

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Layaway Depot Pty Ltd [2023] FCA 1685

File number: QUD 116 of 2022

Judgment of: **RANGIAH J**

Date of judgment: 29 May 2023

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Catchwords: **CONSUMER LAW** – sale of goods by instalments – engaging in credit activities without a licence – annual cost rate of credit contracts – breach of key requirement – agreed relief – declaration – injunction – civil penalty – consideration of appropriate pecuniary penalty – relief granted

Legislation: *Fair Work Act 2009* (Cth) s 546
Federal Court of Australia Act 1976 (Cth) s 21
National Consumer Credit Protection Act 2009 (Cth) ss 6, 29, 29(1), 166, 167, 167(3), 177, 253 and 266
National Credit Code at Schedule 1, ss 4, 5, 9, 32A(1), 111(1)(j), 113(1) and 113(2) to the *National Consumer Credit Protection Act 2009* (Cth)

Cases cited: *ACCC v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238, 145 ALR 36
ACCC v Get Qualified Australia Pty Ltd (in liq) (No 3) [2017] FCA 1018
ACCC v Telstra Corporation Ltd (2010) 188 FCR 238; [2010] FCA 790
ACCC v TPG Internet Pty Ltd (2013) 250 CLR 640
ACCC v Universal Music Australia Pty Ltd (No 2) (2002) 201 ALR 618
ACCC v Yazaki Corporation (2018) 262 FCR 243; [2018] FCAFC 73
ASIC v AGM Markets Pty Ltd (in liq) (No 4) (2020) 148 ACSR 511; [2020] FCA 1499
ASIC v Channic Pty Ltd (No 5) [2017] FCA 363
ASIC v Commonwealth Bank of Australia [2020] FCA 790
ASIC v Fast Access Finance Pty Ltd (No 2) [2017] FCA

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ASIC v Financial Circle Pty Ltd [2018] FCA 1644

ASIC v GoGetta Equipment Funding Pty Ltd [2021] FCA 420

ASIC v Make it Mine Finance Pty Ltd (No 2) [2015] FCA 1255

ASIC v MLC Nominees Pty Ltd (2020) 147 ACSR 266; [2020] FCA 1306

ASIC v Rent 2 Own Cars (No 2) (2022) 159 ACSR 528; [2022] FCA 491

ASIC v Westpac Banking Corporation (No 3) (2018) 131 ACSR 585; [2018] FCA 1701

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (2018) 262 CLR 157; [2018] HCA 3

Australian Building and Construction Commissioner v Pattinson (2022) 399 ALR 599

Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2

CEO of AUSTRAC v Westpac Banking Corporation (2020) 148 ACSR 247; [2020] FCA 1538

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

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

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

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45

Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10

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

Rural Press Ltd v ACCC (2003) 216 CLR 53

Singtel Optus Pty Ltd v ACCC (2012) 287 ALR 249

Trade Practices Commission v CSR Limited (1991) ATPR 41-076; [1990] FCA 521

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Counsel for the Applicant: Ms RL Enbom KC with Mr SE Seefeld

Solicitor for the Applicant: Australian Securities and Investments Commission

Counsel for the Respondent: Mr CGC Curtis

Solicitor for the Respondent: HWL Ebsworth Lawyers

ORDERS

QUD 116 of 2022

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Applicant

AND: **LAYAWAY DEPOT PTY LTD ACN 165 233 947**
Respondent

ORDER MADE BY: **RANGIAH J**

DATE OF ORDER: **29 MAY 2023**

PENAL NOTICE

TO: LAYAWAY DEPOT PTY LTD (ACN 165 233 947)

If you (being the person bound by this order):

(A) Refuse or neglect to do any act within the time specified in the Respondent's undertaking or paragraph 3 of this order for the doing of the act; or

(B) Disobey paragraph 3 of the order by doing an act which the order requires you not to do,

You will be liable to imprisonment, sequestration of property or other punishment.

Any other person who knows of this order and does anything which helps or permits you to breach the terms of this order may be similarly punished.

NOTING THAT

A. These declarations and orders adopt the following defined terms:

- (a) ***Australian Credit Licence*** means a licence issued by the Australian Securities and Investments Commission to persons that engage in credit activities.
- (b) ***Credit Act*** means the National Consumer Credit Protection Act 2009 (Cth);
- (c) ***Credit Code*** means the National Credit Code at schedule 1 to the Credit Act;
- (d) ***Federal Court Act*** means the Federal Court of Australia Act 1976 (Cth);
- (e) ***Pleaded Contracts*** means the contracts listed at Annexure 1; and
- (f) ***Relevant Period*** means the period from 1 June 2020 to 11 August 2021.

AND UPON THE RESPONDENT'S UNDERTAKING TO THE COURT THAT:

- B. Within 14 days of the date of this order, the Respondent will send a communication by email in the form contained at **Annexure 2** to each of the customers who entered into the Pleded Contracts and paid any amount under the Pleded Contracts.

THE COURT DECLARES THAT:

1. The Respondent, by entering into the Pleded Contracts, engaged in credit activity without holding an Australian Credit Licence, in contravention of section 29 of the Credit Act.
2. By entering into the Pleded Contracts which were credit contracts with an annual cost rate that exceeded 48%, the Respondent contravened section 32A(1) of the Credit Code.

THE COURT ORDERS THAT:

3. The Respondent is permanently restrained, from the date of this order, whether by itself, its servants, agents or otherwise, from further contraventions of section 29 of the Credit Act and section 32A(1) of the Credit Code by:
 - (a) engaging in credit activity by entering into contracts on the terms of the Pleded Contracts, without holding an Australian Credit Licence;
 - (b) entering into credit contracts with an annual cost rate that exceeds 48%.
4. The Respondent pay to the Commonwealth a pecuniary penalty of \$375,000.00 in respect to the contraventions of section 29 of the Credit Act and section 32A(1) of the Credit Code, with that sum to be paid as follows:
 - (a) \$175,000.00 on or before 30 June 2023; and
 - (b) \$200,000.00 on or before 31 December 2023.
5. By consent, the Respondent pay the Applicant's costs of and incidental to this proceeding fixed in the amount of \$25,000.00, with that sum to be paid within 28 days of the date of this order.

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

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RANGIAH J:

- 1 The Australian Securities and Investments Commission (**ASIC**) brought proceedings alleging that the respondent, Layaway Depot Pty Ltd (**LAD**), contravened s 29 of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**) and s 32A(1) of the *National Credit Code* at Schedule 1 to the Credit Act (**Credit Code**).

2 The contraventions were alleged to have occurred through LAD’s entry into 70 contracts with consumers (**Pleaded Contracts**) during the period from 1 June 2020 to 11 August 2021 (**Relevant Period**).

3 LAD admitted the contraventions. On 29 May 2023, I made orders substantially in accordance with draft orders agreed by the parties. I indicated that I would provide my reasons for making those orders in due course. These are my reasons.

Background

4 During the Relevant Period, LAD operated a business that offered consumers the option to purchase household appliances and electronic goods. This involved the consumers making regular payments to LAD (via direct debit from their bank account) while having possession and use of the goods. LAD operated the business through its website.

5 LAD used a standard form contract for its agreements with consumers that comprised a general terms document and a specific terms document. The contracts operated as follows:

- (a) The contract provided for the consumer to make instalment payments of a specified amount (either weekly or fortnightly) for a specified period.
- (b) The goods were delivered to the consumer after a minimum number of consecutive instalment payments.
- (c) The contract provided the consumer with the option to purchase the goods. The contract stated that the option is taken to have been exercised by the consumer once all of the instalment payments under the contract had been received by LAD. LAD retained ownership of the goods until all of the instalment payments had been made.
- (d) The contract provided for the consumer to elect not to exercise the option to purchase the goods by returning the goods and notifying LAD that the consumer did not wish to exercise the option.
- (e) If the consumer elected to cancel the contract, the consumer was entitled to a refund of the instalments paid but was required to pay certain fees and charges. These “cancellation charges” included an “administration fee”, a “delivery charge” and “daily hire fees” (calculated from the day the goods were delivered until the day they were returned, but capped at a maximum hire fee). The maximum amount of the cancellation charges was set out in the contract.

6 LAD did not hold an Australian Credit License (ACL).

The legislation

7 Section 9 of the Credit Code provides, relevantly:

9 Goods leases with option to purchase to be regarded as sale by instalments

(1) For the purposes of this Code, a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods, is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so) exceeds the cash price of the goods.

...

(2) A debt is to be regarded as having been incurred, and credit provided, in such circumstances.

(3) Accordingly, if because of subsection 5(1) the contract is a credit contract, this Code (including Part 6) applies as if the contract had always been a sale of goods by instalments, and for that purpose:

- (a) the amounts payable under the contract are the instalments; and
- (b) the credit provider is the person who is to receive those payments; and
- (c) the debtor is the person who is to make those payments; and
- (d) the property of the supplier in the goods passes under the contract to the person to whom the goods are hired on delivery of the goods or the making of the contract, whichever occurs last; and
- (e) the charge for providing the credit is the amount by which the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so), exceeds the cash price of the goods; and

...

(4) For the purposes of this section, the amount payable under the contract includes any agreed or residual value of the goods at the end of the hire period or on termination of the contract, but does not include the following amounts:

- (a) any amount payable in respect of services that are incidental to the hire of goods under the contract;
- (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity.

...

8 Section 29(1) of the Credit Act provides, relevantly:

29 Prohibition on engaging in credit activities without a licence

Prohibition on engaging in credit activities without a licence

- (1) A person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

Civil penalty: 5,000 penalty units.

9 Section 32A(1) of the Credit Code provides, relevantly:

32A Prohibitions relating to credit contracts if the annual cost rate exceeds 48%

Entering into a credit contract

- (1) A credit provider must not enter into a credit contract if the annual cost rate of the contract exceeds 48%.

Criminal penalty: 50 penalty units.

The contraventions

10 The Pledged Contracts entered into by LAD are “credit contracts” by operation of s 9 of the Credit Code. Section 9 of the Credit Code provides that certain contracts for the hire of goods, under which the hirer has a right or obligation to purchase the goods and where the total of the charge and any other amount payable under the contract exceeds the cash price of the goods, are to be regarded as a “sale of the goods by instalments”, and in certain circumstances will be regulated by the Credit Act and the Credit Code.

11 It follows that, by ss 4 and 5 of the Credit Code and s 6 of the Credit Act, the entry by LAD into the Pledged Contracts was “credit activity”. Accordingly, LAD contravened s 29 of the Credit Act by engaging in credit activity without holding an ACL.

12 LAD also contravened s 32A(1) of the Credit Code as the annual cost rate of each of the contracts exceeded 48%.

Relief: Relevant principles

13 ASIC sought declaratory relief, injunctions and pecuniary penalties.

14 The matter was listed for hearing on 29 May 2023. On 26 May 2023, the parties filed joint submissions and a Statement of Agreed Facts (SOAF) whereby LAD had admitted it contravened the Credit Act and the Credit Code. The parties also provided agreed proposed orders.

15 The proper approach to civil regulatory orders which are sought on an agreed basis was explained in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (*Cth v FWBII*). The plurality emphasised, at [46], the “important public policy involved in promoting predictability of outcome in civil penalty proceedings” which “assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention”. As a result, there is “very considerable scope” for the parties to civil proceedings to agree upon the appropriate remedy and for the court to be persuaded that it is an appropriate remedy: at [57]. Their Honours went on to state, at [58]:

Subject to the court being sufficiently persuaded of the accuracy of the parties’ agreement as to facts and consequences, and that the penalty which the parties propose is an appropriate remedy in the circumstances thus revealed, it is consistent with principle and ... highly desirable in practice for the court to accept the parties’ proposal and therefore impose the proposed penalty.

16 A further reason for courts acting upon such submissions is that they are advanced by a specialist regulator able to offer, “informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance”, albeit that such submissions will be considered on the merits in the ordinary way: see at [60]–[61].

17 These principles are not confined to agreed submissions on pecuniary penalties, but apply equally to agreement on other forms of relief. The High Court’s conclusions as to the desirability of acting upon agreed penalty submissions were made in the context of its broader recognition that civil penalties were but one of numerous forms of relief which a regulator could choose and pursue as a civil litigant in civil proceedings including by making submissions as to that relief: see at [24], [57]–[59], [63], [103] and [107]. This is consistent with the long-standing judicial support for agreed positions on declarations, injunctions and the like in civil regulatory proceedings, having regard to the public interest explained in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (ACCC)* (1996) 71 FCR 285 (*NW Frozen Foods*) at [291].

Declarations

18 The Court may make declarations in relation to contraventions of a civil penalty provision under s 166 of the Credit Act. Section 29 of the Credit Act is a civil penalty provision.

19 The Court may also make declarations in relation to breaches of a key requirement by a credit provider under s 113(1) of the Credit Code. Pursuant to s 111(1)(j) of the Credit Code, the requirement in s 32A(1) is a key requirement of a credit contract.

20 Further, the Court has a wide discretionary power to make declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**).

21 Before making declarations, three requirements should be satisfied:

- (a) there must be a real controversy, as opposed to a hypothetical or theoretical question;
- (b) the applicant must have a real interest in raising the question; and
- (c) there must be a proper contradictor

(see *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437–438; *ASIC v MLC Nominees Pty Ltd* (2020) 147 ACSR 266; [2020] FCA 1306 at [110]; and *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at [95]).

22 The High Court and Full Federal Court have both recognised the utility of declarations which set out the particular liability found and the basis for penalties ordered. Declarations may be appropriate to record the Court’s disapproval of the conduct, assist ASIC in carrying out the duties conferred on it by the applicable legislation, assist in clarifying the law, and make clear to other would-be contraveners that such conduct is unlawful. Notwithstanding any agreement between the parties in respect of proposed declarations, it is for the Court to decide whether declaratory relief is appropriate.

23 I am satisfied that it is appropriate to make declarations in the form agreed by the parties.

Injunctions

24 The Court may grant an injunction under s 177 of the Credit Act on such terms it considers appropriate, where it is satisfied that a person has engaged in conduct constituting a contravention of that Act.

25 I am satisfied that it is appropriate to grant injunctions in the form agreed by the parties.

Civil penalty

26 The Court may order payment of a penalty under s 167 of the Credit Act in relation to contraventions of a civil penalty provision.

27 The Court may also order payment of a penalty in relation to breaches of a key requirement by a credit provider under s 113(2) of the Credit Code.

28 The maximum penalty for a corporation for the contravention of s 29 of the Credit Act and s 32A(1) of the Credit Code is 50,000 penalty units.

29 During the Relevant Period, a penalty unit was \$210 until 30 June 2020 and \$222 from 1 July 2020. Accordingly, the maximum penalty for a contravention of the relevant provisions was \$10.5 million to \$11.1 million.

30 Section 167(3) of the Credit Act provides that in determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:

- (a) the nature and extent of the contravention;
- (b) the nature and extent of any loss or damage suffered because of the contravention;
- (c) the circumstances in which the contravention took place; and
- (d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in similar conduct.

31 Further to the matters above, other factors (in some respects overlapping with the express matters) that have been identified as being potentially relevant in setting a pecuniary penalty in relation to a body corporate include:

- (a) the extent to which the contravention was the result of deliberate or reckless conduct by the corporation, as opposed to negligence or carelessness;
- (b) the number of contraventions, the length of the period over which the contraventions occurred, and whether the contraventions comprised isolated conduct or were systematic;
- (c) the seniority of officers responsible for the contravention;
- (d) the size and financial position of the contravening group of which the corporation forms part (taking into account capacity to pay) and the degree of power it has, as evidenced by its market share;
- (e) the existence within the corporation at the time of the contraventions of compliance systems;

- (f) remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention;
- (g) whether the directors of the corporation were aware of the relevant facts and, if not, what processes were in place at the time or put in place after the contravention to ensure their awareness of such facts in the future;
- (h) the degree of the corporation's cooperation with the regulator, including any admission of an actual or attempted contravention;
- (i) the impact or consequences of the contravention on the market or innocent third parties;
- (j) the extent of any profit or benefit derived as a result of the contravention;
- (k) whether the company has disgorged any profit or benefit received as a result of the contravention, or made reparation; and
- (l) whether the corporation has been found to have engaged in similar conduct in the past (see *ASIC v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585; [2018] FCA 1701 at [49]; *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076 at 52,152-52,153; [1990] FCA 521 at [42]; *NW Frozen Foods* at 292).

32 The appropriateness of the amount of a penalty must be assessed by reference to the specific civil penalty provision which has been contravened in light of its context and purpose, and the objects of the relevant statute as a whole: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157; [2018] HCA 3 at [116], citing *Cth v FWBII* at [55].

Deterrence

33 The principles applicable to the imposition of pecuniary penalties were considered by the High Court in *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599, in the context of s 546 of the *Fair Work Act 2009* (Cth). The Court reiterated at [15] that, “civil penalties are imposed primarily, if not solely, for the purpose of deterrence”. Deterrence encompasses both specific and general deterrence: at [31].

34 The Court referred (at [17]) to its earlier decision, *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 approving the statement by the Full Court of the Federal Court in *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 (*Singtel Optus*) at 265 that a civil penalty, “must be fixed

with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business”.

Course of conduct and totality principles

35 Where there are multiple contraventions, with multiple acts and omissions, occurring over a particular period, the Court may group the contraventions together as a single course or courses of conduct.

36 There are several principles relevant to the determination of penalties in such circumstances.

37 First, while contraventions arising from separate acts ordinarily attract separate penalties, where there is an inter-relationship between the factual and legal matters of two or more contraventions, the Court may consider whether it is appropriate to group them as a single course of conduct, so as to avoid double punishment in respect of the relevant acts or omissions that comprise the multiple contraventions: *ASIC v AGM Markets Pty Ltd (in liq) (No 4)* (2020) 148 ACSR 511; [2020] FCA 1499 at [50]; *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1; [2010] FCAFC 39 (*CFMEU v Cahill*) at [39], and [42]; see also *Singtel Optus* at [53], citing *ACCC v Telstra Corporation Ltd* (2010) 188 FCR 238; [2010] FCA 790 (*ACCC v Telstra*) at [231]–[235].

38 The “course of conduct” principle was explained by Middleton and Gordon JJ in *CFMEU v Cahill* at [39]:

...It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is “the same criminality” and that is necessarily a factually specific inquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.

39 In *ACCC v Yazaki Corporation* (2018) 262 FCR 243; [2018] FCAFC 73 (*Yazaki*) the Full Court stated at [234] that “the ‘course of conduct’ principle means that consideration should be given to whether the contraventions arise out of the same course of conduct or the one transaction, to determine whether it is appropriate that a “concurrent” or single penalty should be imposed for the contraventions”.

- 40 However, the “course of conduct” principle is no more than a tool of analysis and does not restrict the Court’s discretion as to the amount of the penalty to be imposed. In *Yazaki* the Full Court cautioned at [227] that “[i]t is not appropriate or permissible to treat multiple contraventions as just one contravention for the purposes of determining the maximum limit dictated by the relevant legislation”: see also *ACCC v Get Qualified Australia Pty Ltd (in liq) (No 3)* [2017] FCA 1018 at [37].
- 41 Secondly, where there have been discrete episodes, each involving deliberation, then such a grouping may be inapposite, even if each episode reflects a common theme, strategy or model: *ASIC v Commonwealth Bank of Australia* [2020] FCA 790 (*ASIC v CBA*) at [74].
- 42 Thirdly, even a single strategy involving a single or substantially consistent form of conduct might deny such a grouping where the conduct is directed towards numerous recipients: *ASIC v CBA* at [75]. Further, it is not necessarily the case that a “failure of process” which has an impact at different times, upon different people, at different locations or involving different staff of a defendant must be treated in a global way, though the totality principle may still apply: *ACCC v Telstra* at [225]–[226].
- 43 Fourthly, in determining the appropriate penalty for a large number of contraventions, the Court will generally have regard to the “totality” principle, as a final consideration of whether the cumulative total of the penalty is just and appropriate and in proportion to the contravening conduct considered as a whole. The totality principle will not always or necessarily result in a reduction of the penalty that would otherwise be imposed. It enables the Court to consider whether the final penalty is in proportion to the nature, quality and circumstances of the conduct involved. In this respect, the totality principle is distinct from the course of conduct principle. The Court may apply the principle to “alter the final penalties to ensure that they are just and appropriate”: *CEO of AUSTRAC v Westpac Banking Corporation* (2020) 148 ACSR 247; [2020] FCA 1538 at [69], citing *ACCC v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238, 145 ALR 36 at 53.
- 44 Fifthly, the Court is not obliged to apply the course of conduct or totality principles if the resulting penalty fails to reflect the seriousness of the contravention: *ASIC v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585; [2018] FCA 1701 at [132] (Beach J); *CFMEU v Cahill* at [42].

Parity

45 Differences in the facts and circumstances which underlie different cases mean there is usually little to be gained by comparing the penalties imposed in other litigation. However, this does not mean that penalties imposed in other cases are never relevant. The parity principle is a doctrine developed in criminal law, the chief purpose of which is to ensure that like offenders are treated in a like manner. Otherwise, the consistency that is sought is “consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence”: *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [18], [48], and [49]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; [2011] HCA 10 at [54]; *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2 at [40], and [41]; *ACCC v Universal Music Australia Pty Ltd (No 2)* (2002) 201 ALR 618 at [34].

Relief: Consideration

Nature and extent of the contravening conduct

46 The contravening conduct occurred during a period of about 13 months from 1 June 2020 to 11 August 2021. During that period, LAD entered into the Pledged Contracts in circumstances where it did not hold an ACL.

47 The Pledged Contracts were with 70 different consumers who described themselves as being on Centrelink benefits. The contracts were for the sale by instalments of household and electronic goods such as printers, headphones, smart phones, televisions, electronic tablets, gaming consoles and wireless speakers. The annual cost rate of those contracts was well in excess of the 48% maximum permitted, and therefore the total amount to be paid to purchase those goods was substantially more than if they had been purchased directly from a supplier. The annual cost rate ranged from 123.78% to 759.87% in respect of the Pledged Contracts.

48 The total instalments to be paid under the Pledged Contracts was \$133,454.00. The total amount payable under the contracts above the 48% annual cost rate was approximately \$72,829.10.

49 LAD was aware that it was entering into the Pledged Contracts and was aware that it did not hold an ACL and that consumers who purchased goods under the contracts would be paying more than if they purchased equivalent goods elsewhere for immediate delivery upon full payment. Prior to engaging in this conduct, LAD had sought and obtained detailed legal advice on how it could minimise the risk of its activities being subject to the Credit Code. The advice included a detailed consideration of the relevant sections of the Credit Code and the lawyers

assisted with the drafting of the contracts. LAD relied upon that advice in entering the contracts and in forming the view that they were not regulated by the Credit Code.

Size and financial position of the respondent

50 LAD is a company of moderate size and financial position. In the last three financial years, it had a net profit before tax of between around \$10,000 and \$360,000. LAD's total income dropped from around \$3.5 million in the year ended 30 June 2020 to around \$215,000 and \$560,000 in the following financial years. In the last three financial years, it had total current assets of around \$2 to \$4 million, although its net asset position was either negative or only just positive.

51 As at 31 March 2021, LAD had 4,636 unique customers with 5,771 contracts on foot. The total value of the instalments specified in those contracts to be paid across the terms of those contracts was around \$11.4 million. This reflects the potential gross amount payable to LAD under the contracts and not the amounts actually received by LAD.

52 I am satisfied that the agreed penalty is appropriate to the size and financial position of LAD, including being a sufficient "sting" to a company of that size.

Deterrence

53 The key factor in the Court being satisfied as to the appropriateness of the agreed penalty is the achievement of general and specific deterrence.

54 As to general deterrence, the agreed penalty should create sufficient disincentive for other similar credit providers to try to avoid licencing and credit contract requirements. It is also sufficient a penalty to not be seen as simply a cost of doing business.

55 As to specific deterrence, LAD ceased offering contracts using the Pleded Contract terms from 31 August 2021, although, it has continued after 31 August 2021 to accept instalment payments from consumers under some of the Pleded Contracts. The agreed proposed orders provide a written notice to be sent to customers who have continued making payments, stating that they are no longer required to make any payments.

56 In all the circumstances, the agreed penalty will provide sufficient disincentive from engaging in similar conduct in the future and serve to encourage compliance with the Credit Act and Credit Code if LAD chooses to engage in credit activity in the future.

Harm to consumers

57 LAD's conduct of engaging in credit activity while unlicensed deprived consumers of the protections afforded by the licensing regime under the Credit Act. Harm was also caused because consumers paid far higher instalment payments than they would have paid had the statutory maximum rate been applied. This is in circumstances where each of the Pledaded Contracts record the consumer's employment status as, "Centrelink".

58 As to the number of consumers harmed, 35 of the Pledaded Contracts were cancelled by LAD or the consumer without LAD receiving payment.

59 In relation to the remaining 35 Pledaded Contracts:

- (a) 7 of the consumers purchased the goods and paid all instalments;
- (b) 6 of the consumers have possession of the goods and continue to pay instalments; and
- (c) 22 of the consumers paid some instalments to LAD but did not purchase the goods. As to these consumers, some of the consumers: (1) paid small amounts which were not refunded; (2) received refunds; (3) paid a closing fee; (4) elected to have their payments applied to another product supplied by LAD; or (5) were not refunded instalments paid but retained the goods.

60 LAD has agreed to send an email to the 35 consumers in the form at Annexure 2 to the proposed orders. By that email, LAD, inter alia, will inform the consumers who are continuing to make payments that they may cease paying for the goods and may also retain the goods.

Past conduct

61 ASIC does not contend that LAD has contravened the Credit Code on any previous occasion.

Cooperation with ASIC

62 LAD complied with notices issued by ASIC under ss 266 and 253 of the Credit Act. LAD made some admissions in its Concise Statement in Response. It also later admitted that the annual cost rate of each Pledaded Contract exceeded 48%, although it did not admit the extent of the excess until recently when the SOAF and proposed final orders were agreed.

63 Whilst agreement as to the SOAF and proposed orders was only reached about one week prior to the date the hearing of this proceeding was scheduled to commence, after periodic dialog between ASIC and LAD, LAD has now fully cooperated with ASIC by making admissions, agreeing the SOAF and proposed final orders.

64 The agreed penalty takes into account that some cooperation was shown by LAD from the start and that it has ultimately cooperated in agreeing final orders.

Civil penalty comparatives

65 As noted above, differences in the facts and circumstances of different cases mean there is a limit to what may be gained by comparing the penalties imposed in other regulatory proceedings. However, some broad level guidance may be obtained from an assessment of other civil penalty decisions. To the extent that it is of assistance to the Court, set out below is a summary of civil penalty cases relating to breaches of consumer credit legislation.

66 *ASIC v Make it Mine Finance Pty Ltd (No 2)* [2015] FCA 1255 concerned contraventions of disclosure requirements, unlicensed credit activity and responsible lending obligations under the Credit Act. The contraventions were admitted and related to 24,377 contracts entered into between 1 July 2010 and 1 March 2013. Beach J ordered penalties of \$500,000 for the disclosure breaches, \$250,000 for the licensing breaches and \$500,000 for the responsible lending breaches.

67 In *ASIC v Fast Access Finance Pty Ltd (No 2)* [2017] FCA 243, Dowsett J found that two credit providers, Fast Access Finance (Beenleigh) Pty Ltd and Fast Access Finance (Burleigh Heads) Pty Ltd had, in relation to three and 14 contracts respectively, engaged in credit activity without an ACL, and the “mother company”, Fast Access Finance Pty Ltd, was knowingly concerned in those 17 infringements. The case involved an attempt to evade the credit legislation by adopting a sham business model, whereby the credit providers charged interest to consumers at a rate higher than the maximum 48%. The Court adopted the approach of imposing a penalty many times greater than the excess interest charged. The Court imposed penalties of \$80,000, \$250,000 and \$400,000 respectively against the three respondents. The reasons for judgment include adverse criticisms and findings in relation to the conduct of the respondents. The findings of contraventions followed a six-day contested trial.

68 *ASIC v Channic Pty Ltd (No 5)* [2017] FCA 363 dealt with two credit providers (Channic Pty Ltd and Cash Brokers Pty Ltd) who provided credit in the second-hand car market. Before the Court were 10 cases concerning the failure to assess consumers’ suitability for credit. Greenwood J observed that had the contraventions not occurred, the probability was that the consumers would not have entered into these contracts. Penalties were \$278,000 for each of Channic Pty Ltd and Cash Brokers Pty Ltd, and \$220,000 for their director (an individual).

69 *ASIC v Rent 2 Own Cars (No 2)* (2022) 159 ACSR 528; [2022] FCA 491 concerned contraventions of three key requirements of credit contracts in respect of 232 credit contracts for the purchase of used cars. For 140 of these contracts, this included exceeding the 48% maximum annual cost rate. The total amount charged to those 140 customers exceeded the 48% rate by \$196,576.07. By the time penalty was handed down, the corporate respondent had been deregistered. Greenwood J stated at [203] that, if the corporate respondent was not deregistered, he would have imposed a penalty of \$200,000 for the contraventions of each key requirement, being a total penalty of \$600,000.

70 In *ASIC v GoGetta Equipment Funding Pty Ltd* [2021] FCA 420, an agreed penalty of \$750,000 was ordered for engaging in credit activity without an ACL. The conduct concerned agreements with ten consumers who hired motor vehicles, pursuant to which payments were made on 295 occasions.

71 In *ASIC v Financial Circle Pty Ltd* [2018] FCA 1644, a penalty of \$420,000 was ordered for engaging in credit activity without an ACL. There were 51 contraventions and the 51 clients paid, on average, \$8,084 in advice fees and upfront commission, totalling \$412,284.

72 Given the outcomes of cases noted above, I am satisfied that the agreed penalty is appropriate.

Conclusion

73 For the reasons above, I am satisfied that the proposed orders are appropriate.

Costs

74 LAD agrees to pay ASIC's costs fixed in the amount of \$25,000.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah.

Associate:

Dated: 29 February 2024