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AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V RECKITT BENCKISER (AUSTRALIA) PTY LTD (2016) 340 ALR 25

I Introduction

In *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd*,[1] the Full Court of the Federal Court of Australia imposed the highest ever corporate penalty to date for misleading or deceptive conduct under the *Australian Consumer Law*.[2] Justices Jagot, Yates and Bromwich ordered Reckitt Benckiser (Australia) Pty Ltd ('Reckitt Benckiser') to pay a revised $6 million penalty, upholding an appeal by the Australian Competition and Consumer Commission ('ACCC').[3] The decision is one of several recent multi-million dollar 'victories' by the ACCC,[4] and has prompted calls for maximum penalties to be increased under the *Australian Consumer Law*.[5]

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1 (2016) 340 ALR 25 ('*ACCC v Reckitt Benckiser*').

2 *Competition and Consumer Act 2010* (Cth) sch 2.

3 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 28 [9], 64 [165], 67 [179]–[180].

4 See also *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation) [No 3]* [2017] FCA 1018; Australian Competition and Consumer Commission, 'Get Qualified Australia to Pay $8 Million Penalty' (Media Release, MR 145/17, 30 August 2017); *Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd* [2017] FCA 602; Australian Competition and Consumer Commission, 'Court Orders Acquire to Pay $45 Million Penalty' (Media Release, MR 79/17, 30 May 2017); *Australian Competition and Consumer Commission v Yazaki Corporation [No 3]* [2017] FCA 465; Australian Competition and Consumer Commission, 'Penalties Ordered Against Yazaki for Collusive Conduct' (Media Release, MR 64/17, 9 May 2017); Australian Competition and Consumer Commission, 'ACCC Appeals Yazaki Corporation Penalty Decision' (Media Release, MR 78/17, 30 May 2017); *Australian Competition and Consumer Commission v Valve Corporation [No 7]* [2016] FCA 1553; Australian Competition and Consumer Commission, 'Valve to Pay $3 Million in Penalties for Misrepresenting Gamers' Consumer Guarantee Rights' (Media Release, MR 2/17, 3 January 2017).

5 Lauren Hartley and Rachel White, 'Reckitt Benckiser's Nurofen Nightmare Continues: $1.7 Million Penalty Increased to $6 Million' on Addisons Lawyers, *Knowledge Bank* (23 January 2017) <http://www.addisonslawyers.com.au/knowledge/Reckitt_Benckiser%E2%80%99s_Nurofen_nightmare_continues__$1-7_million_penalty_increased_to_$6_million962.aspx>.

This case note analyses the differing approaches taken by the primary judge and the Full Court to the assessment of the appropriate penalty to be imposed on Reckitt Benckiser. Specifically, it examines the quantification of the loss suffered by consumers, Reckitt Benckiser's state of mind, and, significantly, the finding that the original penalty was manifestly inadequate. It concludes by considering the wider ramifications of the decision in the context of a recent 'penalties trend' across several corporate regulatory regimes.

II Background

Reckitt Benckiser is the manufacturer of Nurofen, an over-the-counter ibuprofen-based medicine for the temporary relief of pain.[6] In 2006, Reckitt Benckiser began to market and sell the Nurofen Specific Pain Range throughout Australia.[7] The range consisted of Nurofen Back Pain, Nurofen Period Pain, Nurofen Migraine Pain, and Nurofen Tension Headache.[8] The packaging of each product made representations that the product was solely or specifically formulated to treat a particular type of pain.[9] The same representations were made on two webpages on the Nurofen website, though in considerably greater detail.[10]

There was, in fact, no pharmacological difference between any of the four products.[11] Each was of the same formulation, contained the same active ingredient, and had been approved by the Australian Register of Therapeutic Goods as being suitable for treating a wide variety of pain types.[12] None of the four products was any more or less effective than the others in treating the type of pain specified on the packaging.[13] Moreover, each product in the range was identical to standard Nurofen, yet was marketed and sold at approximately double the price.[14] The range attracted criticism

6 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [No 4]* [2015] FCA 1408 [4] ('*ACCC v Reckitt Benckiser [No 4]*').

7 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 32 [17]; *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [5].

8 *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [5].

9 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [No 7]* (2016) 343 ALR 327, 329 [1] ('*ACCC v Reckitt Benckiser [No 7]*').

10 Ibid 329 [1].

11 Ibid [1]; *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [2].

12 *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 329 [1]; Stephen Corones, 'Misleading Premium Claims' (2016) 44 *Australian Business Law Review* 188, 197.

13 *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [2]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 329 [1].

14 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 62 [158].

from the media,[15] consumer advocacy groups,[16] and regulators[17] for misleading millions of consumers.[18] The publicity prompted the ACCC to launch an investigation, which ultimately gave rise to the Nurofen litigation.[19]

III Decision

A *Primary Judgment*

In March 2015, the ACCC commenced proceedings in the Federal Court of Australia, alleging that Reckitt Benckiser had contravened various provisions of the *Australian Consumer Law*.[20] Despite initially denying the substantive allegations, Reckitt Benckiser admitted to contraventions of ss 18 and 33 of the *Australian Consumer Law* at the commencement of the trial.[21]

At first instance, Edelman J delivered a judgment in respect of Reckitt Benckiser's liability.[22] His Honour determined that the representations on the packaging and the website contravened s 18 because they were misleading or deceptive, or likely to

15 See, eg, The Checkout, *Episode 5 Synopsis* (18 April 2013) Australian Broadcasting Corporation <http://www.abc.net.au/tv/thecheckout/episodes/ep05.htm>; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 33 [23].

16 See, eg, CHOICE, *Shonky Awards: Nurofen* (2010) <https://www.choice.com.au/shonky-awards/hall-of-shame/shonkys-2010/nurofen>; Paul Tatnell, 'Shonkys: the Award that No Company Wants', *The Sydney Morning Herald* (online), 26 October 2010 <http://www.smh.com.au/business/media-and-marketing/shonkys-the-award-that-no-company-wants-20101026-171ih.html>; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 32–3 [18]–[20].

17 See, eg, Therapeutic Goods Administration, Department of Health (Cth), 'Nurofen — Reckitt Benckiser (Australia) Pty Ltd — Complaints No. 2012-08-010 and 2012-10-024' (Decision, 9 May 2014) <https://www.tga.gov.au/node/39>; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 33 [25]–[29].

18 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 32–3 [19]–[29].

19 Ibid 33 [27], 33–4 [30].

20 Ibid 34 [31], [36]; *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [3]; *Australian Consumer Law* ss 18, 33, 29(1)(g).

21 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 34 [34]–[35]. Section 18(1) of the *Australian Consumer Law* provides that '[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' Section 33 of the *Australian Consumer Law* provides that '[a] person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.'

22 Justice Edelman delivered two separate judgments. The first, *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408, determined Reckitt Benckiser's liability; the second, *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, assessed the appropriate penalty to be imposed on Reckitt Benckiser.

mislead or deceive; and s 33 because they were liable to mislead the public as to the nature, the characteristics, or the suitability for purpose of the products in the Specific Pain Range.[23] Accordingly, Edelman J made various orders, including injunctions restraining like conduct for a period of three years, corrective advertising, and amendments to Reckitt Benckiser's existing compliance programme.[24]

Pursuant to s 33 of the *Australian Consumer Law* — a civil penalty provision under which the court may impose a maximum penalty of $1.1 million on a body corporate for each contravention[25] — Edelman J delivered a separate judgment, which imposed a penalty of $1.7 million on Reckitt Benckiser.[26]

Despite accepting that Reckitt Benckiser 'plainly engaged' in the marketing and promotion of the products 'with the intention of increasing profits',[27] Edelman J concluded that because the ACCC had failed to plead a state of mind, the penalty ought to be assessed as though the contravening conduct was innocent.[28] His Honour further acknowledged that because there were at least 5.9 million contraventions,[29] the statutory maximum penalty would be 'many, many millions of dollars' and an 'overly crushing burden' on Reckitt Benckiser.[30] The contraventions were therefore characterised as involving 'two courses of conduct', consisting of $1.2 million for the packaging representations and $500,000 for the website representations.[31] Justice Edelman was also influenced by the 'commendable and significant cooperation with the ACCC' provided by Reckitt Benckiser, [32] and concluded that the harm to consumers caused by the contravening conduct was not physical and only monetary

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23 *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [14]–[15], [20]. Justice Edelman also concluded that the relevant contravention period was five years commencing on 1 January 2011 and ending on 11 December 2015: *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, [47]. The Full Court clarified that although the contravening conduct in fact commenced in 2007, s 228(2) of the *Australian Consumer Law* applied a limitation period of six years from the commencement of the proceedings: *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 27 [3].

24 *ACCC v Reckitt Benckiser [No 4]* [2015] FCA 1408 [21]–[24].

25 *Australian Consumer Law* ss 33, 224(1).

26 *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 331 [8], 349 [98].

27 Ibid 340 [55].

28 *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 340 [54], 341 [56], cited in *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 54 [121].

29 Both the Full Court and Edelman J derived this figure from the sale of 5.9 million units of the Nurofen Specific Pain Range products over the contravening period: *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 35 [43]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 343 [66].

30 *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 334–5 [24]–[25], quoting *Johnson v R* (2004) 205 ALR 346, 355.

31 Ibid 349 [95], [98].

32 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 60 [146], citing *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 343 [68].

in nature.[33] His Honour noted that the penalty would have been 'far greater' but for these factors,[34] which provided the fundamental grounds for an appeal by the ACCC.

B *Appeal to the Full Court of the Federal Court*

The ACCC appealed to the Full Court of the Federal Court against the quantum of the penalty imposed by Edelman J. Justices Jagot, Yates and Bromwich unanimously allowed the appeal and imposed a penalty of $6 million on Reckitt Benckiser.[35] The following analysis will compare the reasoning of the Full Court and Edelman J in respect of the quantification of the loss suffered by consumers, the characterisation of the impugned conduct, Reckitt Benckiser's state of mind, and the conclusion that the $1.7 million penalty was manifestly inadequate.

1 *Assessment of Consumer Loss*

The ACCC challenged Edelman J's assessment of consumer loss on three separate grounds. The first ground contended that Edelman J failed to take into account, or give adequate weight to, the loss suffered by consumers as mandated by s 224(2)(a) of the *Australian Consumer Law*.[36] At first instance, Edelman J concluded that it would be 'impossible' and 'useless' to quantify the extent of Reckitt Benckiser's profit and the loss suffered by consumers.[37] The Full Court accepted that although the ACCC's approach to quantification was 'over-complicated', it was sufficient to rebut Reckitt Benckiser's proposition that it derived 'no financial benefit' from the contravening conduct.[38] However, the Full Court noted that Edelman J focused only on the total revenue figure of $45 million,[39] and did not subtract what 'the revenue would have been if the same sales had taken place of standard Nurofen', which was sold at approximately half the price.[40] Their Honours therefore adopted a figure of $26.25 million as a useful 'starting point' for the assessment of the appropriate penalty.[41]

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33 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 51 [111], 52 [115], citing *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 349 [97]; cf *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44.

34 *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 349 [94].

35 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 28 [9], 64 [165], 67 [179]–[180].

36 Ibid 40 [60].

37 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 40 [60]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 330 [5], 340 [53], 343 [66].

38 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 40 [63].

39 Reckitt Benckiser yielded revenue of approximately $45 million from the sale of 5.9 million units of the Nurofen Specific Pain Relief products over the contravening period: *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 28 [7].

40 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 41 [65].

41 Ibid 62 [158], 41 [65].

The Full Court was critical of Edelman J's 'implicit acceptance of the conceptual framework established by Reckitt Benckiser' that consumers would be willing to pay a price premium for the Specific Pain Range products due to product placement and advertising.[42] Their Honours surmised that there was 'no rational reason to speculate in favour of Reckitt Benckiser that consumers might have been willing to pay twice as much for the same product but for the contravening conduct'.[43] Rather, the contraventions were the 'material reason that consumers … purchased [the impugned] products rather than standard Nurofen'.[44] Accordingly, the Full Court concluded that Edelman J materially erred in his assessment of consumer loss.[45] The only 'reasonable inference' was that the difference between total sales of the impugned products and equivalent sales of standard Nurofen had been lost to consumers as a direct result of Reckitt Benckiser's conduct.[46]

The ACCC further challenged Edelman J's conclusion that the harm to consumers was only monetary.[47] The Full Court readily accepted that the conduct caused 'the loss or at least serious distortion of genuine consumer choice', which created an additional risk of physical harm from 'double-dosing' by a person suffering from two types of pain.[48]

2 *Courses of Conduct*

The ACCC reiterated its submission that Reckitt Benckiser's contraventions involved six courses of conduct — 'one for each of the four identical products and one for each of the two webpages'.[49] The Full Court agreed that the primary judge gave undue weight to the courses of conduct principle such that the penalty did not reflect the nature and extent of the conduct.[50] Their Honours preferred to focus on the sheer volume of contraventions, which occurred 'each and every time a consumer saw the packaging'[51] and became 'increasingly serious over time as Reckitt Benckiser's compliance procedures failed to respond to public criticism'.[52] However, the Full

42 Ibid 43 [76].

43 Ibid 45 [85].

44 Ibid 45–6 [85].

45 Ibid 42 [70].

46 Ibid 48 [98].

47 Ibid 51 [111], 52 [115]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 349 [97].

48 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 52 [114].

49 *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 337 [32]; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 58 [140].

50 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 58 [139]–[140], 59 [145], 62 [157].

51 Ibid 59 [144]–[145].

52 Hartley and White, above n 5; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 57 [134].

Court effectively disregarded the multi-trillion dollar theoretical maximum penalty,[53] noting that the figure 'was so great that there was no maximum penalty'.[54]

3 *State of Mind*

The Full Court considered Edelman J to have erred in finding that Reckitt Benckiser's conduct was neither deliberate nor reckless, but innocent.[55] Their Honours disagreed with the primary judge that to do otherwise would deny procedural fairness to Reckitt Benckiser. Their Honours considered that deliberateness of the contravening conduct 'has always been a matter relevant' to the penalty assessment,[56] and that Edelman J had in fact identified deliberateness as a factor to which the court must have regard.[57] In addition, the ACCC had put Reckitt Benckiser 'fairly on notice' that its state of mind would be in issue by seeking a penalty.[58]

Moreover, the Full Court highlighted that even if neither party could establish a particular state of mind, Edelman J was ultimately obliged to form his own view based on the evidence before him.[59] By merely accepting that the conduct was innocent due to a lack of pleading, Edelman J failed to discharge an 'essential judicial function'.[60] In forming its view, the Full Court refused to characterise Reckitt Benckiser's conduct as innocent, highlighting that it had 'deliberately persisted'[61] with a 'fiction[al]' marketing strategy for a period of five years, despite 'pointed criticism'.[62] Rather, their Honours concluded that Reckitt Benckiser did, at the very least, 'court the risk' of the contraventions — in the sense of being objectively reckless — but stopped short of suggesting that the contraventions were intentional.[63]

53 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 62 [157].

54 Ibid 27 [3].

55 Ibid 52 [116], 56 [130]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 341 [56].

56 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 54 [123]–[124], citing *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44; *Trade Practices Commission v CSR Ltd* [1990] FCA 521; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285; *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296, 297–8.

57 *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 333 [21], citing *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44 [124]–[126]; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 54 [122].

58 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 54 [121].

59 Ibid 56 [132].

60 Ibid 57 [133].

61 Ibid 26 (vii), 57 [134].

62 Ibid 57 [134]; *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 341 [56].

63 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 57 [136].

4 *Manifest Inadequacy*

In addressing the fundamental basis of the appeal — that the penalty imposed by Edelman J was manifestly inadequate — the Full Court highlighted the general deterrence objective of civil penalties. Their Honours were concerned to ensure that 'other "would-be wrongdoers" think twice and decide not to act against the strong public interest' in making similar misleading representations about non-prescription medicines,[64] noting that a greater sanction is required where the risk of consumers being misled and the prospect of gain to the contravener is higher.[65] Moreover, it was recognised that a failure to sanction Reckitt Benckiser adequately 'de facto punishes all who do the right thing'.[66]

The Full Court nonetheless emphasised a 'substantial' need for specific deterrence,[67] informed by Reckitt Benckiser's attitude to the contraventions.[68] Their Honours had regard to the fact that Reckitt Benckiser repeatedly denied the contraventions and continued to sell the products for its own commercial benefit well after the proceedings commenced, 'only admit[ting] liability at the last possible moment'.[69] As these actions evidenced a distinct lack of genuine remorse or contrition, the Full Court viewed a penalty discount as inappropriate.[70]

The Full Court concluded that the $1.7 million penalty was indeed manifestly inadequate,[71] and would 'reinforce a view that the price to be paid for the contraventions … was no more than a cost of doing business'.[72] Setting aside the decision of the primary judge, the Full Court imposed a $6 million penalty on Reckitt Benckiser, consisting of $5 million for the packaging representations and $1 million for the website representations.[73] Perhaps surprisingly, their Honours concluded that the figure was 'modest'[74] and 'at the bottom of the appropriate range'.[75]

64 Ibid 60 [150].

65 Ibid 60 [151].

66 Ibid 61 [152].

67 Ibid 60 [149].

68 Ibid 63 [159].

69 Ibid 27, 62 [158], 63 [160], 67 [177].

70 Ibid 63 [160], [163].

71 Ibid 64 [165].

72 Ibid 64 [164].

73 Ibid 64 [165].

74 Ibid 67 [178].

75 Ibid 67 [179], 64 [165].

C *Special Leave Application to the High Court*

Reckitt Benckiser subsequently applied for special leave to appeal the decision to the High Court of Australia, on the basis that the Full Court had erred in its assessment of consumer loss and the finding of manifest inadequacy. Justices Gageler and Keane of the High Court dismissed the application.[76]

D *Consumer Class Action in the Federal Court*

The decision of the Full Court of the Federal Court also prompted the commencement of a consumer class action against Reckitt Benckiser.[77] Despite optimism that the proceedings would not be 'a walk in the park' for Reckitt Benckiser,[78] the parties agreed to settle the matter for $3.5 million.[79] It is notable that the settlement sum is but a fraction of the $26.25 million aggregate consumer loss estimated by the Full Court.[80] Consequently, those customers who purchased Specific Pain Range products between 2011 and 2015 will receive only a partial refund, despite being conclusively misled and deceived by Reckitt Benckiser.

IV Ramifications

The Full Court's decision is likely to have significant ramifications for compliance with, and enforcement of, the *Australian Consumer Law* and other regulatory regimes.[81] The ACCC has announced its intention to capitalise on the 'momentum' created by a number of successful high profile decisions by taking a 'more bullish view' in

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76 *Reckitt Benckiser (Australia) Pty Ltd v Australian Competition and Consumer Commission* [2017] HCASL 86 (5 April 2017) [2].

77 *Keith Hardy v Reckitt Benckiser (Australia) Pty Ltd*, NSD 273/2016, 24 February 2016. See also Bannister Law, 'Bannister Law — Affected Nurofen Specific Pain Relief Products — Class Action', (Press Release, 24 December 2015) <http://nurofenclassaction.com.au/news/press-releases/bannister-law-affected-nurofen-specific-pain-relief-products-class-action-2/>.

78 Hartley and White, above n 5.

79 The Deed of Settlement was approved by Nicholas J of the Federal Court on 20 September 2017: *Hardy v Reckitt Benckiser (Australia) Pty Ltd [No 3]* [2017] FCA 1165 [1]. See also Bannister Law, *Keith Hardy v Reckitt Benckiser (Australia) Pty Ltd: Federal Court of Australia Proceedings No 273/2016* (31 July 2017) Nurofen Class Action <http://nurofenclassaction.com.au/>; Rebecca Armitage, 'Nurofen to Pay $3.5 Million Compensation to Customers who Bought "Misleading" Pain Relief', *ABC News* (online), 3 August 2017 <http://www.abc.net.au/news/2017-08-03/nurofen-offers-3.5-million-compensation-to-customers/8770910?section=health>.

80 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 41 [65], 62 [158].

81 Leigh Howard, *Public Law Update — Civil Penalties, Inferences and Loss: ACCC v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181* (15 February 2017) List G Barristers <https://www.listgbarristers.com.au/publications/public-law-update-civil-penalties-inferences-and-loss-accc-v-reckitt-benckiser-australia-pty-ltd-2016-fcafc-181>.

the pursuit of higher penalties for breaches of the *Australian Consumer Law*.[82] The regulator will have ample opportunity to do so, having already commenced proceedings against several multinationals, including Kimberly-Clark, Pental, Volkswagen and Heinz.[83] Encouraged by the comments of Jagot, Yates and Bromwich JJ that the $6 million penalty could have been 'considerably greater',[84] ACCC Chairman Rod Sims has foreshadowed advocating for penalties that are 'commercially relevant' and which send a 'strong message' to ensure companies consider them as more than an acceptable cost of doing business.[85]

The decision has also prompted calls for increased maximum penalties for contraventions of the *Australian Consumer Law*, which the ACCC has consistently criticised as being too low.[86] In its recent *Consumer Law Enforcement and Administration* report,

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82 David Benson and Sam Fiddian, 'The ACCC's 2017 Compliance and Enforcement Priorities for Consumers and Small Businesses' (2017) 21 *Inhouse Counsel* 55, 55; Robert Baxt 'Does the ACCC Need Further Powers? Are the Penalties in the *Competition and Consumer Act* Sufficient?' (2016) 90 *Australian Law Journal* 703, 703–4; Tom Jarvis and Christopher Stones, *The Push to Increase Penalties for Breaches of the Australian Consumer Law* (March 2017) Johnson Winter & Slattery <https://www.jws.com.au/en/acumen/item/904-the-push-to-increase-penalties-for-breaches-of-the-australian-consumer-law>.

83 Benson and Fiddian, above n 82, 55; Jenny Stathis, 'ACCC Enforcement Action in 2016 — Some Highlights' (2016) 20 *Inhouse Counsel* 199, 201; Australian Competition and Consumer Commission, 'ACCC Takes Court Action on "Flushable" Wipes' (Media Release, MR 236/16, 12 December 2016) <https://www.accc.gov.au/media-release/accc-takes-court-action-on-flushable-wipes>; Australian Competition and Consumer Commission, 'ACCC Takes Action against Volkswagen over Diesel Emission Claims' (Media Release, MR 157/16, 1 September 2016) <https://www.accc.gov.au/media-release/accc-takes-action-against-volkswagen-over-diesel-emission-claims>; Australian Competition and Consumer Commission, 'ACCC Takes Action against Heinz over Nutritional Claims on Food for 1–3 Year Olds' (Media Release, MR 110/16, 21 June 2016) <https://www.accc.gov.au/media-release/accc-takes-action-against-heinz-over-nutritional-claims-on-food-for-1-3-year-olds>.

84 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 67 [178]–[179].

85 Benson and Fiddian, above n 82, 55; Stathis, above n 83, 199, 202; Michael Corrigan and Alexander Vial, *Full Court Increases "Manifestly Inadequate" Civil Penalty for Australian Consumer Law Breaches* (2 February 2017) Clayton Utz <https://www.claytonutz.com/knowledge/2017/february/full-court-increases-manifestly-inadequate-civil-penalty-for-Australian Consumer Law-breaches>; Peta Stevenson and Jessica Waters, 'Increased Penalties, a General Safety Law and Complaints Database Among Recommendations for Consumer Law Reform' (2017) 21 *Inhouse Counsel* 61. See also Australian Competition and Consumer Commission, 'ACCC Appeals Yazaki Corporation Penalty Decision' (Media Release, MR 78/17, 30 May 2017) <https://www.accc.gov.au/media-release/accc-appeals-yazaki-corporation-penalty-decision>.

86 Productivity Commission, 'Consumer Law Enforcement and Administration' (Research Report, Productivity Commission, March 2017) 99; Australian Competition and Consumer Commission, Submission No 23 to Productivity Commission, *Consumer Law Enforcement and Administration*, 31 August 2016, 9; Stevenson and Waters, above n 85, 61; Australian Competition and Consumer Commission, 'Full

the Productivity Commission noted concerns that current penalties are insufficient to deter breaches, particularly where 'profit from [the] breaching behaviour outweighs the penalty',[87] such that larger companies can absorb the penalty as a cost of doing business.[88] In *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*, Gordon J commented that although '[i]t is a matter for the Parliament to review … current maximum penalties are arguably inadequate' for large corporations.[89] Mr Sims of the ACCC has 'long' and 'loudly' advocated for legislative intervention to increase maximum penalties under the *Australian Consumer Law* to mirror those that apply to contraventions of the competition provisions of the *Competition and Consumer Act 2010* (Cth).[90] This approach would impose a corporate penalty of the greater of up to $10 million, three times the value of the benefit the company received from the breach, or 10 per cent of its annual turnover in the preceding 12 months if the benefit cannot be determined.[91] The Productivity Commission ultimately concluded that there is a 'strong case for increasing the maximum financial penalties',[92] and foreshadowed alignment with the competition provisions.[93]

Such reform to the *Australian Consumer Law* is part of a broader 'penalties trend' across a number of corporate regulatory regimes. In October 2016, the Federal Government announced an Australian Securities and Investments Commission

Federal Court Orders $6 Million Penalty for Nurofen Specific Pain Products' (Media Release, MR 244/16, 16 December 2016) < https://www.accc.gov.au/media-release/full-federal-court-orders-6-million-penalty-for-nurofen-specific-pain-products>.

87 Productivity Commission, above n 86, 140; Australian Communications Consumer Action Network, Submission No 6 to Productivity Commission, *Consumer Law Enforcement and Administration*, 30 August 2016.

88 Productivity Commission, above n 86, 140; Andrew Leigh, Submission No 1 to Productivity Commission, *Consumer Law Enforcement and Administration*, 23 August 2016, 1; CHOICE, Submission No 11 to Productivity Commission, *Consumer Law Enforcement and Administration*, 30 August 2016, 9; Terry Fogarty, Submission No DR33 to Productivity Commission, *Consumer Law Enforcement and Administration*, 18 January 2017; Consumers' Federation of Australia, Submission No 19 to Productivity Commission, *Consumer Law Enforcement and Administration*, 31 August 2016, 3.

89 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 [106]; Productivity Commission, above n 86, 141; Corrigan and Vial, above n 85.

90 Stevenson and Waters, above n 85, 61; Rod Sims, 'CCA Compliance in Interesting Times' (Speech delivered at the Committee for Economic Development of Australia Conference, Sydney, 24 February 2017); Corrigan and Vial, above n 85.

91 Productivity Commission, above n 86, 143; *Competition and Consumer Act 2010* (Cth) s 76(1A).

92 Productivity Commission, above n 86, 11; Benson and Fiddian, above n 82, 55.

93 Productivity Commission, above n 86, 143; Consumer Affairs Australia and New Zealand, 'Australian Consumer Law Review' (Interim Report, Consumer Affairs Australia and New Zealand, October 2016) 180; CHOICE, above n 88, 6.

('ASIC') Enforcement Review Taskforce to review ASIC's enforcement regime, including an examination of the adequacy of civil and criminal penalties for serious corporate and financial sector misconduct.[94] The Taskforce, consisting of senior members of ASIC, Treasury, the Attorney General's Department and the Commonwealth Director of Public Prosecutions, will assess the current regulatory tools available to ASIC with respect to corporations, financial services, credit, and insurance.[95] The announcement follows former ASIC Chairman Greg Medcraft's criticism of current 'weak' penalties for bad behaviour among bankers and life insurers.[96] He has advocated for a tougher penalty regime to 'put the fear of God into' wrongdoers.[97] Royal Commissioner Dyson Heydon has echoed Mr Medcraft by recommending that maximum penalties for breaches of directors' duties under the *Corporations Act 2001* (Cth)[98] be increased.[99] Following the recent appointment of new ASIC Chairman James Shipton,[100] the Taskforce has recommended tripling penalties under the *Corporations Act*, as well as requiring corporations to forfeit profits derived from wrongdoing.[101] These moves are intended to 're-energise' the corporate regulator and promote cultural change.[102]

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94 Kelly O'Dwyer MP, 'ASIC Enforcement Review Taskforce' (Media Release, 19 October 2016); Patrick Durkin, 'Corporate Penalties for Wrongdoing to be Tripled', *Australian Financial Review* (online), 22 October 2017; Productivity Commission, above n 86, 143 n 81.

95 O'Dwyer, above n 94; Productivity Commission, above n 86, 143 n 81.

96 Emma Alberici, 'Penalties Too Weak to Discourage Bankers' Bad Behavior, ASIC Boss Greg Medcraft Says', *ABC News* (online), 19 October 2016 <http://www.abc.net.au/news/2016-10-18/penalties-too-weak-to-discourage-banks-bad-behaviour:-asic-boss/7944570>.

97 Ibid; Michael Sill, *Penalties for Banking Sector Need to Put the Fear of God into People: ASIC* (19 October 2016) Mentor Adviser <https://www.mentor.edu.au/blog/2016/10/19/penalties-banking-sector-need-put-fear-god-people-asic/>.

98 ('the *Corporations Act*').

99 Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015), vol 5, 200, 216; Ben Butler, 'Dyson Heydon: Beef Up Fines for Breach of Directors' Duties' *The Australian* (online), 31 December 2015 <http://www.theaustralian.com.au/business/dyson-heydon-beef-up-fines-for-breach-of-directors-duties/news-story/7469b91be732c77e6642914691aa624a>.

100 Kelly O'Dwyer MP, 'Appointment of the Australian Securities and Investments Commission Chair' (Media Release, 17 October 2017); Patrick Durkin, 'James Shipton Appointed ASIC Chairman', *Australian Financial Review* (online), 17 October 2017.

101 Australian Securities and Investments Commission, 'ASIC Enforcement Review: Strengthening Penalties for Corporate and Financial Sector Misconduct' (Position Paper No 7, Australian Securities and Investments Commission, 2017) 45–53; Patrick Durkin, 'Corporate Penalties for Wrongdoing to be Tripled', *Australian Financial Review* (online), 22 October 2017.

102 Durkin, above n 101.

In addition to proposed reforms to foreign bribery offences,[103] recent reforms to combat false accounting practices[104] have created severe maximum corporate penalties of $18 million, three times the value of the benefit obtained, or 10 per cent of the annual turnover of the company if the benefit cannot be determined.[105] More recently, the Australian Transaction Reports and Analysis Centre ('AUSTRAC') has commenced proceedings in the Federal Court against the Commonwealth Bank of Australia under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) — which imposes a maximum pecuniary penalty of $18 million on a body corporate for each contravention[106] — for 'serious and systemic non-compliance' with the legislation.[107] AUSTRAC has alleged 53 700 contraventions by the bank over a three year period, implying a theoretical maximum civil penalty of $960 billion.[108]

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103 Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (Cth).

104 *Criminal Code Act 1995* (Cth) ch 10 pt 10.9 div 490.

105 Robert Wyld, *Likely New Corporate Offence of Failing to Prevent Foreign Bribery* (26 May 2017) Johnson Winter & Slattery <https://www.jws.com.au/en/legal-updates-archive/item/944-likely-new-corporate-offence-of-failing-to-prevent-foreign-bribery>; Robert Wyld, *New Criminal Offence: False Accounting Practices* (December 2015) Johnson Winter & Slattery <https://www.jws.com.au/en/legal-updates-archive/item/717-new-criminal-offence-false-accounting-practices>; Clayton Utz, *Australia's New False Accounting Laws Boost Foreign Bribery Regime, so Review Accounting Safeguards* (15 March 2016) <https://www.claytonutz.com/knowledge/2016/march/australia-s-new-false-accounting-laws-boost-foreign-bribery-regime-so-review-accounting-safeguards>; Rani John and Alexandra Cameron, *Australia Introduces New False Accounting Offences in the Quest to Better Combat Foreign Bribery and Corruption* (3 March 2016) DLA Piper <https://www.dlapiper.com/en/australia/insights/publications/2016/03/new-accounting-offences-to-combat--corruption/>.

106 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 41(2), (4), 175(4); *Crimes Act 1914* (Cth) s 4AA; Australian Transaction Reports and Analysis Centre, *Penalty Units* (13 July 2017) AUSTRAC <http://www.austrac.gov.au/enforcement-action/penalty-units>.

107 Australian Transaction Reports and Analysis Centre, 'AUSTRAC Seeks Civil Penalty Orders against CBA' (Media Release, 3 August 2017) <http://www.austrac.gov.au/media/media-releases/austrac-seeks-civil-penalty-orders-against-cba>.

108 Ibid; Peter Ryan, 'CBA Risks Massive Fines over Anti-Money Laundering, Terrorism Financing Law Breaches', *ABC News* (online), 3 August 2017 <http://www.abc.net.au/news/2017-08-03/cba-risks-massive-fines-over-law-breaches/8770992>; Clancy Yeates, 'Austrac Alleges CBA in "Serious" Breach of Money Laundering Act', *The Sydney Morning Herald* (online), 3 August 2017 <http://www.smh.com.au/business/banking-and-finance/austrac-alleges-cba-in-serious-breach-of-money-laundering-act-20170803-gxoirw.html>. Although the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) came into force in 2006, a $45 million civil penalty was recently imposed on gaming company Tabcorp for failing to notify AUSTRAC of suspicious behaviour over five years: Peter Ryan, 'Tabcorp Fined $45 Million for Breaching Money Laundering, Terror Financing Laws', *ABC News* (online), 16 March 2017 <http://www.abc.net.au/news/2017-03-16/tabcorp-fined-$45-million-for-breaching-money-laundering-laws/8360164>. However, some

Though 'beefing up' maximum penalties has obvious political appeal, it does not necessarily follow that higher penalties will result.[109] The court ultimately determines the magnitude of any penalty to be imposed[110] — the statutory maximum is but one factor to be considered.[111] In the context of the *Australian Consumer Law*, the ACCC will be guided by the Full Court's comments regarding the need to focus on, and better describe, the extent of the loss suffered by consumers,[112] and the benefits derived by the offending company.[113] Enforcement efforts are likely to be supported by courts that are ostensibly prepared to treat consumer law contraventions 'in a very serious way'.[114] Some commentators have observed a 'growing willingness' by judges to take a 'more punitive approach' to such breaches compared to five or ten years ago.[115] Such observations reflect an increased focus by courts and regulators on poor corporate compliance culture, particularly when assessing penalties.[116] As Wigney J observed in *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group*, there is a 'legitimate community expectation' that 'major corporations act as exemplary corporate citizens' and 'develop and maintain a good corporate culture'.[117]

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commentators are skeptical as to whether a penalty so large relevant to the size of the bank would actually be imposed: James Frost, 'CBA Fine Could Range from Zero to Billions', *Australian Financial Review* (online), 7 August 2017 <http://www.afr.com/business/banking-and-finance/financial-services/cba-fine-could-range-from-zero-to-billions-20170807-gxqnsb>; Christopher Joye, 'Commonwealth Bank Money-Laundering Drama is Overblown', *Australian Financial Review* (online), 7 August 2017 <http://www.afr.com/business/banking-and-finance/the-cba-money laundering-drama-is-overblown-20170807-gxqtyr>.

109 Butler, above n 99.

110 Productivity Commission, above n 86, 143, citing *Markarian v The Queen* (2005) 228 CLR 357, 383 [65] (McHugh J), quoting *R v Geddes* (1936) SR (NSW) 554, 555–6 (Jordan CJ).

111 Productivity Commission, above n 86, 143; *Markarian v The Queen* (2005) 228 CLR 357, 359, 361, 369 [20], 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

112 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 41 [65], 62 [158]. But see Howard, above n 81.

113 Jarvis and Stones, above n 82.

114 Stephen Corones, 'Competition Law and Market Regulation' (2016) 44 *Australian Business Law Review* 216, 217.

115 Ibid; Benson and Fiddian, above n 82, 55.

116 See, eg, *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44 [124], cited in *ACCC v Reckitt Benckiser [No 7]* (2016) 343 ALR 327, 333 [21]. See also *Australian Securities and Investments Commission v Chemeq Ltd* (2006) 234 ALR 511, 531 [84]–[86], 532–3 [93].

117 *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group* [2016] FCA 1516 [123].

V Conclusion

The decision of the Full Court in *ACCC v Reckitt Benckiser* has received widespread support as a significant victory for the ACCC.[118] Although the comments of Jagot, Yates and Bromwich JJ seem to foreshadow a modern judicial shift towards the imposition of increased penalties for serious contraventions of the *Australian Consumer Law*,[119] confirmation of this trend will fall to future proceedings. It is hoped that the ACCC's pursuit of higher penalties will influence the behaviour of large companies that seek to engage in systemic misconduct.[120] The publicity surrounding the Full Court's decision places these companies, and their officers, on notice that marketing strategies, compliance programmes and business practices may need to be reviewed and amended.[121] Ultimately, recent and future penalty reform — under the *Australian Consumer Law* and other corporate regimes — will only effect meaningful change on corporate compliance culture if larger penalties are combined with an increased likelihood of detection and 'strong and visible' enforcement action by regulators.[122]

118 It is also worth noting that in New Zealand, Reckitt Benckiser (New Zealand) Ltd was fined NZ$1.08 million for contraventions of provisions analogous to ss 18 and 33 of the *Australian Consumer Law* relating to the Specific Pain range: see, eg, *Commerce Commission v Reckitt Benckiser (New Zealand) Limited* [2017] NZDC 1956; Commerce Commission New Zealand, '$1m Penalty for Misleading Nurofen Specific Pain Range Claims' (Media Release, 3 February 2017) <http://www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2017/1m-penalty-for-misleading-nurofen-specific-pain-range-claims>.

119 *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, 64 [165], 67 [178]–[179].

120 Benson and Fiddian, above n 82, 55.

121 Stathis, above n 83, 202; Benson and Fiddian, above n 82, 57.

122 Stathis, above n 83, 202; Benson and Fiddian, above n 82, 55; Productivity Commission, above n 86, 142; Fogarty, above n 88, 1; Australian Toy Association, Post-Draft Submission No 42 to Productivity Commission, *Consumer Law Enforcement and Administration*, 23 January 2017.