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FOOD FOR THOUGHT: *AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V HJ HEINZ COMPANY AUSTRALIA LIMITED*

I Introduction

In March 2018, HJ Heinz Company Australia Limited ('Heinz') was found to have contravened ss 18 and 29(1)(g) of the *Australian Consumer Law*[1] by representing that its 'Heinz Little Kids fruit & veg SHREDZ' products were beneficial to the health of children aged one to three years. Justice White of the Federal Court ordered Heinz to pay a $2.25 million pecuniary penalty, establish a consumer protection law compliance program, and pay costs to the Australian Competition and Consumer Commission ('ACCC'). His Honour's reasons were explained in *ACCC v HJ Heinz Company Australia Limited*[2] ('Liability Judgment') and *ACCC v HJ Heinz Company Australia Limited (No 2)*[3] ('Relief Judgment'), collectively '*Heinz*'.

Heinz was an example of the ACCC seeking to capitalise on its 'momentum' following high profile successes against Coles,[4] Reckitt Benckiser,[5] Ford,[6] Telstra,[7] Yazaki,[8] and Apple.[9] However *Heinz* did not vindicate the ACCC's 'more bullish view' on penalties.[10] The judgment fell far short of the ACCC's claim of $10 million. That

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1 *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

2 (2018) 363 ALR 136 ('*Heinz*').

3 [2018] FCA 1286 ('*Heinz (No 2)*').

4 *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540.

5 *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 ('*Reckitt Benckiser*').

6 *ACCC v Ford Motor Company of Australia Limited* [2018] FCA 703.

7 *ACCC v Telstra Corporation Limited* [2018] FCA 571.

8 *ACCC v Yazaki Corporation* (2018) 357 ALR 55.

9 *ACCC v Apple Pty Ltd [No 4]* [2018] FCA 953.

10 James Keeves, '*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25' (2017) 38(1) *Adelaide Law Review* 503, 511. See also *Reckitt Benckiser* (n 5) 66 [165], 69 [178]–[179]; Esther Han, 'Heinz to Pay $2.25 Million Fine for "Deceptive" Peddling of Toddler Snack', *The Sydney Morning Herald* (online, 25 August 2018) <https://www.smh.com.au/business/consumer-affairs/heinz-to-pay-2-25-million-fine-for-deceptive-peddling-of-toddler-snack-20180825-p4zzon.html>.

vindication may now be realised thanks to amendments to the *Australian Consumer Law* that have significantly increased the maximum pecuniary penalties.[11]

This case note analyses the Court's reasoning in *Heinz* and considers its approach to identifying representations, the deterrence aspect of the penalty, the utility of the 'course of conduct' principle and problems with the quantification of penalties generally.

II Background

A *Facts*

Heinz concerned the packaging of three 'Heinz Little Kids' food products aimed at children aged one to three years.[12] Named 'SHREDZ', the products came in 'berries apple & veg', 'peach apple & veg' or 'strawberry & apple with chia seeds' flavours (collectively, 'Products').[13]

The Products were all sold in boxes featuring a tree with a rope ladder and a smiling boy.[14] There were pictures of fruit, vegetables or seeds, corresponding to the ingredients. The boxes declared that the Products were '99% fruit and veg' without preservatives, artificial colours or flavours. The 'berries apple & veg' and 'peach apple & veg' boxes used the term 'nutritious' several times. The 'strawberry & apple with chia seeds' box stated 'Just the Good Stuff' and 'No Nasties'. However the back of each box displayed nutritional information showing the Products were approximately two-thirds sugar.[15] Figure 1 shows an unfolded copy of the packaging.

11 *Treasury Laws Amendment (2018 Measures No 3) Act 2018* (Cth) sch 1. But some commentators doubt that Australian courts will ever impose maximum penalties: see Caron Beaton-Wells and Julie Clarke, 'Deterrent Penalties for Corporate Colluders: Lifting the Bar' (2018) 37(1) *University of Queensland Law Journal* 107, 107.

12 *Heinz* (n 2) 138 [1].

13 Ibid 138 [4].

14 See ibid 139–42 [7]–[22] for a description of the boxes.

15 The berries apple & veg flavor contained an average of 68.7g of sugars per 100g.

Figure 1: Heinz Little Kids SHREDZ Berries Apple & Veg[16]
Source: *Heinz*

On 20 June 2016, the ACCC commenced proceedings against Heinz. On 19 March 2018, White J handed down the Liability Judgment. Heinz filed a notice of appeal. On 24 August 2018, the Relief Judgment followed. Notably, Heinz then discontinued its appeal.

B *Issues*

First, the Court considered whether statements and images on the Products' packaging conveyed representations to the effect that each Product

(a) is of an equivalent nutritional value to the natural fruit and vegetables depicted on the packaging (the Nutritional Value Representation);

(b) is a nutritious food and is beneficial to the health of children aged 1–3 years (the Healthy Food Representation); and/or

(c) encourages the development of healthy eating habits for children aged 1–3 years (the Healthy Habits Representation).[17]

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[16] Ibid 187.

[17] Ibid 142 [23].

If conveyed, the Court then had to consider whether the representations contravened the *Australian Consumer Law* ss 18 (misleading or deceptive conduct), 29(1)(a) and (g) (false or misleading representations) or 33 (conduct liable to mislead the public).

Justice White put aside questions such as whether purchasing the Products would be a sensible decision.[18] This shows that litigation about false, misleading or deceptive packaging does not stray into normative questions about the desirability of having the item on our shelves.

III Decision

A *Representations*

1 *Nutritional Value Representation*

Justice White held that the Nutritional Value Representation was not conveyed. One hurdle was that the Nutritional Value Representation was never *expressly* stated. Heinz seized upon this, but White J focussed on the general effect of the statements and images. His Honour accepted that implied representations are possible.[19] However, crucially, consumers understand processed foods may not be nutritionally equivalent to their raw ingredients or ingredients depicted on their packaging.[20] Without a representation, there also could be no contravention of the *Australian Consumer Law*.

2 *Healthy Habits Representation*

The Healthy Habits Representation was also rejected.[21] The ACCC relied heavily on the statement: 'we aim to inspire a love of nutritious food that lasts a life time'.[22] Significantly, this contained no reference to eating habits.[23] The ordinary and reasonable consumer would understand it to be 'aspirational' only.[24] Again, if there was no representation, there could be no *Australian Consumer Law* contravention either.

18 Ibid 143 [28]–[29].
19 Ibid 147 [58].
20 Ibid 149 [65]–[67].
21 Ibid 178 [254].
22 Ibid 177 [247].
23 Ibid 177 [249].
24 Ibid 177 [250].

3 *Healthy Food Representation*

This representation was accepted. It contained two limbs:

- that the Products were nutritious; and
- that the Products were beneficial to the health of children.[25]

Heinz had several arguments for why these representations were not made. It contended that ordinary and reasonable consumers would read both the front and back of the box. However, White J considered that consumers were unlikely to read the detailed information 'in the press of a supermarket aisle'.[26] Heinz also submitted that the packaging focussed on statements about the natural ingredients (not the word 'nutritious'), and that consumers would understand the Products to be merely a snack (not a meal).[27] However, White J considered that consumers would likely absorb only 'the general thrust' of the packaging.[28] His Honour rejected the snack distinction as 'artificial'.[29]

Having rejected Heinz's contentions, White J analysed the imagery on the boxes (healthy young boy climbing a tree with wholesome fruit and vegetables), the colours used and the wording ('99% fruit and veg', 'snacks and meals' and 'nutritious').[30] Additionally, Heinz's marketing reports confirmed an intention to convey that the Products were nutritious and healthy.[31] Justice White therefore had 'no difficulty' in finding that both limbs of the Healthy Food Representation were conveyed.[32]

B *Contravention of the Australian Consumer Law*

1 *Section 18*

Justice White then considered whether either limb of the Healthy Food Representation contravened the *Australian Consumer Law* s 18(1), which prohibits conduct in trade or commerce that is 'misleading or deceptive or is likely to mislead or deceive'. It would suffice for both ss 18 and 29 — despite their different wording[33] — that

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25 Ibid 150 [74].

26 Ibid 151 [81].

27 Ibid 151 [82]–[83].

28 Ibid 153 [89].

29 Ibid 152 [86].

30 Ibid 155–6 [99]–[100]. However for the 'strawberry & apple with chia seeds' product, the use of 'Just The Good Stuff', 'No Nasties' and the emphasis on fruit ingredients were the essential factors: at 180 [267]–[270].

31 Ibid 154–5 [93]–[98].

32 Ibid 155 [100].

33 *Australian Consumer Law* s 29(1) prohibits various 'false or misleading' representations.

either limb of the Healthy Food Representation was false (meaning contrary to the relevant fact), or misleading (having a tendency to lead the ordinary and reasonable consumer into error).[34] This inquiry 'is one of fact to be determined by an objective consideration in the light of all the relevant surrounding circumstances'.[35]

His Honour held that it was not false or misleading to represent that the Products were nutritious.[36] This rested on a narrow view of what 'nutritious' means. His Honour held that ordinary and reasonable consumers would understand 'nutritious' as referring to 'the extent to which [a food] provides the nutrients which sustain life'.[37] Expert evidence indicated that the Products *did* contain nutrients such as vitamins A and C, that they were each a source of energy, and that the 'strawberry & apple with chia seeds' flavour was a source of dietary fibre.[38] It was therefore not false to represent that the Products were nutritious.

Conversely, the representation that the Products were beneficial to the health of children was found to be false and therefore contravened s 18.[39] This was due to two related qualities: the Products' high sugar content and their sticky texture.[40] Regarding the former, his Honour considered Heinz's internal guidelines on sugar content — which the Products exceeded — and expert evidence which supported the view that the sugar level was too high for the Products to be healthy.[41] Regarding the latter, his Honour also accepted expert evidence that the stickiness of the Products made them likely to adhere to teeth, where the high sugar level and low pH of the Products would increase the risk of developing dental caries.[42] In reaching the ultimate conclusion that there was a contravention of s 18, it was enough that the Products were not beneficial.[43]

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34 Ibid 144 [37], [39]. See also *ACCC v Dukemaster Pty Ltd* [2009] FCA 682, [14] ('*Dukemaster*'); *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 317 ALR 73, 81 [40]. In *Dukemaster*, Gordon J considered the difference in wording between the predecessors to ss 18 and 29 (see *Trade Practices Act 1974* (Cth) ss 52 and 53), stating that her Honour had not found 'any authority which attributes a meaningful difference to this dichotomy': at [14]. See further *Foxtel Management Pty Ltd v Australian Video Retailers Association Ltd* (2004) 214 ALR 554, 588 [94].

35 *Heinz* (n 2) 144 [40], citing *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198–9; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 625 [109].

36 Ibid 163 [146], 179 [262], 180 [270].

37 Ibid 162 [140].

38 Ibid 162–3 [143]–[146].

39 Ibid 177 [245], 179 [262], 180 [270].

40 Ibid 172 [215], 177 [244].

41 Ibid 165 [161]–[162], 167 [175], 175 [236].

42 Ibid 172–3 [214]–[218], 175 [231].

43 Ibid 175 [232].

2 *Sections 29(1)(a), 29(1)(g) and 33*

Justice White was 'circumspect' regarding other alleged contraventions, as the ACCC 'did not address any submissions relating the evidence in this case to those elements [of ss 29 and 33]'.[44] In the absence of specific submissions, White J declined to find that ss 29(1)(a) or 33 were contravened.[45] However, the representation that the Products were beneficial to children amounted to a false or misleading representation that the Products had benefits, contravening s 29(1)(g) for the same reasons as s 18.[46]

C *Relief*

Finally, an appropriate pecuniary penalty had to be assessed pursuant to s 224 for the contravention of s 29(1)(g). Contraventions of s 18 cannot attract pecuniary penalties.

Justice White held that Heinz's conduct had the non-monetary effect of distorting consumer choice and had potentially adverse health effects for children.[47] A false or misleading representation was made *at least* every time the Products were purchased, amounting to 1.2 million contraventions.[48] The maximum penalty for each contravention was then $1.1 million. There was also a contravention every time a consumer viewed the packaging, but that number was 'indeterminate'.[49] Heinz's size was emphasised, as larger companies require larger penalties to be deterred from unlawful conduct.[50]

Heinz's state of mind was also 'very relevant' to the assessment of its culpability,[51] and therefore the penalty. His Honour held that 'Heinz nutritionists ought to have known that a representation that a product containing approximately two-thirds sugar was beneficial to the health of children aged 1–3 years was misleading'.[52] However, Heinz was not viewed as having treated the possibility of sanctions as a mere 'cost of doing business',[53] nor as having an indifferent senior management.[54] Further, while the contraventions were 'serious', they were not 'egregious'.[55]

44 Ibid 180–1 [271]–[273].

45 Ibid 181 [274], [277].

46 Ibid 181 [275].

47 *Heinz (No 2)* (n 3) [18]–[20].

48 Ibid [15], [17].

49 Ibid [17].

50 Ibid [39]–[43].

51 Ibid [21], citing *Reckitt Benckiser* (n 5) 58 [131].

52 *Heinz* (n 2) 186 [312].

53 *Heinz (No 2)* (n 3) [54].

54 Ibid [62].

55 Ibid [36], [38].

Taking all of this into account, and considering Heinz's overall course of conduct, White J ordered that Heinz pay a pecuniary penalty of $2.25 million. Further, his Honour ordered that Heinz establish a three-year consumer protection law compliance program and pay costs. His Honour declined to make a corrective publication order, given the time that had elapsed since sales of the Products had ceased and the publicity surrounding the litigation.[56]

IV Comment

A *Implied Representations*

Heinz shows that businesses may not escape censure through a careful choice of words and the use of fine print. Justice White's pragmatic approach focussed on the *implication* conveyed to the relevant class of ordinary and reasonable consumers.[57] The same approach could equally be applied to find implications regarding the qualities or risks of other types of products, such as financial products and services.[58] The possibility of such an application may now be higher given the increased scrutiny following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. However, the key question would be whether consumers of financial services are equally as 'unlikely'[59] to read the fine print as supermarket shoppers. Perhaps not traditionally. But with the rise of mobile-based online financial services,[60] and clickwrap contracts,[61] White J's approach may be increasingly applicable.

56 Ibid [84].

57 *Heinz* (n 2) 147 [57]–[58]. For a similar approach to implications, see *ACCC v Nudie Foods Australia Pty Ltd* [2008] FCA 943; Sharn Hobill and Jay Sanderson, 'Not Free to Roam: Misleading Food Credence Claims, the ACCC and the Need for Corporate Social Responsibility' (2017) 43(1) *Monash University Law Review* 113, 126.

58 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DB, 12DF; *Corporations Act 2001* (Cth) ss 1041E, 1041F, 1041H.

59 *Heinz* (n 2) 151 [81].

60 Val Srinivas and Richa Wadhwani, 'The Value of Online Banking Channels in a Mobile-Centric World', *Deloitte Insights* (Blog Post, 13 December 2018) <https://www2.deloitte.com/insights/us/en/industry/financial-services/online-banking-usage-in-mobile-centric-world.html>.

61 See Susan E Gindin, 'Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC's Action Against Sears' (2009) 8(1) *Northwestern Journal of Technology and Intellectual Property* 1; Christopher McMahon, 'iPromise: How Contract Theory Can Inform Regulation of Online Consumer Contracts' (2018) 21 *Trinity College Law Review* 174.

B *Does Intention Show That a Representation Was Made?*

Justice White also stated, in line with authority,[62] that a finding that a representation was made may be reached more readily when the Court can discern an intention on the part of the representor to make it.[63] As a matter of principle, this is difficult to reconcile with an analytical framework that otherwise focusses entirely on the effect of representations on the ordinary and reasonable consumer. Of course, insofar as the representor's intention is *manifested* in statements or images (as in the present case),[64] the intention is indirectly considered. However, it is not apparent what standalone references to intention *add* to this. At best, White J's approach may help to catch malicious advertisers whose motives were clear but whose execution lacked a smoking gun. Yet it equally invites the possibility of exonerating an advertiser whose conduct was the same but who lacked a Heinz-level trail of incriminating marketing reports.

C *Deterrence: The Bigger They Are, the Harder They (Should) Fall*

Turning to the penalty, deterring unlawful conduct is undoubtedly '[t]he principal concern of the Court in fixing … an appropriate pecuniary penalty'.[65] For a penalty to achieve specific deterrence, the size of the contravener's financial resources is 'clearly relevant'.[66] Justice White noted Heinz's $448 million revenue and its parent company's US$26.5 billion in annual global sales.[67]

Yet his Honour was circumspect regarding the need for specific deterrence of Heinz. Justice White considered that the continuation of Heinz's conduct after the ACCC commenced investigations did not indicate that Heinz viewed sanctions as a 'cost of doing business'.[68] Rather, Heinz's conduct was attributable to a 'failure to appreciate' that it was making a false or misleading representation.[69]

Heinz's conduct may well have been less culpable than, for example, Reckitt Benckiser's in the Nurofen litigation. In that case, Reckitt Benckiser repeatedly denied liability despite a string of public criticisms and complaints,[70] only for the company to admit liability at the last possible moment.[71] However, White J's approach

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62 *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640, 657 [55]–[56].

63 *Heinz* (n 2) 154–5 [93]–[98].

64 Ibid 155 [99].

65 *Heinz (No 2)* (n 3) [45], citing *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, 506 [55]. See also *Reckitt Benckiser* (n 5) 62 [148]; Hobill and Sanderson (n 57) 129.

66 *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540, 560 [92].

67 *Heinz (No 2*) (n 3) [42]–[43].

68 Ibid [50].

69 Ibid [54].

70 *Reckitt Benckiser* (n 5) 59 [136], 61 [144].

71 Ibid 65 [160], 68–9 [177].

is arguably at odds with both a judicial[72] and legislative[73] trend towards *higher* penalties. This trend culminated in the recent maximum penalty increase, which took effect a week after the Relief Judgment was handed down.[74] The maximum penalty for a body corporate (previously $1.1 million) is now the greater of

> (a) $10,000,000;
>
> (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission — 3 times the value of that benefit;
>
> (c) if the court cannot determine the value of that benefit — 10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur.[75]

In this context, Heinz's $2.25 million penalty goes against the grain. Whereas White J's approach accepts that financial resources are relevant but takes a careful approach to deterrence, the approach in the *Treasury Laws Amendment (2018 Measures No 3) Act 2018* (Cth) makes financial resources potentially decisive and focuses strongly on deterrence. Further, whereas the Court saw limited moral culpability in Heinz's 'failure to appreciate', the size of the possible penalties now creates an imperative for companies to proactively appreciate consumer law issues. That is precisely the goal endorsed by the Assistant Minister to the Treasurer in his second reading speech:

> [P]enalties must be sufficiently high that a business, acting rationally and in its own interests, would not be prepared to treat the risk of such a penalty as simply a cost of doing business.[76]

That statement echoes the aim set out a year earlier in *Reckitt Benckiser*: making 'the deterrence sufficiently effective in achieving *voluntary compliance*'.[77] Thus, even though *Heinz* preceded the legislative changes, White J could have gone further in

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72 Ibid 69 [178]–[179]; *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, [106].

73 Explanatory Memorandum, Treasury Laws Amendment (2018 Measures No 3) Bill 2018 (Cth) 7–8. See also Keeves (n 10) 512, citing David Benson and Sam Fiddian, 'The ACCC's 2017 Compliance and Enforcement Priorities for Consumers and Small Businesses' (2017) 21 *Inhouse Counsel* 55.

74 *Treasury Laws Amendment (2018 Measures No 3) Act 2018* (Cth). Schedule 1, which contains the relevant amendments, commenced on 1 September 2018: at s 2.

75 Ibid sch 1 s 49.

76 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 February 2018, 1619 (Michael Sukkar, Assistant Minister to the Treasurer).

77 *Reckitt Benckiser* (n 5) 62 [151] (emphasis added).

pursuing the underlying objective of deterrence. Indeed, so much might be gleaned from Heinz's decision to discontinue its appeal following the Relief Judgment.

D *The 'Course of Conduct' Principle and Quantifying Penalties*

Finally, the 'course of conduct' principle warrants consideration. This discretionary tool permitted White J to group numerous contraventions into a 'course of conduct' and impose a single overall penalty for it, without that sum being capped by the statutory maximum.[78]

The first issue is whether this is permitted by s 224 of the *Australian Consumer Law*. Justice White noted that statutory limits on the penalty for each act or omission seem '[p]rima facie … inconsistent with the Court being permitted to impose a penalty of a single sum "in respect of" multiple contraventions'.[79] However, his Honour sidestepped the problem and applied the course of conduct principle by holding that s 224 'may not preclude' the imposition of a single pecuniary penalty which reflects the aggregate of individual penalties comprising a course of conduct.[80] His Honour did not propose a broader solution to this problem — indeed, 'none of the authorities have articulated a rationale' for applying the course of conduct principle to s 224.[81] This state of play is unsatisfactory. It could be easily clarified by statute, as in the *Fair Work Act 2009* (Cth) s 557.[82]

Adding further mystery to the penalty calculation, his Honour considered that it was 'not necessary for me to identify the individual penalties used to derive that aggregate figure',[83] an approach which neither party disputed. His Honour also considered that it was immaterial to determine the precise number of courses of conduct (as the result would be similar regardless).[84] It apparently followed that the appropriate penalty was $2.25 million. This approach is an example of 'instinctive synthesis'[85] — a term that leads to more questions than answers.

Not quantifying the courses of conduct or individual penalties for each act is at least pragmatic. It was the approach of the Full Court in *Reckitt Benckiser*,[86] has High

78 *Heinz (No 2)* (n 3) [63]. See also *ACCC v Yazaki Corporation* (2018) 357 ALR 55.

79 *Heinz (No 2)* (n 3) [70].

80 Ibid [71].

81 Ibid [69].

82 See *Fair Work Ombudsman v Zucco Farming Pty Ltd* [2019] FCCA 1277, [26]–[28] for a recent application of this provision. See also *Spam Act 2003* (Cth) s 25(3)(b).

83 *Heinz (No 2)* (n 3) [77].

84 Ibid [73]–[74].

85 *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540, 543 [6]; OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (Report, 2018) 7.

86 *Reckitt Benckiser* (n 5) 38 [44], 65–6 [164]–[165].

Court support,[87] and has been applied since.[88] It may be that greater precision is elusive for large-scale representations to consumers,[89] especially if the effects are non-monetary like in *Heinz*.

Nonetheless, greater certainty for litigants including the ACCC would be achieved if we could know the secret recipe. Compared to other jurisdictions, Beaton-Wells and Clarke have called the Australian approach 'unstructured and non-sequential, as well as non-transparent and highly discretionary'.[90] *Heinz* is a case in point. The discretion results in outcomes that are both hard to justify and hard to appeal.[91] Perhaps the course of conduct principle is less a useful tool and more new clothes for the Emperor.

Now that the maximum penalties have increased significantly, it is even more important that a clear analytical approach be introduced for s 224 and its analogues.[92] The new maximums will shift the goal posts towards higher penalties in general, as maximum penalties are relevant when considering what is appropriate in any particular case.[93] The increase will likely go some way to achieving Handsley and Reeve's recommendation of 'meaningful sanctions for non-compliance'.[94] But by shunning a structured method for calculating penalties, the courts have given themselves a multi-million-dollar judicial discretion. As the stakes rise, will we see more appeals purely in the hope that the next roll of the dice is more favourable?

V Conclusion

The ACCC's success in *Heinz* was tempered by the fact that the ACCC proved contraventions of only two of four relevant *Australian Consumer Law* provisions for one of three alleged representations. While *Heinz* was a timely reminder that companies are responsible for both express and implied representations, the penalty was also smaller than other recent ACCC successes. However, with greater maximum penalties now

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87 *Markarian v The Queen* (2005) 228 CLR 357, 375 [38]–[39].

88 *Veeraragoo v Goldbreak Holdings Pty Ltd (No 2)* [2018] FCA 1448, [62].

89 See, eg, *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540, 546 [18].

90 Beaton-Wells and Clarke (n 11) 125.

91 *Reckitt Benckiser* (n 5) 37–8 [44].

92 See, eg, *Competition and Consumer Act 2010* (Cth) s 76.

93 *Markarian v The Queen* (2005) 228 CLR 357, 372 [30]–[31]. See also *Setka v Gregor (No 2)* (2011) 195 FCR 203, 211 [46]; *McDonald v Australian Building and Construction Commissioner* (2011) 202 IR 467, 474 [28]–[29].

94 Elizabeth Handsley and Belinda Reeve, 'Holding Food Companies Responsible for Unhealthy Food Marketing to Children: Can International Human Rights Instruments Provide a New Approach?' (2018) 41(2) *University of New South Wales Law Journal* 449, 482.

in place, perhaps future courts will satisfy ACCC Chairman Rod Sims' hope that 'this sort of behaviour is effectively deterred'.[95]

Heinz is more pragmatic than principled. The case raises questions about the relevance of a representor's intention in determining whether a representation is conveyed, the importance of deterrence, the utility of the course of conduct principle and — most significantly — the pressing need for methodology in the dark art of quantifying pecuniary penalties.

On that final issue, the OECD's recent recommendation to study the possibility of adopting a structured approach to setting penalties is an excellent starting point.[96] The OECD's 2018 report summarises the approach in the European Union, Germany, Japan, Korea, the United Kingdom and the United States. Each jurisdiction calculates penalties through a more transparent process that involves determining a base penalty, adjusting it for aggravating and mitigating circumstances, then making final adjustments to achieve an end result that is adequate and deters non-compliance.[97] Those jurisdictions already light the path to reform. Without further legislative changes to bring Australia into line, we will continue to lack a transparent and predictable mechanism for determining pecuniary penalties. How fitting, then, that a case about food should provide so much food for thought.

95 Rebecca Opie, 'Heinz to Pay $2.25m for "Misleading and Deceptive" Marketing of Sugar-Heavy Food', *ABC News* (online, 24 August 2018) <https://www.abc.net.au/news/2018-08-24/heinz-fined-$2.25-million-for-misleading-public/10162404>.

96 OECD (n 85) 73–4.

97 Ibid 38–54.