

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Colonial First State Investments Limited [2021] FCA 1268

File number: VID 183 of 2020

Judgment of: **MURPHY J**

Date of judgment: 19 October 2021

Catchwords: **CONSUMER LAW** – admitted false or misleading representations in contravention of ss 12DB(1)(h) and (i) of the *Australian Securities and Investment Commission Act 2001* (Cth) – application for pecuniary penalties and adverse publicity order – principles relevant to assessment of appropriate penalty – substantial penalty appropriate – adverse publicity order made

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12 DA, 12DB, 12 GBA, 12GLB
Corporations Act 2001 (Cth) ss 766B, 912A, 949A, 1041H
Evidence Act 1995 (Cth) s 140
Superannuation Industry (Supervision) Act 1993 (Cth) ss 20B, 29WA
Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012 (Cth)

Cases cited: *Australian Building and Construction Commissioner v Construction Forestry Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Another [2018] HCA 3; 262 CLR 157
Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181; 340 ALR 25
Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4) [2011] FCA 761; 282 ALR 246
Australian Competition and Consumer Commission v SMS Global Pty Ltd [2011] FCA 855; ATPR 42-364
Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2) [2012] FCA 629; ATPR 42-402
Australian Competition and Consumer Commission v TPG

Internet Pty Ltd [2013] HCA 54
Australian Competition and Consumer Commission v Woolworths Ltd [2016] FCA 44
Australian Securities and Investments Commission v Wooldridge [2019] FCAFC 172
Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; 258 CLR 482
Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39; 269 ALR 1
Director of Consumer Affairs Victoria v Gibson (No 3) [2017] FCA 1148
Director of Consumer Affairs Victorian v Domain Register Pty Ltd (No 2) [2018] FCA 2008
Markarian v The Queen [2005] HCA 25; 228 CLR 357
Mill v The Queen [1988] HCA 70; 166 CLR 59
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134; 71 FCR 285
Pattinson v Australian Building and Construction Commissioner [2020] FCAFC 177; 299 IR 404
Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; 287 ALR 249
Trade Practices Commission v CSR Ltd [1990] FCA 762; [1991] ATPR 41-076
Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd [1978] FCA 104; ATPR 40-091
Transport Workers Union of Australia v Registered Organisations Commissioner (No 2) [2018] FCAFC 203; 267 FCR 40
Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49; 151 ACSR 407

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Date of hearing: 12 October 2021
Counsel for the Plaintiff: Mr S Senathirajah QC and Ms A Folie
Solicitor for the Plaintiff: Johnson Winter & Slattery

Counsel for the Defendant: Mr B Walker SC, Mr P Kulevski and Mr K Loxley

Solicitor for the Defendant: Clayton Utz

ORDERS

VID 183 of 2020

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

AND: **COLONIAL FIRST STATE INVESTMENTS LIMITED**
Defendant

ORDER MADE BY: MURPHY J

DATE OF ORDER: 19 OCTOBER 2021

THE COURT NOTES THAT:

- A. On 6 September 2021, the Court:
- (a) made declarations that the Defendant, Colonial First State Investments Ltd (ACN 002 348 352) (**Colonial**), contravened sections 912A(1)(a), 912A(1)(c), 949A and 1041H(1) of the *Corporations Act 2001* (Cth), and sections 12DA(1), 12DB(1)(h) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
 - (b) fixed the proceeding for a hearing as to penalty and other relief on 12 October 2021.

THE COURT ORDERS THAT:

1. Within 14 days of this Order, Colonial pay to the Commonwealth of Australia a pecuniary penalty of \$20 million in respect of its conduct declared to be in contravention of sections 12DB(1)(h) and 12DB(1)(i) of the ASIC Act;
2. Pursuant to section 12GLB(1)(a) of the ASIC Act, within 14 days of this Order, Colonial must publish, at its own expense, a written adverse publicity notice (Written Notice) in the terms set out in Annexure A to this Order, by:
 - (a) for a period of no less than 90 days, maintaining a copy of the Written Notice, in font no less than 10 point, in an immediately visible area of the following web address <https://www.cfs.com.au/> (**the webpage**);
 - (b) for a period of no less than 365 days, maintaining a copy of the Written Notice, in font no less than 10 point, in an immediately visible area of the webpage to

appear after a person uses credentials to log into Colonial's secure online service via the 'member' or 'employer' sections of the webpage; and

- (c) sending a copy of the Written Notice to any person who was a member of Colonial's Colonial First State FirstChoice Superannuation Trust FirstChoice Personal Super product between 18 March 2014 and 21 July 2016.
3. Colonial pay the Plaintiff's costs of and incidental to this penalty hearing.

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

ANNEXURE A

Adverse Publicity Notice

The Federal Court of Australia has ordered Colonial First State Investments Ltd (ACN 002 348 352) (Colonial) to publish this notice.

On 19 October 2021, Justice Murphy of the Federal Court of Australia (in proceeding VID183 of 2020) ordered Colonial to pay a pecuniary penalty of \$20 million for contravening Australia's financial services laws.

At all material times, Colonial is and was the trustee and registered superannuation entity of the Colonial First State FirstChoice Superannuation Trust (**FirstChoice Fund**).

The Court found that Colonial contravened these laws by making false or misleading representations in letters and phone calls with members of the FirstChoice Fund concerning:

1. A recent legislative change which Colonial stated required it to contact members in relation to the investment of their superannuation contributions, when that was not the case.
2. The need for the members to take urgent action so that Colonial could continue to receive the members' superannuation contributions, when that was not the case.
3. A recent legislative change which Colonial stated required it to hold investment directions from its members, when that was not the case.

In some phone calls Colonial also:

1. Failed to inform the members that it was required to transfer their account to a MySuper product (a low cost and simple superannuation product) if they did not provide Colonial with an investment direction.
2. Failed to warn some members, when it provided general financial product advice, that the advice did *not* take into account the member's objectives, financial situation or needs.

Colonial has paid \$67,028,633 to remediate losses to 5,745 members who received calls with similar features to those which the Court found contravened the laws below and for other related conduct. At the time of publishing this notice, Colonial's remediation program is continuing and these figures are expected to increase.

Further Information

Colonial's misconduct contravened the following financial services laws:

- Sections 912A(1)(a), 912A(1)(c), 949A and 1041H(1) of the *Corporations Act 2001* (Cth).
- Sections 12DA(1), 12DB(1)(h) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* (Cth).

For further information about Colonial's misconduct, see the following links:

- The statements of facts agreed between ASIC and Colonial dated 2 September 2021 [hyperlink] and 24 September 2021 [hyperlink].

- Justice Murphy’s judgment on penalty [hyperlink].
- ASIC’s media release [hyperlink].

REASONS FOR JUDGMENT

MURPHY J:

INTRODUCTION

1 The defendant in this proceeding, Colonial First State Investments Limited (**Colonial**) is, and was at all material times, the trustee and registered superannuation entity of the Colonial First State FirstChoice Superannuation Trust (**FirstChoice Fund**). Following the commencement of this proceeding Colonial admitted that between 2014 and 2016 it designed and implemented a communications campaign, via letters and telephone calls with nearly 13,000 of the members of its FirstChoice Personal Super product (**FirstChoice Personal Super**), in which it made false or misleading representations about members' entitlements in relation to their superannuation investments. Colonial's conduct occurred in the context of the MySuper reforms instituted by the Commonwealth government, and it involved:

- (a) sending 12,911 letters on or about 22 April 2014 to members of its FirstChoice Personal Super product from whom Colonial did not hold an investment direction (as defined) and who had accepted superannuation contributions into Colonial's FirstChoice Personal Super product in contravention of s 29WA of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) (the **Letters**); and
- (b) making 70 telephone calls between 18 March 2014 and 21 July 2016 to members of its FirstChoice Personal Super product who were in the same position as the recipients of the Letters (the **Calls**), as part of a program of calls to at least 12,209 members.

2 Colonial embarked on the communications campaign because it was aware that it had committed, and was continuing to commit, breaches of s 29WA of the SIS Act, and the communication campaign with its members was its purported means of ceasing those contraventions. In the Calls and Letters, Colonial: (a) did not disclose to its members that it was in breach of s 29WA; (b) misrepresented to members the nature of the obligation under that provision; and (c) misled its members in a manner designed to maximise the prospects of the members providing Colonial with an investment direction. Obtaining an investment direction was in Colonial's commercial interests because those members would continue to pay the higher fees associated with the FirstChoice Personal Super product rather than the lower fees payable under the no-frills, low-cost MySuper product.

3 The plaintiff, the Australian Securities and Investments Commission (**ASIC**) commenced this proceeding on 17 March 2020. The issue of liability was listed for hearing on 6 September 2021. On 2 September 2021, the parties filed a Statement of Agreed Facts and Admissions (**SAFA**) in which Colonial admitted that it had contravened the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Australian Securities and Investments Commissions Act 2001* (Cth) (**ASIC Act**) in the various respects set out therein. The liability hearing was vacated and on 6 September 2021, the Court declared, in summary, that Colonial:

- (a) made false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act;
- (b) made false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act; and
- (c) engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act.
- (d) provided general advice within the meaning of s 766B of the Corporations Act in contravention of s 949A of the Corporations Act;
- (e) failed to do all things necessary to ensure the financial services covered by its licence were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Corporations Act; and
- (f) failed to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act,

(collectively, the **Declarations**).

4 ASIC now seeks orders pursuant to s 12GBA(1)(a) of the ASIC Act that Colonial pay pecuniary penalties with respect to its contraventions of ss 12DB(1)(h) and 12DB(1)(i) of the ASIC Act. It does not seek imposition of a penalty in relation to the contraventions of s 12DA of the ASIC Act or the provisions of the Corporations Act as, at the material times, they were not civil penalty provisions. ASIC also seeks an adverse publicity order against Colonial pursuant to s 12GLB(1) of the ASIC Act, and an order that CFSIL pay its costs of and incidental to the penalty phase of the proceeding.

5 A hearing as to penalty and other relief was listed for 12 October 2021. On 24 September 2021, the parties filed a Supplementary Statement of Agreed Facts and Admissions (**SSAFA**)

which set out the additional agreed facts and admissions for the purpose of the relief hearing. The parties also relied on written submissions and made oral submissions.

6 For the reasons I explain, I am satisfied that it is appropriate to impose a substantial pecuniary penalty in the sum of \$20 million, as the parties submitted. Having regard to Colonial's admissions and its broad acceptance of ASIC's submissions on penalty it is plain that Colonial's contraventions are serious. While Colonial denied that the evidence supported a finding that its contraventions were part of a "deliberate and considered attempt" to further its own commercial interests, it did not cavil with ASIC's submission that the contravening conduct involved it, in effect, seeking to take advantage of members of FirstChoice Personal Super whose interests it was, as trustee of the fund, duty-bound to protect. Its conduct involved employees in senior management positions, affected approximately 13,000 of its members, and caused estimated losses in the range of \$112 to \$120 million. Colonial is a large corporation, and a wholly-owned subsidiary of an even larger corporation, the Commonwealth Bank of Australia (CBA). The contraventions require imposition of a substantial penalty, with a sufficient sting or burden to satisfy the requirements of general and specific deterrence, which is the *raison d'être* of its imposition. It is important that Colonial, and other participants in the superannuation industry, are not left with the impression that the cost of courting a risk of contravention may be regarded as an acceptable cost of doing business.

7 I have taken into account that Colonial has embarked on a substantial remediation program, and the penalty would have been higher had it not done so. In respect of telephone calls made to its members of FirstChoice Personal Super (not just the 70 Calls which are the subject of the Declarations) it has paid a total of \$77,079,209 to date in relation to 7,695 member accounts, doing so on the assumption that, in each case, the member would not have provided Colonial with an investment direction had the call not occurred. The remediation was calculated by reference to any additional fees which the member paid as a result of not being moved across to a cheaper MySuper product and to any lesser performance of FirstChoice Personal Super compared to MySuper. Further, in respect of the contravening Letters, Colonial has committed to remediating all affected customers that have not already been compensated, which is likely to amount to approximately a further \$45 to \$53 million, in relation to losses arising from conduct within the scope of this proceeding.

8 In my view it is also appropriate to make an adverse publicity order which will provide for a notice advising of the contraventions to appear for 90 days on the home page of Colonial's

website, and for one year on the webpage which appears after a member or employer logs into Colonial's secure online service via the 'member' or 'employer' sections of the webpage using their personal credentials; Colonial is also to mail the notice to members of its FirstChoice Personal Super product in the relevant period.

OVERVIEW OF THE CONTRAVENING CONDUCT

9 The following is taken directly from ASIC's penalty submissions, which Colonial accepted provides an accurate overview of the contravening conduct and its context. Some parts are also drawn from the SAFA and the SSAFA.

The MySuper reforms

10 The MySuper reforms were introduced following a review of Australia's superannuation system by an expert panel appointed by the Commonwealth Government. The review panel found that: (a) a significant portion of superannuation fund members were not engaged with their superannuation or were not in a position to make informed decisions about their superannuation; (b) superannuation fund trustees were not always focused on maximising members' retirement incomes in an efficient and cost-effective way; and (c) members who were invested in the default investment option of their current fund were not adequately protected in the existing system.

11 One of the reforms recommended by the review panel was the creation of a simple, cost-effective superannuation product intended to better serve the interests of members who were invested in the default investment option of their fund, called MySuper. The review panel recommended that legislative changes be made so that only a MySuper product would be eligible to be nominated by an employer as a default fund for compulsory superannuation contributions.

12 Between September 2012 and January 2014, various legislative provisions came into operation to give effect to the MySuper reforms (including to establish MySuper products as the default investment option for compulsory superannuation contributions). Two aspects of that legislation are of particular relevance.

13 First, s 29WA was introduced into the SIS Act pursuant to the *Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012* (Cth). The effect of that provision was to require that, from 1 January 2014 onwards, the RSE licensees of regulated superannuation funds (superannuation fund trustees) treat any superannuation contributions of members of the

fund who had not provided the superannuation fund trustee with a direction in writing specifying one or more investment options into which their contributions were to be invested (**investment direction**), as contributions to be paid into a MySuper product of the fund. At all material times, contravening s 29WA has been a strict liability offence.

14 Second, pursuant to various provisions of the SIS Act, and the regulations and superannuation prudential standard 410 (**SPS 410**) made under the SIS Act, superannuation fund trustees were required by no later than 1 July 2017 to attribute to a MySuper product each amount that is an “accrued default amount” (**ADA**) for a member unless otherwise directed in writing by the member. An ADA is defined in s 20B of the SIS Act. Relevantly for this proceeding, the definition in effect meant that both (i) default superannuation contributions of FirstChoice Fund members (that is, superannuation contributions in respect of which the member had not provided an investment direction) which had been paid into FirstChoice Personal Super prior to s 29WA coming into effect on 1 January 2014 and (ii) any default superannuation contributions of the members received by Colonial after 1 January 2014 were deemed to be ADAs. Colonial was accordingly required to transfer those ADAs to a MySuper product by no later than 1 July 2017 unless otherwise directed in writing by the member.

15 Consistently with the purpose for which the MySuper reforms were introduced, MySuper products have at all material times been subject to various statutory requirements designed to ensure that they are suitable to be the default investment option for members who had not chosen an investment option into which their superannuation contributions were to be invested. These included:

- (a) restrictions on the type of fees that can be charged to MySuper members;
- (b) prohibitions on trustees charging fees to MySuper members which relate to the payment of product-based up-front or trailing commissions in respect of superannuation advice or other products or services provided to members;
- (c) requirements that default levels of life and total permanent disability insurance are offered to MySuper members on an opt-out basis; and
- (d) the imposition of additional obligations on superannuation fund trustees in relation to MySuper products, including to promote the financial interests of MySuper members (in particular, to improve returns to the members).

16 Similarly, the transfer of members' ADAs to a MySuper product was subject to legislative requirements, the purpose of which was to protect the interests of those members. In Colonial's case, the effect of the requirements included the following:

- (a) it could identify a product as being a suitable MySuper product into which ADAs of FirstChoice Fund members could be transferred only if it had determined that the attribution of the member's ADA to that MySuper product promoted the financial interest of the member;
- (b) if the transfer of a member's ADA would result in any of: (i) an increase in a fee or charge that applied to the ADA; (ii) a reduction in an insured benefit for the member; (iii) an increase in an insurance premium; or (iv) a change in the investment strategy relating to the ADA, it was required to give the member at least 90 days' written notice of the transfer specifying, inter alia, the relevant change, how the member could opt out of the transfer, and any other information that the member needed to understand the transfer;
- (c) it must develop a "clear and comprehensive communication strategy to explain what an ADA was and what was involved in the MySuper transition process", including providing members with information "that should reasonably enable the member to understand the nature of the changes resulting from the transfer"; and
- (d) it must give all members at least 90 days' notice prior to transferring their ADAs to a MySuper product.

17 Colonial was at all material times aware of the legislative protections afforded to members in respect of MySuper discussed above. In particular, it was at all material times aware that MySuper products were simple, low fee super products that met certain minimum requirements set by government, and it was aware they had basic features and fee structures. Similarly, it was aware that prior to transferring the ADA of a member of the FirstChoice Fund to a MySuper product, it was required to comply with the requirements set out above.

Colonial's breach of s 29WA

18 By early 2014, Colonial had determined that there was a cohort of approximately 13,000 members in respect of whom it had, in breach of s 29WA, accepted contributions into its FirstChoice Personal Super product without an investment direction (**undirected contributions**) instead of paying those contributions into a MySuper product. Colonial had

also determined by early 2014 that it had failed to put in place a system capable of stopping further undirected contributions in breach of s 29WA.

19 Colonial could, at that point, have candidly communicated with members:

- (a) about what had occurred and provided the members with the information necessary to enable them to make an informed decision as to whether to provide Colonial with an investment direction; and
- (b) that if they did not want to provide an investment direction, their contributions would be transferred to a MySuper product.

20 However, as Colonial has admitted, instead it did as follows:

- (a) it embarked upon a communications campaign with the approximately 13,000 members affected by its s 29WA breach, for the purpose of procuring from them an investment direction that would enable Colonial to continue to accept contributions of those members into FirstChoice Personal Super (i.e. without Colonial committing further breaches of s 29WA);
- (b) where Colonial did not obtain an investment direction from a member following these communications, it transferred the member's ADA to a MySuper product in tranches. Colonial paid compensation to those members, in accordance with its trustee compensation policy, in respect of losses incurred by the members by reason of their contributions since 1 January 2014 not having been paid into a MySuper product in accordance with s 29WA; and
- (c) where an investment direction was, however, obtained (or deemed by Colonial to have been obtained) Colonial: (i) continued to accept those members' contributions into FirstChoice Personal Super; (ii) did not transfer the members' contributions, which it had previously accepted into FirstChoice Personal Super in breach of s 29WA, to a MySuper product; and (iii) did not pay members any compensation in relation to those contributions.

Conduct giving rise to the relevant contraventions

Colonial's call campaign

21 Colonial made at least 12,209 calls to members affected by its s 29WA breach, during which it sought an investment direction. The 70 Calls which give rise to the contraventions of s 12DB are a subset of those 12,209 calls.

22 On 18 March 2014, Colonial sent an email to its call centre staff which included instructions in relation to the conduct of the calls. The email relevantly stated:

1. Position the call that due to legislative changes we need to confirm details on their account.
2. Complete security check (if hesitant, confirm we won't ask for bank details or passwords and PINs).
3. Confirm call is being recorded.
4. Let client know that we need to confirm they are comfortable or find their current investment option suitable.
5. Can say to client that they came from an employer account previously where the investment selection may have been chosen by the plan adviser or set to the default.
6. Can talk about the option and current structure/performance of it.
7. Confirm client is happy with current investment option.
8. Tell client that you will be recording this on their behalf, on their account.
9. Let them know that they can call us at any time to change this.

If they are a little unsure, you can ask if it is okay to note that they are ok with it as it [is] currently and they can reference our website/adviser/PDS and always call us back in the future.

23 The email attached a "script" for the calls. An updated version of that script was sent to the call centre staff three days later as part of a document entitled "APRA Callout Training Document". That document included a section headed "General Awareness Only" which purported to explain the background to the calls. The section included the following statements:

We need to collect written or verbal direction from all 14,000 clients that they are happy with their current investment selection or we will not be able to continue to accept contributions and will need to transfer them to a MySuper compliant product.

24 Section 3 of the document "outline[d] the scripting that [was] to be used when making these outbound calls". The following aspects of the scripting are relevant:

- (a) The call centre staff were instructed to “position the background” (i.e. explain the background) to the calls by saying the following:

Recent changes in legislation require us to confirm you are still comfortable/satisfied with the investment options your contributions are paid into.

- (b) If the client provided such a confirmation, the staff were instructed to say:

Great, so to confirm, I am leaving your investment selection as is, and I am going to make a note on your account on your behalf, that you are comfortable with their current option/s.

- (c) The staff were instructed to log the call in Colonial’s system as “successful” in circumstances where they made “contact with a client and [were] able to get confirmation from the client that they [were] happy to keep their investment selection as is”. By contrast, where the staff member was unable to obtain such a confirmation from the client on the call, they were instructed to log the call as “unsuccessful”;
- (d) The document contained no instructions to the call centre staff to explain, at any stage, the actual reason why Colonial was contacting the member, namely, that: (a) Colonial had determined that it was in breach of s 29WA in respect of the member’s contributions since 1 January 2014; and (b) it was required to obtain an investment direction from the member in order to be able to continue to accept his or her contributions into FirstChoice Personal Super;
- (e) The document contained no instructions to staff to inform or even mention that “the recent changes in legislation” about which it was purporting to inform the member in fact required that, unless the member provided Colonial with an investment direction, Colonial must pay the member’s contributions into a MySuper product; and
- (f) The document contained no instructions to mention anything to the members about the MySuper reforms, including anything about the purpose for which those reforms were introduced and the legislatively mandated features of MySuper products.

25 In relation to 67 of the Calls, Colonial has admitted that it contravened ss 12DB(1)(h) and (i) of the ASIC Act in circumstances where its representative made false or misleading representations that:

- (a) recent legislative changes required Colonial to contact the member in relation to the investment of the member’s superannuation contributions;

- (b) recent legislative changes required Colonial to obtain a direction, instruction or confirmation from the member in relation to the investment of their superannuation contributions; and
- (c) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions.

26 Colonial has admitted to making materially similar representations in relation to the further three calls the subject of paragraph 3 to 5 of the Declarations.

27 Colonial did not, in any of the Calls, disclose that if it did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.

The Letters

28 The Letters were in a standard form and were sent to 12,911 FirstChoice Personal Super members on or about 22 April 2014. The letters relevantly said:

Dear [member]

Our records show that your account in FirstChoice Personal Super was set up following a transfer from another superannuation product. On transfer into FirstChoice Personal Super, your funds were invested into investment option(s) aligned to your holding in the previous product.

There has been a recent change to superannuation legislation which requires us to hold an investment direction from you in relation to future contributions paid into FirstChoice Personal Super. If a direction is not held by us, we are unable to accept contributions into your account. For this reason, we would like to confirm the investment option(s) into which you would like your contributions to be paid.

Your contributions are currently being paid into the:

FirstChoice Moderate 100%

What you need to do

Simply sign and date the form enclosed confirming your investment selection and send it back to us using the reply paid envelope provided. Alternatively, you can call us on the number below to confirm your investment selection.

If you want to change the investment option(s), please refer to the Product Disclosure Statement available on our website, or discuss it with your financial adviser. Once you have chosen the investment option(s) you can advise us by phone. Alternatively, if you have transaction access to your account, you can make the change online by logging on to FirstNet at colonialfirststate.com.au.

29 The content of the Letters were approved by Sam Wall, Acting General Manager, Product and Investment; and Peter Sutherland, General Manager Colonial First State and Wealth

Management Advice, Wealth Risk Management. At the time that Mr Wall approved the Letters, on 31 March 2014, he reported to Peter Chun, General Manager, Product and Investments. At the time that Mr Sutherland approved the Letters, on 15 April 2014, he reported to Peter Taylor, Chief Risk Officer, Wealth Management. Mr Taylor at that time reported to Alden Toevs, Group Chief Risk Officer. The Letters or drafts of them were also approved by the following persons: John Anderson, Head of Corporate Superannuation; Amanda Ortlepp, Senior Marketing Manager, FirstChoice, Colonial First State; Carlene Hing, Manager, Wealth Risk Management – Colonial First State & Advice; Rebecca Warneford, Platform Development Manager, Distribution, Colonial First State; and Lisa Rava, Senior Legal Counsel, Superannuation, Wealth Management Legal, Group Corporate Affairs (CBA).

30 On 26 March 2014, Colonial provided the Australian Prudential Regulatory Authority (APRA) with:

- (a) a copy of a draft of the Letters which was in a similar form to the final version of the Letters; and
- (b) a document titled “Outbound script for contribution directions”.

APRA did not propose any changes to those documents at that time.

31 On 14 April 2014, Colonial provided APRA with a further version of the Letters. APRA provided some comments on the sentence in the Letters which discussed the issue of costs and insurance for members. After some modification to those sentences, the Letters were finalised.

32 Colonial has admitted that the Letters give rise to contraventions of ss 12DB(1)(h) and 12DB(1)(i) of the ASIC Act in circumstances where the Letters made false or misleading representations that:

- (a) the member was required to take urgent action (in the form of providing an investment direction) in order for Colonial to continue to receive the members’ superannuation contributions;
- (b) recent legislative changes required Colonial to hold investment directions from its members; and
- (c) the “recent change to superannuation legislation” referred to in the Letters applied only to future contributions paid into FirstChoice Personal Super in relation to which Colonial did not hold an investment direction but not to previous contributions paid into

FirstChoice Personal Super in relation to which Colonial had not held an investment direction.

PECUNIARY PENALTY

33 At all material times, s 12GBA(1) of the ASIC Act provided that if the Court is satisfied that a person has contravened, inter alia, s 12DB of the Act, 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”. On 6 September 2021 the Court made declarations of contravention of ss 12DB(1)(h) and (i), and the power to impose a pecuniary penalty was thereby enlivened.

34 ASIC seeks the imposition of a pecuniary penalty in the sum of \$20 million payable by Colonial in respect of its admitted contraventions of s 12DB. It did not seek imposition of a penalty in respect of the admitted contraventions of s 12DA of the ASIC Act, nor ss 1041H, 949A or 912A(1)(a) and (c) of the Corporations Act, because they are not civil penalty provisions. Colonial accepts that a \$20 million penalty is appropriate in all the circumstances.

The mandatory considerations

35 At all material times, s 12GBA(2) provided:

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.

Other relevant considerations

36 Other matters relevant to the exercise of the power to impose a penalty are commonly referred to as discretionary factors, but as noted by Edelman J in *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44 at [123], they are not truly discretionary. Once they become relevant they are considerations that the Court *must* have regard to. Those factors have been considered in numerous decisions and were conveniently summarised by Perram J in *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761; 282 ALR 246 at [11] to include the following:

- (a) the size of the contravening company;

- (b) the deliberateness of the contravention and the period over which it extended;
- (c) whether the contravention arose out of the conduct of senior management of the contravener or at some lower level;
- (d) whether the contravener has a corporate culture conducive to compliance with the relevant legislation as evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention;
- (e) whether the contravener has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act;
- (f) whether the contravener has engaged in similar conduct in the past;
- (g) the financial position of the contravener; and
- (h) whether the contravening conduct was systematic, deliberate or covert.

37 Further considerations include:

- (a) whether a contravener has shown remorse or contrition: *Director of Consumer Affairs Victoria v Gibson (No 3)* [2017] FCA 1148 at [50] (Mortimer J); and
- (b) whether a contravener has paid or has been ordered to pay compensation so as to ameliorate the loss or damage suffered: *Woolworths* at [166].

The applicable principles

38 The parties agreed as to the applicable principles in relation to assessing the appropriate pecuniary penalty.

Deterrence

39 The principal object of a pecuniary penalty is deterrence, directed both to discouraging repetition of the contravening conduct by the contravener (specific deterrence) and discouraging others who might be tempted to engage in similar conduct (general deterrence). The object of a pecuniary penalty is to attempt to put a price on the contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to engage in contraventions: *Trade Practices Commission v CSR Ltd* [1990] FCA 762 at 44; [1991] ATPR 41-076 at 52,152 per French J (as his Honour then was), cited with approval in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [55] (French CJ, Keifel, Bell, Nettle and Gordon JJ).

40 The Court must fashion a penalty which makes it clear to the contravener and to the relevant market or industry, that the cost of courting a risk of contravention of consumer protections cannot be regarded as an acceptable cost of doing business: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20 at [68]; 287 ALR 249 at 266 (Keane CJ (as his Honour then was), Finn and Gilmour JJ) cited with approval in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 at [64]; 250 CLR 640 at 659 (French CJ, Crennan, Bell and Keane JJ). It must have sufficient sting or burden to achieve the specific and general deterrent effect that are the fundamental reason for imposition of the penalty: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Another* [2018] HCA 3; 262 CLR 157, 195 at [116] (Keane, Nettle and Gordon JJ)

41 Having said that, a penalty must not be so high as to be oppressive: *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* [1978] FCA 104; ATPR 40-091 at 17,896 (Smithers J) cited with approval in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285 at 293 (Burchett and Kiefel JJ (as her Honour then was)).

The maximum penalty

42 The maximum penalty is not just a limit on power; “it provides a statutory indication of the punishment for the worst type of case, by reference to which the assessment of the proportionate penalty for other offending can be made, according to the will of Parliament”: *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; 299 IR 404 at [62] (Allsop CJ, White and Wigney JJ, with whom Besanko and Bromwich JJ agreed). Careful attention to maximum penalties will almost always be required because, the legislature has legislated for them; they invite comparison between the worst possible case and the case before the court at the time; and balanced with all of the other relevant factors, they provide a yardstick: *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

The course of conduct principle

43 In cases involving multiple contraventions, care must be taken to avoid the contravener being penalised more than once for what is in substance the same underlying misconduct.

44 The course of conduct principle recognises that where there is a sufficient interrelationship in the legal and factual elements of the acts or omissions that constitute multiple contraventions, the Court may, in its discretion, penalise the acts or omissions as a single course of conduct. It involves treating multiple contraventions arising from the same underlying wrongdoing together, for the purpose of assessing the appropriate penalty for that conduct, so as to ensure that the sentence or penalty fairly reflects the substance of the offending conduct. The principle has been described as just a “tool of analysis” and the question as to whether contraventions should be treated as a single course of conduct requires consideration of all the circumstances of the case: see *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1 at [41]-[47] (Middleton and Gordon JJ).

45 Whether or not the course of conduct framework of analysis is used, the Court’s task remains the same: that is, to determine an appropriate penalty which is proportionate to the wrongdoing viewed as a whole and having due regard to the need to avoid double punishment: *Transport Workers Union of Australia v Registered Organisations Commissioner (No 2)* [2018] FCAFC 203; 267 FCR 40 at [83]-[91] (Allsop CJ, Collier and Rangiah JJ).

The parity principle

46 Assessments of penalty in analogous cases may provide guidance to the Court in assessing an appropriate penalty, by assisting equal treatment in similar circumstances and thereby meeting the principle of equal justice. The circumstances in different cases are rarely precisely the same as the case then before the Court: see *Australian Competition and Consumer Commission v SMS Global Pty Ltd* [2011] FCA 855; ATPR 42-364 at [80] and the cases there cited. I was not taken to any case with similar facts to the present case and the application of this principle does not bear on my assessment of the appropriate penalty.

The totality principle

47 The totality principle is the last step in the sentencing process, to be undertaken after the Court has determined what it considers to be an appropriate penalty for the contravening conduct. Where there are multiple contraventions the Court must apply this principle to ensure that, overall, the total penalty does not exceed what is appropriate for the totality of the contravening conduct involved. It operates as a “final check” to ensure that the aggregate penalty is just and appropriate having regard to the totality of the contravening conduct: *Mill v The Queen* [1988] HCA 70; 166 CLR 59 at 63 (Wilson, Deane, Dawson, Toohey, Gaudron JJ); *Australian*

Securities and Investments Commission v Wooldridge [2019] FCAFC 172 at [26] (Greenwood, Middleton and Foster JJ).

Consideration regarding penalty

48 I now turn to address the salient considerations. It should be kept in mind that no single factor is decisive in determining the appropriate penalty. Instead, “[t]he fixing of a penalty involves the identification and balancing of all the factors relevant to the contravention[s] and the circumstances of the defendant[s], and making a value judgment as to what is the appropriate penalty in light of the protective and deterrent purpose of a pecuniary penalty”: *Australian Building and Construction Commissioner v Construction Forestry Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 (*ABCC v CFMEU*) at [100] (Dowsett, Greenwood and Wigney JJ), as affirmed in *Pattinson* at [114] (Allsop CJ, White and Wigney JJ, with whom Besanko and Bromwich JJ agreed).

49 *First*, having regard to the nature and extent of the acts or omissions, and the circumstances in which the contraventions occurred, it is plain that Colonial’s conduct involved serious contraventions of ss 12DB(1)(h) and (i). It involved false or misleading representations made to approximately 13,000 members of the fund, in a concerted campaign which went on for more than two years; the decision to implement the campaign, and to sign off on the Letters and call script in which the misleading representations were made involved Colonial’s senior management; and those representations were made in the context that Colonial was a trustee with fiduciary duties to the members of FirstChoice Personal Super.

50 Colonial does not suggest that its contravening conduct was not serious. It accepts that a pecuniary penalty of \$20 million is appropriate because it reflects the gravity of its contravening conduct and sends a message that its contraventions are serious and unacceptable. It denies that its conduct involved a deliberate and concerted attempt to further its own interests; but it does not cavil with ASIC’s submission that its contravening conduct involved, in effect, seeking to take advantage of members whose interests it was, as trustee of the fund, duty-bound to protect.

51 Colonial’s conduct had a tendency to mislead members into believing that they were required to provide an investment direction to Colonial, without Colonial having given any proper regard to whether it was in fact in each individual member’s best interests to remain in FirstChoice Personal Super, as it was required as a trustee. A decision by members as to whether their superannuation contributions should continue to be invested in FirstChoice

Personal Super or in a MySuper product was obviously not a decision suitable for the kind of standard form, mass communications campaign that Colonial engaged in by sending the Letters and conducting the calls. The decision required attention to the personal circumstances of the member and the respective features of FirstChoice Personal Super in which the member was invested compared to the relevant MySuper product.

52 In addition, as ASIC submits, at the time of its misleading communications with members, Colonial knew the importance of members being provided with detailed information to enable them to make an informed decision as to whether it was in their best interest to transfer to a MySuper product. Colonial's own MySuper transition plan stated that members who had an ADA would be provided with a "clear and comprehensive communication strategy to explain what an ADA was and what was involved in the MySuper transition process", including providing members with information "that should reasonably enable the member to understand the nature of the changes resulting from the transfer". Further, Colonial's conduct was inconsistent with what it knew to be the intent of the MySuper reforms, including s 29WA, being that members who had not chosen an investment option into which their compulsory superannuation contributions were to be invested, would have their contributions invested in a MySuper product, being a no frill, low cost product specifically designed to be suitable as the default investment option.

53 Further, while only 70 Calls were found to have contravened s 12DB, it is relevant that the contravening conduct which occurred in those calls was not isolated. The 70 Calls were part of Colonial's broader call campaign which included calls to at least 12,209 members. Colonial's own analysis of its broader call campaign indicates that the same or similar misleading representations were likely to have been made in at least 5,745 calls in which Colonial sought an investment direction. Colonial says that it is not able to identify what proportion of the 70 Calls also fall within the group of 5,745 calls. While Colonial only stands to be penalised for the 70 Calls, it is nevertheless relevant that the contravening conduct in those calls was systematic in nature and likely to have been repeated in calls with thousands of other members.

54 ASIC submits that the misleading representations to members in the Letters and Calls were part of a "deliberate and considered attempt" by Colonial to further its own interests. It argues that there can be no doubt as to the ultimate purpose of Colonial's deception of its members: to maximise the prospect of the members providing Colonial with an investment direction

which would enable it to retain the members in its higher fee, FirstChoice Personal Super product rather than transferring them across to its low cost, MySuper product.

55 It says that Colonial’s interest in obtaining an investment direction of that kind was two-fold. First, it had an urgent need to obtain that direction so that its contraventions of s 29WA would not continue for that member. Second, it was aware that it stood to earn greater profits from members maintaining their investment in FirstChoice Personal Super rather than it being transferred to a MySuper product. ASIC notes that the yearly fees in FirstChoice Personal Super were \$587 higher per member than in the relevant MySuper product in 2014, \$709.10 higher in 2015 and \$721.73 higher in 2016. It contends that there was an obvious commercial incentive for Colonial to obtain investment directions that would enable it to retain those members in FirstChoice Personal Super.

56 ASIC contends that, against that background, it is implausible that the features of the Letters and the Calls that rendered them liable to mislead the members, in particular Colonial’s inaccurate and incomplete description of the nature of its obligations under s 29WA, were inadvertent or innocent. Rather, it submits that it is clear from the content of the Letters and the instructions Colonial gave to its call centre staff that it made a conscious decision to communicate with its members in a manner that was not candid or transparent about Colonial’s breach of s 29WA and the nature of its obligation under that provision, in order to maximise the prospect that the members would provide Colonial with an investment direction.

57 In addition, ASIC submits that it is not credible that Colonial could reasonably have believed in the truth of the representations it conveyed to members in the Letters and the Calls. Colonial was plainly aware of the nature of its obligations under s 29WA at the time of those communications; indeed, the fact that Colonial had determined that it had breached those obligations is what gave rise to the need to contact members in the first place. It contends that:

- (a) on no rational reading of s 29WA could it be said that it required Colonial to “hold investment directions from its members”, or “applied only to future contributions paid into FirstChoice Personal Super” (as conveyed in the Letters); or required Colonial “to contact the member in relation to the investment of the member’s superannuation contributions”, or “to obtain an [investment direction] from the member” (as conveyed in the Calls);

- (b) the slightly different representations in the Calls, referring to supposed requirements of “recent industry changes” and supposed requirements of the “regulator” were plainly inaccurate; and
- (c) it could not reasonably be suggested in respect of the Calls that Colonial was not aware of the nature of the representations that were being conveyed to members. The representations arise from the express statement that Colonial’s call centre staff were instructed to state to members: “Recent changes in legislation require us to confirm you are still comfortable/satisfied with the investment options your contributions are paid into”; it is implausible that Colonial could genuinely have believed that that statement represented an accurate description of the requirements of s 29WA.

58 ASIC contends that if Colonial wished to establish that the reasons for its contravening conduct were those advanced in its submissions on penalty, it should have put on affidavit evidence from one of its officers. It argues that, in the absence of such evidence and having regard to the implausibility of the explanation Colonial proffered in its penalty submissions, the Court should find that Colonial made the misleading representations without any genuine belief that they were true. At a minimum, it says that the Court should find that Colonial was reckless as to the accuracy of the representations in circumstances where, in order to maximise its prospect of obtaining an investment direction, it deliberately communicated with members in a way which was not candid and transparent and which gave rise to a real and patent risk of misleading members as to whether the provision of an investment direction was required.

59 Colonial strenuously denies the suggestion that the contraventions were part of a “deliberate and considered attempt” to further its own interests. It relies on a letter sent by Mr Sutherland, the General Manager of Wealth Risk Management and Wealth Risk Management Advice to APRA dated 6 March 2014 (the **APRA letter**) which said, amongst other things:

The majority of members in [FirstChoice Personal Super] became members of the Fund by completing an application form which required the applicant to make an investment selection at the time of application. These members are considered to have satisfied the requirements of section 29WA and are not within the scope of this submission. However, [FirstChoice Personal Super] also includes two further categories of members, namely those members who are transferred into [FirstChoice Personal Super] as a result of a successor fund transfer or due to the operation of an ‘automatic’ transfer from the [FirstChoice Employer Super] Division of the Fund into [FirstChoice Personal Super] on cessation of employment.

The letter further stated:

Moreover [Colonial] is very concerned that the application of section 29WA to 'choice' contributions to MySuper may result in adverse member outcomes including:

- The creation of dual accounts prior to ADA transition (of which members may opt-out);
- Contributions being directed to MySuper against the member's clear intention for contributions to be directed to their personal superannuation product; and
- Member's being charged two sets of administration fees.

60 It argues that the evidence establishes that the reason it sought investment directions from its members was two-fold:

- (a) first, the members who received the Letters and the Calls were members who had been transferred into FirstChoice Personal Super as a result of a successor fund transfer and those who were transferred from the First Choice Employers division of the fund were transferred on cessation of employment. It says that Mr Sutherland's letter to APRA shows that it was concerned that treating contributions in FirstChoice Personal Super accounts of those members as contributions to the MySuper product would result in adverse member outcomes, including the prospect of their contributions being directed to the MySuper product against the members' intentions; and
- (b) second, Colonial had an urgent need to obtain an investment direction so that its contraventions of s 29WA would not continue for that member.

61 It accepts that it was aware of the nature of its obligations under s 29WA and, for the purposes of penalty, it does not assert that it was not conscious of those obligations. But it says that the serious allegation that it intentionally or recklessly made misleading representations, made for the first time by ASIC in its submissions on penalty, is unsupported by the evidence. It argues that ASIC's submission is premised on no more than a hypothesis, which in turn is underpinned by the proposition that Colonial was aware that it stood to earn greater profits from members maintaining their investment in FirstChoice Personal Super rather than the investments being transferred to a MySuper account, because the fees in FirstChoice Personal Super were higher.

62 Colonial submits that ASIC's argument boils down to the irrationality, or implausibility, of anyone having supposed that s 29WA of the SIS Act could possibly have justified the statements that were made, including the relevant omissions, and the contention that the extra profits to be achieved were material. It argues that the margin it achieved, by a proportion of the 13,000 members who were the subject of the communications campaign not transferring to

a MySuper account, was not material to its business, and it did not have the economic incentives that ASIC suggests. It also contends that the evidence is insufficient for the Court to be satisfied that ASIC has discharged its onus to show that Colonial made false or misleading representations knowing them to be so, or that Colonial was objectively reckless in relation to the misleading nature of the representations, particularly having regard to the requirements of s 140 of the *Evidence Act 1995* (Cth).

63 It is uncontentious that the purpose of Colonial's communications with its members was to obtain an investment direction that would result in ceasing its continuing contraventions of s 29WA, and I have no difficulty in inferring that the senior Colonial officers who designed and/or implemented the communications campaign were likely to have understood that obtaining an investment direction was materially in Colonial's commercial interests. But I do not accept that the evidence rises to the level that it is appropriate to make findings about the state of mind of those officers; that is, as to their knowledge of the falsity of the representations or as to their objective recklessness in that regard. In my view, when one has regard to the APRA letter the seeds of the contravening conduct can be seen, which points away from a finding that Colonial plotted to contravene s 12DB by making false or misleading representations. Another piece of circumstantial evidence against such a finding is that both the Letters and the Calls' script were provided by Colonial to, and were vetted by, APRA in advance. It is no small matter to find that senior employees or officers of a corporation deliberately flouted s 12DB, or at least were objectively reckless as to its requirements, and s 140 of the *Evidence Act 1995* (Cth) requires that in deciding whether a matter is proved, the Court must take into account the gravity of the matters alleged. I am not so satisfied. Nor is it necessary to reach such a conclusion when this is an application for an agreed penalty, and a penalty of \$20 million is justified whether or not Colonial's conduct was deliberate or reckless as ASIC contends.

64 *Second*, the contravening conduct gave rise to substantial losses. Colonial was unable to provide the necessary information to enable a precise quantification of the extent of the loss likely to have been suffered as a result of the Letters and Calls, but I am satisfied that they are likely to have been very substantial. The total loss suffered by members as a result of Colonial's contraventions of s 12DB in respect of the 70 Calls was approximately \$424,808 which equates to approximately \$6,068 per member. Applying that average to the 8,688 recipients of the Letters who supplied Colonial with an investment direction, the estimated losses of those members are in the order of \$52.718 million. The estimated loss suffered by

members who provided Colonial with an investment direction in the 5,745 calls which were part of the broader campaign (but which are outside the contraventions found) is in the order of \$67.028 million. The parties agreed that the Letters and the calls overall caused estimated losses in the range of \$112 to \$120 million, but not all of that conduct is the subject of the contraventions.

65 *Third*, turning to the maximum penalty, at all relevant times 12GBA(3) of the ASIC Act provided that the pecuniary penalty applicable to the contravention of a civil penalty provision by a body corporate is 10,000 penalty units. From 2014, each penalty unit had a value of \$170, which increased to \$180 on 31 July 2015.

66 Thus, treating each Letter and Call as a separate contravention rather than as part of a course or courses of conduct, for the 12,911 Letters sent in April 2014, the maximum penalty would be \$21.948 billion, and for the 70 Calls over the period from March 2014 to July 2016, the maximum penalty is \$120 million. The maximum penalty is therefore approximately \$22.068 billion.

67 However, where such a large number of contraventions is involved, and the maximum penalty rises to such numbers, there is in reality, no meaningful maximum penalty. In such circumstances care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Ordinarily, there must be some reasonable relationship between the theoretical maximum and the final penalty imposed, but in the circumstances of the present case it is best to assess the appropriate penalty range by reference to other factors: see *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [156]-[157] (Jagot, Yates and Bromwich JJ); see also *ABCC v CFMEU* at [143]-[146].

68 *Fourth*, Colonial's size and financial resources, and the fact that it is a wholly owned subsidiary of CBA, an even larger corporation, indicates a requirement to impose a substantial penalty so as to meet the requirements of specific and general deterrence. In each of the 2014-2016 financial years, Colonial earned revenues exceeding \$1 billion and net profit in excess of \$200 million. In the same years, CBA had total revenues exceeding \$22.4 billion and net profit exceeding \$8.6 billion. A penalty of \$20 million is substantial, particularly when considered in light of the approximately \$112 to \$120 million cost of Colonial's remediation program. The penalty puts a price on the contravention that is sufficiently high to deter repetition by

Colonial and by others who might be tempted to contravene the ASIC Act. Such a penalty, on top of the expense of remediation, is unlikely to be seen as an acceptable cost of doing business.

69 *Fifth*, ASIC acknowledges that there is an underlying similarity in the nature of the contraventions arising from the 70 Calls such that those calls may reasonably be viewed as forming part of a single course of conduct. The same can be said in relation to the Letters which were all standard-form, and they may be seen as another course of conduct.

70 *Sixth*, it is relevant to my view in relation to the appropriate penalty, although not a matter of great significance, that Colonial admitted some of the contraventions alleged by ASIC (being contraventions which do not give rise to a civil penalty) before the proceeding was commenced, and it subsequently admitted the relevant contraventions for which it is liable to pay a pecuniary penalty. Colonial also made extensive admissions in respect of factual matters alleged by ASIC which has facilitated the efficient conduct of the proceedings.

71 Of more significance is the fact that since the proceedings were commenced Colonial has paid compensation to the recipients of the 70 Calls and of 5,745 other calls made as part of Colonial's calls campaign in which the same or similar misleading representations were made; which remediation program is continuing. The remediation undertaken by Colonial has been significant. It has paid \$77.079 million to 7,695 member accounts in remediating its calls conduct, \$67.514 million of which relates to calls that were assessed as containing statements that might reasonably be considered to be or likely be misleading; and \$9.564 million of which was paid without an assessment of the nature of the calls. The remediation was undertaken on the assumption, in the case of each account, that the member would not have provided Colonial with an investment direction had the call not occurred, and is based on a comparison between the fees paid and performance of the FirstChoice Personal Super product compared to the MySuper product. Colonial has also committed to remediating customers affected by the Letter conduct, who have not already been compensated. The parties estimated that remediation of the Letter conduct will be in the range of \$45 to \$53 million.

72 *Seventh*, I must give weight to the fact that ASIC, a specialist regulator, and Colonial, a large and well-resourced corporation which has had the benefit of expert legal advice, have agreed to propose a \$20 million penalty to the Court.

73 As the Full Court explained in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; 151 ACSR 407 at [124]-[129]:

- [124] The principles that apply where the parties to a civil penalty proceeding have settled that proceeding and agreed and jointly proposed a penalty to the Court were comprehensively explained by the High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46 and in the earlier decisions of the Full Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41-993 at 48,626-48,627; [2004] FCAFC 72...The key points are as follows.
- [125] First, the Court must be persuaded that the penalty proposed by the parties is appropriate: *Fair Work* at [57]. The agreement of the parties cannot bind the Court in any circumstances to impose a penalty which it does not consider to be appropriate.
- [126] Second, if the Court is persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the agreed penalty jointly proposed is an appropriate remedy in all the circumstances, it would be highly desirable in practice for the Court to accept the parties' proposal and therefore impose the proposed penalty: *Fair Work* at [58]. The desirability of the Court accepting a proposed agreed penalty which it is persuaded is an appropriate penalty derives primarily from a public policy consideration; the promotion of predictability of outcome in civil penalty proceedings: *Fair Work* at [46]. Predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation. It should be emphasised, however, that this public policy consideration is but one of the relevant considerations to which the Court must have regard and, more significantly, it cannot override the statutory directive for the Court to impose a penalty that is determined to be appropriate.
- [127] Third, in considering whether the agreed and jointly proposed penalty is an appropriate penalty, it is necessary to bear in mind that there is no single appropriate penalty. Rather, there is a permissible range of penalties within which no particular figure can necessarily be said to be more appropriate than another. The permissible range is determined by all the relevant facts and consequences of the contravention and the contravener's circumstances. An agreed and jointly proposed penalty may be considered to be "an" appropriate penalty if it falls within that permissible range: *NW Frozen Foods* at 290-291; *Mobil Oil* at 48, 625-48, 626; [47], [51]. It is unlikely to be considered an appropriate penalty if it falls outside that range.
- [128] It should be emphasised in this context, however, that even though the process in determining whether an agreed and jointly proposed penalty is an appropriate penalty involves or includes determining whether that penalty falls within the permissible range of penalties, having regard to all the relevant facts and circumstances, it does not follow that the Court's task can be said to amount to no more than determining whether the proposed penalty falls within the permissible range, as the Commission's submission tended to suggest. Nor can it be said that the Court is bound to start with the proposed penalty and to then limit itself to considering whether that penalty is within the permissible range: *Mobil Oil* at 48,627; [54].
- [129] Fourth, in considering whether the proposed agreed penalty is an appropriate penalty, the Court should generally recognise that the agreed penalty is most likely the result of compromise and pragmatism on the part of the regulator, and to reflect, amongst other things, the regulator's considered estimation of

the penalty necessary to achieve deterrence and the risks and expense of the litigation had it not been settled: *Fair Work* at [109]. The fact that the agreed penalty is likely to be the product of compromise and pragmatism also informs the Court's task when faced with a proposed agreed penalty. The regulator's submissions, or joint submissions, must be assessed on their merits, and the Court must be wary of the possibility that the agreed penalty may be the product of the regulator having been too pragmatic in reaching the settlement: *Fair Work* at [110].

74 I do not accept Colonial's suggestion that the Court's task is no more than to decide whether the proposed penalty falls within the permissible range; that is, whether it is manifestly too little or excessive. But having regard to the approach outlined in *Volkswagen* it is appropriate to give weight to the parties' agreement.

75 *Eighth*, turning into the last mandatory consideration under s 12GBA(2), the evidence is that Colonial has not previously been found to have made false or misleading representations in contravention of s 12DB, or other similar conduct.

76 I am satisfied that a penalty of \$20 million is just and appropriate for the totality of the contravening conduct having regard to the seriousness of the contraventions, including the number of breaches and the period over which they occurred, that the conduct involved senior management, that Colonial was acting as a trustee when it committed the breaches, that the conduct caused substantial losses, the need for specific and general deterrence; and taking into account the substantial remediation program.

THE ADVERSE PUBLICITY ORDER

77 ASIC seeks an adverse publicity order under s 12GLB(1)(a) of the ASIC Act.

78 Section 12GLB(1)(a) empowers the Court to make an adverse publicity order in relation to a person who has been ordered to pay a pecuniary penalty under s 12GBA. An "adverse publicity order" is defined in s 12GLB(2) as follows:

In this section, an ***adverse publicity order***, in relation to a person, means an order that:

- (a) requires the person to disclose, in the way and to third parties specified in the order, such information as is so specified, being information that the person has possession of or access to; and
- (b) requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

79 It is uncontentious that the Court has a broad discretion as to whether to make such an order.

80 ASIC seeks an adverse publicity order for Colonial to publish a corrective notice:

- (a) for 90 days in an immediately visible area on the homepage of Colonial’s website;
- (b) for 365 days in an immediately visible area of the webpage that appears after a person uses personal credentials to log into Colonial’s secure online service via the ‘member’ or ‘employer’ sections of the webpage; and
- (c) by sending a copy of the notice to any person who was a member of Colonial’s FirstChoice Personal Super product between 18 March 2014 and 21 July 2016.

81 Colonial does not oppose an order that it publish an adverse publicity notice substantially in the form that ASIC seeks but it opposes two aspects of the orders sought:

- (a) the requirement that the publication be made on a private section of its webpage (after a person logs into Colonial’s secure online service via the webpage) for a period of 365 days; and
- (b) that in addition to website publication, a copy of the notice be sent to any person who was a member of the FirstChoice Personal Super product during the relevant period.

82 As to the first matter, while Colonial accepts the utility of the notice being published on a “private” section of its website where members will see the notice after they login, it submits that the requirement to maintain the notice for one year is excessive, and would be an outlier having regard to other adverse publicity orders made by the Court. It says that website notices are usually ordered to be maintained for between 40 and 90 days, and argues that there is no reason to require the notice to be maintained for a period beyond 90 days, particularly given the circumstances that that it is to be published in two locations on the Colonial website rather than solely on the homepage.

83 As to the second matter, Colonial does not contend that mailing a notice to members of FirstChoice Personal Super during the relevant period is inappropriately burdensome in logistical and financial terms. It argues that, bearing in mind that the corrective notice will be published on its website and on the webpage of a member who logs in, and having regard to the remediation program, it is difficult to see who in the affected class would miss out on information about Colonial’s contraventions. In its submission it would be superfluous for the Court to require the corrective notice to also be mailed to members.

84 The authorities reveal various rationales behind the making of such orders, including to:

- (a) alert affected persons to the fact that there has been misleading conduct;

- (b) protect the public interest by dispelling the incorrect or false impressions that were created; and
- (c) support the primary orders and assist in preventing repetition of the contravening conduct.

: see *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2)* [2012] FCA 629; ATPR 42-402 at [143] and the cases there cited.

85 The primary objective of the adverse publicity order is to make members of FirstChoice Personal Super who may have been misled by Colonial's conduct aware of the Court's findings. It can be said to be overkill to require publication of the adverse publicity notice in three ways, but having regard to the number of people affected, the period over which the misleading representations were made, and that the representations were made by Colonial to persons to whom it owed fiduciary duties, I am not persuaded to give Colonial the benefit of the doubt in that regard.

86 I am satisfied that it is appropriate to make the orders ASIC seeks for the following reasons:

- (a) first, I accept ASIC's submission, that it understands, anecdotally, that typically members do not regularly log onto their superannuation accounts, and that they may do so perhaps only once a year, for tax purposes. I note that the expert panel appointed by the Commonwealth Government which recommended the introduction of the MySuper reforms concluded that a significant proportion of members were not "engaged with" their superannuation. Having regard to those matters I consider that fixing a period of less than a year for publication of the notice on a page which the member must log into runs a risk that members will not be alerted to the findings of the Court;
- (b) second, I do not accept Colonial's contention that - having regard to the Declarations made by the Court and its remediation program - it is superfluous to require the notice to be mailed to members. There is no evidence the Declarations have come to the attention of the members, and no evidence as to the content of Colonial's communications with members in relation to its contravening conduct. In such circumstances I am not satisfied that that it is unnecessary to require the notice to be mailed to members. It is also relevant that, because of their disengagement, a significant proportion of members may not go onto Colonial's website, or log into their page using their personal credentials. In my view mailing the notice to members will

materially improve the prospect that Colonial's contravening conduct will come to their attention;

- (c) third, Colonial mailed the Letters containing the misleading representations to its members. It must have considered that imparting that information by mail rather than on its website was likely to be effective. I agree. In my view mailing the notice to members is likely to be an effective method for alerting them to the findings of the Court; and
- (d) fourth, contrary to the thrust of Colonial's submissions, it is not uncommon for the Court to order that corrective notices or adverse publicity notices be mailed or emailed directly to affected persons and also be published on the contravener's website: see for example, *Director of Consumer Affairs Victorian v Domain Register Pty Ltd (No 2)* [2018] FCA 2008 at [42]. In my view sending the notice directly to the affected persons is more likely to bring it to their attention than doing so via the website.

COSTS

87 Colonial did not oppose an order that it pay ASIC's costs of the penalty phase of the application. On 6 September 2021 it was ordered to pay the cost of the proceedings up to that point. It is appropriate to so order.

CONCLUSION

88 I have made the attached orders in accordance with these reasons.

I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Murphy.



Associate:

Dated: 19 October 2021