this basis, it asserted that it had not previously been found to have engaged in any conduct similar to the contravening conduct in this case.

141 That submission should be rejected. When regard is had to the full passage of the judgment of Jacobson J within which the text quoted by NAB appears, it is clear that his Honour was not attempting to define the phrase "similar conduct", or to establish a test for what might render conduct sufficiently "similar" to be relevant to the penalty inquiry. The extract upon which NAB has seized does no more, in effect, than put the words "similar" and "conduct" the other way around. NAB seems, nevertheless, to have understood that as giving rise to quite a narrow conception of what amounts to sufficient "similarity", such that it is possible to conclude that it has not previously been found to have engaged in any conduct "similar" to the contravening conduct in this case despite the two aforementioned cases having some noticeable factual parallels.

142 In fairness to NAB, it does not appear that there has been any particularly detailed consideration of what the phrase "similar conduct" actually entails. In at least two decisions of this Court, it has been treated, albeit without any supporting analysis, as involving or extending to a prior

contravention of the same legislation: see *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* (2020) 148 ACSR 247, 275 [182]; *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 [150]. In *Director of Consumer Affairs Victoria v Dimmeys Stores Pty Ltd* (2013) 308 ALR 296, Marshall J gave a relatively thorough explanation of the previous occasions on which the respondent in that case had been brought before the Court for engaging in similar conduct. At the outset of this explanation, his Honour stated at 302 [35] that:

> It would be an understatement to say that Dimmeys has a poor record of compliance with its consumer protection obligations. Cases where Dimmeys' failure to fulfil its legal duties in that regard are discussed below.

143 This statement could perhaps be taken to suggest that the past conduct need only be "similar" in a more general sense, in that it also involved a contravention of a rule within the same overarching area of law — for example, consumer protection.

144 These authorities offer some preliminary guidance, but it is necessary to consider the point at the level of principle. Whether or not a contravenor can be said to have engaged in "similar conduct" in the past must involve a relatively broad and impressionistic inquiry. The phrase, taken in isolation, cannot be understood as necessitating that the conduct in question constituted a contravention of the same statutory provisions, or even provisions within the same statute. If the conduct was comprised of analogous acts or omissions, it would be surprising if it could be considered dissimilar merely because, by reason of fluctuations in its severity, in its context or in the cogency of the evidence available to the applicant, it was found to breach a certain rule in one case and a different rule in another. One might even doubt whether the phrase strictly requires a contravention of a rule within the same area of law, although it is difficult to envisage a circumstance in which instances of conduct in breach of rules in wholly different legal settings could be described as "similar".

145 The concept of "similarity" can in this way be mapped as a spectrum. At one extreme lies instances of identical conduct in breach of precisely the same rule. It is not especially useful to speculate as to what might lie at the other extreme, although the points of correspondence between the instances of conduct would no doubt have to be more than tenuous. Along that spectrum will rise and fall the relevance of the prior conduct to the penalty in the case at hand. If the contravenor has contravened the same statutory provision in two separate cases by engaging in precisely the same conduct, the need for specific deterrence will be substantially

elevated, and the quantum of the appropriate penalty ought to be increased accordingly. The repetition of the conduct would show a gross disregard for, or even an intentional defiance of, the law. As the similarity of the instance of conduct diminishes, however, so too might the bearing of this factor on the need for specific deterrence. For instance, if a contravenor engages in behaviour on multiple occasions that breaches rules of consumer protection law in different ways, that might reveal a degree of insouciance or a want of effective compliance systems, but will not ordinarily be taken to demonstrate outright neglect or defiance of the law.

146 Whilst the question of what constitutes "similar conduct" might in this way be approached quite broadly, the investigation in many instances will have a clear outer limit: if the "similar conduct" factor falls to be considered because it is referred to specifically in the applicable legislation, then one must pay close attention to the text of that legislation. In this case, for instance, s 12GBA(2)(c) of the *ASIC Act* sets an apparent outer limit for what might be considered "similar conduct" by requiring that the contravenor "has previously been found by the Court *in proceedings under this Subdivision*" to have engaged in the relevant conduct.

147 Proceeding accordingly, there are clear points of analogy between this case and the two prior cases in which a pecuniary penalty was imposed against NAB. In the proceedings before Jagot J, NAB was found to have engaged in unconscionable conduct in contravention of the *ASIC Act*, as it was here. In the case before Davies J, it was found to have charged ongoing fees to clients without an entitlement to do so, as it was here. In both cases, as here, the Court made findings as to NAB's failure to have in place effective systems and procedures to ensure compliance with the law. These points suffice to demonstrate that the conduct in those cases was "similar" to the conduct here. Indeed, they show the degree of similarity to be tending towards the upper end of the spectrum, at which a greater degree of specific deterrence is warranted. The prior contraventions, at the very least, prevent the Court from granting the reduction in penalty that might be accorded to a first time offender with a prior exemplary record. This factor, too, justifies the imposition of a penalty of $2.1 million.

148 Given the inadequacy of the maximum available penalty in this case, there is no need to consider whether considerations of parity, either with two prior cases involving NAB or with other similar decisions, should influence the outcome.

149 Finally, the issue of general deterrence does not loom large in this case, given that the maximum available penalty is a fraction of that which would be required to deter other banks from engaging in similar conduct. In this respect, it should be noted that banks are in a position of

particular power in their relationships with their customers, given the control that they exert over their customers' accounts and their ability to ascertain at any time the true state of the indebtedness *inter se*. Many customers will accordingly proceed on an expectation that their bank will deal with them in good faith, and with integrity and honesty. That unavoidable degree of trust, engendered by an overwhelming power imbalance, will ordinarily make considerations of general deterrence particularly acute in circumstances where it is found that a financial institution has taken advantage of its customers. Were the present circumstances different, that would compel the imposition of a higher penalty against NAB for its unconscionable conduct.

Conclusion on penalty

150 For the reasons set out above, the only penalty that can appropriately be imposed is $2.1 million. That is, without question, woefully insufficient in the circumstances. However, some solace can be taken in the fact that, in the time that has passed since the contravening conduct in this case occurred, the relevant provisions of the *ASIC Act* have been updated to permit the imposition of a substantially higher penalty.

ADVERSE PUBLICITY ORDER

151 As at the time of the contravening conduct, the Court had power under s 12GLB(1)(a) of the *ASIC Act* to make an adverse publicity order, as defined in s 12GLB(2), against a person who had been ordered to pay a pecuniary penalty under s 12GBA(1).

152 NAB did not oppose the making of an adverse publicity order, though it sought certain amendments to the statement proposed by ASIC in order to ensure that it was accurate and fair. It did not take issue with ASIC's position in relation to the manner in which the statement is to be made available, or the length of time over which it is to be published.

153 Any statement that a court requires a party to make in relation to a proceeding must no doubt be entirely accurate. Compelled speech is a curtailment of our common law freedom of speech, which has long been recognised as part of the law of Australia: see *Hogan v Hinch* (2011) 243 CLR 506, 526 [5] and the cases cited by French CJ at footnote 127. Where a court is urged to impose upon a citizen an obligation to make a statement, it is fundamental to the preservation of their protected freedom that they are not compelled to say more than is strictly necessary and appropriate, and that what they are required to say is verifiably true. It is highly unlikely that, by enacting provisions such as s 12GLB of the *ASIC Act*, the legislature intended to empower courts to compel a person to make false, misleading or needlessly value-laden

statements. Were it intended for the courts to have such a power, the principle of legality would demand that it be conferred in clear and unambiguous terms.

154 Happily, in this case, there is little variation between the statements proposed by each of the parties, with the only differences being NAB's clarifications. Without intending any criticism of the version proposed by ASIC, I have adopted the slightly more precise version put forward by NAB. I have also made a slight amendment to the duration for which the statement is to be published.

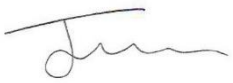
155 ASIC is accordingly entitled to an order that NAB make the statement that is contained in the orders accompanying these reasons in the manner and for the duration specified.

COSTS

156 The Court can, in appropriate circumstances, apportion the costs of proceedings where the parties have each succeeded on different and severable issues: *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, 236 – 237 [15]. In this case, NAB did succeed in defeating some of the contraventions alleged at the liability stage of this litigation. However, ASIC was obliged to bring the proceedings in the discharge of its statutory duty to enforce the requirements of the *ASIC Act*. Its enforcement of financial services legislation, generally, serves a wider public interest in ensuring that financial markets operate ethically and efficiently. Importantly, in this case, ASIC also succeeded on a significant part of its claim in the face of vigorous, but fair, opposition from NAB.

157 Although the issues on which NAB succeeded were separate from those on which ASIC succeeded, it is not easy to determine what portion of the evidence and the time spent at trial was devoted to each. This renders apportionment a most difficult task, such that any attempt to perform it will almost certainly be attended by an undesirable degree of artificiality. In the circumstances, the most appropriate conclusion is that NAB should pay ASIC's costs of the proceedings, given that ASIC has substantially succeeded in obtaining orders for the imposition of civil penalties against NAB for unconscionable conduct.

I certify that the preceding one hundred and fifty-seven (157) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate: 

Dated: 22 September 2023