FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Ultra Tune Australia Pty Ltd [2019] FCA 12

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| File number: | NSD 750 of 2017 |
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| Judge: | **BROMWICH J** |
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| Date of judgment: | 18 January 2019 |
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| Catchwords: | **CONSUMER LAW** – whether franchisor contravened disclosure requirements in the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (**Franchising Code**) – whether franchisor contravened cl 6(1) of the Franchising Code, obligation to act in good faith – whether franchisor engaged in misleading or deceptive conduct – whether franchisor made false or misleading representations – whether conduct of the franchisor aberrant – held: contraventions established as alleged – assessment of pecuniary penalties – held: pecuniary penalty of $2,604,000 imposed; ancillary declarations and other relief to be granted in final orders |
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| Legislation: | *Australian Consumer Law* (contained in Sch 2 to the *Competition and Consumer Act 2010* (Cth)) ss 18, 29, 224, 239, 246  *Competition and Consumer Act 2010* (Cth) ss 51ACA, 51ADA, 51ADB, 51AE, 51ACB, 76, 86C  *Crimes Act 1914* (Cth) s 4AA  *Evidence Act 1995* (Cth) s 140(2)  *Federal Court of Australia Act 1976* (Cth) s 37AF  *Trade Practices Act 1974* (Cth) ss 51AD, 52, 53  *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) Sch 1, cll 2, 4, 5, 6, 8, 9, 10, 15, 16, 31  *Trade Practices (Industry Codes – Franchising) Regulations 1998* (Cth) cll 2, 4, 6, 6A, 6B, 17, 19, 23A |
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| Cases cited: | *Alcatel Australia* *v Scarcella* (1998) 44 NSWLR 349  *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595  *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761; 282 ALR 246  *Briginshaw v Briginshaw* (1938) 60 CLR 336  *Burger King Corporation v Hungry Jack’s Pty Ltd* [2001] NSWCA 187; 69 NSWLR 558  *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410  *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2018] FCAFC 97  *Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268  *Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd* [2006] VSC 223  *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17  *Pierce Bell Sales Pty Ltd v Frazer* (1973) 130 CLR 575  *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234  *R v JS* [2007] NSWCCA 272; 230 FLR 276  *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; 41 WAR 318  *Sydney Medical Service Co-operative Limited v Lakemba Medical Services Pty Ltd* [2016] FCA 763  *Veen (No 2) v The Queen* (1988) 164 CLR 465  *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190; [2017] ATPR 42-563  Bilson, B, *The Future of Franchising* (Treasury, Canberra, 2014)  Gummow W, “What is in a Word? ‘Legitimate’ Interests and Expectations as a Common Law Criteria” (2018) 45 *Australian Bar Review* 23  Summers RS, “‘Good Faith’ in General Contract Law and the Sales Provisions of the *Uniform Commercial Code*” (1968) 54 *Virginia Law Review* 195  Wein, A, *Review of the Franchising Code of Conduct: Report to the Hon Gary Gray AO MP, Minister for Small Business, and the Hon Bernie Ripoll MP, Parliamentary Secretary for Small Business* (Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, Canberra, 2013) |
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| **Table of Corrections** |  |
| 23 September 2019 | In paragraph 90, “Spigelmann CJ” has been replaced with “Spigelman CJ”. |
| 24 January 2019 | In paragraph 261, “a solicitor for” has been replaced with “an employee of”. |
| 24 January 2019 | In paragraph 277, “5 October 2015” has been replaced with “4 October 2015”.” |
| 24 January 2019 | In paragraph 288, “5 October 2015” has been replaced with “4 October 2015”.” |
| 24 January 2019 | In paragraph 301, “15 September 2015” has been replaced with “22 September 2015” twice. |

ORDERS

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|  | | NSD 750 of 2017 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | ULTRA TUNE AUSTRALIA PTY LTD ACN 065 214 708  Respondent | |

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| JUDGE: | BROMWICH J |
| DATE OF ORDER: | 18 January 2018 |

THE COURT ORDERS THAT:

1. The respondent pay to the applicant a pecuniary penalty of $2,604,000 within 60 days of this judgment.
2. The respondent pay to the applicant $33,000 plus interest within 14 days for the redress of Mr Nakash Ahmed.
3. The applicant pay the sum referred to in order 2 to Mr Nakash Ahmed within 14 days of receipt of the sum from the respondent.
4. The respondent pay the applicant’s costs on an indemnity basis.
5. The parties furnish agreed or competing draft orders and declarations to reflect these reasons within 28 days.

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

REASONS FOR JUDGMENT

BROMWICH J:

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# INTRODUCTION

1. The respondent, **Ultra Tune** Australia Pty Ltd, is a franchisor for motor vehicle engine repair and maintenance services provided by a national network of approximately 200 franchises operating in New South Wales (divided into metropolitan and country), Queensland, Victoria and Western Australia.
2. This case is about Ultra Tune’s failure to comply with minimum franchisor obligations, including a number of more serious breaches, and the fabrication of business records in a failed attempt to conceal its wrongdoing. Ultra Tune’s stance at trial and in closing submissions has required detailed and comprehensive reasons to be given to explain why most of its evidence and submissions cannot be accepted.
3. The applicant, the Australian Competition and Consumer Commission (**ACCC**), is Australia’s national franchise regulator. The ACCC is therefore concerned to ensure that all manner of franchisors and franchisees comply with their legal obligations. That is especially so in relation to compliance by franchisors with laws designed to protect the interests of franchisees. The ACCC is concerned to ensure that any case it brings in relation to non-compliance with those laws contributes to future compliance by both the respondent to such a proceeding, and by others engaged in franchise activities.
4. Ultra Tune’s compliance with its minimum legal obligations as a franchisor are central to the proper conduct of its business. In this proceeding, the ACCC alleges that Ultra Tune has contravened mandatory industry codes that regulate the conduct of a franchisor towards its franchisees and prospective franchisees. The applicable codes are:
5. for conduct by Ultra Tune in the period from 1 July 2011 to 31 December 2014, the “*old*” Franchising Code of Conduct in the Schedule to the *Trade Practices (Industry Codes – Franchising) Regulations 1998* (Cth) (***Pre-2015 Code***); and
6. for conduct by Ultra Tune in the period from 1 January 2015 onwards, the “*new*” Franchising Code of Conduct found in Schedule 1 to the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) (***Franchising Code***).
7. Each code had force for its respective period by virtue of Part IVB of the *Competition and Consumer Act 2010* (Cth) (***CCA***). Broadly speaking, the codes prescribe minimum standards in franchise agreements and require franchisors to disclose certain information to franchisees and prospective franchisees. Both franchisors and franchisees also have a statutory duty to act in good faith, with civil penalty sanctions for failing to do so.
8. The codes may be seen to facilitate the better working of market forces within the various industries that use franchises as a business model. They encourage the practical advancement of the economist’s ideal of better – if not perfect – information by which to make rational decisions.
9. The ACCC seeks pecuniary penalties in respect of breaches of the *Franchising Code* and breaches of s 29(1) of the *Australian Consumer Law* (***ACL***). The *ACL* is contained in Schedule 2 to the *CCA*. Civil penalties are not provided for under the *Pre-2015 Code*.
10. The ACCC also seeks declarations, injunctions, publication orders and compliance orders, as well as certain specific relief by way of a refund for the prospective franchisee who brought the complaint to the ACCC, which led to the investigation and this proceeding.
11. For the reasons that follow, I am satisfied that the ACCC has established its case against Ultra Tune in relation to all alleged breaches. Declarations and orders as to penalties are to be made accordingly, with those penalties fixed in the substantial sums that have been arrived at, as set out at the end of these reasons, totalling $2,604,000. The other types of relief sought by the ACCC should also be granted.
12. The ACCC also seeks an order for costs of and incidental to the proceedings. As concluded in the penultimate section of these reasons, Ultra Tune should pay the ACCC’s costs of this proceeding on an indemnity basis.

# Overview of the alleged contraventions

1. There are two main categories of contravention alleged by the ACCC in this proceeding:
2. breach of disclosure obligations; and
3. illegal treatment of a prospective franchisee.

## First category of alleged contravention – breach of disclosure obligations

1. The first category of contravention concerns alleged failures by Ultra Tune to comply with various types of disclosure obligations under the codes. The alleged contraventions to which civil penalty consequences attach under the *Franchising Code* were:
2. a failure to *maintain* disclosure documents in relation to Ultra Tune’s four State-based regions, summarised in the table at [15] below (there being a single combined disclosure statement for metropolitan and regional NSW), by failure to update them within four months after the end of the 2015-16 financial year (that is, by 31 October 2015): cl 8(6) of the *Franchising Code*;
3. a failure to *prepare* financial statements for the marketing funds for the five Ultra Tune marketing regions (there being separate funds for metropolitan and regional NSW) within four months of the end of the 2014-15 financial year (that is, by 31 October 2015): cl 15(1)(a) of the *Franchising Code*;
4. a failure to *ensure* that financial statements for the marketing funds for the five Ultra Tune marketing regions included “*sufficient detail*” for the 2014-15 and 2015-16 financial years: cl 15(1)(b) of the *Franchising Code*;
5. a failure to *provide* to franchisees the financial statements for marketing funds and an auditor’s report for the five Ultra Tune marketing regions relating to the 2014-15 financial year within 30 days of them being prepared: cl 15(1)(d) of the *Franchising Code*; and
6. a failure to *provide* a disclosure statement when requested by a franchisee on 16 December 2015: cl 16(1) of the *Franchising Code*.
7. With one exception, Ultra Tune admits to the above contraventions. The exception is that Ultra Tune denies the allegation referred to at [12(3)] above that it failed to disclose “*sufficient detail*” in statements prepared for its marketing funds, contrary to cl 15(1)(b) of the *Franchising Code*, asserting that the obligation was met. That issue aside, the main areas of controversy between the parties in relation to the alleged disclosure contraventions is to the quantum of the penalties to be imposed, largely based on how many contraventions took place as a matter of statutory construction.
8. The maximum pecuniary penalty that may be imposed for each contravention of the above provisions is $54,000. The maximum pecuniary penalty available multiplied by the number of contraventions has an important bearing on the amount that Ultra Tune is ordered to pay as a proportion of the overall maximum penalty available to be imposed, it not being in dispute that the imposition of at least some pecuniary penalty for the admitted breach of disclosure obligations is inevitable.
9. The number of franchisees affected by the conduct referred to above, for each financial year, was as follows:

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Ultra Tune region** | **2011-12** | | **2012-13** | | **2013-14** | | **2014-15** | | **2015-16** | |
| **NSW Metro** | 26 |  | 29 |  | 30 |  | 32 |  | 33 |  |
| **NSW Country** | 19 |  | 19 |  | 21 |  | 23 |  | 24 |  |
| **Queensland** | 43 |  | 43 |  | 50 |  | 51 |  | 58 |  |
| **Victoria** | 33 |  | 48 |  | 51 |  | 58 |  | 60 |  |
| **Western Australia** | 14 |  | 14 |  | 18 |  | 21 |  | 25 |  |
| **TOTAL** | **135** |  | **153** |  | **170** |  | **185** |  | **200** |  |

1. There was a separate Ultra Tune disclosure statement for each of the four States. There was a separate marketing statement for each of the five regions listed in the table above, with separate marketing statements for NSW Metro and NSW Country.

## Second category of alleged contravention – illegal treatment of a prospective franchisee

1. The second category of contravention alleged by the ACCC in this proceeding concerns Ultra Tune’s specific dealings with a prospective franchisee, Mr Nakash Ahmed, who is alleged to have been misled in negotiations about the purchase of a franchise in Parramatta in 2015 (**Parramatta Franchise**). In this regard, it is the ACCC’s case that Ultra Tune breached:
2. the obligation in cl 6 of the *Franchising Code* to act in good faith, which carries a maximum pecuniary penalty consequence of $54,000;
3. the obligation in cl 9 of the *Franchising Code* to give certain disclosure documents to a franchisee or prospective franchisee (in this case, prospective), which carries a maximum pecuniary penalty of $54,000;
4. the proscription on misleading or deceptive conduct in s 18 of the *ACL* (formerly s 52 of the *Trade Practices Act 1974* (Cth)), which carries no pecuniary penalty; and
5. the same conduct as for s 18, advanced as several different contraventions by way of false or misleading representations contrary to s 29(1)(b), (i) or (m) of the *ACL* (formerly s 53(aa), (e) and (g) of the *Trade Practices Act*), each of which at the time of the relevant alleged contraventions carried a maximum pecuniary penalty of $1.1 million for a corporate respondent, being:
   1. alleged false or misleading representations that the franchise Mr Ahmed was proposing to buy had been open for only about six months: s 29(1)(b);
   2. alleged false or misleading representations that the purchase price of the franchise was only $163,000: s 29(1)(i);
   3. alleged false or misleading representations concerning the existence of a condition, namely that a deposit paid by Mr Ahmed was unconditionally refundable, which might also be characterised as going to price: s 29(1)(m), or alternatively s 29(1)(i).
6. Ultra Tune denied the allegations concerning Mr Ahmed at trial and did not indicate otherwise until the exchange of written closing submissions well after the trial. By that time there was effective capitulation as to aspects of the ACCC’s case concerning Mr Ahmed, while other related contraventions continued to be denied.
7. At the heart of the factual dispute concerning Mr Ahmed was a refusal by Ultra Tune to refund $30,000 of a payment of $33,000 that had been made by Mr Ahmed in the course of negotiations. Ultra Tune also contested Mr Ahmed’s reasons for not proceeding with the purchase of the franchise. Mr Ahmed said that he had made that decision as a result of becoming aware that Ultra Tune had provided him with misleading or inaccurate information. The ACCC asserted that this payment was understood to be a refundable deposit and should be returned. The ACCC later asserted that the full $33,000 should be refunded with interest, the additional $3,000 being for a training course that Mr Ahmed attended. At trial, Ultra Tune maintained that the payment was for the purchase of equipment for the franchise site, and that Mr Ahmed could still collect that equipment if he wished to do so.
8. Ultra Tune now accepts the ACCC’s position in relation to the deposit paid by Mr Ahmed and accepts that it should be ordered to reimburse him for the full $33,000 that he paid, but does not accept that he was misled so as to justify him seeking the refund in the first place. To make good that limited concession, the ACCC seeks redress for Mr Ahmed under s 51ADB of the *CCA* in the form of an order that Ultra Tune refund the full $33,000 deposit, $3,000 of which was for a training course. In the alternative, the ACCC seeks a compensation order for Mr Ahmed pursuant to s 239(1) of the *ACL*.
9. The ACCC presses, and Ultra Tune still denies, that Mr Ahmed was misled in the several ways alleged, as summarised at [17(4)] above.

## Preliminary observations about the conduct alleged and the relief to be granted

1. As will be seen, the first category of alleged contravention raises troubling questions about how such a substantial franchisor as Ultra Tune was able to get away with making a very poor effort in complying with the minimum disclosure obligations. Those obligations are at the very heart of long-standing franchise code requirements designed to make such arrangements in Australia function fairly and properly. This serves to emphasise the importance of an active and effective regulator, as the ACCC has been in this case, there having been a prompt and ultimately wide-ranging investigation, albeit triggered by Mr Ahmed’s complaint.
2. The second category of alleged contravention raises troubling questions about Ultra Tune’s candour to the ACCC and to this Court. Indeed, the issue of evidence fabrication, or at least document fabrication, which took place to justify retaining the deposit paid by Mr Ahmed, raises further questions that require determination. An important part of Ultra Tune’s original case in defence of the second category of alleged contraventions, since abandoned, was advanced in reliance upon a letter and enclosures that were purportedly sent to Mr Ahmed in early October 2015. As these reasons make clear, that correspondence was a fiction, apparently designed to mislead the ACCC, and initially maintained in this proceeding as being true with the evident purpose of misleading this Court.
3. In making the concession as to its liability to refund Mr Ahmed, Ultra Tune submits that there is no longer any need for findings to be made about issues surrounding the payment of that deposit. However, those documents cannot be ignored merely because they cannot be defended in light of the material inconsistencies that plague them and in light of the issue of fabrication. As the ACCC’s case exposes beyond any reasonable doubt, the impugned documents were created to justify and to conceal Ultra Tune’s reprehensible conduct towards Mr Ahmed. That circumstance is an important consideration in setting the appropriate penalty for civil penalty contraventions that are established, because it informs the attitude of Ultra Tune towards such contraventions, and thus is relevant to the need for specific deterrence and also general deterrence.
4. As will be seen, the concession made by Ultra Tune was in a very limited compass, evidently recognising the inevitable and also seeking to avoid serious adverse findings being made. The concession was as limited in its effect as it was in its scope and had almost no material impact in terms of contrition or remorse, or in reduction of the need for specific or general deterrence in relation to the treatment meted out to a prospective franchisee. However, even late capitulation of this kind must still be acknowledged, and credit be given, to a late recognition, to some degree, of wrong-doing.

# LEGISLATION

## The enforcement of industry codes under the *CCA*

1. Part IVB of the *CCA* provides for the creation and enforcement of “*industry codes*”. The purpose of an industry code is to regulate the conduct of participants in an industry toward other participants or consumers in the industry. “*Franchising*” is included as an industry for the purposes of Part IVB: s 51ACA(3). An applicable industry code may be a voluntary industry code: s 51ACA(1)(b)). It may also be a mandatory industry code, which must be declared to be mandatory by regulation: ss 51ACA(1), 51AE. Both the Pre-2015 Code and the Franchising Code are examples of mandatory industry codes. By reason of what is now s 51ACB (and was formerly s 51AD), a corporation must not, in trade or commerce, contravene an applicable industry code.
2. Under Part IVB of the *CCA*, the ACCC has been entrusted with various regulatory powers in relation to applicable industry codes. These include the power to issue a public warning notice (s 51ADA), certain investigative powers (Division 5), and the ability to seek orders for redress of a contravention (s 51ADB). From 1 January 2015, the ACCC has also had the power to issue an infringement notice (Division 2A), and the ability to seek the imposition of civil penalties for breach of a civil penalty provision of an applicable industry code (s 76(1)).

## The Franchising Code of Conduct – the *Pre-2015 Code* and current *Franchising Code*

1. The franchising code of conduct was originally established by regulation in 1998 under the *Trade Practices Act*. The *Trade Practices Act* was renamed as the *Competition and Consumer Act 2010* (Cth) on 1 January 2011, with the *ACL* being added as Schedule 2 at the same time, replacing the former Part V consumer protection provisions. In 2014, an updated version of the code was introduced, to apply from 1 January 2015. The new code was intended to modernise the provisions of the old code and to give effect to proposed reforms that had emerged from an independent review of franchising policy.
2. Broadly speaking, there is a great deal of similarity in the structure of the *Franchising Code*, and its predecessor, the *Pre-2015 Code*. The codes share a stated purpose, which is “*to regulate the conduct of participants in franchising towards other participants in franchising*”: cl 2. The codes also share three general areas of focus, which are to require franchisors to disclose certain information to franchisees, including prospective franchisees, to prescribe minimum standards in franchise agreements, and to provide dispute resolution processes.
3. Each code is divided into four parts. Part 1 contains the introduction to the code, including definitions. Part 2 addresses disclosure requirements before entry into a franchising agreement. Part 3 addresses franchise agreements. Part 4 addresses dispute resolution. The codes also annex prescribed forms for the disclosure documents that are to be given to franchisees and prospective franchisees.
4. The *Franchising Code* introduced several changes that are of particular bearing to this proceeding. The first is to make the obligations placed on franchisors more prescriptive. The second is the designation of certain clauses as civil penalty provisions. The third is the inclusion of an explicit obligation on the parties to a franchise agreement (or proposed franchise agreement) to act in good faith, which is also a civil penalty provision. This good faith obligation had no equivalent in the old code, save that cl 23A of that code operated to explicitly preserve any obligation to act in good faith that might have arisen under the common law.
5. Provisions reproduced below refer to a civil penalty of 300 penalty units. A penalty unit in 2015, which is when all the contraventions the subject of this proceeding are alleged to have occurred, was $180: see s 4AA of the *Crimes Act 1914* (Cth). Thus the maximum dollar penalty equivalent to 300 penalty units was $54,000 in 2015. The value of a penalty unit is indexed in accordance with inflation every two years, and will therefore increase over time. The value of a penalty unit was increased to $210 on 1 July 2018 (increasing the maximum penalty from that date to $63,000), and will increase again on 1 July 2020. It is therefore useful to express a penalty that is imposed by reference to penalty units as well as dollar amounts for the purposes of any future comparison and to ensure that, all other things being equal, generally speaking the dollar value of penalties imposed rise with the increase in the value of penalty units, reflecting properly the will of parliament.
6. The relevant provisions of the codes have been set out under the following headings below:
7. definitions: the meaning of “*franchise agreement*”;
8. the obligation to act in good faith;
9. the obligation to maintain a disclosure document;
10. the prescribed form and content of a disclosure document;
11. the obligation to give documents to a franchisee or a prospective franchisee; and
12. the obligation to provide a copy of financial statements, including marketing fund statements.

### (1) Definitions: the meaning of “franchise agreement”

1. An integral term in the operation of both codes is the core contractual concept of a “*franchise agreement*”, which is defined in cl 4 of the *Pre-2015 Code* and in cl 5 of the *Franchising Code*. The differences between the definitions are not significant for present purposes. The *Franchising Code* provides in cl 5:

(1) A ***franchise agreement*** is an agreement:

(a) that takes the form, in whole or part, of any of the following:

(i) a written agreement;

(ii) an oral agreement;

(iii) an implied agreement; and

(b) in which a person (the ***franchisor***) grants to another person (the ***franchisee***) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor; and

(c) under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol:

(i) owned, used or licensed by the franchisor or an associate of the franchisor; or

(ii) specified by the franchisor or an associate of the franchisor; and

(d) under which, before starting or continuing the business, the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor an amount including, for example:

(i) an initial capital investment fee; or

(ii) a payment for goods or services; or

(iii) a fee based on a percentage of gross or net income whether or not called a royalty or franchise service fee; or

(iv) a training fee or training school fee;

but excluding:

(v) payment for goods and services supplied on a genuine wholesale basis; or

(vi) repayment by the franchisee of a loan from the franchisor or an associate of the franchisor; or

(vii) payment for goods taken on consignment and supplied on a genuine wholesale basis; or

(viii) payment of market value for purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the franchise agreement.

(2) For subclause (1), each of the following is taken to be a franchise agreement:

(a) the transfer or renewal of a franchise agreement;

(b) the extension of the term or the scope of a franchise agreement;

(c) a motor vehicle dealership agreement.

[Sub-section (3) excludes from this definition particular agreements not relevant to this proceeding, such as for an employer and employee relationship.]

### (2) The obligation to act in good faith

1. As already mentioned, the *Franchising Code* introduced an express obligation to act in good faith, which is set out in cl 6 as follows (emphasis in original):

**6 Obligation to act in good faith**

*Obligation to act in good faith*

(1) Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to:

(a) the agreement; and

(b) this code.

This is the **obligation to act in good faith**.

Civil penalty: 300 penalty units [$54,000].

(2) The obligation to act in good faith also applies to a person who proposes to become a party to a franchise agreement in respect of:

(a) any dealing or dispute relating to the proposed agreement; and

(b) the negotiation of the proposed agreement; and

(c) this code.

*Matters to which a court may have regard*

(3) Without limiting the matters to which a court may have regard for the purpose of determining whether a party to a franchise agreement has contravened subclause (1), the court may have regard to:

(a) whether the party acted honestly and not arbitrarily; and

(b) whether the party cooperated to achieve the purposes of the agreement.

*Franchise agreement cannot limit or exclude the obligation*

(4) A franchise agreement must not contain a clause that limits or excludes the obligation to act in good faith, and if it does, the clause is of no effect.

(5) A franchise agreement may not limit or exclude the obligation to act in good faith by applying, adopting or incorporating, with or without modification, the words of another document, as in force at a particular time or as in force from time to time, in the agreement.

*Other actions may be taken consistently with the obligation*

(6) To avoid doubt, the obligation to act in good faith does not prevent a party to a franchise agreement, or a person who proposes to become such a party, from acting in his, her or its legitimate commercial interests.

(7) If a franchise agreement does not:

(a) give the franchisee an option to renew the agreement; or

(b) allow the franchisee to extend the agreement;

this does not mean that the franchisor has not acted in good faith in negotiating or giving effect to the agreement.

1. This obligation had no equivalent in the *Pre-2015 Code*, which provided under cl 23A only that:

**23A Good faith**

Nothing in this code limits any obligation imposed by the common law, applicable in a State or Territory, on the parties to a franchise agreement to act in good faith.

### (3) The obligation to maintain a disclosure document

1. The codes impose an obligation on a franchisor to maintain a disclosure document. The stated purpose of a disclosure document is the same under both codes: see cl 6A of the *Pre-2015 Code* and cl 8(2) of the *Franchising Code*. That purpose is to give a prospective franchisee (or a current franchisee who is considering renewal, variation or extension of an agreement) information that is material to the running of the business and information to help a franchisee or prospective franchisee make a reasonably informed decision about the franchise.
2. Under the *Pre-2015 Code*, the obligation to create a disclosure document was set out in cl 6 and cl 6B. The substance of the obligation was contained in cl 6(1), which provided:

A franchisor must, before entering into a franchise agreement, and within 4 months after the end of each financial year after entering into a franchise agreement, create a document (a ***disclosure document***) for the franchise in accordance with this Division.

1. The form and content of a disclosure document was prescribed by cl 6(2). If the expected annual turnover of the franchised business was over $50,000, the document was to be prepared in accordance with annexure 1. If the expected annual turnover was $50,000 or less, either annexure 1 or annexure 2 was to be used, the latter being a short form of the disclosure document.
2. Under the *Franchising Code*, the obligation to maintain a disclosure document is now set out in cl 8. Civil penalties may be imposed in respect of any contravention of cll 8(1), 8(6) or 8(8), which impose obligations to create such a document and update it where required. Clause 8 provides:

**8 Franchisor must maintain a disclosure document**

*Disclosure document to inform franchisee or prospective franchisee*

(1) A franchisor must create a document (a ***disclosure document***) relating to a franchise that complies with subclauses (3), (4) and (5).

Civil penalty: 300 penalty units [$54,000].

(2) The purpose of a disclosure document is to:

(a) give a prospective franchisee, or a franchisee proposing to:

(i) enter into a franchise agreement; or

(ii) renew a franchise agreement; or

(iii) extend the term or scope of a franchise agreement;

information from the franchisor to help the franchisee to make a reasonably informed decision about the franchise; and

(b) give a franchisee current information from the franchisor that is material to the running of the franchised business.

*Content and form of disclosure document*

(3) Information in a disclosure document must:

(a) comply with the following:

(i) be set out in the form and order of Annexure 1;

(ii) use the headings and numbering of Annexure 1;

(iii) if applicable—include additional information under the heading “Updates”; or

(b) comply with the following:

(i) if particular items are applicable—use the headings and numbering of Annexure 1 for those items;

(ii) if particular items are not applicable—include an attachment that sets out the headings and numbering of Annexure 1 for those items.

(4) A disclosure document must be signed by the franchisor, or a director, officer or authorised agent of the franchisor.

(5) A disclosure document must also have a table of contents based on the items in Annexure 1, indicating the page number on which each item begins. If the disclosure document attaches other documents, the table of contents must list these other documents too.

*Maintaining a disclosure document*

(6) After entering into a franchise agreement, the franchisor must update the disclosure document within 4 months after the end of each financial year.

Civil penalty: 300 penalty units [$54,000].

(7) However, the franchisor need not update the disclosure document after the end of a financial year if:

(a) the franchisor did not enter into a franchise agreement, or only entered into 1 franchise agreement, during the year; and

(b) the franchisor does not intend, or if the franchisor is a company, its directors do not intend, to enter into another franchise agreement in the following financial year.

(8) Despite subclause (7), if a request is made under subclause 16(1), the franchisor must update the disclosure document so that it reflects the position of the franchise as at the end of the financial year before the financial year in which the request is made.

Civil penalty: 300 penalty units [$54,000].

1. Unless requested by a franchisee, cl 8(7) permits a franchisor not to update a disclosure document where the franchisor entered into only one franchise agreement, or none, and does not intend to enter into another franchise agreement in the following financial year.
2. The franchise design implemented by Ultra Tune operated on a State-based franchise model with four separate disclosure documents. As outlined above at [15], Ultra Tune increased its number of franchisees in the relevant years overall, but not in all years in respect of all States. No increase in franchise numbers for a given State, or only an increase of one franchise for a given State, in a given year would trigger the first limb of the cl 8(7) exception to the cl 8(6) obligation to update a disclosure document for the following year: see [40] above. However, there was no evidence of any absence of intention on the part of Ultra Tune to enter into another franchise agreement for any of the years in question either across all of the States, or in respect of any individual State, so as to trigger the second limb of the cl 8(7) exception. The cl 8(7) is therefore not relevant to the current proceeding.

### (4) The prescribed form and content of a disclosure document

1. Both of the codes include forms at Annexure 1 for the primary disclosure document to be given to franchisees or prospective franchisees. There are some differences between the two versions of the disclosure document that are not presently material.
2. The information to be set out in the disclosure document is in large part dictated by the items specified in Annexure 1 in some considerable detail. In the case of the *Franchising Code*, this includes:

* a covering page, which sets out a pro forma description of the document and its legal effect (item 1);
* franchisor details (item 2);
* details of the business experience of the franchisor and its officers (item 3);
* details of past and present litigation involving the franchisor, as well as details of judgments and convictions against the franchisor or its directors (item 4);
* details of any agreement under which the franchisor must pay or give other valuable consideration to agents in connection with the introduction or recruitment of a franchisee (item 5);
* details of existing franchises (item 6);
* details regarding a master franchisor, where applicable (item 7);
* details of intellectual property that is material to the franchise system (item 8);
* details of the franchise site or territory (item 9), as well as a history of previous franchised businesses that have been operated on the site in the previous 10 years (item 13);
* details regarding the supply of goods or services to a franchisee (item 10), by a franchisee (item 11) and online (item 12);
* details and explanations of payments that are required before the entry into a franchise agreement (item 14);
* details of any marketing or other cooperative fund controlled by the franchisor (item 15);
* details regarding financing arrangements offered by the franchisor (item 16);
* details regarding unilateral variations of the franchise agreement by the franchisor (item 17);
* details regarding the end of a franchise agreement (item 18);
* details regarding any amendment of the agreement where the franchise is transferred (item 19);
* earnings information for the franchised business (item 20);
* financial details for the franchisor (item 21), which must be updated to reflect any changes from the date of the disclosure document and the date that the document is given as required per the *Franchising Code* (item 22); and
* a final page, which notes that the prospective franchisee may retain the document, and a form for the prospective franchisee to acknowledge receipt of the disclosure document (item 23).

1. Several items require more detailed reproduction for the purpose of these reasons. Relevantly, item 13 relates to details of previous franchises that may have operated at a particular site. It states:

…

13.2 Details of whether the territory or site to be franchised has, in the previous 10 years, been subject to a franchised business operated by a previous franchise granted by the franchisor and, if so, details of the franchised business, including the circumstances in which the previous franchisee ceased to operate.

13.3 The details mentioned in item 13.2 must be provided:

(a) in a separate document; and

(b) with the disclosure document.

Thus this franchise-specific information is required to be provided in a separate document with the disclosure document, but is not itself part of the disclosure document.

1. Item 14 relates to payments involved in a franchise agreement. It relevantly provides:

*Prepayments*

14.1 If the franchisor requires a payment before the franchise agreement is entered into—why the money is required, how the money is to be applied and who will hold the money.

14.2 The conditions under which a payment will be refunded.

…

1. Item 20 relates to disclosure of earnings information. It relevantly states (emphasis in original):

20.1 Earnings information may be given in a separate document attached to the disclosure document.

20.2 [An inclusive definition of earnings information]

20.3 If earnings information is not given—the following statement:

The franchisor does not give earnings information about a [*insert type of franchise*] franchise.

Earnings may vary between franchises.

The franchisor cannot estimate earnings for a particular franchise.

20.4 [Details to be provided for any projection or forecast of earnings information]

Thus, this franchise-specific information can be provided in a separate document attached to the disclosure document, in which case it is not itself part of the disclosure document.

1. The disclosure document requirements outlined above enable a franchisor, depending on the design of its franchising arrangements, to deploy a document that is generic for all franchisees, or for a particular group of franchisees, rather than by having a document that is separate and distinct for each individual franchisee. Based on the disclosure document given to Mr Ahmed, it is apparent that Ultra Tune chose to design a generic disclosure document for each of its four State-based franchise regions, combining for that purpose the metropolitan and regional franchises in NSW. As will be seen, that has a material impact on the number of contraventions that take place when it comes to obligations to create and to maintain a disclosure document, but does not affect the number of contraventions when it comes to the obligation to provide a disclosure document to each franchisee, which is considered next.

### (5) The obligation to give a disclosure document (and other documents) to a franchisee or a prospective franchisee

1. The codes impose obligations on a franchisor to give the disclosure document to a prospective franchisee.
2. Under the *Pre-2015 Code*, cl 6B relevantly provided:

**6B Requirement to give disclosure document**

(1) A franchisor must give a current disclosure document to:

(a) a prospective franchisee; or

(b) a franchisee, if the franchisor or the franchisee proposes to renew, extend, or extend the scope of the franchise agreement.

…

1. A franchisor was also required to give a franchisee a current disclosure document within 14 days after a written request by the franchisee. Clause 19 provided:

**19 Current disclosure document**

(1)A franchisor must give to a franchisee a current disclosure document within 14 days after a written request by the franchisee.

(2) However, a request under subclause (1) can be made only once in 12 months.

1. Under the *Franchising Code*, the obligation to give documents to a prospective franchisee is now set out in cl 9, which provides:

**9 Franchisor to give documents to a franchisee or prospective franchisee**

(1) A franchisor must give:

(a) a copy of this code; and

(b) a copy of the disclosure document:

(i) as updated under subclause 8(6); or

(ii) if subclause 8(7) applies—updated to reflect the position of the franchise as at the end of the financial year before the financial year in which the copy of the disclosure document is given; and

(c) a copy of the franchise agreement, in the form in which it is to be executed;

to a prospective franchisee at least 14 days before the prospective franchisee:

(d) enters into a franchise agreement or an agreement to enter into a franchise agreement; or

(e) makes a non‑refundable payment (whether of money or of other valuable consideration) to the franchisor or an associate of the franchisor in connection with the proposed franchise agreement.

Civil penalty: 300 penalty units [$54,000].

(2) If a franchisor or franchisee proposes to:

(a) renew a franchise agreement; or

(b) extend the term or scope of a franchise agreement;

the franchisor must give to a franchisee (within the meaning of paragraph (a) of the definition of that expression) the documents mentioned in subclause (1) at least 14 days before renewal or extension of the franchise agreement.

Civil penalty: 300 penalty units [$54,000].

(3) A franchisor is taken to have complied with the requirements of this clause even if, during the relevant 14‑day or longer period, changes are made to a franchise agreement:

(a) to give effect to a franchisee’s request; or

(b) to fill in required particulars; or

(c) to reflect changes of address or other circumstances; or

(d) for clarification of a minor nature; or

(e) to correct errors or references.

1. Clause 10 of the *Franchising Code* requires that a franchisor not enter into a franchise agreement unless they have received written statements from the franchisee or prospective franchisee that *they* have received, read and had a reasonable opportunity to understand the disclosure document and the code, and have been given advice from an independent legal adviser, independent business adviser or an independent accountant. The protective purpose of this requirement is obvious, yet it was not observed by Ultra Tune in relation to Mr Ahmed *prior* to accepting what Ultra Tune would for a time contend to be a non-refundable payment.
2. Under the *Franchising Code*, a franchisor is also required to give to a franchisee a disclosure document upon receiving a written request. Clause 16 provides:

**16 Disclosure document**

(1)Upon receiving a written request from a franchisee, a franchisor must give to the franchisee a disclosure document:

(a) if subclause 8(8) applies—within 2 months of the date of the request; and

(b) in any other case—within 14 days of the date of the request.

Civil penalty: 300 penalty units [$54,000].

(2) However, a request under subclause (1) can be made only once every 12 months.

As noted above at [42], cl 8(7) does not apply, such that cl 8(8) is not enlivened, and therefore cl 16(1)(b), rather than cl 16(1)(a), is applicable to Ultra Tune.

### (6) The obligation to provide a copy of financial statements, including marketing fund statements

1. The codes contain obligations on the part of franchisors to provide copies of certain financial statements to franchisees if they have been required to pay money to a marketing or other cooperative fund. Ultra Tune required all of its franchisees to pay money to a marketing fund, with separate funds for each State-based franchise region, except NSW which has a separate fund for metropolitan NSW and regional NSW, making a total of five marketing funds. The following provisions required financial statements to be prepared within four months of the end of each financial year and for the statements to be audited, unless (not applicable on the evidence in this case) 75% of franchisees contributing to the fund voted not to require auditing within three months after the end of the financial year. The financial statements were then to be provided, along with the auditor’s report (if applicable), to each franchisee within 30 days of preparation. There is no evidence of any such agreement by the Ultra Tune franchisees.
2. Under the *Pre-2015 Code*, the obligations were set out in cl 17, which provided:

**17 Marketing and other cooperative funds**

(1) If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the franchisor must:

(a) within 4 months after the end of the last financial year, prepare an annual financial statement detailing all of the fund’s receipts and expenses for the last financial year; and

(b) have the statement audited by a registered company auditor within 4 months after the end of the financial year to which it relates; and

(c) give to the franchisee:

(i) a copy of the statement, within 30 days of preparing the statement; and

(ii) a copy of the auditor’s report, if such a report is required, within 30 days of preparing the report.

(2) A franchisor does not have to comply with paragraph (1)(b) for a financial year if:

(a) 75% of the franchisor’s franchisees in Australia, who contribute to the fund, have voted to agree that the franchisor does not have to comply with the paragraph; and

(b) that agreement is made within 3 months after the end of the financial year.

(3) The agreement referred to in paragraph (2)(a) will remain in force for 3 years, and franchisees must vote, at the end of that time, in accordance with paragraph (2) (a), for the agreement to remain in force.

(4) If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the reasonable costs of administering and auditing the fund must be paid from the fund.

1. Under the *Franchising Code*, these obligations are now contained in cl 15. It relevantly provides:

**15 Copy of financial statements**

(1) If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the franchisor must:

(a) within 4 months after the end of the last financial year, prepare an annual financial statement detailing all of the fund’s receipts and expenses for the last financial year; and

(b) ensure that the statement includes sufficient detail of the fund’s receipts and expenses so as to give meaningful information about:

(i) sources of income; and

(ii) items of expenditure, particularly with respect to advertising and marketing expenditure; and

(c) have the statement audited by a registered company auditor within 4 months after the end of the financial year to which it relates; and

(d) give to the franchisee:

(i) a copy of the statement, within 30 days of preparing the statement; and

(ii) a copy of the auditor’s report, if such a report is required, within 30 days of preparing the report.

Civil penalty: 300 penalty units [$54,000].

(2) A franchisor does not have to comply with paragraph (1)(c) in respect of a financial year if:

(a) 75% of the franchisor’s franchisees in Australia, who contribute to the fund, have voted to agree that the franchisor does not have to comply with the paragraph in respect of the financial year; and

(b) that agreement is made within 3 months after the end of the financial year.

(3) If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the reasonable costs of administering and auditing the fund must be paid from the fund.

## The *Australian Consumer Law* (*ACL*)

1. The ACCC also advances part of its case under the *ACL*. The relevant provisions need to be briefly identified.
2. Section 18 of the *ACL*, formerly s 52 of the *Trade Practices Act*, 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. No pecuniary penalty attaches to a breach of s 18 of the *ACL*.
3. Section 29 of the *ACL* proscribes the making of false or misleading representations about goods or services. It relevantly provides:

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

…

(b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

…

(i) make a false or misleading representation with respect to the price of goods or services; or

…

(m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); …

…

1. At the time of the alleged contraventions, item 2 in the table in s 224(3) of the *ACL* provided that each act or omission proscribed by a provision in Part 3-1 of the *ACL*, which includes s 29, carried a maximum penalty of $1.1 million for a company and $220,000 for an individual. Had this been expressed as penalty units at the time, it would have been just over 6,100 penalty units for a company and just over 1,200 penalty units for an individual, a considerably greater maximum than for contraventions of the provisions of the *Franchising Code* reproduced above of 300 penalty units.
2. By virtue of s 239(1), the Court may make orders for redress of a contravention of s 29 of the *ACL*, making such orders against the contravener as it considers appropriate.

# THE ADMITTED DISCLOSURE CONTRAVENTIONS

1. By way of an amended concise statement in response, Ultra Tune largely admits to the alleged disclosure contraventions of the *Pre-2015 Code* and the *Franchising Code*. The admitted contraventions are set out below. Those admissions have been extended by Ultra Tune’s closing submissions, both in writing and orally, which abandon the defence to a portion of the allegations concerning Mr Ahmed.
2. It should be noted that, in relation to the admitted breaches of cll 8(6), 15(1)(a) and 15(1)(d) of the *Franchising Code*, Ultra Tune resists the ACCC’s submission that each act or omission constitutes a separate contravention in relation to *each franchisee*. According to Ultra Tune, the obligations contained in those clauses each refer to what may be described as “*one transaction*” for the franchisor generally. For example, Ultra Tune submits that the obligation to update its disclosure documents under cl 8(6) arises only once per financial year, and not in relation to each franchisee. The parties therefore agree that contraventions have taken place, but disagree as to the number of contraventions that have occurred.
3. At this point, it is convenient to note again the table at [15] above which shows how Ultra Tune divides its operations into five geographical regions: Victoria, NSW Metro, NSW Country, Queensland and Western Australia (**Ultra Tune** **regions**). It is the ACCC’s fall-back position that, at the very least, Ultra Tune must be taken to have engaged in a separate contravention of cll 8(6), 15(1)(a) and 15(1)(d) for each of those five Ultra Tune regions. In its closing address and supplementary submissions, Ultra Tune maintained its position that there was only one transaction for the breaches that it admitted to.
4. The issue of the number of contraventions will be returned to when considering the relief that should be granted.

## Breaches of the *Pre-2015 Code*

1. Ultra Tune admits to having breached the *Pre-2015 Code* in the following three respects.
2. While none of breaches under the *Pre-2015 Code* described below give rise to any liability for a pecuniary penalty, they are none-the-less relevant to the later contraventions of the *Franchising Code*, which did attract such a liability. That is because they enable the Court to view the later contraventions admitted or found to have taken place as not being, for example, out of character: see, by analogy, *Veen (No 2) v The Queen* (1988) 164 CLR 465 at 477-8. These earlier contraventions therefore additionally operate as a prism through which to view the later contraventions. However, care must be taken to ensure that the penalty is proportionate to the instant contravention and that no element of the pecuniary penalty imposed for later contraventions is reflective of any sanction for these earlier contraventions: see *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (****The Non-Indemnification Personal Payment Case****)* [2018] FCAFC 97 at [22].

### Preparing annual financial statements

1. Ultra Tune admits that, contrary to cl 17(1)(a) of the *Pre-2015 Code*, it failed to prepare annual financial statements within four months of the end of the 2011-12 and 2012-13 financial years:
2. for the 2011-12 financial year (the statement having been completed on 30 November 2012, instead of by 31 October 2012); and
3. for the 2012-13 financial year (the statement having been completed on 28 November 2013, instead of by 31 October 2013).

### Providing annual financial statements

1. Ultra Tune admits that, contrary to cl 17(1)(c) of the *Pre-2015 Code*, it did not provide annual financial statements and auditor’s reports to any franchisee as required to be done within 30 days of preparation:
2. for the 2011-12 financial year;
3. for the 2012-13 financial year; and
4. for the 2013-14 financial year,

no such documents having been provided at all.

### Creating a disclosure document

1. Ultra Tune admits that, contrary to cl 6(1) of the *Pre-2015 Code*, it failed to create a disclosure document within four months after the end of the 2014-15 financial year, that document having been completed on 5 December 2014 instead of by 31 October 2014.

## Breaches of the *Franchising Code*

1. For the 2014-15 and 2015-16 financial years, Ultra Tune was required by cl 15 of the *Franchising Code* to prepare, have audited, and distribute certain annual financial statements if a franchisee was required to pay money into a marketing fund. Ultra Tune was also required by cl 8(6) to update its disclosure document and to provide that disclosure document when requested by a franchisee per cl 16(1)(b). Ultra Tune admits to having breached the *Franchising Code* in the following four respects, and thus to being liable to pay pecuniary penalties for those contraventions.
2. On any view, the admitted disclosure contraventions of the *Franchising Code* described below were substantial, and in the case of the more lengthy delays described were of a relatively high level of objective seriousness when due regard is had to the reason why these requirements exist in the first place and the extent of the non-compliance. The later the provision of such information, the less use it is and the closer it comes to not providing it at all. Such requirements are now able to be deterred by the sanction of substantial pecuniary penalties, taking into account the number of franchisees affected in relation to information that was not provided to them as required.

### Preparing annual financial statements for marketing funds

1. Ultra Tune admits that, contrary to cl 15(1)(a) of the *Franchising Code*, it failed to prepare marketing fund statements within four months after the end of the last financial year for the 2014-15 financial year (that document having been completed on 24 December 2015 instead of by 31 October 2015).

### Providing annual financial statements for marketing funds to franchisees

1. Ultra Tune admits that, contrary to cl 15(1)(d) of the *Franchising Code*, it did not provide to franchisees the annual financial reports and auditor’s reports for the marketing funds for the 2014-15 financial year within 30 days of their preparation. Those reports had been completed on 24 December 2015, so were required to be provided to each franchisee who was required to contribute to the marketing funds (which was all franchisees) by 24 January 2016. Ultra Tune says that these documents were instead provided as follows:
2. the annual financial statement and auditor’s report for the Queensland region was provided to two Queensland franchisees on 28 January 2016;
3. the annual financial statement and auditor’s report were provided to a single NSW franchisee on 29 January 2016, following a specific request by that franchisee; and
4. the annual financial statement and auditor’s report for each region was provided to the other 182 franchisees for the 2014-15 financial year on 11 August 2016, over seven months after they were created rather than within the necessary 30 days, and therefore over six months late.

### Updating the disclosure document

1. Ultra Tune admits that, contrary to cl 8(6) of the *Franchising Code*, it did not update its disclosure documents for the 2015-16 financial year within four months after the end of the 2014-15 financial year, being 31 October 2015. Those documents were not completed until 26 February 2016, so were almost four months late, taking almost twice as long as required.

### Providing the disclosure document

1. Ultra Tune admits that, contrary to cl 16(1)(b), it did not provide a disclosure document to a franchisee in Morayfield within 14 days of a request made on 16 December 2015, that document having not been provided until 23 March 2016, over three months after the request was made.

# THE DISPUTED DISCLOSURE CONTRAVENTIONS

## Preparation of marketing fund statements

1. In accordance with cl 15(1) of the *Franchising Code*, the statements for the 2014-15 and 2015-16 financial years were required to detail all of the relevant marketing fund’s receipts and expenses for the previous financial year. Given that Ultra Tune maintained a separate marketing fund for each of the five Ultra Tune regions listed in the table at [15] above, it was required to prepare annual statements for each of those funds. It is not in dispute that for both financial years:
2. Ultra Tune did so in the form of a profit and loss statement for each region’s fund;
3. had the statements audited; and
4. provided the statements and auditor’s reports to the franchisees.
5. What is controversial, however, is the adequacy of those statements in terms of meeting the standard required by the *Franchising Code*. In respect of both financial years, the ACCC alleges that the financial statements that were prepared by Ultra Tune did not have “*sufficient detail*” as specifically required by cl 15(1)(b) of the *Franchising Code*. Ultra Tune disputes this.
6. Clause 15 of the *Franchising Code* below provides (emphasis added):

**15 Copy of financial statements**

(1) If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the franchisor must:

(a) within 4 months after the end of the last financial year, prepare an annual financial statement detailing all of the fund’s receipts and expenses for the last financial year; and

(b) ensure that the statement includes **sufficient detail** of the fund’s receipts and expenses so as to give **meaningful information** about:

(i) sources of income; and

(ii) items of expenditure, **particularly with respect to advertising and marketing expenditure**; and

(c) have the statement audited by a registered company auditor within 4 months after the end of the financial year to which it relates; and

(d) give to the franchisee:

(i) a copy of the statement, within 30 days of preparing the statement; and

(ii) a copy of the auditor’s report, if such a report is required, within 30 days of preparing the report.

Civil penalty: 300 penalty units [$54,000].

(2) A franchisor does not have to comply with paragraph (1)(c) in respect of a financial year if:

(a) 75% of the franchisor’s franchisees in Australia, who contribute to the fund, have voted to agree that the franchisor does not have to comply with the paragraph in respect of the financial year; and

(b) that agreement is made within 3 months after the end of the financial year.

(3) If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the reasonable costs of administering and auditing the fund must be paid from the fund.

1. The question of construction that arises is as to the proper meaning of the expression “*sufficient detail*” in cl 15(1)(b). This has not been the subject of any previous authority that I have been able to detect or that the parties have raised.
2. It is important to also note that cl 15(1) is evidently related to cl 31, which imposes direct requirements on how marketing fees are to be used. This provides an important contextual basis for understanding a key practical use of the information that is required to be disclosed, informing what information needs to be included to be useful and to achieve the regulatory purpose. Of particular relevance is cl 31(3), which provides:

Despite any terms of a franchise agreement, marketing fees or advertising fees may only be used to:

(a) meet expenses that:

(i) have been disclosed to franchisees under paragraph 15.1(f) of the disclosure document; or

(ii) are legitimate marketing or advertising expenses; or

(iii) have been agreed to by a majority of franchisees; or

(b) pay the reasonable costs of administering and auditing a marketing fund.

1. Ultra Tune prepared its financial statements for both the 2014-15 and 2015-16 financial years for the purposes of cl 15(1) in the form of profit and loss statements for each Ultra Tune region. Those statements were uniform in structure. Each took the form of an ordinary balance sheet, with a limited number of line items listed as either “*income*” or “*expenses*” together with dollar figures and percentages reflecting each item’s proportion of the overall expenditure. For the most part, the total income of each fund for the 2014-15 financial year was in the order of $6.7 million, with a similar expenditure. The 2015-16 financial year also had similar levels of income and expenditure.
2. Included as expenses in the financial statements were a large number of minor items that generally did not account for more than 20% of the total expenditure of the funds in question. These included items described as “*Gift Vouchers*”, “*Printing & Stationary*” (sic), “*Seminars and Meetings*”, “*Administration Fees*”, “*Fleet Administration*” and “*Customer Support*”. In the case of each financial statement, the majority of the relevant fund’s expenditure was constituted by a single item, which was described simply as “*Promotion & Advertising – Television*”. For example, in the case of the NSW Metro marketing fund for the financial year 2014-15, this item comprises 76.65% of the total expenditure of the fund.
3. Ultra Tune defends the adequacy of its financial statements, which it says are sufficiently detailed for the purposes of cl 15(1)(b). It says that the reference to “*meaningful information*” in cl 15(1)(b) does no more than emphasise that what is required is an accounting, not a bookkeeping, exercise. It is said to be sufficient that the figures in each financial statement are classified and recorded such that a franchisee can see what the major sources of income and expenses were. According to Ultra Tune, that is exactly what its statements do. I do not accept these submissions.
4. It may be seen from its terms, and its relationship with cl 31(3), that cl 15(1) seeks to promote transparency and accountability in the way that marketing fees are used by a franchisor. It does so by requiring a franchisor to disclose “*sufficient detail*” of a fund’s receipts and expenses so as to give “*meaningful information*” to the franchisees about sources of income and items of expenditure, particularly with respect to advertising and marketing expenditure. The ACCC submits that the notion of “*meaningful information*” conveys at a textual level that the financial statement must have some explanatory force and permit meaningful insights to be gained by the franchisee. I agree.
5. The minimal requirement that Ultra Tune submits is enough would have the effect of denying any real, practical content to the express requirement to give “*sufficient detail of the fund’s receipts and expenses so as to give meaningful information*” about “*sources of income*” and *“items of expenditure, particularly with respect to advertising and marketing expenditure*”. What is required to be provided is sufficiently detailed meaningful information, which is necessarily information that is useful and practical, not merely minimal accounting information.
6. That said, it should be acknowledged that cl 15(1)(b) is not particularly clear or prescriptive as to what is required to give “*meaningful information*” about a marketing fund’s income and expenditure. However, the general intention of the provision is plain enough, namely that the franchisee should be in a position to know what the income and expenses of the fund are for the purpose of making some meaningful assessment of whether that use is appropriate. The references to “*sufficient detail*” and “*meaningful information*” must be understood with that purpose in mind.
7. To be more prescriptive might have reduced the capacity for franchisors to tailor the information provided to a wide range of different circumstances, given the diverse range of economic activities in which franchise arrangements exist. To accommodate those different circumstances, cl 15(1)(b) has a protean quality. What is sufficient detail to give “*meaningful information*” on a fund’s income and expenditure will vary from case to case. Similarly, what may be a sufficient level of detail for certain items or categories of expenditure may be insufficient for others, bearing in mind also that cl 15(1)(b)(ii) necessarily requires a focus “*particularly with respect to advertising and marketing expenditure*”. As a general proposition, the more significant an expense is, the more important it will be to a franchisee, and therefore the greater the level of detail that will be required to facilitate an informed assessment by the franchisees concerned. There may be cases in which more detail is needed for a lesser expenditure in order to understand why it is appropriate. In each case, however, the adequacy of the statement must be considered and assessed as a whole.
8. The parties made reference to extrinsic material that was said to aid in construction of cl 15(1)(b). Such material, however, must also be approached with caution to the extent that Parliament may have made “*aspirational*” statements of its intentions that are not reflected in the terms of the *Franchising Code*. As emphasised by Spigelmann CJ in *R v JS* [2007] NSWCCA 272; 230 FLR 276 at [142], the task of the courts is to determine what Parliament meant by the words it used; it is not to determine what Parliament intended to say.
9. Here, the extrinsic materials do not go further than confirming that the purpose of the provision is to provide accountability and transparency in the use – and potential misuse, or even inappropriate or ineffectual use – of marketing funds. For instance:
10. it is recommended in the *Review of the Franchising Code of Conduct* (30 April 2013), by the author, Mr Wein, that the franchising code of conduct be amended based on the principles that:
    1. a franchisor should separately account for marketing and advertising costs; and
    2. the marketing and advertising fund should only be used for expenses which are clearly disclosed to franchisees; and
11. it is stated in *The Future of Franchising*, a publication by the Australian Government in April 2014, that the government would “*introduce greater transparency for the way in which marketing funds are used and accounted for [including] requiring additional disclosure on the types of expenses marketing funds are being used for*”.
12. Turning to the present case, it should be noted that, putting to one side questions of the level of detail required by cl 15(1)(b), there is nothing inherently deficient about the *structure* of the profit and loss statements prepared by Ultra Tune. Although the structure will always be generally relevant to the question of whether information is presented in a meaningful way, the issue here is with content and the provision of information that makes sense to an ordinary reader. Franchisees are not to be taken, just because they are running a business, as having accounting expertise or the like. It is they, not their accountants, who must be placed in a position to understand how marketing funds are being deployed and to form a view as to whether the expenditure is appropriate. It is the ordinary franchisee who must be armed with information that has the necessary qualitative character.
13. Ultra Tune notes in written submissions that the term “*annual financial statement*” at cl 15(1)(a) is not defined in the *Franchising Code* or the *CCA*, but is well known to accountants, auditors and businesses generally, comprising a profit and loss statement and balance sheet. Ultra Tune further submits that if additional information was required as contended by the ACCC, no profit and loss statement or balance sheet would comply with the requirement, and it would “*turn into something that no longer was an annual financial statement as … understood by accountants, auditors and businesses*.” This argument cannot be accepted, as it places undue emphasis on the form of what the statement would take, according to what is submitted to be an industry-accepted standard, above the express substantive requirements of cl 15(1)(b) as to what is required by way of sufficiency of detail.
14. For a number of the minor items, such as “*Accounting Fees*”and “*Bank Charges*”, there may not be any great issue with how the items have been described. In this case, this is mainly because there is some degree of granularity in the description of the items, and it is doubtful that further detail would bring any great explanatory force to the statement. Moreover, they may well be relatively fixed expenses with little room for reduction or change and therefore real doubt as to whether or not they were, for example, per cl 31(3)(a)(ii) “*legitimate marketing or advertising expenses*”.
15. I do not have enough evidence or other information to accept the suggestion by the ACCC that Ultra Tune’s marketing statements were deficient to the extent that they did not explain how the minor items relate to marketing. Indeed, cl 15(1) appears to contemplate that not all of the expenditure of the fund may be on marketing per se, given that it requires a particular focus on items that do. Moreover, it may be inferred that there would or could be accounting fees and bank charges associated with running a marketing fund.
16. The line item for customer support is more cryptic, and might well also be inadequate. However, it is not necessary to decide that in this case because it is sufficient in present circumstances to focus on the central issue of how the lion’s share of expenditure was described. In other cases, and indeed in future for Ultra Tune, such a sparse description might warrant closer attention.
17. The substantial deficiency of Ultra Tune’s marketing fund statements lies in how the preponderance of the funds’ expenditure has been itemised. As described above, the most significant expense is identified simply as “*Promotion & Advertising – Television*”. Ultra Tune submitted that the line item descriptions made it plain that the “*vast bulk of the money spent … was on television advertising*”. The problem with describing that expense in such bare and general terms is that, notwithstanding that there might be some granularity in the description of a large number of minor expenses, the statements provide no meaningful information about how most of the fund has in fact been used. It certainly does not provide sufficient detail so as to give meaningful information about advertising and marketing expenditure as expressly required by cl 15(1)(b)(ii).
18. Put another way, where it is indicated that approximately 80% of a fund has been applied to something as non-specific as “*Promotion & Advertising – Television*”, the statement does little more than suggest, in a circular fashion, that Ultra Tune spent the majority of the marketing fund on marketing. This is plainly inadequate for the purposes of cl 15(1)(b)(ii), and certainly would not assist in ascertaining whether the money was expended on “*legitimate marketing or advertising expenses*”. In these circumstances, a franchisee would have very limited information to inform its understanding of the item. To whom have the fees been paid? What services were obtained, and when? Almost any other questions cannot even be posed, let alone answered, yet it is plain enough that the intent of cl 15(1)(b) is that franchisees be placed in a position whereby they can assess and question how the money they, along with all other contributing franchisees, have provided, has been spent. The information provided is not just lacking the quality of providing “*meaningful information*”; it has the active quality of providing largely meaningless information except as to raw quantum, begging the question as to what the money was spent on, and how and when. None of the franchisees could have made any useful assessment as to the appropriateness of this item of expenditure based on the financial statement provided by Ultra Tune.
19. In submissions, Ultra Tune notes that franchisees receive “*InTune*”, an in-house newsletter, which includes references to the franchise’s advertising and marketing. Ultra Tune also notes, in opening written submissions, that franchisees would be aware of how the marketing fund was spent by virtue of the television advertising being national and on the internet. Although the terms “*sufficient detail*” and “*meaningful information*” are subjective, and franchisees may otherwise be aware of specific advertising campaigns, it is clear from the text of cl 15(1)(b) that sufficient detail must be included in the financial statement itself, without recourse being had to other materials, perhaps aided by what might appear in an auditor’s report.
20. Ultra Tune also submits that the nature of the adverse findings sought by the ACCC meant that the quality of evidence required to arrive at reasonable satisfaction that the civil standard of proof has been established was that dictated by the reasoning of Dixon J in *Briginshaw* *v Briginshaw* (1938) 60 CLR 336 at 360-2, now reflected in s 140(2) of the *Evidence Act 1995* (Cth). However, that submission does not seem to engage with the live issue here as to the objective requirements attaching to the document that Ultra Tune was required to create, maintain and furnish to franchisees, with the documents that were in fact so produced being in evidence. To the extent that serious allegations require a reasonable quality of evidence, rather than “*inexact proofs, indefinite testimony, or indirect inferences*”, Ultra Tune has not identified any evidentiary shortcoming.
21. I reject Ultra Tune’s submissions referred to above, and more generally. They simply do not grapple with the requirement imposed by cl 15(1)(b) when read with cl 31(3). It follows that I do not accept that Ultra Tune’s financial statements for the 2014-15 and 2015-16 financial years came even close to meeting the requirements of cl 15(1)(b). I therefore find that those contraventions have been easily established.
22. Ultra Tune’s suggestion that if an adverse finding was made, “*the fact that this is the first case on this provision and that its approach has been one that in terms of the provisions, is one that was open to it, are matters relevant to the amount of any pecuniary penalty*” must be rejected for several reasons. First and foremost, I do not accept that Ultra Tune’s approach was reasonably open to it. Further, Ultra Tune failed to change its practices and approach with the introduction of the *Franchising Code* on 1 January 2015, despite being a large national company with a large scale franchise business. Sophisticated legal advice was not required to understand that its stance was untenable.
23. In all the circumstances, this was a serious shortcoming and, especially for a large franchisor spending such a large sum of money in a marketing fund, a serious contravention. It was a deficiency for which Ultra Tune provided no real explanation beyond a denial of the manifest inadequacy of what was provided. That stubborn approach calls for a significant deterrent penalty, to encourage future and ongoing compliance by Ultra Tune, as well as franchisors more generally who might otherwise be tempted to skimp on the information provided to their franchisees. To do otherwise would be to countenance ignoring the clear policy objectives of the *Franchising Code* by making this a hollow requirement, able to be treated in as cavalier a way as Ultra Tune has done.
24. A franchisor may be well advised to err on the side of candour, rather than secrecy, or take the risk of expensive adverse consequences and significant reputational harm. Candour is wise in any event, because it inevitably helps to build trust with franchisees, which in turn is likely to facilitate advancing their mutual interests. The use to which a marketing fund is put can and should easily be the subject of meaningful disclosure to franchisees so that they can properly assess how the money they have been required to contribute has been spent.

# ULTRA TUNE’s DEALINGS WITH MR AHMED

## Overview

1. This aspect of the dispute concerns Ultra Tune’s dealings with a prospective franchisee, Mr Ahmed, who the ACCC asserts was misled in the course of negotiations about a franchise in Parramatta and then refused the refund of the deposit that he sought when, on his evidence, he discovered the truth. As indicated above, the allegations concerning Mr Ahmed were strongly contested by Ultra Tune at the trial. Ultra Tune made key, but not complete, concessions in closing written submissions and orally much later, during an additional, final day of hearing. Ultra Tune’s final stance was still to downplay the seriousness of the conduct engaged in by its very senior officers.

## Summary of the key events

1. In early 2015, Mr Ahmed became interested in purchasing an Ultra Tune franchise. Between May 2015 and August 2015, he and his brother, Mr Shahbaz Khalid, had various meetings with Ultra Tune’s State Manager for New South Wales, Mr Nick Tatsis.
2. Ultimately, Mr Ahmed selected a site in Parramatta. In the course of the parties’ dealings with one another, Mr Tatsis made various key representations to Mr Ahmed about the Parramatta site. This included representations about the rent that was payable, the age of the franchise, the price that was payable, the inclusion of the necessary equipment in the sale and whether the deposit that was paid was unconditional. As already noted, the ACCC’s case is that several of those representations were misleading or deceptive, contrary to s 18 of the *ACL*, and also met the reasonably parallel concept of being false or misleading contrary to a number of paragraphs of s 29(1) of the *ACL*. It should be noted that although a s 29(1) contravention carries with it the possibility of a civil penalty being imposed, “*false*” in s 29(1) means objectively incorrect, rather than requiring any state of mind to be established: *Sydney Medical Service Co-operative Limited v Lakemba Medical Services Pty Ltd* [2016] FCA 763, per Flick J at [17]; *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595 per Perry J at [64], and the authority cited in those two paragraphs. Of course, proof that the falsity is intentional may be, and usually will be, a circumstance of aggravation on penalty.
3. The ACCC asserts, referring to the more serious civil penalty allegations, that it was false or misleading to represent that the franchise that Mr Ahmed was proposing to buy had been open for only about six months, that the rent was $45,000 plus GST per annum, that the purchase price of the franchise was only $163,000, or that the deposit paid by Mr Ahmed was unconditionally refundable, when none of that information was correct.
4. On 4 September 2015, Mr Ahmed paid a deposit of $33,000 to Ultra Tune. According to Mr Ahmed, this payment was understood to be a holding deposit, and would be refunded if the deal did not go ahead. According to Ultra Tune at the trial, this payment was intended for the purchase of equipment to bring the Parramatta site up to Ultra Tune’s standards. It was Ultra Tune’s position at the trial that it then made certain purchases on Mr Ahmed’s behalf. This is said to have included the purchase of signage from a contractor, Marlin Signs Pty Ltd, and the sale by Ultra Tune to Mr Ahmed of three pieces of equipment that had been held in Ultra Tune’s storage since 2012. Ultra Tune previously claimed that Mr Ahmed was advised of the purchases by a letter dated 4 October 2015, which Mr Ahmed denied receiving.
5. Ultra Tune, in closing submissions, accepts that there was no separate agreement to purchase the equipment and that the deposit should be refunded to Mr Ahmed, but seeks to avoid most of the adverse reasoning pathways in support of that conclusion by accepting little more than the result that a refund should take place. Ultra Tune effectively abandons reliance on much of Mr Tatsis’ evidence and conduct, preferring to suggest that even without that evidence, presumably including in cross-examination, the more serious allegations made by the ACCC were not established.
6. On 21 September 2015, Mr Ahmed attended a training course in Melbourne for new Ultra Tune franchisees. The course was conducted in large part by the National Operations Manager for Ultra Tune, Mr Anthony Cott. On the first day of the training course, Mr Cott provided Mr Ahmed with a bundle of documents relating to the Parramatta Site. Having reviewed those documents, Mr Ahmed apparently became concerned that Mr Tatsis had made misleading representations about the cost of the rent and the age of the franchise, which the documents indicated had been operating at that site in various forms since the 1980s.
7. On the second or third day of the training course, Mr Ahmed and the other attendees were advised that they would need to install illuminated Ultra Tune signage. Following a meeting with Mr Tatsis, Mr Ahmed was advised that the additional cost of the signage would be $12,100, which would be added to the total purchase price.
8. By this point, Mr Ahmed had a number of concerns about the deal, and decided that he did not wish to go ahead with the purchase of the franchise. He then made repeated requests that Ultra Tune refund the $33,000 deposit, less the $3,000 cost of the training course. A refund was refused by Mr Tatsis and Mr Cott. On 25 November 2015, he lodged a complaint with the ACCC. The ACCC took the complaint seriously, but also investigated well beyond the ambit of the complaint that was made, including as to Ultra Tune’s compliance with its disclosure obligations. In early 2016, Mr Ahmed made further requests through a lawyer, but was unsuccessful in obtaining a refund.
9. Ultra Tune’s decision to retain Mr Ahmed’s deposit has been calamitous for it, opening the door for the ACCC to examine a myriad of deficiencies, including the disclosure breaches already considered above, but more particularly the details of the treatment meted out to Mr Ahmed.

## ACCC’s key contentions

1. The ACCC submits that Ultra Tune breached the obligation in cl 6 of the Franchising Code to act in good faith by:
2. failing to honestly disclose information about the Parramatta franchise;
3. making misrepresentations to Mr Ahmed;
4. putting pressure on Mr Ahmed to make the $33,000 payment before providing documentation relevant to the purchase of the Parramatta franchise;
5. requiring the payment of $33,000 and subsequently treating $30,000 of that sum as a non-refundable deposit without making it apparent that the money would be treated as non-refundable;
6. making a decision to expend $33,000 immediately towards signage and equipment, assuming this genuinely occurred, without any apparent need for urgency; and
7. failing to repay to Mr Ahmed the money or failing to cooperate with Mr Ahmed to recover the money from the person who received the benefit of the equipment purchased.
8. Alternatively, the ACCC alleges that if Ultra Tune did not represent to Mr Ahmed that the deposit was non-refundable, then by refusing to return the deposit, Ultra Tune behaved as if the deposit was a non-refundable payment, and therefore breached the obligation in cl 9(1) of the *Franchising Code* to make certain disclosures at least 14 days before requiring a non-refundable deposit to be paid. The ACCC, in a further nuance, submits that conduct that falls short of being a contravention of cl 9(1) may still be found to be conduct in contravention of the obligation to act in good faith in respect of the requirements of cl 9(1) itself.
9. The ACCC called four witnesses:
10. Mr **Ahmed**;
11. Mr Shahbaz **Khalid**, Mr Ahmed’s brother;
12. Mr Allan **Gray**, the natural person behind the corporate entity who was at all material times, and still is, the current franchisee at the Parramatta site; and
13. Mr Lance **Walter**, who is and was the managing director of Marlin Signs Pty Ltd.

## Ultra Tune’s key contentions

1. At trial, Ultra Tune denied that the $33,000 paid by Mr Ahmed was a deposit. It said that Mr Ahmed made the payment as a $3,000 fee for attending UTA’s training course in Melbourne and to purchase $30,000 worth of equipment to be installed at the Parramatta Franchise. Because payments for equipment are specifically excluded from the definition of “*franchise agreement*” in cl 5(1)(d) of the *Franchising Code*, Ultra Tune said that the *Franchising Code* was not relevantly engaged at all. That, presumably, was the reason for characterising $30,000 as being for equipment purchases, rather than as a refundable deposit.
2. At trial, Ultra Tune also denied that it engaged in the misleading conduct alleged by the ACCC. Further, it appeared to submit that Mr Tatsis was not acting on behalf of Ultra Tune in the proposed sale of the Parramatta Site. Instead, it was suggested that he was acting for and on behalf of Mr Allan Gray and his company, **Harriscoop** Pty Ltd (ACN 167 645 650), which was and remains the franchisee of the Parramatta Franchise. However, this suggestion of agency, if it was ultimately maintained, cannot be accepted. As the ACCC correctly pointed out:
3. any suggestion of such agency is inconsistent with Ultra Tune’s evidence in that Mr Tatsis’ evidence was that no sale of business contract was required with Harriscoop – he contemplated that Harriscoop would surrender the franchise to Ultra Tune;
4. there is no evidence that Mr Tatsis indicated to Mr Ahmed that there was a third party/owner involved in the transaction;
5. Mr Tatsis represented to Mr Ahmed that Ultra Tune “*owned*” the Parramatta Franchise;
6. Mr Gray expected to receive payment for the Parramatta Franchise from Ultra Tune, rather than from any third party/purchaser
7. Ultra Tune’s position was that Mr Ahmed was being sold a “*new*” franchise and that is why he was being asked to pay for signage or equipment – as Mr Chong (Ultra Tune’s in-house counsel and company secretary) had indicated in his s 155 examination, where there was a sale of an existing franchise “*the outgoing franchisee is required to make the store compliant*”; if Harriscoop had been the “*outgoing franchisee*” then it, and not the new franchisee, would have needed to make the store compliant;
8. the “*deposit*” was paid to Ultra Tune and deposited into an Ultra Tune account – nothing was ever remitted to Harriscoop.
9. All of the remaining contentions above were expressly or implicitly abandoned by the time of Ultra Tune filing written closing submissions. That position was reinforced in oral closing submissions.
10. Ultra Tune called three witnesses:
11. **Mr** Albert **Chong**, who is and was in-house counsel and company secretary for Ultra Tune, and was also the company’s compliance manager;
12. **Mr** Nicholas (Nick) **Tatsis**,who is and was the State Manager for Ultra Tune in New South Wales; and
13. **Mr** Tony **Cott**, who is and was the National Operations Manager for Ultra Tune.

## General observations about the witnesses who gave oral evidence

1. It is convenient to outline some general impressions gleaned from each of the witnesses who gave oral evidence, before turning to a reasonably detailed summary of the evidence adduced in order to resolve the very different arguments of the parties.

### Mr Ahmed

1. Mr Ahmed was born in Lahore, Pakistan. He is 28 years old. His main spoken language is Punjabi, but he has used English as a second language since he was six years old. He was an obviously intelligent, thoughtful and careful witness.
2. The starting point in considering Mr Ahmed’s evidence is, perhaps curiously, aspects of what he said in cross-examination. That is because it was only in cross-examination where the process by which he came to provide his affidavits was revealed. Questions in cross-examination were evidently and understandably designed to test the reliability of the account he gave in his first and primary affidavit affirmed on 9 August 2017 concerning meetings and conversations and written communications that took place between May and November 2015. His other two affidavits were very short, the second responding to affidavit evidence for Ultra Tune, and the third making formal corrections to his first affidavit as to certain minor errors made with documentary exhibits.
3. The burden of Mr Ahmed’s evidence in cross-examination as to his memory and the process by which it was recorded in his first affidavit was that, while he did not now remember precisely what was said, he did remember the substance of the various conversations that he deposed to. At each point where conversations were deposed to in his affidavit in direct speech, they were prefaced by the commonly used phrase (at least in New South Wales) of “*words to the effect of*”. After he lodged his complaint with the ACCC on 25 November 2015, he decided not to stay in Australia and moved back to his family in Pakistan in January 2016. He described all of his subsequent communications with the ACCC as taking place by Skype and by drafts being emailed to him and returned. Unsurprisingly, he could not recall how many Skype conversations he had with officers of the ACCC, nor how many drafts he had received of his affidavit.
4. Overall, Mr Ahmed presented as an honest and forthright witness, genuinely doing his best to give a truthful account of events, including conversations, to the best of his recollection. I did not perceive him to be embellishing his evidence, nor to be giving in to rhetorical or self-serving flourishes. I was comfortably satisfied that I could rely upon his evidence as given both by affidavit and orally, with any shortcomings being overt rather than hidden. Ultimately, I did not find there to be any material shortcoming in his evidence.

### Mr Khalid (Mr Ahmed’s brother)

1. What was centrally relevant from Mr Khalid’s oral evidence was the questioning directed to him about the expression “*words to the following effect*” in his affidavit. Initially, Mr Khalid said in cross-examination that this meant, paraphrasing, that he said *exactly* those words. But later when he was taken to parts of evidence, he backed away from the suggestion that the conversations involved exactly those words. What I think this reflected was his earnestness to have his evidence taken seriously and defending his evidence as he thought he needed to. When ultimately pressed, he made the appropriate concession that he was not recording a perfect recollection of events. Overall, he was an honest and reliable witness, but the ambit of his evidence was limited and, except insofar as he corroborated Mr Ahmed, did not substantially impact upon the factual findings that needed to be made.

### Mr Gray

1. Mr Gray was subpoenaed as a witness by the ACCC. It is not in dispute that he, through his company, Harriscoop Pty Ltd, was and remains the current operator of the franchise at the Parramatta site. That centre is apparently one of four Ultra Tune franchises that Mr Gray operates either directly or through corporate entities. Mr Gray was an impressive witness, and there was no reason to doubt any aspect of his evidence.

### Mr Walter

1. Mr Walter was an unimpressive and largely unhelpful witness. I only accept his evidence to the extent that it is corroborated, against interest or uncontroversial.

### Mr Chong

1. Mr Chong did not present as a dishonest witness, but nor was he impressive or particularly reliable on areas of controversy. Rather than being an independent legal voice within Ultra Tune, he came across as compliant and facilitative of advancing Ultra Tune’s interests, and, perhaps more importantly, those of its principal, Mr Sean Buckley. Disturbingly, part of the justification Mr Chong gave for the disclosure contraventions that Ultra Tune admitted to was that he was heavily involved in Mr Buckley’s personal interests, including his family law litigation, and did not have enough time to attend to the regulatory requirements of his job as company secretary and in-house counsel.

### Mr Tatsis

1. Mr Tatsis was, at best, an unreliable witness. Ultra Tune accepts that key aspects of both his affidavit and oral evidence could not be accepted. In closing oral submissions, counsel for Ultra Tune went so far as to accept that Mr Tatsis had lied, although he was not explicit as to which parts of his evidence was as bad as that. Counsel appropriately conceded in closing written submissions that Mr Tatis having “*deposed to matters in his sworn affidavit that were false is unacceptable, to say the least”*. That was a wise final stance to take, as far as it went, but it do not go far enough. In any event, counsel for Ultra Tune did not cavil with the suggestion by the Court that it would be difficult to accept Mr Tatsis’ evidence on anything of importance if was not corroborated.
2. There was a curious tension in Mr Tatsis’ evidence. On the one hand, he presented as deeply apprehensive about having his evidence tested in cross-examination and highly unreliable in his account of events. At the same time, he conveyed a strong sense that he believed that he was justified in the way that he had dealt with Mr Ahmed, although he was never clear or consistent in his account of those dealings, perhaps reflecting a realisation that his subjective view of those matters may not be shared. To my mind, the most compelling explanation for this dissonance is that Mr Tatsis regarded his own justifications for his actions as valid, but did not wish to share these fully with the Court for fear of them not being accepted, or finding difficulty in articulating the justification that he felt. This attitude was conveniently illustrated when Mr Tatsis suggested that Mr Ahmed “*didn’t need to know*” the details about the equipment that Mr Tatsis purported to have purchased for him, which is on any view an odd stance to take with a prospective franchisee.
3. It was clearly and expressly a significant source of frustration for Mr Tatsis that a large number of prospective franchisees that he had dealt with over time indicated interest in purchasing a franchise without taking any steps to follow through on a sale. Indeed, this frustration is also suggested on the face of Mr Tatsis’ emails and text messages, and in the accounts given by Mr Ahmed and Mr Khalid of their discussions with him. On this point, I do not consider it to be out of character, despite his denials of this, for Mr Tatsis to have made comments recorded in the narrative below, such as “*a lot of people who meet with me like this are just fucking with me*”, “*the deposit shows that you are really interested in this franchise and are not a time waster*” and “*never fuck with us*”, as were described variously by Mr Ahmed and Mr Khalid.
4. Mr Tatsis’ evidence in cross-examination suggested a degree of resentment towards Mr Ahmed. To my mind, a view that Mr Ahmed had wasted his time is a compelling reason why Mr Tatsis might have felt, subjectively, to be entitled to retain Mr Ahmed’s deposit and to justify that position retrospectively in whatever way he saw fit. The correspondence in evidence shows a level of anxiety on Mr Tatsis’ part about Mr Ahmed’s intentions towards proceeding with the purchase of the Parramatta site franchise.
5. The net result is that, as indicated in numerous places in the narrative of the evidence below, Mr Ahmed’s evidence is to be preferred to that of Mr Tatsis, both as to recollection and as to points of conflict. Although I do not go so far as to conclude that Mr Tatsis was knowingly or intentionally giving false evidence on oath, as opposed to evidence that was objectively untrue, I none-the-less found it impossible to accept important parts of his evidence as to what had transpired in his dealings with Mr Ahmed.

### Mr Cott

1. Mr Cott’s evidence was tied into Mr Tatsis’ evidence at key points. Mr Cott endeavoured to corroborate Mr Tatsis. However, it is not now disputed that key aspects of Mr Tatsis’ evidence that Mr Cott endeavoured to support cannot be accepted. Mr Cott’s credibility is profoundly undermined by the concessions made about Mr Tatsis’ evidence.
2. Mr Cott has been Ultra Tune’s National Operations Manager since April 2015. Mr Cott described this role as also encompassing the positions of National Training Manager, Western Australia State Manager and Equipment Manager. For reasons that follow, I do not accept him to have been a truthful witness and I do not accept his evidence on any point of importance. Only formal and uncontentious aspects of his evidence can be accepted.
3. Mr Cott presented as a practical, forceful man who likes things to be done his own way. Indeed, this was very much how he sought to portray himself. He described himself as “*anal*” about the types of signage that is displayed at Ultra Tune franchises, and gave evidence that he has tried in the past to manage personally too many aspects of the company’s operations. As to compliance by franchisees with Ultra Tune’s equipment requirements, he made passing comments to the effect that his predecessors at Ultra Tune had been lax, which he said he was trying to correct. At other points, he expressed frustration with his accounts department or his in-house legal assistance. I do not doubt that he has extensive experience in the industry and has strong views about how things should be done. Indeed, that strong desire to get his own way may well explain some of the more extraordinary and unreliable aspects of his evidence.
4. Despite a measure of initial ostensible confidence, Mr Cott rapidly displayed evident unease at having his evidence tested, going beyond the ordinary discomfort of a witness under the rigours of a forensic cross-examination. Although initially genial in manner, he became increasingly tense and defensive as his account of events was challenged. At times, he accused senior counsel for the ACCC of trying to “*trip him*” up on details, or described her questions about key details as pedantic, whereas what took place was a forensic dissection of his evidence. While there was a measure of condescension towards senior counsel for the ACCC in some of Mr Cott’s answers, this did not give the impression that he was assured in his position; to the contrary, it appeared born of a great deal of apprehension on his part. He displayed a particular unease about questions concerning a 4 October 2015 letter and the enclosed invoices. The conclusions I reach about that document below mean that such unease was warranted.
5. The overall pattern of Mr Cott’s responses in cross-examination was one of deflection and evasion. He appeared averse to details, at least of the kind about which he was challenged. He disavowed having much recollection of correspondence that had been copied to him. When asked pointed questions, he would fall back on generalised assertions, for example, that a deposit was needed from Mr Ahmed to make the Parramatta Site compliant. When asked about inconsistencies between his evidence in cross-examination and his evidence on affidavit, he distanced himself from his affidavit.
6. As his cross-examination progressed, Mr Cott increasingly gave the impression that he was taking great pains to try to maintain the coherence and internal consistency of his answers. From time to time he would seize upon the opportunity to digress from the question at hand. Somewhat tellingly, his digressions on matters irrelevant to the dispute would be detailed and unfaltering. In my view, these digressions were a way for Mr Cott to seek to escape the considerable pressure he felt in maintaining an untruthful account of events in light of the obvious inconsistencies put to him by senior counsel for the ACCC, both as to the evidence he gave and as to certain documents in the context of other like documents.
7. Inconsistently with his own claims about the paucity of his recollection, Mr Cott also gave the impression that he has a good memory for dates and details when it suits him. For instance, he was asked a question about why he had not replied to an email sent by Mr Ahmed on 30 October 2015. His immediate response, given with some apparent relief, was that he was in the United States at the time, most likely on a flight to Los Angeles. The specificity of this recollection, of an event that was of little importance to the dispute, was in stark contrast to the vague responses he gave to questions about key events.
8. As noted above, Mr Cott presented as a practical man. He could not, however, give any practical explanation in cross-examination for why, as described below, he had purported to send Mr Ahmed a letter on 10 September 2015 and on 4 October 2015, in lieu of an email on either occasion, especially when he said that he did not write many letters. It was only in re-examination that he suggested that he had done so because he considers a letter to be more formal.
9. Similarly, Mr Cott could not give a practical explanation for how it made any sense that Ultra Tune would require Mr Ahmed to replace equipment that had been purchased in 2014, with equipment that had been held in Ultra Tune’s storage since 2012, to meet what he described as rapid technological changes in the industry. The questions asked of Mr Cott in this context are illustrative of what he was like as a witness, both on this topic, and more generally:

Ms Sharp SC: As a matter of just logic, would you expect in 2015 to replace equipment bought in 2014 with equipment bought in 2012?

Mr Cott: Yes. I mean, the automotive industry; yes. Scan tool is a good example; the scan tools on this list now are not even close to what – what we accept, with the technology like you see with smartphones. Scan tools used to cost [$]25,[000], $30,000. Now, you can get a good quality scan tool for about $5,000 that does 20,000 more cars. Technology changes very very rapidly in our industry. You see that in the cars that we service.

Ms Sharp SC: If technology changes very rapidly in your industry, why would you in 2015 replace equipment bought in 2014 with equipment bought in 2012?

Mr Cott: Because my lovely predecessors that I inherited a lot of problems from aren’t as specific about the detail and making sure our stores were fully compliant with things. There was a lot of, “She’ll be right” things happening. I’ve taken that away in the three years I’ve been the operations manager.

1. The above transcript passage forcefully demonstrates the difficulty that can be experienced in maintaining the logic and consistency of a falsehood. The truth is often more inherently logical and consistent with objective contextual facts.

## Evidence

1. The key evidence in these proceedings has been summarised below. However, some further introductory comments are warranted. As naturally flows from the above observations, I am not able to accept significant aspects of the evidence given by Ultra Tune’s witnesses, particularly, Mr Cott, Ultra Tune’s National Operations Manager, and Mr Tatsis, Ultra Tune’s State Manager for NSW, insofar as they concern Mr Ahmed. To the extent that their evidence was inconsistent with events described by Mr Ahmed, including in particular where supported by the written correspondence with him that was in evidence, it must be rejected.
2. Mr Cott and Mr Tatsis were evasive and unreliable, and effectively distanced themselves from the evidence they had given on affidavit when confronted with inconsistencies, often presenting a new version of events in cross-examination. The impression these witnesses gave was that they were making up parts of their stories as they went along. Of particular concern is Mr Cott’s evidence as to a letter and enclosures that he had purported to send Mr Ahmed in October 2015. For reasons that will be explained, I have concluded that these documents are fabrications that were brought into existence, most likely by Mr Cott, to retrospectively justify Ultra Tune’s conduct in relation to Mr Ahmed. The overall effect of these factors was to lead to the inescapable conclusion that the version of events advanced on behalf of Ultra Tune was not accurate and reliable. By contrast, I have no reason to doubt the evidence given by Mr Ahmed and Mr Khalid.

### Mr Ahmed becomes interested in purchasing an Ultra Tune franchise

1. In March 2015, Mr Ahmed travelled to Australia from Pakistan to look for employment as a mechanical engineer. He was unsuccessful finding work and started looking into different business options. Following some research, he became interested in purchasing an Ultra Tune franchise. On 12 May 2015, he sent an email expressing his interest to Mr Tatsis, using an address provided on Ultra Tune’s website. Mr Tatsis responded by email a short time later. Mr Tatsis said that he also rang Mr Ahmed by phone to introduce himself, but nothing turns on this.

### Mr Tatsis’ role within Ultra Tune

1. Mr Tatsis has been the State Manager for Ultra Tune in NSW since January 2009. He was formerly an Ultra Tune franchisee at Menai in NSW. He is a qualified motor mechanic.
2. According to Mr Tatsis, his functions as State Manager include: developing growth in NSW, which includes opening new centres to “*franchise them off*”; overseeing compliance with Ultra Tune’s franchise requirements in the State; supporting franchisees with business strategies; and dealing with franchisees as their first point of contact. Mr Tatsis operates a home office, but is supported by one assistant, who is a customer support officer for Ultra Tune.
3. Mr Tatsis’ evidence was that he would be contacted in a typical year by around 80 to 90 persons to indicate that they might be interested in becoming a franchisee. According to Mr Tatsis, a vast majority of these people “*fade away*”, meaning that they do no more than indicate an interest and take no steps to follow it up. Mr Tatsis said that, ordinarily, he arranges to meet those with a serious enquiry at a mutually convenient café, which he described as the “*getting to know you*” meeting.
4. Mr Tatsis said that he is particularly concerned at such an initial meeting to ascertain whether the person will be an asset to Ultra Tune in growing the business. However, he said that he will only talk in generalities until a confidentiality agreement and a franchise application is signed. This general approach to prospective franchisees is consistent with the approach he took with Mr Ahmed, including in particular his concern about prospective franchisees fading away after the initial contact, without follow up.

### Mr Ahmed, Mr Khalid and Mr Tatsis meet for the first time

1. On 15 May 2015, Mr Ahmed and Mr Tatsis met for the first time at a café in Menai, a southern suburb of Sydney. Mr Ahmed was joined by his brother, Mr Khalid. According to Mr Ahmed, he asked his brother to join him because he believed that his brother knew more about business practices in Australia, and because he hoped that his brother would help him with the business after he had completed his education. It is not disputed that Mr Tatsis and Mr Ahmed did most of the talking. Mr Tatsis described this meeting in his evidence as the “*getting to know you*” meeting.
2. Mr Ahmed’s affidavit deposes to Mr Tatsis asking him questions about his engineering background and experience, which he explained. Mr Ahmed’s affidavit then deposed to a conversation that he had with Mr Tatsis to the following effect:

Mr Tatsis: Are you capable of handling the franchise by yourself?

Mr Ahmed: Yes. My brother will join me after he finishes his degree.

Mr Tatsis: Then you have to handle it by yourself. It depends on how you run it. It’s not like it will take care of itself. It depends on how you do it. You are young and energetic and if you run it by yourself you can do better than giving it to a manager to handle. There are start-up fees and you have to set up your business. We can work together to set it up and get it going.

Mr Ahmed: How much will this cost?

Mr Tatsis: You can go for a new franchise but you have to start up your business and get customers. It will cost you over $150,000. Or you can go for an older franchise, which will have more customers, but it will be more expensive. It depends on the location and age of the business.

Mr Ahmed: Okay I’m interested in setting up a new franchise.

Mr Tatsis: How will you arrange for the funds?

Mr Ahmed: Most of the money will come from my dad.

Mr Tatsis: You will need to fill out an application form and confidentiality agreement. I will email this to you. You need to pay a holding deposit into a transitional account if you want to go for a new one.

The deposit shows that you are really interested in this franchise and are not a time waster. Without a deposit we cannot go any further. If you pay a deposit and everything goes well then good. If not, then it’s always refundable.

1. Mr Ahmed’s evidence was that at no point during this meeting did Mr Tatsis inform him that he should seek independent legal or financial advice.
2. Mr Khalid also gave evidence of the meeting on 15 May 2015. In his affidavit, he recalled the following exchange between his brother and Mr Tatsis:

Mr Ahmed: I would like to see the accounts and financial statements for some of these franchises. I would like to know how much they are earning.

Mr Tatsis: You are asking the wrong questions, Nakash. These aren’t the questions you should be asking right now.

Mr Ahmed: What questions should I be asking?

Mr Tatsis: You should be asking us about the company more generally. We need to get to know each other first – that is how we do business here. Our franchisees are our business partners, and we are very friendly with our business partners. A lot of people who meet with me like this are just fucking with me. They come here and don’t buy a franchise, and this just wastes our time. Whatever you do, never fuck with us.

1. Mr Tatsis disagreed with key aspects of the evidence given by Mr Ahmed and Mr Khalid about the meeting on 15 May 2018. He denied using coarse language, and described the exchange of words recalled by Mr Khalid as a complete fabrication. I do not accept Mr Tatsis’ evidence on this topic, largely because I accept Mr Ahmed’s and Mr Khalid contrary evidence, but also because the last passage above in which Mr Tatsis complains about his time being wasted is consistent with his own evidence about his irritation at the frequency with which he has to endure false starts with prospective franchisees.
2. Put bluntly, the accounts given above by Mr Ahmed and Mr Khalid have a strong and credible ring of truth, which is absent from Mr Tatsis’ denial of having said the things attributed to him. A further reason to accept the evidence of Mr Ahmed and Mr Khalid on these conversational details is that this was a small number of unprecedented meetings for them, whereas Mr Tatsis, on his own account, had a large number of such meetings in any given year, many of which would have had general features in common. There was no suggestion that Mr Tatsis kept notes, let alone detailed notes, of what took place at these meetings. His capacity to remember the nuances of each individual meeting without such notes is at best doubtful and in many instances simply unbelievable.
3. Mr Tatsis recalled having explained to Mr Ahmed and Mr Khalid various aspects of Ultra Tune’s business, including its general requirement that centres have equipment and signage that meet Ultra Tune’s specifications. According to Mr Tatsis, he then sought an explanation from Mr Ahmed about his background education and experience in the field, which is consistent with Mr Ahmed’s account, even if the recalled sequence of the conversation may have differed somewhat.
4. Mr Tatsis also claimed to have asked Mr Ahmed how he saw the running of the franchise would occur. He said that Mr Ahmed seemed to indicate that he thought that Ultra Tune would take care of the operations and staffing. Mr Tatsis recalled replying to the effect that Ultra Tune’s preference was for an owner-operator. As to discussions about the costs of a franchise, Mr Tatsis gave evidence of having indicated that the cost of purchasing or setting up a franchise could vary, telling Mr Ahmed that there was one franchise that was set up for $50,000 and another for $500,000. While this is not Mr Ahmed’s recollection, nor is it inconsistent with what he did recall. I am therefore prepared to accept that evidence.
5. Mr Tatsis was adamant that he informed Mr Ahmed that he should seek independent legal and financial advice. I prefer Mr Ahmed’s evidence and find that either this did not occur at all, or was not effectively communicated to Mr Ahmed. It is difficult to know, but Mr Tatsis may have assumed he had said something to this effect to Mr Ahmed, based on conversations he had had with other prospective franchisees, rather than having any active recollection in relation to Mr Ahmed. I therefore fall short of concluding that Mr Tatsis was being untruthful, rather than being unreliable, on this topic.
6. Later on 15 May 2015, Mr Tatsis emailed Mr Ahmed a confidentiality agreement, a blank franchise application, and a blank franchise agreement.
7. On 24 May 2015, Mr Ahmed sent an email to Mr Tatsis thanking him for the meeting, and advising that he would be in touch soon.

### Mr Ahmed obtains finance

1. In June 2015, Mr Ahmed travelled to Dubai to speak to his father about his proposal to purchase an Ultra Tune franchise. Mr Ahmed’s father agreed to loan to him $100,000 to cover some of the associated costs. Mr Ahmed received this money and drew $50,000 from his personal savings. He then did further research into Ultra Tune and decided that he would purchase an established business, as it would already have a customer database and cash flow. As will be seen, that position did not endure, largely because of the substantial costs of such a franchise. Mr Ahmed was clearly sensitive both to the cost and to the future earnings potential of any franchise he might acquire. Mr Tatsis could not have failed to appreciate that concern. Indeed, that appreciation is manifested in numerous communications from Mr Tatsis considered below.

### Mr Ahmed considers franchise sites

1. At the start of August 2015, Mr Ahmed returned to Australia. On 3 August 2015, he sent Mr Tatsis an email confirming that he wanted to continue discussions about the purchase of an established Ultra Tune franchise. He indicated that he had “*decided to go with an already running/established business*” and would email Mr Tatsis the signed confidentiality agreement as soon as possible. He did not receive a response to that email.
2. On 10 August 2015, Mr Ahmed sent a text message to Mr Tatsis’ mobile asking him if he was available to discuss any franchise opportunities. Mr Tatsis responded by text message asking if Mr Ahmed was interested in a site in Narellan (which is in south-western Sydney, near Campbelltown). Mr Ahmed replied in the affirmative. They agreed to meet at the site on 12 August 2015.
3. Mr Ahmed recalled that on 12 August 2015, he and his brother attended both the site in Narellan and another site in Peakhurst (in southwest Sydney) with Mr Tatsis. Upon being advised by Mr Tatsis that the price of each of those two sites would be in excess of $300,000, Mr Ahmed realised that they were outside of his budget and told Mr Tatsis that this was the case. Mr Ahmed claimed to have said words to the effect that he wanted to go for a new franchise site. In any event, this was communicated soon afterwards in an email.
4. On 13 August 2015, Mr Tatsis sent an email to Mr Ahmed in the following terms (verbatim):

Hi Nakash.

Please email confidentiality agreement and lets move forward.

If you have no interest in the current sites I have shown you please let me know now.

1. On 14 August 2015, Mr Ahmed replied by email as follows:

Hi Nick

Thanks for the time you took in showing the two sites. After thorough review, both the sites are not in accordance to what we are looking for. We will go for setting a new franchise.

Kindly guide me with the next step. The signed confidentiality agreement is attached.

1. Thus, by 14 August 2015, if not sooner, Mr Ahmed had expressly and unambiguously changed from seeking to buy an established franchise, to seeking to buy a new franchise, which was communicated to Mr Tatsis. It is a prism through which Mr Tatsis’ subsequent communications are to be read and understood, with numerous references in writing indicating a clear awareness of this requirement.

### Mr Tatsis suggests the Parramatta site

1. On 14 August 2015, Mr Tatsis replied to Mr Ahmed’s email immediately above as follows (verbatim):

Ok no problems ,..

thank you for forwarding the confidentiality document please find attached an application for a new centre

Please think about the area or region you prefer and I will prepare a demographic study.

Also please advise of dates that you will be available in the next month for training & accreditation and how many people participating

It will be for a week in Melbourne ,.. also prepare a $50k deposit to be put in our new centre start up account ,..these funds will be drawn upon for training ,signage ,equipment ,fit-out when a site is secured ,..envisage total outlay for a new site will be $120-130k. (all receipts and costs breakdown provided at settlement )

We have recently opened a new centre in Parramatta / Rosehill area , (River Rd West ,off James ruse drive).

We were going to wait until the new development housing project across the road was finished to on-sell this centre ,

I may consider on-selling the franchise now if this site is suitable and appeals to you.

1. In his evidence about this email, Mr Tatsis accepted that this was the first time he had mentioned the Parramatta site to Mr Ahmed. He accepted in cross-examination that the site had been established as an Ultra Tune franchise in various forms since the 1980s, and constituted an existing site given that a franchisee, Mr Allan Gray via Harriscoop Pty Ltd, was already operating a franchise there and the site had equipment and signage. Mr Tatsis noted that he had referred to the centre as being “*recently opened*”, but did not accept suggestions by senior counsel for the ACCC that this was misleading. Mr Tatsis maintained that he considered that the centre was a “*new site*”, as it had only recently been “*reopened*” following the dismissal of the manager. It is convenient at this point to turn to the evidence of Mr Gray, who was and still is, via his company, the franchisor of the Parramatta site, to assess whether Mr Tatsis’ stance is tenable.

### The history of the Parramatta site

1. Mr Gray commenced operating the Parramatta site in March 2014, which is a considerably longer period than Mr Tatsis communicated to Mr Ahmed, as set out below at [184]. He described it as a site that had been shut down by Ultra Tune “*just some months prior*”, with a contract for a substantial amount of work having been lost immediately before that closure. In context, this appeared to be a reference to a contract with the police force stationed nearby that had been terminated. Mr Gray said that his intention in taking on the centre was “*purely to get that work back*”.
2. Mr Gray’s hopes for the Parramatta Franchise were not realised. Mr Gray described having to close the centre between October and December 2014, because the manager he had employed to operate the store was found to have been involved in some illegal activity, apparently on the premises. This had given rise to a raid of the site and the police contract being lost. Following Christmas 2014, Mr Gray employed another manager to operate the centre and continued to trade without the police work he had “*intentionally went in there for*”. However, it was Mr Gray’s evidence that he decided at that point that he didn’t want to have the franchise anymore, and spoke to Ultra Tune via Mr Tatsis in August or September 2015 about “*unloading it*”. He described having lost a substantial amount of money during the period that he had operated the franchise at the Parramatta site.
3. Mr Gray gave evidence as to discussions he had had with Mr Tatsis in August or September 2015. He said that he spoke to Ultra Tune because they had previously tried to help him out at other franchises. He said that, at the time, there “*wasn’t really* *any financials*” for the store, because it had not been performing. Thus, it was not the case that no financial information at all was available for the Parramatta site, but rather that the limited financial information that was available was not positive in the sense of being helpful in furthering a sale of the Parramatta site franchise. This conclusion is reinforced by Mr Gray’s evidence that he recalled Mr Tatsis saying that Ultra Tune would probably try and sell the centre as a “*sort of new site*”, not an ongoing concern, because of the short period that Mr Gray had been operating the centre and because of the lack of financial information to give to a prospective buyer.
4. Mr Gray was asked by senior counsel for the ACCC whether he kept financial statements for the period he had operated the Parramatta site and whether it would have been possible to produce accounting statements from those. He confirmed that this was the case. Mr Gray’s evidence provides an important context for Mr Tatsis’ evidence, and makes it quite clear that referring to the Parramatta site as only operating for six months, and as new, while perhaps not out and out false, was at least clearly misleading. Mr Tatsis must have been aware of that, and Ultra Tune is unavoidably fixed with that knowledge given the senior position he occupied.
5. Mr Gray was asked about what he had discussed with Mr Tatsis in relation to the proposed deal. He said:
6. it would be a “*walk-in, walk-out*” deal, including all the plant and equipment;
7. it was Mr Gray’s understanding that Ultra Tune’s role in the sale was to find and train a new franchisee to take over, and to pay Mr Gray his money;
8. Mr Gray suggested figures of $120,000 to $130,000 to Mr Tatsis as the amount he would like to sell the franchise for – this was what Mr Gray needed to cover his costs of the franchise, which included an equipment finance loan of around $85,000 and amortisation from an oil company of about $25,000 to $30,000;
9. Mr Gray and Mr Tatsis had no discussions about what would happen if Mr Tatsis was unable to secure a price in the proposed range – Mr Gray was mainly concerned at that point to “*get out of it*” and pay off his debts;
10. Mr Gray did not really have an expectation that he would be told by Mr Tatsis if he secured an amount for the site greater than the proposed range; and
11. as to what would happen if Mr Tatsis secured a higher amount of money than the range proposed, Mr Gray assumed that he “*would get more, but … wasn’t looking for more*”, and had never requested it at any point.

### Mr Tatsis’ provision of further information to Mr Ahmed about the Parramatta site

1. In cross-examination, Mr Tatsis gave evidence that he explained the history of the Parramatta site to Mr Ahmed on the telephone and in person. It was put to Mr Tatsis that this was not in his affidavit. He said that his affidavit was a written reply to assertions in Mr Ahmed’s affidavit, and did not contain a whole version of what had happened from start to finish. Mr Tatsis’ evidence that he explained the history of the Parramatta site to Mr Ahmed on the telephone and in person is rejected, as reinforced by the exchange of emails referred to in the next several paragraphs.
2. On 14 August 2015, Mr Ahmed sent an email to Mr Tatsis as follows (verbatim):

Hi Nick

Can you send me some details of the parramatta site you mentioned?

1. Mr Tatsis responded by email on the same date as follows:

Go + have a look

1. Mr Ahmed’s evidence was that, on the same date, he went to the Parramatta site and inspected the outside of the premises. Mr Ahmed observed that the site had a parking lot and a sign with the words “*Ultra Tune*”. From outside the site, he observed that it looked like the site was open and there were people inside working.
2. During the afternoon of 14 August 2015, Mr Ahmed sent an email to Mr Tatsis as follows:

I have seen the site. How long it has been established? What is the demand?

1. On the same date, Mr Tatsis replied by email as follows:

Do you like it?

1. On 17 August 2015, Mr Ahmed and Mr Tatsis had an exchange by text message as follows, it not being in dispute that references to the “*Rosehill*” site are references to the Parramatta site (verbatim):

Mr Ahmed: Hi Nick I like the Rosehill site. Just wanted to know what is the selling price?

Mr Tatsis: $175k … can settle and have you in by 1st October

Mr Ahmed: rent?

Mr Tatsis: The rental is very good there $45k per annum

Mr Ahmed: How old it is?

Mr Tatsis: How old is what ?

Mr Ahmed: rodehill franchise

Mr Tatsis: Open for about 6 months

Mr Ahmed: why the franchisee is selling so early?

Mr Tatsis: It’s not franchised …. we own it

[Mr Ahmed then sent a message that appears to be a link to the Ultra Tune website]

Mr Tatsis: Are you interested?

Mr Ahmed: Yes

Mr Tatsis: Long story … As I said we run the site …

Mr Ahmed: can we meet to discuss it?

Mr Tatsis: Wednesday?

1. Mr Tatsis agreed that the above text exchange had taken place, but gave various explanations for his comments. As to his statement that the rent was $45,000, he accepted that this was inaccurate in light of the rent indicated in the disclosure documents that were ultimately given to Mr Ahmed, but maintained that he had given this figure because it was what he understood the rent to be at the time, which was based on him having negotiated the lease for the franchise in 2014. Mr Tatsis accepted that he was wrong to state that the store was not franchised and that it was owned by Ultra Tune. He said that what he was seeking to convey, ineptly, was that the current franchisee, Mr Gray, wanted to sell the franchise and had left it to him to see if that could occur. In cross-examination, Mr Tatsis said that, in his mind, it was true that Ultra Tune ran the site, because it had been handed to him to sell. That gloss on his text messages cannot be accepted.
2. As to his text that the store had been “*open for about 6 months now*”, Mr Tatsis accepted that the site in Parramatta had operated for a long time in various forms since 1980. He maintained that what he meant by this statement was that the store had been “*reopened*” for the six-month period, which he said in cross-examination was not misleading because he told Mr Ahmed the “*full history*” of the franchise, evidence that is again rejected. Mr Tatsis said that his text message was to be understood in the context of a conversation he and Mr Ahmed had in which Mr Tatsis showed him “*where we used to be in Harris Street; where we moved; why they left*”.
3. As part of the conversation that had allegedly taken place, Mr Tatsis said that he told Mr Ahmed that the goodwill of the franchise had been dissipated and the “*cops aren’t coming back*” (apparently a reference to the contract to provide services to the police, which had been lost, see [173] to [174] above). He claimed to have said that there had been issues and that Ultra Tune would need to start again. Mr Tatsis’ attempt to explain away the misleading, if not wholly false, representation by text that the Parramatta site had only been open for about six months is rejected. As the following emails indicate, Mr Tatsis was fully aware of the value to Mr Ahmed in representing that the Parramatta site was new or recently opened, especially in light of Mr Ahmed’s previously expressed wish to buy a new site, but being unable to afford it.
4. On the same day, 17 August 2015, Mr Ahmed sent an email to Mr Tatsis as follows:

Hi Nick

Yes I like the site. What is the selling price?

1. Mr Tatsis responded by email, including a repetition of the incorrect representation that the Parramatta site had only been open for about six months, as follows:

Hi Nakash,

Selling price :$175k

Opened about 6 months

Averaging turnover $5000 per week and growing every week.

1. On 20 August 2015, Mr Ahmed sent Mr Tatsis an email in the following terms:

Hi Nick

Can you send me the financial reports?

I will get the confidentiality agreement signed from my accountact [sic] if I show to him the reports.

1. On the same date, Mr Tatsis responded by email in the following terms (verbatim):

No reports… you said you were interested in a new site ? Please treat this as a new site.with the added bonus of some turnover.as I’ve previously mentioned it’s averaged about $5k a week in turnover in the past few months.

1. In cross-examination, it was put to Mr Tatsis that it was open to him to obtain the financial reports for the Parramatta site from Mr Gray. Mr Tatsis said that, “*we were selling the site as a new site. Financials means zero*”. It was put to Mr Tatsis that Mr Gray was obliged to provide financial statements to Ultra Tune for the calculation of Ultra Tune’s royalty. Mr Tatsis said that senior counsel for the ACCC was “*confusing financials with turnover*”. He said that he was more than willing to share the turnover figures of the franchise, but had no “*financials*” from Mr Gray whatsoever. Mr Tatsis undoubtedly intended to convey to the Court in his cross-examination the impression that there was no financial information available for the Parramatta site at all. However, it is clear that he must have known that some degree of such information could have been obtained, but that this would not have assisted in convincing Mr Ahmed to buy that site. Rather, it might have had the opposite effect. Mr Tatsis must have been aware of that risk. I infer that he decided not to take that risk.
2. I therefore find that Mr Tatsis knew that he could have obtained relevant financial information about the Parramatta site from Mr Gray. I infer that he did not want to obtain and provide such information, at least in part because it would have revealed the fact that the franchise was neither operated by Ultra Tune, nor had it only been open for about six months.
3. Mr Ahmed’s evidence was that he then called Mr Tatsis on the same day and had a conversation with him in words to the following effect, including, as may be seen, a further reference to the recurrent misleading representation that the Parramatta site had only been open for about six months:

Mr Ahmed: Could I see the financial reports?

Mr Tatsis: I’m telling you it’s $5,000. Why do you want to waste time and look at the financial reports? You should consider it as a new site as it’s six months old.

Mr Ahmed: Ok, I can go inside by myself to look at the site and speak with the staff there?

Mr Tatsis: You’re not allowed to go by yourself. I will accompany you. I will take you in later. There is one mechanic and one accountant. They can’t give you any information as they are just workers. Everything has to come from me.

1. Mr Tatsis disavowed having any recollection of the above telephone call having occurred. He said that if there was such a call, he would not have said that Mr Ahmed could not go in to talk to the staff. In his affidavit, he said he had no objection to Mr Ahmed going in and introducing himself. I accept Mr Ahmed’s evidence as to this conversation and reject Mr Tatsis’ denial that he sought to restrict access by Mr Ahmed to the Parramatta site.
2. Mr Ahmed gave evidence that he took into account Mr Tatsis’ advice on 20 August 2015 that the Parramatta site was six months’ old and already had a turnover. In particular, he said that he gave weight to the fact that the selling price was close to the price for a new franchise that had been suggested by Mr Tatsis, while the site had an existing turnover which he thought would take him five or six months to generate if he had bought a new franchise. Based on this, he considered the site to be a good opportunity which he wanted to pursue.
3. On 24 August 2015, Mr Ahmed sent an email to Mr Tatsis attaching his completed application form with his account statement, and asking for a date to finalise the deal.

### Mr Ahmed inspects the Parramatta site with Mr Tatsis

1. On 31 August 2015, Mr Ahmed sent Mr Tatsis a text message requesting to meet on the same day to finalise the deal. On that day, at around 3.00 pm, Mr Ahmed and Mr Khalid met with Mr Tatsis at the Parramatta site. Mr Tatsis took Mr Ahmed and his brother inside the premises and showed them around. Mr Ahmed said that he did not speak with any of the staff because he was busy talking with Mr Tatsis, and because of the statements Mr Tatsis had made during their earlier discussion on 20 August 2015 to the effect that any questions should be directed to him (see [194] to [195] above]).
2. Mr Ahmed gave evidence that he and Mr Tatsis had a discussion in words to the following effect:

Mr Ahmed: Is there anything needed to be done when I take it over?

Mr Tatsis: No, everything is there as required. You just have to move in and start working. You don’t have to do anything extra.

1. As to this inspection, Mr Tatsis’ evidence in his affidavit and in cross-examination was inconsistent and difficult to follow. By affidavit, Mr Tatsis said (emphasis added):

I explained to Mr Ahmed that what would be required **as new equipment was a tyre machine, wheel aligner and air conditioning machine** …

…

**I deny that I said to Mr Ahmed that “everything is there as required”**. I told him, as I have said before, that the new equipment and the new signs were required and everything would be there by settlement.

1. However, in cross-examination, Mr Tatsis accepted that he had said to Mr Ahmed that “*everything is there as required*” and that his affidavit was false to that extent. As to the asserted explanation of the equipment that would be required at the site, it was put to Mr Tatsis that at no point in time up to and including 31 August 2015 had he told Mr Ahmed that there would be any need to purchase expensive new equipment comprising a tyre changing machine, a wheel aligner and an air conditioning unit. Mr Tatsis’ response was that “*specific equipment wasn’t mentioned*”. Mr Tatsis’ evidence was that he told Mr Ahmed that Ultra Tune required $33,000 “*to get the place compliant*”, and that he was not specific on what needed doing. Mr Tatsis denied that that he was making up his story as he went along. Despite that denial, it is obvious that this was precisely what he was doing in the witness box on this topic in particular, but also at other points in his cross-examination.
2. In cross-examination, Mr Tatsis also conceded that he never told Mr Ahmed that Mr Gray or Harriscoop Pty Ltd were the current operators of the franchise. It was put to him that at no point had he suggested to Mr Ahmed that anyone other than Ultra Tune operated the franchise. Mr Tatsis accepted that this might have been the case. I find that this was in fact what happened, further aggravating the “*open for six months*” misrepresentation, whether styled as a misleading statement or deceptive conduct or both.

### Mr Ahmed agrees to purchase the Parramatta Franchise

1. Mr Tatsis, Mr Ahmed and Mr Khalid then went to the site parking lot and had a discussion about the price of the franchise. Mr Tatsis agreed to lower the price to $160,000, plus $3,000 for the Ultra Tune training.
2. According to Mr Ahmed, he and Mr Tatsis had a conversation in words to the following effect:

Mr Tatsis: The centre is up to date and has all of the equipment. We will give you everything you need.

We will need a deposit of $33,000 paid into a transition holding account. I’m not willing to process the paperwork until you pay the deposit.

Mr Ahmed: Why do you need a deposit?

Mr Tatsis: We need it to see that you are a serious buyer and not a time waster. We are a big company and will not run away with your money. If the deal doesn’t go ahead, your money will be refunded.

Mr Tatsis: After the training we can set a settlement date. Then you pay the rest. The faster you pay the faster we get the paperwork started. It’s up to you.

The rent is only $45,000 a year.

Mr Ahmed: Do I have to buy anything?

Mr Tatsis: No everything is there you don’t have to get anything.

1. In cross-examination, Mr Tatsis accepted that he had indicated that the centre was “*up-to-date and has all the equipment*” and that he would require a deposit before he would process the paperwork. However, he said that there was “*no chance*” he would have made the comments that the deposit was to show that Mr Ahmed was a serious buyer and would be refunded if the deal did not go ahead. Instead, he said that he told Mr Ahmed what he envisaged, namely, that he would bring the centre up to specification for Mr Ahmed. He claimed to have said to Mr Ahmed, “*You won’t need to do a thing. You will get it turnkey*”. Mr Tatsis accepted that he had represented the rent as being $45,000 per year. Mr Tatsis accepted that Mr Ahmed had asked him if he would need to buy anything. Mr Tatsis accepted that he responded by saying that “*everything is there*”, and that Mr Ahmed would not need to get anything. I accept Mr Ahmed’s evidence on this topic over that of Mr Tatsis.
2. Mr Ahmed gave evidence that, following this discussion, he did a rough calculation in his head about the franchise costs and his budget. He said that, based on the advice he had received from Mr Tatsis, he was more persuaded to enter into the deal because he considered that the Parramatta site had potential to generate more customers in the future given its age (about six months) and existing income. That is, a site with that level of business that had been operating for a relatively short time had potential for growth that would not be so readily achieved for a longer-running site that was closer to having already realised its potential.
3. According to Mr Ahmed, at no point during the meeting did Mr Tatsis advise him of any other reason why the deposit was needed. Similarly, he said that at no point did Mr Tatsis advise him that there were any other expenses associated with the proposed franchise agreement, or that the Parramatta site needed any refurbishment.
4. Mr Ahmed’s evidence was that, at the conclusion of the meeting, he advised Mr Tatsis that he wanted to proceed and that he did so based on his account of what Mr Tatsis had told him about the franchise, including the representation that the deposit was refundable.
5. I accept Mr Ahmed’s evidence as summarised in the preceding three paragraphs.

### Mr Tatsis requests a deposit

1. On 2 September 2015, Mr Tatsis sent an email to Mr Ahmed in the following terms (verbatim; emphasis in original):

Hi Nakash

Recapping our Parramatta deal.

* **Full price $163,000** as per negotiation
* The above will include all equipment at the site as inspected except hand tools
* Will include induction training
* Induction scheduled for **21st September** in Melbourne
* Proposed start date **1st October 2015**
* Stock on hand can be negotiated on settlement or returned to suppliers

Kindly deposit $33k into our transitions holding account and I will get the franchise agreement happening

[account details]

The balance of $130k due on settlement .

1. In cross-examination, Mr Tatsis was asked several questions about this email. He accepted that he had copied Mr Cott and Mr Sean Buckley to the message, being senior figures at Ultra Tune. He accepted that he had done so because, as a deal was imminent, they would need to look at it. He accepted that he would need to include the main features of the deal in such an email. It was pointed out to Mr Tatsis that he had specified that the purchase price of $163,000 would “*include all equipment at the site as inspected except hand tools*”. Mr Tatsis accepted that this included the tyre-changing machine, the wheel aligner and the air-conditioning unit that were already on site.
2. It was put to Mr Tatsis that he did not indicate anything in the email about the need to purchase any new equipment. Mr Tatsis replied that Mr Ahmed “*didn’t need to know*”, which is on any view a strange thing to say in light of repeated representations that nothing more was needed by way of equipment for the Parramatta site.
3. Mr Tatsis said that it was his job to make the Parramatta site compliant and up to current specification, and that Mr Ahmed would not know what that meant. He said that the purchase of equipment for the Parramatta site could be inferred, insofar as he had stated in the email: “*Kindly deposit the 33k into our transitions holding account*”. That evidence is absurd and must be rejected.
4. For his part, Mr Cott accepted that he would most likely have seen this email, but could not recall reading it. He accepted that there was no reference made to any requirement that additional equipment be purchased. He accepted that there was nothing in the email to say that the deposit was to be expended on purchasing equipment or signage. Mr Cott was asked whether anyone from Ultra Tune had made it known to Mr Ahmed that he would be required to expend that deposit money on new equipment or signage. Mr Cott said that, to his knowledge, no one had done so. He said that that was the “*minutiae*” of the deal, and was not his job.
5. Mr Ahmed’s evidence was that between 2 and 4 September 2015, he had a conversation with Mr Tatsis in words to the following effect:

Mr Tatsis: When are you going to pay the deposit?

Mr Ahmed: It is coming. How do I get a receipt?

Mr Tatsis: Just deposit the money. When you pay, we’ll send you a receipt from Melbourne head office later.

Mr Ahmed: When I submit the money I should get the receipt for it at the same time. I will come to your office in Sydney and will pay you there so that I could get a receipt at the same time.

Mr Tatsis: We don’t have the equipment to do that in New South Wales. The receipt will come from the Melbourne office.

Mr Ahmed: I need the receipt at the time of payment.

Mr Tatsis: Why are you being childish? We are a big company and you should trust us and we’re not going to take your money away. Do you have any trust issues with us? If you don’t trust us now then how will we work together in the future? It’s a normal business procedure. You pay us the money and then we give you the business.

Mr Ahmed: I replied to this in a text message that I don’t have any trust issue. It’s a normal business procedure to ask for a receipt for records. My accountant also suggested this. I will get a representative to pay the deposit at the Melbourne office so they can get the receipt.

…

Mr Tatsis: I don’t believe in lawyers or accountants. They mess things up. If you don’t deposit the money then it’s cancelled and we don’t go any further.

…

Mr Tatsis: The receipt will not be given at the same time. When the funds are cleared then you will get the receipt.

1. Mr Ahmed’s evidence was that he felt intimidated by what Mr Tatsis told him during this discussion and the manner in which he spoke to him. Mr Ahmed said that Mr Tatsis sounded angry and condescending. Mr Ahmed described feeling very pressured. I have no doubt that he was accurately describing his state of mind at that time, and that it was reasonable for him to possess such a state of mind in all the circumstances.
2. On this point, Mr Tatsis’ evidence on affidavit was that, sometime after his email of 2 September 2015, he rang Ultra Tune’s head office to see if the $33,000 had been paid and discovered it had not. He deposed to then having called Mr Ahmed by phone to find out what the hold-up was. He said that Mr Ahmed raised that he needed a receipt and wanted to come to Ultra Tune’s office in Sydney. Mr Tatsis recalled having told him that there was no such office. Mr Tatsis did not dispute that Mr Ahmed then suggested that his friend attend Ultra Tune’s head office in Melbourne. Mr Tatsis recalled saying that this was fine and then asking “*is there a trust issue here?*” He recalled Mr Ahmed saying that his accountant wanted a receipt. He said that he told Mr Ahmed that to get a receipt, he had to make the payment first. Mr Tatsis denied that he was angry or condescending. He also denied saying to Mr Ahmed that, if there was no deposit, “*it’s cancelled*”. The evidence of Mr Ahmed is accepted on this topic over that of Mr Tatsis.
3. Mr Ahmed gave evidence that Mr Tatsis called him two or three times between 2 and 4 September 2015. He recalled having a discussion on each occasion in words to the following effect:

Mr Tatsis: Give me the $33,000 and I will get the franchise thing happening.

Mr Ahmed: When will I get a copy of the agreement?

Mr Tatsis: Just pay the deposit and we will start the paperwork.

1. Mr Tatsis denied that any of these further discussions took place. I am satisfied that these discussions did take place as described by Mr Ahmed. I also accept Mr Ahmed’s evidence that he felt pressured to make a decision about the franchise as a result of the above discussions that he described having taken place. I also find that such pressure was intentional on the part of Mr Tatsis, being consistent with his concern and experience with potential franchisees not going through with the acquisition of a franchise.
2. On 3 September 2015, Mr Ahmed sent Mr Tatsis a text message asking if he would accept payment in person. Mr Tatsis replied on the same date, advising that he would prefer a cheque payable to Ultra Tune Transitions Pty Ltd.
3. On 4 September 2015, Mr Ahmed was advised by his contact in Melbourne, on advice from his friend’s accountant, that Mr Ahmed should not make a deposit without receiving any proof that it had been made. Mr Ahmed sent Mr Tatsis a text message asking for a receipt for the deposit. Mr Tatsis agreed.
4. On 4 September 2015, Mr Ahmed deposited $33,000 by bank cheque into the account stipulated by Mr Tatsis. Mr Ahmed received confirmation by text message from Mr Tatsis that the deposit had been received.

### Mr Gray’s knowledge of the prospective sale

1. Mr Gray, being the current franchisee at the Parramatta site, recalled having been notified by Mr Tatsis that he had found a purchaser, albeit that Mr Tatsis did not advise him of the purchase price. He was not informed by Mr Tatsis that he had received a deposit from the potential buyer. Mr Gray’s evidence was that he heard through a third party that the franchise was selling for around the $160,000-$170,000 mark. He said that at no point had he had any discussion with Mr Tatsis whereby he required a deposit to be paid for the transaction to go ahead. Having been made aware of the deposit, Mr Gray said that he was a little bit disappointed and annoyed that he had not received any of the money, as he had moved and laid off staff, and shut the business down for a period of time. However, he said that in the end it was irrelevant as the deal had not gone through. Limited to his knowledge, Mr Gray denied that a draft contract of sale was ever prepared, or that he had any conversations about such a document with Mr Tatsis. He said that he assumed that everything was going to be done through Ultra Tune.

### Mr Gray’s evidence as to the equipment already on the premises at the Parramatta site

1. Mr Gray gave evidence that he had purchased equipment for the Parramatta site from a company named **Burson** Auto Parts when he was opening the centre in March 2014. He confirmed that he had checked Ultra Tune’s requirements for equipment, and satisfied himself that the purchased items were compliant with those requirements. On this point, Mr Gray flagged that his air-conditioning machine was not the brand that is specified by Ultra Tune in its requirements. Mr Gray said that he was not sure whether this brand specification was in place at the time he made the purchase in 2014, or had been introduced later.
2. Mr Gray gave evidence that the equipment he had purchased for the Parramatta site included a tyre-changing machine, a wheel aligner and an air-conditioning machine. Each was detailed in an invoice dated 14 February 2014 that Mr Gray had produced to the Court. Mr Gray gave evidence that he had made the purchases through “*Ultra Tune Dural*” on behalf of Harriscoop Pty Ltd, as it was less difficult to borrow money under a pre-existing entity with a trading history. He said that the invoice date was probably the date that the finance would have been approved and the point at which equipment would have been started to be delivered. Mr Gray gave evidence that the supplier he used, Burson, is one of the major suppliers for Ultra Tune, and is considered by Ultra Tune to be a preferred supplier.
3. There was no suggestion in Mr Gray’s evidence that any of the items were other than new when purchased. He confirmed that each of the items met Ultra Tune’s requirements, save as to the requirement that the air-conditioning unit be a particular brand. Regarding that particular item, Mr Gray said that although it might not be the brand that Ultra Tune requests on the intranet, or on their equipment list now, it “*does everything that is required*”.
4. Mr Gray’s evidence was that these items remain in use at the Parramatta site, in good working order. He confirmed that no one from Ultra Tune had ever had any conversation with him to suggest that the three items of equipment were not compliant with Ultra Tune’s requirements, save only that Mr Tatsis made a comment to him, at some point after the sale had fallen through, that he assumed that the wheel-aligner did not work, because it had been sitting in the corner and was covered with other equipment. According to Mr Gray, he indicated to Mr Tatsis that the machine still worked, evidence that is accepted.
5. Mr Gray was asked whether there were audits by Ultra Tune of his franchise. He gave evidence that a franchise support manager would perform inspections every couple of months, although he would never provide any documents afterwards. Mr Gray confirmed that at no point in time was he ever notified that he needed to replace his tyre changer, wheel-aligner or air-conditioning unit.
6. Mr Gray confirmed that no new tyre-changing machine, wheel aligner, or air-conditioning unit had been delivered to the Parramatta site in the interim. He also confirmed that there was no such equipment sitting in packaging on site. In light of this and the preceding evidence already discussed, I find that there was never a need for any additional equipment at the Parramatta site and that this aspect of Mr Tatsis’ written communications to Mr Ahmed was accurate and truthful. Necessarily, the evidence in those written communications are accepted in place of the contrary evidence from Mr Tatsis, including his evidence to the effect that further equipment was required to make the site compliant with Ultra Tune’s requirements.

### The 10 September 2015 letter

1. Mr Cott, the National Operations Manager for Ultra Tune, gave evidence that he sent a letter dated 10 September 2015 by post to Mr Ahmed to advise him that the $33,000 he had paid into Ultra Tune’s account on 4 September was to be used to set up the store as per Ultra Tune’s current “*standards and conditions*”. The copy of the letter that was in evidence was in the following terms:

Dear Nakash,

I am confirming your discussion with our NSW State Manager Nick Tatsis that the deposit paid for the franchise store at Parramatta is to be utilised to set up the store as per current Ultra Tune’s standards and conditions.

The equipment purchased is outside the normal franchise agreement and a separate contract will be formatted.

Yours faithfully

[Signature]

Tony Cott

National Operations Manager

CC: Nick Tatsis, Hamish Murdoch

1. Mr Ahmed denied having received this letter. That denial is accepted. The basis for that acceptance is bolstered by the following discussion about an email sent the next day by Mr Cott.
2. Mr Tatsis said that he “*may have*” received a copy of the letter but, given that he could not recall noting that down, his answer was that he had not. He then suggested that it might have been sent to him by email, which he accepted was the ordinary way in which Mr Cott would send him documents. There was no evidence that such an email had ever been sent.
3. I find that the 10 September 2015 letter was not only never received by Mr Ahmed, but also that it was never sent to him. That is because I find that this letter was a fabrication that was only brought into existence some time after Mr Ahmed had advised, as detailed below, that he would not be proceeding to purchase the Parramatta site franchise. I find that the reason this letter was brought into existence and backdated to make it look like it had existed at the relevant time was to bolster the basis for resisting the return of the deposit to Mr Ahmed. The only aspect of this fabrication that cannot be clearly ascertained is whether the letter was fabricated only to deceive the ACCC, or whether it was also designed to affect this Court’s decision. In the absence of sufficient evidence to conclude the latter, I find that it went no further than to seek to persuade the ACCC that Mr Ahmed was not entitled to a refund, but that having gone this far, Mr Cott and perhaps others at Ultra Tune felt they could not walk away from the deception, including maintaining this position in their evidence in this proceeding.

### Mr Cott acknowledges receipt of the deposit

1. There was undisputed documentary evidence that on the next day, 11 September 2015, Mr Cott sent an email to Mr Ahmed. The email was as follows:

Dear Nakash

I can confirm that we have received your deposit for the purchase of Ultra Tune Parramatta of $33,000 paid into our account on 4th September 2015.

We will be holding the incoming franchisee training from 21st to 25th September… [further details of the training omitted]

Let me know if you have any questions.

1. Mr Cott was asked whether it was his intention that any part of the deposit be used to pay for signage. He said that he was not doing the deal. It was pointed out to him by senior counsel for the ACCC that he was confirming receipt of the deposit. Mr Cott said that he did so because Mr Ahmed wanted to know if Ultra Tune had received his money. He said that he sent the email to Mr Ahmed to provide that confirmation and to give Mr Ahmed the dates for the training.
2. Mr Cott accepted that he had no understanding of the structure of the deal at the time he sent the email to Mr Ahmed. He said that he left the structure up to his state managers, and would get involved at the end to make sure things were the way he wanted them. It was put to Mr Cott that he had no understanding that the deposit was to be used to pay for equipment. Mr Cott denied this, albeit somewhat equivocally, stating: “*I think I did know*”.
3. The nature of this response stood in contrast to the letter Mr Cott had purportedly sent on 10 September 2015, one day prior. It was illustrative of the general difficulty that Mr Cott demonstrated in maintaining a coherent narrative of what he asserted had happened. The tone and content of the 11 September 2015 email from Mr Cott reinforces a conclusion above that the purported 10 September 2015 letter is a fabrication, designed to justify, *ex post facto*, keeping the deposit that Mr Ahmed had paid.
4. I therefore find that the purported use of the deposit money to buy additional equipment for the Parramatta site was at all times a fiction and no more than a desperate attempt to justify keeping the deposit that had been paid by Mr Ahmed.
5. I find that the attempt to have Mr Ahmed pay more money for better signage was genuine. However, it was never brought to Mr Ahmed’s attention at any time prior to the training course so as to form any part of what Mr Ahmed had agreed to pay for when he had paid the deposit.
6. On 11 September 2015, Mr Ahmed sent a reply email to Mr Cott, requesting a deposit receipt in a form other than an email, and asking where the training was to take place. Mr Ahmed did not receive a response to this email.
7. Mr Ahmed gave evidence that he then telephoned Mr Tatsis and had a conversation in words to the following effect:

Mr Ahmed: I got an email from Mr Cott saying they have my deposit but I need a proper receipt for the deposit.

Mr Tatsis: You can treat the email as a receipt. The training is going to be held in Melbourne. You can take a friend with you.

1. Mr Ahmed decided to take a friend with him to the training.
2. In his affidavit evidence, Mr Tatsis had a largely similar recollection of this conversation. However, he said that he did not recall agreeing that a friend could attend the training with Mr Ahmed. Rather, he said that it was his understanding that Mr Ahmed and his brother were going to do the training. Nothing turns on this difference.

### Mr Ahmed asks for further details about the Parramatta site

1. On 16 September 2015, Mr Ahmed sent an email to Mr Tatsis asking for further details about the Parramatta site as well as asking for a sales statement for the months of August and September 2015. The email relevantly explained the requests as follows:

Hi Nick

As I am going for training in few days and the agreement will be ready during that period. So I have certain final things to do before leaving. I want to do a final check and make sure that all the equipment are in working condition.

There are the few details I want you to provide me so that I can have an idea about running expense of the workshop. Then according to that I have to arrange funds to bear the running expense in case I don’t make enough money at the start.

1. On 17 September 2015, Mr Tatsis replied by email, entering his responses against the text of each of the items specified by Mr Ahmed (Mr Tatsis’ responses in bold, per the original):

1. Utility Bills (electricity, Internet, telephone) **approx. $7000 per annum**

2. Maintenance Cost of the equipment (if there any) **very minimal $1000 per annum for hoist service & sundry repairs**

3. Salary of the mechanic and the apprentice **good head technician $70k per annum,.. apprentice 30k per annum**

4. Sales statement for the month of august and September

**August $23k**

**September $ 16k till yesterday.**

1. Mr Tatsis did not include any sales statement in that email. Both Mr Ahmed’s email and Mr Tatsis’ response reinforce the falsity of the suggestion that any part of the deposit was needed for additional equipment for the Parramatta site. The response is also circumstantial evidence that the idea of attributing the deposit as a payment for equipment had not emerged at that time.

### Mr Ahmed attends Ultra Tune’s training in Melbourne

1. On 21 September 2015, Mr Ahmed commenced a five-day training course in Melbourne for new and prospective Ultra Tune franchisees. The training course was conducted by Mr Cott.
2. On the first day of the training course, Mr Ahmed was provided with a bundle of documents by Mr Cott. The bundle included a letter from Mr Chong to Mr Ahmed dated 18 September 2015. The letter enclosed a franchise agreement, deed of guarantee and indemnity, disclosure document dated 17 September 2015, copy of the franchising code, direct debit request authorities, and a document of occupation, annexing the existing lease agreement. It is not in dispute that this was the first time that any of these documents had been provided to Mr Ahmed.
3. Mr Ahmed read the documents provided to him by Mr Cott in Melbourne. After reviewing the disclosure document and the draft franchise agreement, Mr Ahmed became concerned that the costs involved in becoming an Ultra Tune franchisee were significantly more than had been communicated to him by Mr Tatsis. As set out in the lease, the rent was $50,000 plus GST rather than $45,000 (plus GST on Mr Ahmed’s understanding), a $5,000 or 11% increase, which on any view is a not insubstantial increase for a fixed cost. In his evidence, Mr Ahmed said that he became concerned that the franchise was not in fact a “*new*” franchise, as the disclosure document recorded it as having operated since at least 2001. There is no reason to doubt that Mr Ahmed’s concern was genuine.
4. On the second or third day of training, Mr Cott showed the training attendees a photo of illuminated Ultra Tune signage and said that everyone would need to install it.

### Mr Ahmed cancels the sale and seeks a refund

1. On returning to Sydney, Mr Ahmed sought a meeting with Mr Tatsis. Mr Ahmed’s evidence was that he met with Mr Tatsis on about 29 September 2015. Mr Ahmed told Mr Tatsis that he was not willing to pay for the illuminated signage that Mr Cott had raised as a requirement. On 30 September 2015, Mr Tatsis sent Mr Ahmed an email with revised costs for the site. He advised that the difference of upgrading to backlit illuminated signage would be $12,100, taking the sale price to $175,000. The email was in the following terms (verbatim):

Dear Nakash

Recap our discussion yesterday.

Rent is $45k per annum as quoted. Plus outgoings & GST….( outgoings vary ,currently approx. $5000 per annum ) confirming there is an 5 year option on the lease

As per the UTA operations manual all equipment is present and within specification

Illuminated backlit signage is now required at the Parramatta site, reason being it has now being classified as a high exposure site , Im sure you will agree there will be increased traffic flow due to the huge residential & retail development happening across the road.

The difference of upgrading to backlit illuminated signage from the aluminium panels signs is $12100.

This will take the sale price back to the original quoted price of $175k,..its Ultratune policy that the outgoing entity hands over the centre fully compliant ,..in this particular case it’s particularly important the illuminated signage is done now as the development opposite is still in construction phase ,..changing to illuminated signage later on with 300 odd apartments facing our building may prove a hurdle if the residents start complaining .

I have made several phone calls this morning ,..Please reply to this email what your intentions are ,..as you are aware franchise agreements have been drawn up & training has been provided ,..we had set a tentative settlement date of 1st October

I will speak to Head office management and forward you with expenses incurred to this point .

1. Mr Ahmed sent an email to Mr Tatsis on the same date. He relevantly wrote:

Dear Nick

After analysing the current situation I want to cancel the deal for the Parramatta centre. My decision is based on the following reasons. Firstly, as per the deal the centre doesn’t needed any refurbishment; such as the changing of the signage. I can’t afford this extra cost of $12100. Secondly, according to the deal the rent quoted was $45,000 plus GST and in the agreement it is quoted $50,000 plus GST. Thirdly, I was aware that the centre was opened about six months ago but according to the franchise agreement it is opened around 18 months ago. Initially the average turnover of $18000 the centre is making was acceptable to me as the centre was just opened around six months ago but after figuring out that it is 18 months old this turnover is very low as it is covering only the costs.

I really wanted to become the franchisee and be part of the ULTRA TUNE family that is why I went to the training. Sadly, the things aren’t turning out as they are supposed to be. I was ready to accept the new rent but the signage expense I can’t afford as the centre is currently not making any profit and I am not clear about the history of the centre.

Please refund me the deposit less the training cost.

1. Mr Tatsis replied on the same date, as follows (verbatim; emphasis in the original text):

Hi Nakash,

recount with my dealing with you and your brother

I had contact with you back in May ? you and the brother had a mountain of questions and over the course of several meetings we sorted through them and then talked about the Seven hills site ,.. you stated you were happy to proceed with an Ultra Tune centre but not ready financially ,I accepted your confidentiality agreement and postponed accepting your application at the time

You contacted me again several weeks ago and said you had gained financial backing and was ready to submit an application

In our lengthy discussions since & after showing you two other established sites and an independent in the process of re-branding , you expressed a wish to buy a new centre ,.. I asked you to look at Parramatta and treat it as a new centre , if it were suitable to you , let me know ,..I explained that it had some previous issues and we installed new management 6 months ago ,and were planning to sell it once the development across the road had finished , I also clearly explained that if we were to sell it now you are to treat it as a new centre with no turnover whatsoever (if there was some turnover that was an added bonus)

You expressed strong interest and forwarded an application and a deposit on the centre …a time and place was discussed and booked for Induction training,. Disclosure docs and a franchise agreement was prepared

Brief history on Parramatta

As previously discussed ,..the Parramatta centre has been active in various locations since the late 70’s

In late 2013 there was a partnership split with the long standing franchisee’s ,(brother & sister ) one of the partners declared bankruptcy as a default of those actions the franchise agreement & lease had to be automatically terminated by law

As per our tri-party agreement the landlord at the time asked us to take over the site for the remainder of the lease period ,..however with the rent at $80k plus per annum and a short term lease head office declined ,..the centre remained vacant for many months ,….the landlord approached again with a long term lease and much better rental terms ,.after a further rent negotiation the centre was re-opened by a multi-site franchisee approx. 18 months ago , to be run under management ,..without going into detail that management did the wrong thing by us and the franchisee ,..we lost a major fleet client due to this

The centre was closed very briefly pending some outcomes and re-opened 6 months ago with new caretaker management with a view to building it up and re-franchising to an owner-operator

For the record ,you are first and only potential franchisee to be offered this centre ,.. **the rent is $45k ,..there is variable outgoings that push it up to $50k +GST**. the fact that it has **18-20k ex GST** turnover per month and a customer database should be **looked at as a bonus not a negative** ,..when a new centre opens it has **ZERO turnover & ZERO database** ,..you also need to remember that any UT goodwill built up in the old Parramatta centres over the years has dissipated to neighbouring centres such as North Parramatta & Lidcome,…this is why its vitally important to have a strong capable owner operator running the operation to win this back ,.I clearly stated to you that I would not approve your application at a state level if you weren’t looking to be an owner operator ,..there has clearly being a miscommunication issue as it appears by the wording in your email that you have feel you were misinformed ,..this was never our intention ,our future success depends on you doing well at the centre ,if we didn’t feel you were up to the task we would not have approved the application and wasted valuable resources going forward with you ,..it’s not in our long term interests to mislead you ,nor are we trying to hid anything from you in any way shape or form ,.these are the facts , there’s a disclosure document in your possession that clearly lists all centre happenings.

As a goodwill gesture we are offering to **split the premium backlit signage costs @ $6000 each**

I would very much like you to join the Ultra Tune Family ,..I feel you can make a valuable contribution ,..hope this meets with your approval & let’s get this done

If you would still like to cancel the sale ,. Will forward you a summary of our costs to date.

1. On the same date, Mr Ahmed replied by email as follows (verbatim):

Hi Nick

It pains me as much as it pains you with the current predicament. I will not be going forward with the purchase of the franchise. I would highly appreciate that the deposit be refunded as soon as possible. I recall from our prior conversations that the full deposit , $33,000 , will be returned less the training fee of $3,000. So let me know when I can expect the $30,000.

1. On the same date, Mr Tatsis replied by email as follows (verbatim):

Ok mate that’s your

The deposit was refundable before paperwork was instigated

A lor of time & work has gone into preparation .

1. On the same date, Mr Ahmed replied by email as follows:

You told me that the deposit will be refundable before the signing of franchise agreement. Only training fee is deductible and the remaining deposit should be returned.

1. Mr Ahmed’s evidence was that he did not receive any reply to this email. No such reply was in evidence. It is safe to conclude that no reply was ever sent. It is highly likely that the idea of fabricating the circumstances of the deposit money being used to purchase additional equipment was settled upon after this time. I find that this was what happened, but cannot determine with precision when.

### Mr Ahmed writes to Mr Cott seeking a refund

1. On 1 October 2015, Mr Ahmed sent an email to Mr Cott in the following terms (verbatim):

Hi Tony

I am cancelling the deal of the Parramatta centre. I am not cancelling because I changed my my mind its because the things turned out were not the part of the deal. Here is the recap of all the deal.

I met Nick and visited Narellan and the Peakhurst site. I did’t like the sites and then he told me about the Parramatta site. I liked the Parramatta site and wanted to buy it. The information I was provided before the deal was not accurate. I was told the base rent was $45000 plus GST and after getting the agreement It was mentioned the base rent of $50,0000 + GST. I was not informed about the changing in the signage before the deal. I was told that all the parts will be on consignment and I don’t have to purchase any. During the training you informed me that not all the parts is on consignment. I asked about the sales of the month of August and was informed that it was $23000 which I found later that it is less than $20,000. I was also not clarified about the history of the centre before the deal. I was told that currently there is no franchisee for the Parramatta centre and it is owned by Ultra Tune.

I was wrongly informed about all these things. I wouldn’t have gone for the deal if I knew these things before the deal. Nick told me before depositing the money that my deposit will be refunded if the deal doesn’t go through. Now he has threatened me that I will lose my deposit if I don’t go ahead with the deal of purchasing the franchise.

This turn of events has lead me to become very mentally stressed and I do not find myself to be able to trust this deal. I need my deposit returned to me.

1. The only fault that I can find with this email was that Mr Ahmed did not also insist on the $3,000 training fee being refunded as well, in circumstances in which it is clear that he would not have paid for or attended such training had he been told the truth about the Parramatta site franchise. Mr Ahmed should receive the full $33,000 that he paid under the influence of highly misleading representations that plainly went to the heart of his decision to pay the deposit and training amounts totalling $33,000.

### The 4 October 2015 letter

1. Mr Cott gave evidence that he had sent a particular letter and invoices to Mr Ahmed on 4 October 2015. The documents purported to advise that the $33,000 deposit had been used on training and the purchase of equipment and signage. Mr Ahmed denied having received either the letter or the enclosed invoices. I accept Mr Ahmed’s evidence for two reasons. First, he was a reliable and truthful witness. Secondly, and more importantly, he could not have received those documents because, as the reasons below demonstrate, I find that the letter was a fabrication, as were most, if not all, of the purported enclosures.
2. The purported letter and the three enclosures were put in evidence before the Court as an annexure to an affidavit of Mr Ahmed, who deposed to having seen the letter for the first time when shown by an employee of the ACCC. All four documents have been reproduced as annexures to these reasons to aid a better understanding of them, especially given the serious adverse conclusions I have reached about those documents.
3. The ACCC submits that not only were the letter and enclosures not sent to Mr Ahmed, but that they were not brought into existence until 2016 to justify Ultra Tune’s position in its dealings with Mr Ahmed. As the following narrative explains, that submission must be accepted.
4. On its face, the purported letter (reproduced as Annexure A to these reasons) relevantly states (verbatim):

4th October 2015

Mr Nakash Ahmaed

…

Dear Nakash

Please be advised as per our recent discussion last week, I write in reference to the deposit previously paid on the 4th September for the Franchised store at Parramatta which have informally informed us that you no longer agree to purchase.

As per previous discussions and correspondence with our NSW State Manager Mr Nick Tatsis the funds have been used for the following.

1. Franchisee training attended in Box Hill Victoria on the 21st through to 25the September 2015.

2. Signage previously authorised as per the attached quote.

3. Equipment purchased as per the attached invoice and previously sent which was done outside the franchise agreement.

Yours faithfully

Tony Cott

National Operations Manager

CC: Nick Tatsis, Hamish Murdoch

1. The purported enclosures to this supposed letter comprise an invoice for training, an invoice for equipment and an invoice for signage. It is convenient to refer to them respectively as the “*Training Invoice*”, the “*Equipment Invoice*” and the “*Signage Invoice*”.
2. The “*Training Invoice*” (reproduced as Annexure B to these reasons) purports to have been issued on behalf of Ultra Tune. It is addressed to “*Ultra Tune Parramatta*” and bears the date “*15-Sep-2015*”. The invoice reference number is “*242351*”. The single item invoiced is described as “*Training*”, having been incurred for the week ending “*15/09/2015*”. The invoice specifies a total amount of $3,300.00 (including GST) as owing, on payment terms of 7 days.
3. The “*Equipment Invoice*” (reproduced as Annexure C to these reasons) also purports to have been issued on behalf of Ultra Tune. It is addressed to “*Ultra Tune Parramatta*” and bears the date “*23-Sep-2015*”. The invoice reference number is “*242352*”. Three items are invoiced, being:
4. “*Wheel Aligner WS-5888-ERT*” – $10,890.00 (including GST);
5. “*Tyre Fitting Machine WS-TA632-A*” – $3,949.99 (including GST); and
6. “*Air Conditioning UT-105CM*” – $5,280.00 (including GST).

A total amount of $20,119.99 (including GST) is specified as owing on payment terms of seven days.

1. The “*Signage Invoice*” (reproduced as Annexure D to these reasons) purports to have been issued by a company named “*Marlin Signs*”. It is addressed to “*ULTRA TUNE HEAD OFFICE*” and titled “*Parramatta Signage Rebrand*”. It refers to “*Marlin Job No: J001801*” and has the invoice number “*INV-1083*”. It is dated 22 September 2015. A number of items are invoiced, being:
2. “*ultratune 1200mm high Lightbox with ACM Face Push through lettering*” – $6,600.00;
3. “*Ultratune Standard Menu Board 1220x2000mm*” – $970.00;
4. “*Ultratune and Ultratyres logos*” – $709.50;
5. “*Router cut “Auto Service Centre” & Phone number*” – $525.00;
6. “*Freight to location*” – $787.50;
7. “*Access Equipment Hire*” – $2,062.50;
8. “*Installation*” – $1,960.00; and
9. “*Onsite Painting*” – $2,550.00.

A total amount of $17,780.95 (including GST) is specified as owing, with a due date of 22 July 2016.

1. In his affidavit, Mr Cott gave the following evidence as to these documents:

By letter dated 4 October 2015, I wrote to Mr Ahmed saying that the $33,000 had been spent on his training, the backlit signage and equipment. That letter is tab 44 to Mr Ahmed’s affidavit. It attaches the invoices for the purchases. The letter was sent to Mr Ahmed at the address of he and his brother which was [address details].

1. However, in cross-examination, Mr Cott sought to clarify this evidence. While he maintained that he had sent the letter, the *Training Invoice* and the *Equipment Invoice* to Mr Ahmed, he denied that the *Signage Invoice* was, in fact, the fourth document that was enclosed and sent with the letter. Instead, he said that the fourth document was a quote from Marlin Signs. There is no suggestion that the quote document was other than genuine. This was another example of Mr Cott changing his story to suit his position. The inference that is able to be drawn is that, the authenticity of the invoice having been challenged extensively in the evidence the day before, Mr Cott wished to revise and thereby protect his position.
2. In cross-examination, Mr Cott was asked how he had sent his letter to Mr Ahmed. He said that he thought “*we [Ultra Tune] posted it*”. By way of explanation, Mr Cott said that he would have written it and given it to his personal assistant to put in the mail, if he did not put the stamp on it himself and put it in the outbox. Mr Cott was asked if he was aware that 4 October 2015 was a Sunday. He said that it would not surprise him. He was asked if he emailed the letter to Mr Ahmed. He said that he “*may have, but that was [his] old laptop*”. This was a reference to his evidence that he had lost the data on his laptop at some point in 2016 due to a computer “*crash*”.
3. An explanation was sought from Mr Cott as to why he had elected to write a letter to Mr Ahmed. It was pointed out to Mr Cott that, in answer to a notice to produce, Ultra Tune had been unable to locate any other letters that he had sent on letterhead in the periods 1 September 2015 to 20 October 2015, and 22 June 2016 to 11 August 2016. He accepted that he had not sent any letters to an Ultra Tune franchisee or potential franchisee in those periods. He said that he does not write many letters. He said that he is not a good letter writer.
4. Mr Cott was then taken to a letter signed by him and dated 16 September 2015 which had been found among other documents provided by Ultra Tune in answer to a different category of documents sought in the notice to produce. It was put to him that his evidence was wrong insofar as he had suggested that he did not write a single letter in the September to October 2015 period. He denied this. He said that he had had his personal assistant write this letter, although he could not convincingly explain why the writing of such an important letter would be delegated in that way. It was pointed out to him that this was inconsistent with prior evidence he had given to the effect that he wrote most of his own letters and did not have very much administrative assistance. He said that this was an exception.
5. Mr Cott was shown various differences between the purported letter dated 4 October 2015 and the undoubtedly genuine letter dated 16 September 2015. This included the fact that the address block in the 4 October 2015 letterhead specifies a slightly different Australian Business Number, a different post code for what is otherwise the same address, and includes reference to “*Ultra Tune Head Office*”, which the other letterhead does not. It was also pointed out that, in contrast to the 4 October 2015 letter, the 16 September 2015 letter features metadata at the bottom of the page, in the form of a line reading: “*(\sloans 150916.docx)*”. It should be noted that the 16 September 2015 letter on its face refers to having been sent via email.
6. Mr Cott’s explanation for the differences in the form of the letter template was that he had written the 4 October 2015 letter on his laptop, and his personal assistant had written the 16 September 2015 letter.
7. It was pointed out to Mr Cott that Ultra Tune had been unable to produce the original, electronic copies of the letters dated 10 September 2015 and 4 October 2015 in answer to a notice to produce issued by the ACCC. Mr Cott accepted that he had given instructions for Ultra Tune to respond to the effect that his computer had crashed in the first quarter of 2016, and that he had been unable to locate any other electronic copies. It was pointed out that, in answer to a different category of documents sought, Ultra Tune had produced a copy of an email that had been sent by Mr Cott to Mr Lance Walter of Marlin Signs on 28 September 2015. Mr Cott accepted that he had been able to access that email in February 2018, despite the fact that his computer had crashed. When asked to account for this, Mr Cott said that he has a folder that he puts all the “*draft artworks*” for signage in, and that it was more likely that this email was a hardcopy document. It was pointed out to Mr Cott that Ultra Tune had been able to produce an email from him to Mr Walter dated 7 September 2015 that did not have attached any artwork.
8. For his part, Mr Tatsis gave evidence in cross-examination that he had never seen the 4 October 2015 letter before, notwithstanding that he had been copied as a recipient. He denied that it had been posted to him. He suggested that it would have come to him by email. When asked why he assumed that the letter had been sent by email, and not by post, Mr Tatsis expressed a (plainly erroneous) understanding of “*CC*” as terminology that is restricted to use in relation to the sending of emails. (In the age before photocopiers and personal computers, “*cc*” originally stood for “*carbon copy*” by which copies of documents were made by inserting a sheet of carbon paper between an original document as it was typed so that an exact copy of the typewritten text could be given to someone other than the addressee. The same means was used to create file copies of documents that had been sent out.) Mr Tatsis accepted that it was Mr Cott’s ordinary practice to send documents to him by email. There was otherwise no evidence that Mr Tatsis had in fact been sent this letter by email or post.
9. It was pointed out to Mr Cott that his purported letter of 4 October 2015 was inconsistent with Mr Tatsis’ statement by email on 30 September 2015, just a few days earlier, that “[as] *per the UTA operations manual, all equipment is present and within specification*”. He accepted that he would likely have seen that email. By way of explanation of the apparent inconsistency, Mr Cott said the following:

I would say, well, that’s a good point you bring up “within specification” there. I would say that the equipment that we had sold him had been delivered to the store – right – and it was there and within specification.

1. At this point, it was put to Mr Cott that the new equipment was never delivered to the Parramatta site. He denied this. When asked how he knew this was the case, Mr Cott said that he helped “*load the trailer*” with the equipment. He then conceded that he had never set foot on the Parramatta site. When it was put to him that the current franchisee, Mr Gray, had said that such equipment was never delivered, Mr Cott said that he did not know about this, and that this was not his role. Mr Cott denied that no equipment had in fact been purchased for Mr Ahmed by that time.
2. I find that there was never any genuine purchase of equipment from stock held by Ultra Tune for the purposes of the Parramatta site franchise. In keeping with the earlier findings, this was simply part of the false paper trail that was created to justify keeping Mr Ahmed’s deposit. I find that there were never any genuine equipment purchases for that site.

#### The Training Invoice and the Equipment Invoice

1. As noted above, it is the ACCC’s position that the *Training Invoice* and the *Equipment Invoice* are fabrications and were brought into existence much later than September 2015. The basis for this position should be explained before turning to the evidence that was given on the topic of these documents, because it is such powerful and ultimately irrefutable evidence of fabrication. The following analysis is based on, or substantially assisted by, careful and detailed submissions for the ACCC.
2. The invoices bear the reference numbers “*242351*” and “*242352*”. The ACCC says that these reference numbers are inconsistent with the invoices having been created in September 2015. This position is based on a comparison with the reference numbers and issue dates of other invoices that have been issued by Ultra Tune. To this end, the ACCC tendered a number of documents for comparison that had been produced by Ultra Tune in answer to a notice to produce, being:
3. copies of each of the tax invoices issued by Ultra Tune with the reference numbers 242330 to 242370; and
4. copies of a sample of 50 invoices issued by Ultra Tune in the month of September 2015.
5. It is clear from the face of the invoices that the invoice reference numbers have been issued sequentially. The reference numbers fall within number and date ranges, and, as a general rule, the invoices that have higher reference numbers bear later dates of issue. Invoices in the range 242331 to 242370 bear dates in January 2016, with the only exceptions being the *Training Invoice* and the *Equipment Invoice*.
6. As to the sample of the invoices that were issued by Ultra Tune in the month of September 2015, the vast majority of these invoices bear reference numbers in the range “*501470-1*” to “*501735-2*”. There appear to be only five exceptions. The first two are the *Training Invoice* and the *Equipment Invoice*. The others are:
7. an invoice dated 11 September 2015 to Ultra Tune Menai, with the reference number 240774;
8. an invoice dated 15 September 2015 to Ultra Tune Crows Nest, with the reference number 240779; and
9. an invoice dated 18 September 2015 to Ultra Tune Corrimal, with the reference number 240858.
10. Having regard to the comparison invoices, it is plain that the *Training Invoice* and the *Equipment Invoice* are well out of sequence with invoices they purport to be contemporaneous to and invoices that have a similar range of reference numbers. This is illustrated by the following:
11. the invoice immediately preceding the *Training Invoice* in number, being invoice 242350, is dated 28 January 2016 – thus, assuming the invoices to be sequentially issued, the *Training Invoice* and the *Equipment Invoice* could not have been brought into existence before 28 January 2016;
12. the other invoices in the same range of reference numbers, being 242331 to 242370, appear to have all been issued in January 2016;
13. the *Training Invoice* (242351) and the *Equipment Invoice* (242352)are far later in sequence than the other three invoices bearing dates in September 2015, being invoices 240774, 240779 and 240858;
14. the *Training Invoice* and the *Equipment Invoice* have consecutive reference numbers, notwithstanding that the latter invoice, by its issue date, purports to have been brought into existence some eight days later than the former – the strong suggestion being that they have been brought into existence on the same date.
15. Numerous inconsistencies concerning the invoice numbering were put to Mr Cott for explanation. Mr Cott said that he believed that the invoices were issued by a computer system. He accepted that generally, the system issues invoice numbers sequentially, although he said that sometimes the computer system does “*weird things*”. As to the suggestion that the invoices were out of sequence, Mr Cott said that he has to go by what his accounts department gives him. Mr Cott suggested that there was a chance that the dates might be different because the invoices had been issued on behalf of different companies. It was pointed out to Mr Cott that the invoices followed the same numbering sequence regardless of whether it appeared on letterhead for Ultra Tune Australia Proprietary Limited or Ultra Tune Properties (Vic) No. 2 Pty Ltd. He accepted that this appeared to be the case.
16. It was put to Mr Cott that it did not make sense that the *Training Invoice* and the *Equipment Invoice* would list the amounts of $3,300.00 and $20,119.99 as owing towards training and equipment, in circumstances where Ultra Tune had purportedly already received payment on 4 September 2015 towards those items. Mr Cott accepted that the invoice was inaccurate to suggest that the amount remained outstanding. He said that his accounts department would not have receipted them properly. He said that he has the “*most frustrating accounts department in Australia to deal with when it comes to putting payments through and receipting them correctly in time*”.
17. It was put to Mr Cott directly that, to his knowledge, the *Training Invoice* and the *Equipment Invoice* were brought into existence on or sometime after 28 January 2016. Mr Cott denied this. However, he was not able to give any meaningful explanation for the discrepancies in the invoice reference numbers. The assertion in the question put to Mr Cott must be accepted, and his denial must be rejected.
18. No credible alternative finding is available other than that the *Training Invoice* and the *Equipment Invoice* were created on or after 28 January 2016 and that both were fabrications. It follows that the purported letter dated 4 October 2015 supposedly enclosing those documents was also a fabrication. That leads to a live question as to whether Mr Cott has knowingly sworn a false affidavit and has knowingly given false evidence on oath in maintaining the position deposed to in his affidavit filed and read in these proceedings. It is best that a concluded view is not expressed in that regard as it goes further than is necessary for the resolution of this dispute and may be a question to be determined in any criminal prosecution that may ensue in respect of Mr Cott.

#### The Signage Invoice

1. As noted above, the *Signage Invoice* was issued by the company “*Marlin Signs*”. The ACCC called Mr Lance Walter, the managing director of that company, to give evidence. The ACCC also tendered documents that had been produced by Marlin Signs in answer to a subpoena.
2. Mr Walter runs the business of Marlin Signs. He gave evidence that Ultra Tune has been a customer of Marlin Signs since about 2014. He said that Ultra Tune’s work contributes about 25% of Marlin Signs’ revenue.
3. Mr Walter said that he has a working relationship with Mr Cott and Mr Tatsis that does not extend to friendship. He said that he would speak with Mr Cott about work once a week or once every fortnight.
4. It is necessary to say something about the subpoena to Marlin Signs and the documents produced. By its terms, the subpoena sought:
5. communications between Marlin Signs and Ultra Tune about signage during the period of 1 September 2015 and 30 July 2016;
6. documents recording payments for signage for the Parramatta Franchise during the period of 1 July 2015 and 31 December 2016; and
7. each Marlin tax invoice for an order by Ultra Tune or an Ultra Tune franchisee in the period 1 January 2015 and 31 December 2016.
8. Marlin Signs produced documents in response to this subpoena on two occasions.
9. The first production tranche, on 7 November 2017, included an email from Mr Cott to Mr Walter requesting a “*mock up*” bringing the Parramatta site up to the correct appearance.
10. The first production tranche included approximately 70 Marlin Signs invoices. They are generally uniform to the *Signage Invoice* (reproduced as Annexure D to these reasons) and vary only at a level of customer specific detail. Each invoice relevantly features a logo at the top of the document, a job number, an invoice number, an invoice date, and a due date for payment. It is clear, looking at the invoices as a set, that the reference numbers have been issued sequentially. For example, an invoice dated 25 February 2015 bears the reference “INV-0005”, while the next invoice in time that was produced to the ACCC, which bears the date 26 February 2015, has the reference “INV-0014”. It is the case that, throughout the invoice set, the invoice numbers correlate, and ascend in relation to the job number, such that it can safely be concluded that INV-0892, for example, should be the 892nd invoice that has been produced in this numbering system according to job number. It is important to note also that, for the vast majority of the invoices, the invoice date and the due date for payment are identical. With one exception, the invoices that were produced have been printed in colour. The exception is the *Signage Invoice*, being the invoice that was purported to have been sent to Mr Ahmed on 4 October 2015.
11. The second tranche of documents was produced by Marlin Signs by post on 8 January 2018. These relevantly include a document dated 15 September 2015, purporting to be a quote for the Parramatta site. It has been reproduced as Annexure E to these reasons. The documents produced include a colour copy of the *Signage Invoice*. When asked why he produced further documents in January 2018, Mr Walter said that he had found them after having a further look for them, and that the matter had been weighing on his mind.
12. Mr Walter was asked how he had collated the relevant documents for production. He said that he had searched for them through the “*WorkflowMax*” program that the company used. He described “*WorkflowMax*” as a cloud-based, “*job sheet*” computer program that generates quotations and invoices. He said that he used the program to print out the relevant invoices and collated them for production.
13. Leave was granted to the ACCC under s 38 of the *Evidence Act* to cross-examine Mr Walter as an “*unfavourable*” witness. He was asked in a cross-examination to account for several peculiarities about the *Signage Invoice*. He was asked why the invoice was the only invoice, of the 70 odd invoices produced, that was in black and white. He said that he had no idea, and no idea how he had come to have possession of the invoice. He accepted that the coloured invoices were printed from his computer system using the WorkflowMax program. He accepted that it could have been the case that the *Signage Invoice* was not obtained the same way. When asked to give his best explanation for the discrepancy, he said he was not really sure.
14. Mr Walter was asked why the invoice specified the due date for payment as being 22 July 2016, some 10 months after it purported to have been issued. Mr Walter suggested that there may have been no date added when the invoice was created, and the date was added in later. It was suggested to Mr Walter that 22 July 2016 was the date that the invoice was created. He said that this “*could have been, yes*”, and that “*2016 is probably the date I’ve added in there for the due date*”. Mr Walter accepted that it was not in accordance with his usual practice to issue an invoice that has a due date for payment some 10 months after the date of the invoice.
15. It was put to Mr Walter that, following having been served with the subpoena, he had spoken to a solicitor acting for the ACCC, Mr Draper, on 15 December 2017 about the *Signage Invoice*. He accepted that he had done so. It was put to Mr Walter that he told Mr Draper that he was unable to pull up the *Signage Invoice* in the computer system by entering its invoice number, 1083, or by using the search term “*UTA Head Office*”. Mr Walter said that he could not remember the exact conversation. He said that he could have discussed the invoice with Mr Draper. It was put to Mr Walter that he told Mr Draper that the due date for payment on an invoice generally reflects the date an invoice was created. Mr Walter said that he could have. It was put to Mr Walter that the probable explanation was that the invoice had not been raised on 22 September 2015.
16. I find that, as Mr Walter effectively conceded, the *Signage Invoice* was brought into existence on or about 22 July 2016, rather than the purported creation date on its face of 22 September 2015. It is to that extent a fabrication. I have grave suspicions, but ultimately no conclusive evidence, that this document was brought into existence at the behest of someone at Ultra Tune. No finding can conclusively be made other than that the document is not authentic in that it is not, as it purports to be, an invoice created on 22 September 2015.

# OUTSTANDING CONTRAVENTION DETERMINATION AND PENALTIES

## Principles

1. In determining the appropriate pecuniary penalty, s 76(1) of the *CCA* requires the Court to have regard to “*all relevant matters*”, including, using the express terms within that provision:
2. the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission;
3. the circumstances in which the act or omission took place; and
4. whether the person has previously been found by the Court in proceedings under Pt VI or Pt XIB of the *CCA*, to have engaged in any similar conduct.
5. Non-mandatory factors to be taken into account include (per, e.g., *Australian Competition and Consumer Commission v* ***Singtel Optus*** *Pty Ltd (No 4)* [2011] FCA 761; 282 ALR 246 at [11], referred to without objection on appeal):
6. the size of the contravening company;
7. the deliberateness of the contravention and the period over which it extended;
8. whether the contravention arose out of the conduct of senior management of the contravener or at some lower level;
9. whether the contravener has a corporate culture conducive to compliance with the Act (or the *ACL*) as evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention;
10. whether the contravener has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention;
11. whether the contravener has engaged in similar conduct in the past;
12. the financial position of the contravener;
13. whether the contravening conduct was systematic, deliberate or covert.
14. In  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68, the Full Court of this Court provided a succinct summary of the process for determining civil penalties (at [98], [100]-[107]):

**General principles**

Whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty is primarily, if not wholly, protective in promoting the public interest in compliance: *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52, 152 [42]; *Commonwealth v Director, FWBII*at [55] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ). The principal object of a pecuniary penalty is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene; both specific and general deterrence are important: *Chemeq*at [90]; *Ponzio* at [93]. A pecuniary penalty for a contravention of the law must be fixed with a view to ensuring that the penalty is not to be regarded by the offender or others as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 (*TPG Internet*) at [66]; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*  (2012) 287 ALR 249 at [62]-[63]. In relation to general deterrence, it is important to send a message that contraventions of the sort under consideration are serious and not acceptable: *Australian Securities and Investments Commission v Southcorp Ltd (No 2)* (2003) 130 FCR 406 at [32].

…

The fixing of a pecuniary penalty involves the identification and balancing of all the factors relevant to the contravention and the circumstances of the defendant, and making a value judgment as to what is the appropriate penalty in light of the protective and deterrent purpose of a pecuniary penalty. While there may be differences between the criminal sentencing process and the process of fixing a pecuniary penalty (cf. *Commonwealth v Director, FWBII* at 491 [56]-[57]), the fixing of a pecuniary penalty may to an extent be likened to the “instinctive synthesis” involved in criminal sentencing: *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 294. Instinctive synthesis is the “method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case”: *Markarian v The Queen* (2005) 228 CLR 357 (*Markarian*) at [51] (per McHugh J). Or, as the plurality put it in *Markarian* (at [37], per Gleeson CJ, Gummow, Hayne and Callinan JJ) “the sentencer is called on to reach a single sentence which … balances many different and conflicting features”. Like the exercise of imposing a sentence for an offence, the process of fixing an appropriate pecuniary penalty should not be approached as a mathematical exercise involving increments to or decrements from a predetermined range of sentences: *Wong v The Queen*(2001) 207 CLR 584 at [74]-[76].

In fixing the amount of a civil penalty, reference is frequently made to the lists of factors or considerations identified by Santow J in *Australian Securities and Investments Commission v Adler (No 5)* [2002] NSWSC 483; (2002) 42 ACSR 80 at 114-115 [126] and French J in *Chemeq* at 534 [99]. Those lists of relevant considerations, which have been approved and elaborated on by many subsequent decisions of this Court, were not, and plainly were not intended to be, exhaustive. Nor was it suggested that each of the factors referred to in the respective lists was necessarily relevant or important in every case. These lists of factors should not be treated as a rigid catalogue or checklist of matters to be applied in each case; the overriding principle is that the Court should weigh all relevant circumstances: *Australian Securities and Investments Commission v GE Capital Finance Australia* [2015] ASC 155-203 at [72].

In general terms, the factors that may be relevant when fixing a pecuniary penalty may conveniently be categorised according to whether they relate to the objective nature and seriousness of the offending conduct, or concern the particular circumstances of the defendant in question.

The factors relating to the objective seriousness of the contravention include: the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness; whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time; if the defendant is a corporation, the seniority of the officers responsible for the contravention; the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation; the impact or consequences of the contravention on the market or innocent third parties; and the extent of any profit or benefit derived as a result of the contravention.

The factors that concern the particular circumstances of the defendant, particularly where the defendant is a corporation, generally include: the size and financial position of the contravening company; whether the company has been found to have engaged in similar conduct in the past; whether the company has improved or modified its compliance systems since the contravention; whether the company (through its senior officers) has demonstrated contrition and remorse; whether the company had disgorged any profit or benefit received as a result of the contravention, or made reparation; whether the company has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention; and whether the company has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law.

Where the defendant is a body corporate, the size of the body does not of itself justify a higher penalty than might otherwise be imposed: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at [89]-[92]. The size of the corporation may, however, be particularly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent. The sum required to achieve that object will generally be larger where the company has vast resources: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301 at [39]; *Australian Competition and Consumer Commission v Apple Pty Limited* [2012] ATPR 42-404 at [38].

Careful attention must also be given to the maximum penalty for the contravention. That is so for at least three reasons: first, because the legislature has legislated for the maximum penalty and it is therefore an expression of the legislature’s policy concerning the seriousness of the prescribed conduct; second, because it permits comparison between the worst possible case and the case that the Court is being asked to address; and third, because the maximum penalty provides a “yardstick” which should be taken and balanced with all the other relevant factors: *Markarian* at 372 [31] (per Gleeson CJ, Gummow, Hayne and Callinan JJ).

Even where the maximum penalty for the contravention is high, and the amount necessary to provide effective deterrence is large, the amount of the penalty should be proportionate to the contravention and should not be so high as to be oppressive: *Stihl Chainsaws*at 17,896;*NW Frozen Foods* at 293.

1. As the above passages make clear, factors of the kind identified above are no more than a guide, not a rigid catalogue of matters for attention. They are not intended to be exhaustive. Nor are they to replace the essential judicial function of fact-finding and consideration of all relevant circumstances.

## The number of disclosure obligation contraventions

1. A key issue in dispute going to the determination of the quantum of the alleged disclosure obligation contraventions is whether each act or omission by Ultra Tune in relation to its disclosure obligations, summarised at [12(1)] to [12(4)] above ([12(5)] being a single contravention), should be characterised as being a contravention in relation to each franchisee to which the obligation in some way related, or whether some form of aggregation is required, either as a matter of law, or as a matter of approach having regard to practicality or fairness.
2. The number of contraventions and the maximum penalty for each is important because it sets the overall maximum penalty that is applicable. The Court is required to form a view as to how serious each contravention is, how serious the overall effect of all the contraventions is, and what the individual and overall penalty should be, including by way of adjustment so that the aggregate sanction is proportionate to the conduct. This ensures that the overall penalty imposed is just, as a matter of what is known in the criminal law as “*totality*”. It should not be a crude mathematical exercise, but necessarily there is a mathematical relationship between these related components.
3. Each contravention of a *Franchising Code* disclosure requirement alleged by the ACCC carries a maximum pecuniary penalty of $54,000. Depending on the determination to be made as to the number of contraventions that have been admitted to, and on the denied but established contravention, the applicable theoretical overall maximum of the asserted contraventions could be as little as $324,000 (six multiplied by $54,000 arising from the five categories of contravention set out in [12] above, one of which is committed twice over successive financial years) or as much as tens of millions of dollars due to there being 185 franchisees nationally in the 2014-15 financial year (on that view, a maximum theoretical penalty of 185 multiplied by $54,000 to equal $9.99 million for each of the three categories of contravention in that financial year) and 200 franchisees nationally in the 2015-16 financial year (on that view, a maximum theoretical penalty of 200 multiplied by $54,000 to equal $10.8 million for each of the two categories of contravention in that financial year).
4. Except for the last, single, contravention involving a single franchisee not being given a disclosure document within time when it was requested, the ACCC asserts that there is a contravention for each franchisee, but that the contraventions should be grouped as courses of conduct:
5. for the alleged failure to maintain the disclosure document contraventions in the 2015‑16 financial year, by reference to the separate disclosure document used by Ultra Tune for each of the four State-based regions, thus constituting four courses of conduct for this one category of contravention, but with a maximum penalty for each group of contraventions calculated by the contravention maximum of $54,000 multiplied by the number of franchisees for region: thus, by reference to the franchisee numbers set out in the table at [15] above, a maximum across the four courses of conduct of $10.8 million ($54,000 multiplied by 200), from:
   1. a maximum for NSW (metropolitan and country) of $3,078,000 ($54,000 multiplied by 57);
   2. a maximum for Queensland of $3,132,000 ($54,000 multiplied by 58);
   3. a maximum for Victoria of $3,240,000 ($54,000 multiplied by 60); and
   4. a maximum for Western Australia of $1,350,000 million ($54,000 multiplied by 25);
6. for the alleged marketing fund contraventions, by reference to a separate financial statement for each of the five Ultra Tune marketing regions, thus constituting:
   1. five courses of conduct for each of the four categories of alleged contravention of:
      1. failure to *prepare* each marketing fund statement for the 2014-15 financial year within the required time;
      2. failure to *ensure* each marketing fund statement for the 2014-15 financial year included sufficient detail;
      3. failure to *ensure* each marketing fund statement for the 2015-16 financial year included sufficient detail; and
      4. failure to *provide* a copy of each marketing fund statement for the 2014-15 financial year to each franchisee within a given region within 30 days of being prepared;
   2. but with a maximum penalty for each group of contraventions calculated by multiplying the contravention maximum of $54,000 by the number of franchisees for each region; thus, by reference to the franchisee numbers set out in the table at [15] above:
      1. for each of the three groups of contraventions for the 2014-15 financial year set out in paragraph [309](2)(a)(i), (ii) and (iv) above, a maximum across the four courses of conduct of $9.99 million ($54,000 x 185), made of:
7. a maximum for NSW (metropolitan and country) of $2,970,000 ($54,000 multiplied by 55);
8. a maximum for Queensland of $2,754,000 million ($54,000 multiplied by 51);
9. a maximum for Victoria of $3,132,000 ($54,000 multiplied by 58);
10. a maximum for Western Australia of $1,134,000 million ($54,000 multiplied by 21);
    * 1. for the contraventions for the 2015-16 financial year set out in paragraph [309](2)(a)(iii), above, a maximum across the four courses of conduct of $10.8 million ($54,000 multiplied by 200), made of:
11. a maximum for NSW (metropolitan and country) of $3,078,000 ($54,000 multiplied by 57);
12. a maximum for Queensland of $3,132,000 million ($54,000 multiplied by 58);
13. a maximum for Victoria of $3,240,000 ($54,000 multiplied by 60);
14. a maximum for Western Australia of $1,350,000 million ($54,000 multiplied by 25).
15. Ultra Tune asserts that there is only one contravention in relation to each category of disclosure document contravention and only one contravention for each category of marketing fund contravention, but at no stage explained in any coherent fashion how there could be:
16. a single contravention for failure to *prepare* each of four marketing statements for the 2014-15 financial year within the required time;
17. a single contravention for failure to *ensure* each of those four marketing statements for the 2014-15 financial year included sufficient detail;
18. a single contravention for failure to *ensure* each of those four marketing statements for the 2015-16 financial year included sufficient detail; or
19. a single contravention for failure to *provide* a copy of each of those four marketing statements for the 2014-15 financial year to each franchisee within a given region within 30 days of being prepared.
20. Ultra Tune’s submissions on the question of the number of disclosure obligation contraventions must be rejected. It should be acknowledged that Ultra Tune’s fall back submission was that there could only be one contravention for each act or omission per disclosure document or marketing statement.
21. For the following reasons, I have concluded that there is a single obligation, capable of constituting only a single contravention for a given financial year:
22. of maintaining each disclosure document for each of Ultra Tune’s four State-based regions, and thus up to four such contraventions;
23. of preparing the single marketing fund statement for each of the marketing funds for the five Ultra Tune marketing regions, and thus up to five such contraventions; and
24. of ensuring that the single marketing fund statement for each of the marketing funds for the five Ultra Tune marketing regions contains “*sufficient detail*”, and thus up to five such contraventions.
25. A failure to prepare a document, to maintain a document, or to have enough detail in a document does not amount to a greater number of contraventions merely because it is required subsequently to be given to, say, 100 franchisees rather than 10 franchisees. The obligation speaks to whether the franchisor has, as required:
26. maintained a given disclosure document, the number of such documents in existence being determined by the particular franchise model deployed, by updating it within four months after the conclusion of each financial year (there is a parallel obligation, not in issue in this case, to bring the document into existence in the first place by creating it: s 8(1) of the *Franchising Code*);
27. prepared a marketing fund statement for each marketing fund run by the franchisor for each financial year within four months after the conclusion of that financial year; or
28. ensured that each such marketing fund statement contains sufficient detail.
29. Thus the ACCC’s submissions as to the number of contraventions in relation to maintaining each of the four disclosure statements for the 2015-16 financial year, in relation to preparing each of the five marketing statements for the 2014-15 financial year, and in relation to ensuring that each of the five marketing statements for the 2014-15 financial year and for the 2015-16 financial year had sufficient detail must be rejected. However, the number of franchisees for each such document is a relevant consideration in the determination of penalty.
30. For the reasons that follow, the ACCC’s submission that the number of contraventions in relation to giving a copy of the marketing fund statement is determined by the number of franchisees who did not receive that document within the required time should be accepted. The same reasoning applies to the number of contraventions in relation to the failure to give a copy of the corresponding auditor’s report, noting that the exception in cl 15(2) of the *Franchising Code* does not apply to Ultra Tune. (Clause 15(2) provides that an auditor’s report is not required if 75% of franchisees of a given franchisor who contribute to the marketing fund in Australia have voted to that effect within three months of the end of a given financial year.)
31. The obligation in cl 15(1)(d) to give each franchisee who is required to contribute to a marketing fund a copy of a marketing fund statement, and a copy of a corresponding auditor’s report, within 30 days of each being prepared, is focussed not on the preparation of, or detail in, the marketing fund statement, but rather on whether or not such a (compliant) document has been provided to each and every such franchisee. It seems likely that there will still be compliance with the cl 15(1)(d) obligation if the marketing fund statement, and/or the auditor’s report is late in preparation, but given to each franchisee within 30 days of being prepared. It is arguable that giving a marketing statement that does not contain sufficient detail will, to that extent, not meet the implicit requirement in cl 15(1)(d) to give franchisees a compliant document, but this is not a point taken by the ACCC in this case. Determining whether that is so should be left for a case in which it is squarely raised and argued, including as to issues of overlapping obligations and the risk of the same conduct being sanctioned more than once.
32. For each franchisee who is not given a marketing fund statement, there is a separate contravention. If there were 100 franchisees, and only 90 had been given a marketing fund statement and corresponding auditor’s report, within 30 days after preparation of each, then there would be 10 contraventions in respect of each document and thus a total of 20 contraventions, with a combined maximum available penalty of $1,080,000.
33. The above conclusions have the effect of producing the following maximum penalties for the categories of contravention listed at [12] above:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Number and type of disclosure obligation contraventions** | | | **Maximum penalty** | **Competing positions** | |
| 4 | Failure to maintain each of the four separate disclosure documents by updating each within four months of the end of the 2014-15 financial year: cl 8(6) | | $216,000 | Ultra Tune admitted the conduct, but disputed the number of contraventions. The ACCC seeks a penalty of $200,000 (four contraventions x $50,000) | |
| 5 | | Failure to prepare each of the five financial statements for the five separate marketing funds within four months of the end of the 2014-15 financial year: cl 15(1)(a) | $270,000 | | Ultra Tune admitted the conduct, but disputed the number of contraventions. The ACCC seeks a penalty of $250,000 (five contraventions x $50,000) |
| 10 | | Failure to ensure that each of the five financial statements for the five separate marketing funds included “*sufficient detail*” for each of two financial years, 2014‑15 and 2015-16: cl 15(1)(b) | $540,000 | | Ultra Tune denied that the conduct had taken place and in any event disputed the number of alleged contraventions. The ACCC seeks a penalty of $350,000 (ten contraventions x $35,000) |
| 185  (financial statement)  185  (auditor’s report) | | Failure to provide to franchisees one of the five different marketing fund financial statements that related to their region within 30 days after each having been prepared for the 2014-15 financial year, to be grouped with the simultaneous and parallel alleged contravention of the failure to provide to franchisees an auditor’s report for each of those marketing fund statements: cl 15(1)(d). | $9.99 million (financial statement)  $9.99 million (auditor’s report)  (maximum arrived at by multiplying the number of contraventions (185) by the maximum per contravention ($54,000) | | Ultra Tune admitted the conduct, but disputed the number of contraventions. The ACCC seeks a penalty of $62,500 (185 contraventions treated as five courses of conduct x $12,500) – an average of just over $337 per contravention, although that sum will be less for regions with a larger number of franchisees and more for regions with a smaller number of franchisees |
| 1 | | Failure to provide a disclosure statement when requested by a franchisee on 16 December 2015 (and required to be provided within 14 days of the request):cl 16(1) | $54,000 | | Ultra Tune admitted this contravention. The ACCC seeks a penalty of $30,000. |
|  | | **Total sought by ACCC:** | | | $892,500 |

## Quantum

1. In its closing written submissions, Ultra Tune sought a pecuniary penalty for the admitted conduct in the order of $100,000 and leave to make further submissions in the event that the defended alleged contraventions were established. Ultra Tune’s further written submission handed up at the closing submissions hearing relied on the filed written closing submissions, but initially sought an opportunity to be heard in light of the Court’s findings. That was not pressed at the hearing, with counsel advising the Court that he was in a position to deal with what had been advanced, including by way of detailed penalty tables furnished by the ACCC referred to below.
2. At the closing submissions hearing on 2 August 2018, the ACCC provided an updated schedule of the penalties it sought in its written closing submissions in respect of all contraventions, both admitted and denied. The penalties sought for the disclosure obligation contraventions are set out in the table at [318] above.
3. Ultra Tune submits that the way that a civil penalty proceeding has been conducted, if disapproved of, is analogous to the defence of criminal proceedings, and that such disproval may be addressed by way of an appropriate costs order (addressed below). That submission is accepted as far as it goes, but, as in criminal proceedings, the conduct of a defence may have a material bearing on the assessment of a respondent’s attitude towards the contravening conduct. The absence or presence of contrition or remorse may have a material impact on the level of penalty to be imposed. In the case of civil penalty cases, the High Court has made it abundantly clear that the most important, if not only, consideration, is the need to deter: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [55]. I consider that Ultra Tune’s conduct in this case, including the downplaying of the significance of even admitted contraventions, indicates that Ultra Tune has predominantly manifested the wrong kind of sorry – that is, sorry that it has been caught – rather than sorry that it engaged in the conduct, both admitted and denied, in the first place.
4. Specific deterrence looms large, as does general deterrence lest any other franchisor be tempted to conduct a franchise business in a like manner. Such conduct, by both Ultra Tune, and by others contemplating the same or similar behaviour, will only be likely to be deterred if the penalties imposed are large enough to ensure that this cannot be seen as a mere cost of doing business, or a chance worth taking, because of the greater returns to be made from franchisees, and prospective franchisees, who are not appropriately armed with the information they need to make sound business decisions, in entering into, and continuing franchise arrangements and in spending substantial sums of otherwise unchecked money on marketing funds. Importantly, there was no evidence to indicate that the contravening conduct was aberrant or out of character for Ultra Tune, as opposed to the robust and headstrong way it chose to do business.
5. The penalty factors drawn from case law referred to at [302] to [305] above mostly do not favour Ultra Tune. It is a substantial national company, now with at least 200 franchisees. It ought to be among the most professional of franchisors, yet plainly it is far from that and appears to have little or no aspiration to be of that calibre.
6. The conduct in relation to the disclosure contraventions was deliberate in the sense that the failure to comply was a consequence of deliberate actions or omissions, rather than inadvertence. Those contraventions took place over a substantial period of time. They involved conduct on the part of the most senior levels of management, including Mr Chong who was company secretary and in-house counsel. There was no suggestion of responsibility on the part of lower level staff, but rather that priority was evidently not given at the highest levels in the company to even informing itself as to what was required to comply with its obligations, let alone to ensuring compliance took place. The evidence was limited as to corporate culture, but it was not established, as a matter of mitigation, that Ultra Tune has a corporate culture conducive to compliance with the *Franchising Code* or the *ACL*. There was passing reference to compliance training, but limited evidence as to content, delivery, or response to this case. The corrective response, to the extent it was shown at all, was, at best, leisurely. There was no evidence of active obstruction in relation to the non-disclosure contraventions, but little to suggest an active approach to remedying the defects as a matter of urgency or priority.
7. In relation to the conduct concerning Mr Ahmed, the conduct itself was the entire duration of the franchise negotiating period. It is therefore a prolonged instance of contravening. Given that the worst of the conduct was engaged in by the most senior officer of the company in NSW, it is a case of direct, rather than vicarious liability – the conduct of Mr Tatsis and of Mr Cott was, directly, the conduct of Ultra Tune, not just vicarious liability for the actions of a lesser employee or agent. They were the guiding mind of the company in virtually all of its dealings with Mr Ahmed. Worse still, there was the highest level of obstruction in key respects going to the heart of Mr Ahmed’s complaint, being the active fabrication of documents, and the giving of false evidence by affidavit and orally under oath, in order to resist liability to repay the deposit, or sanction for failing to do so and for related conduct. A stern view of Ultra Tune’s conduct is required.
8. There has been a prior contravention, but it was a long time ago and therefore has a very limited part to play. I deal with the question of penalty with reference to this conduct not being out of character, but that is almost entirely a conclusion arrived at as a result of the evidence before me in this proceeding in relation to the present contraventions.
9. There is no suggestion, let alone compelling evidence, that Ultra Tune is not in a position to pay any pecuniary penalty that the Court considers appropriate.
10. I am required to consider each penalty to be imposed for each contravention, or course of conduct involving multiple contraventions, and then to effectively step back, consider the total amounts involved, and make any necessary adjustments to ensure that the overall penalty is just and appropriate as a matter of totality. Many of the penalties that the ACCC seeks are harsh and often reflect a very high proportion of the maximum penalty, which is, at least in the criminal law, to be reserved for the worst category of offending. I consider that this principle applies with equal force and effect to civil penalties, because, as with gaol terms for criminal offences, the maximum pecuniary penalty reflects the legislature’s view as to what the worst category of contravention should attract by way of penalty.
11. When considering the proportion of a maximum penalty, this Court is also entitled to have regard to the contravener’s history and circumstances (apart from any prior contraventions), not just to assess the deterrence required, both specific and general, but to appreciate the gravity of the contraventions in their proper and complete context, being the context of the contravener, not just the isolated context of the individual contravention.
12. Ultra Tune is a major franchisor, operating in four States. It has been in this business for many years. Despite that, the evidence reveals that it has failed to take its franchisor obligations seriously. For that reason, each of the disclosure obligation contraventions can be viewed, in that context, and not in some kind of splendid isolation, as being in, or towards, the worst category. That culture and attitude, as manifested in the disclosure obligation contraventions, has inexorably led to the contraventions involving Mr Ahmed. With those observations in mind, I turn to the assessment of the appropriate starting point, and then the final penalties that should be imposed.
13. Turning first to the disclosure obligation contraventions:

|  |  |  |  |
| --- | --- | --- | --- |
| **Number and type of disclosure obligation contraventions** | | **Maximum penalty** | **Individual contravention penalty assessment** |
| 4 | Failure to maintain each of the four separate disclosure documents by updating each within four months of the end of the 2014-15 financial year: *Franchising Code*, cl 8(6). | $216,000 | The overall penalty that the ACCC seeks of $200,000 is severe, but reasonable when due regard is had to the 185 franchisees at that time. The maintenance of disclosure documents is essential to the proper functioning of the *Franchising Code*. In all the circumstances, there is no need for totality adjustment. |
| 5 | Failure to prepare each of the five financial statements for the five separate marketing funds within four months of the end of the 2014-15 financial year: *Franchising Code*, cl 15(1)(a). | $270,000 | Again, as a starting point, the overall penalty that the ACCC seeks of $250,000 is condign but reasonable. However, that starting point is in need of totality adjustment, in part due to the interplay with the remaining disclosure obligation contraventions. Having regard to the following contraventions, a final penalty of $150,000 for these five contraventions is appropriate. |
| 10 | Failure to ensure that each of the five financial statements for the five separate marketing funds included “*sufficient detail*” for each of two financial years, 2014‑15 and 2015-16: *Franchising Code*, cl 15(1)(b). | $540,000 | The overall penalty that the ACCC seeks of $350,000 is entirely reasonable, especially as Ultra Tune stubbornly adhered to its position that no more information was required. It does not require totality adjustment. |
| 185  (financial statement)  185  (auditor’s report) | Failure to provide to franchisees one of the five different marketing fund financial statements that related to their region within 30 days after each having been prepared for the 2014-15 financial year, to be grouped with the simultaneous and parallel alleged contravention of the failure to provide to franchisees an auditor’s report for each of those marketing fund statements: *Franchising Code*, cl 15(1)(d). | $9.99 million (financial statement)  $9.99 million (auditor’s report)  (maximum arrived at by multiplying the number of contraventions (185) by the maximum per contravention ($54,000) | The overall penalty that the ACCC seeks of $62,500 is inadequate. It fails to reflect the seriousness of the conduct. The course of conduct approach also fails to have regard to the impact on the 185 individual franchisees who did not receive the information that they were entitled to, when it remained of most use to them. As a starting point, each dual contravention of not providing the financial statement and not providing the auditor’s report when required warrants a serious starting point sanction of $10,000. However, when that is multiplied by 185 contraventions, the overall penalty is excessive and disproportionate as it totals $1,850,000. Adjusted for totality, a penalty of $2,000 per dual contravention produces an overall penalty of $370,000. |
| 1 | Failure to provide a disclosure statement when requested by a franchisee on 16 December 2015 (and required to be provided within 14 days of the request): *Franchising Code*, cl 16(1). | $54,000 | The penalty that the ACCC seeks of $30,000 is appropriate in all the circumstances. The obligation to provide a disclosure statement promptly when requested requires support by such a sanction so as to forcefully encourage compliance by Ultra Tune and by other franchisees. |
|  | **Total:** | | $1,100,000 |

## Consideration of the allegations concerning Mr Ahmed

1. I now turn to the contraventions concerning Mr Ahmed’s treatment by Ultra Tune.
2. By the time of the parties exchanging written closing written submissions, ahead of a closing submissions hearing, Ultra Tune abandoned, in part, its defence of its conduct towards Mr Ahmed. As was expressed pithily in a further outline for Ultra Tune handed up in Court at the closing submissions hearing, and adhered to in oral closing submissions, from Ultra Tune’s perspective the principal issues remaining in respect of Mr Ahmed were (footnotes and paragraph references omitted):

* [w]hether, in relation to the dealings with Nakash Ahmed (Parramatta), a breach of section 29 of the ACL as to the “open about 6 months”, rent and purchase price representations is also open to be found (Breach of clause 6(1) of the Franchising Code is admitted as to the $33,000 …);
* [w]hether the conduct of the defence of the Parramatta matter allows an increase in the civil penalty; [and]
* the quantum of the civil penalty.

1. Those further written submissions handed up in court make it clear that Ultra Tune had changed its stance and admits that, in relation to Mr Ahmed, it contravened the obligation in cl 6(1) of the *Franchising Code* to act in good faith, and that it had made false or misleading representations concerning the existence of a condition, namely that the deposit paid by Mr Ahmed was unconditionally refundable.
2. Ultra Tune continues to deny key aspects of the ACCC’s case concerning Mr Ahmed. In particular, it denies:
3. that there was any breach of the cl 9(1) of the *Franchising Code* obligation to give documents to Mr Ahmed because he was given a disclosure document;
4. that there was any breach of s 29(1)(b) of the *ACL* by way of false or misleading representations that services were of a particular quality, namely as to the Parramatta site being only open for about six months;
5. that there was any breach of s 29(1)(i) of the *ACL* by way of false or misleading representations with respect to the price of services, namely;
   1. that the rent was $45,000, when in fact it was $50,000 (both ex-GST); and
   2. that the purchase price of the Parramatta franchise was $163,000.

### Obtaining and retention of the deposit – want of good faith and the non-refundable deposit

1. It is convenient to address first the issue of the obtaining and retention of the deposit paid by Mr Ahmed, because that is the centrepiece of Ultra Tune’s conduct constituting both the admitted obligation to act in good faith, and the admitted specific false or misleading representations to the effect that the deposit paid by Mr Ahmed was unconditionally refundable.
2. The meaning of Ultra Tune’s limited concession concerning Mr Ahmed and the deposit is apparent when regard is had to the evidence summarised in detail above. In substance it involved no more than maintaining tenuous arguments as to benign interpretations of representations that were made to Mr Ahmed. Ultra Tune only abandoned the manifestly unsustainable opposition to refunding the deposit paid after the trial, evidently hoping that this might obviate the Court looking too closely at why the defence in relation to taking the deposit from Mr Ahmed was doomed and had therefore been abandoned.
3. The ACCC undertook a thorough, forensic and unrelenting investigation into Ultra Tune’s purported reasons for retaining the deposit paid by Mr Ahmed, which turned out to rely not just on false assertions, but manufactured communications. This necessitated numerous subpoenas in the lead up to the trial to get to the bottom of what had taken place. But for the ACCC’s perseverance, the ruse on behalf of and by Ultra Tune might well have succeeded.
4. The cover up that Ultra Tune attempted reflects a significantly heightened need for deterrence, in relation to conduct that was already a most serious and fundamental breach of the *Franchising Code* in taking the deposit in the first place, reflecting as it does Ultra Tune’s attitude in relation to its contravening conduct. A condign sanction is required for the contravening conduct that was sought to be hidden, to dissuade both Ultra Tune and any other franchisor similarly tempted not just to engage in such transgressions, but also to hide them by fraudulent means in the future.
5. There must be no tolerance for manufacturing evidence to deceive a regulator, and even less when the deception is maintained in this Court. Care must none-the-less be taken to sanction the pleaded conduct, rather than the separate and subsequent conduct of covering up what had taken place, in the absence of a separate cause of action. The use of the conduct in covering up what had taken place must be confined to the assessment of the seriousness of the contravening conduct and of the heightened need for specific and general deterrence. It is a matter for the ACCC as to whether any separate proceeding, in this Court, or in a State court exercising federal criminal jurisdiction, is to be commenced to sanction, in its own right, any aspect of the cover-up conduct.
6. The ACCC seeks:
7. in respect of the good faith contravention, the maximum penalty of 300 penalty units ($54,000 at the time of the contravention);
8. in respect of the false or misleading representations to the effect that the deposit was unconditionally refundable, the maximum penalty of $1,100,000.
9. At first blush, maximum penalties in both respects seems like an excessive sanction. Before considering the ACCC’s arguments for treating this conduct as being in the worst category, it is convenient to consider what Ultra Tune had to say about this conduct.

#### Whether Ultra Tune’s conduct towards Mr Ahmed was aberrant

1. Ultra Tune submits that the conduct towards Mr Ahmed that is admitted to constitute contraventions was “*sui generis*” – in other words, was unique or otherwise in a category of its own – and constituted no more than a “*one-off failure*” within Ultra Tune’s system, and a “*one-off occurrence*” in the period since 1998 (the only prior contravention being in the period from 1996 to 1998), as opposed to a recurring course of conduct. There are a number of fundamental problems with that argument.
2. A significant problem is that an assertion that serious contraventions are aberrant or out of character, so as to be treated less seriously, is one of mitigation. Proof of facts or circumstances said to constitute mitigation lies with the party seeking to rely upon them. However, the evidence and submissions concerning Mr Tatsis’ evidence and conduct were in a limited compass, and only made in the face of that evidence being, in particular respects, identified as indefensible. The admitted “*unacceptable*” falsity was confined to the following:
3. The three pieces of “*new*” equipment having been installed in the premises at the Parramatta site, when in fact it was taken to Peakhurst. However, I find that the purported purchase of the equipment was a fiction and did not really take place at all except as a paper transaction, with any notional movement of already held and stored equipment being no more than a contrivance to justify keeping Mr Ahmed’s deposit. This finding renders key parts of Ultra Tune’s submissions unable to be accepted, such as the suggestion that the price of that equipment was factored into the sale price so it did not matter to Mr Ahmed, as such submissions rely upon the fiction that there was in fact such new equipment.
4. Mr Tatsis purporting to have explained to Mr Ahmed at a meeting on or about 31 August 2015 that the “*new*” equipment would be required, whereas he admitted in cross-examination that the specific equipment was not mentioned. Once again, I go further in finding that the purported purchase of the equipment was a fiction.
5. Mr Tatsis denying that he had said to Mr Ahmed that “*everything is there as required*”, with him admitting in cross-examination that he had said that. This was a stance that could not possibly have endured contemporaneous emails to the same effect.
6. Mr Tatsis explaining to Mr Ahmed that the “*new*” equipment was for him to use as he wished if he did not proceed with the franchise agreement, with him admitting in cross-examination that he had not said this to Mr Ahmed. This concession again does not go far enough. There was no “*new*” equipment such as to enable any such conversation to have taken place.
7. There was no separate agreement apart from the franchise agreement to purchase the “*new*” equipment. Again this concession does not go far enough. There was no such equipment to permit any such genuine agreement to exist.
8. The very limited nature and scope of the concessions concerning Mr Tatsis’ evidence are not only troubling for their limited scope, but also by reason of what is left untouched, despite ample opportunity to go much further and address the real and substantial import of not just Mr Tatsis’ evidence, but also his behaviour towards Mr Ahmed. There was no evidence and no clear or express submission that the behaviour towards Mr Ahmed was in some way aberrant or out of character for Mr Tatsis and through him Ultra Tune, given his position as the most senior officer in NSW. There was no suggestion that Mr Tatsis had been told that his behaviour towards Mr Ahmed (as opposed to Mr Tatsis’ evidence about that behaviour being untruthful in a very limited way) was in any way unacceptable, let alone that they had been sanctioned, disciplined or even reprimanded, although Ultra Tune does submit that it does not seek to avoid responsibility for his actions. Both he and Mr Cott still held the same very senior positions. Mr Tatsis did not suggest that his behaviour towards Mr Ahmed was unusual or out of character in any way, or that he treated Mr Ahmed differently from the way in which he treated any other prospective franchisee.
9. On the totality of the evidence, I am unable to regard the conduct towards Mr Ahmed as being out of character, let alone disapproved of by Ultra Tune, except to the very limited extent that aspects of Mr Tatsis’ evidence is characterised in its closing submissions as being untrue and to that extent unacceptable. The thrust of the conduct, exhaustively detailed above, was not, however, said to be other than Ultra Tune’s usual way of doing business except by the oblique submission referred to above that it was “*sui generis*”. There is simply no evidence that this was one off at all, as opposed to an established way of doing business by a very senior officer – the most senior in NSW.
10. The Court needs to send a clear and unambiguous message that such conduct, and such flagrant contraventions, will not be tolerated. But is that enough to justify maximum penalties being imposed for conduct initially denied, but ultimately partially conceded in the face of the ACCC’s overwhelming case? It is useful to consider carefully the ACCC’s submissions.

#### The obligation to act in good faith: Franchising Code, cl 6(1)

1. The ACCC’s submissions on good faith were considerably more detailed than for the admitted false or misleading representations as to the deposit being refundable and thus unconditional, or for the denied false or misleading representations as to the rent and the purchase price, although those aspects also feature as part of the good faith contravention. In part, that is a function of the untested nature of a civil penalty for failure to act in good faith. In those circumstances, it is desirable to refer to the substance of those submissions to give content to the obligation, as well as to assess the seriousness of the contravention. That is especially so as Ultra Tune’s submissions on the topic are sparse. Although Ultra Tune admitted in its closing submissions that there was a breach of the obligation in respect of not refunding the deposit, it denied that there was any dishonest failure to disclose information upon the basis that correct information was contained in the disclosure documents. That contention is rejected for two reasons.
2. First, while correction of false or misleading information may, from that point in time, prevent the impact of that incorrect information continuing, it does not and cannot cure the effect up to that time, let alone steps taken in reliance on such information, as Mr Ahmed so clearly did as considered next.
3. Secondly, in this case, the deposit was paid in reliance on the incorrect information, and Ultra Tune refused to accept any liability to repay it until after the trial had taken place. Thus the only impact of giving the correct information was to make Mr Ahmed become aware of that fact, not to prevent its impact in obtaining the deposit from continuing by retaining it.
4. The ACCC submits, and I accept, that cl 6(1), in providing that parties to a franchise agreement arrangement (including per cl 6(2) during the negotiation phase) must “*act towards another party with good faith, within the meaning of the unwritten law from time to time*”, is intended to apply common law concepts to give content to the obligation. This was evidently intended to preserve the flexibility of the common law to develop as circumstances in commerce change. Further, Mr Wein’s report, which preceded the amendments that introduced a statutory obligation of good faith, makes it clear that part of the purpose of the new standard would be to ensure that there was no gap between conduct that is unconscionable and conduct that is misleading or deceptive under the *ACL* and the other specific *Franchising Code* obligations. This ensures that the debate in contract law as to whether the obligation should be implied does not have any work to do in this context.
5. The ACCC directs attention to a number of key authorities as to the content of the good faith obligation at common law. Those authorities and the submissions made in reliance upon them are helpful, useful and compelling, giving meat to the bones of good faith.
6. In ***Renard*** *Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, Priestly JA observed that a number of statutes had altered contract law so as to have regard to fairness, and that the sequence of those statutes show that (at 268):

the ideas of unconscionability, unfairness and lack of good faith have a great deal in common. The result is that people generally … have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance.

1. Further, at 266, Priestly JA adopted the observation of R S Summers in “‘Good Faith’ in General Contract Law and the Sales Provisions of the *Uniform Commercial Code*” (1968) 54 *Virginia Law Review* 195 at 196 that good faith is best understood as an “*excluder*”, a phrase that “*has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith*”. This approach has been quoted with approval in ***Burger King*** *Corporation v Hungry Jack’s Pty Ltd* [2001] NSWCA 187; 69 NSWLR 558 at [150]. The conceptual fellow traveller with good faith is reasonableness: *Burger King* at [163], [169].
2. In ***Alcatel*** *Australia* *v Scarcella* (1998) 44 NSWLR 349, Sheller JA (with whom Powell and Beazley JJA agreed) said (at 368):

If a contract confers power on a contracting party in terms wider than necessary for the protection of the legitimate interests of that party, the courts may interpret the power as not extending to the action proposed by the party in whom the power is vested or, alternatively, conclude that the powers are being exercised in a capricious or arbitrary manner or for an extraneous purpose, which is another [way] of saying the same thing. Thus, a vendor may not be allowed to exercise a contractual power where it would be unconscionable in the circumstances to do so: *Pierce Bell Sales Pty Ltd v Frazer* (1973) 130 CLR 575 at 587.

1. It may be observed that this is reflected in cl 6(6), which expressly provides that it will not be a breach of the obligation to act in good faith if a party has regard to its own “*legitimate commercial interests*”. *Alcatel* thus provides some guidance as to how cl 6(6) should be interpreted and applied.
2. Returning to reasonableness as a parallel concept of good faith, the Full Court of this Court in ***Virk*** *Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190; [2017] ATPR 42-563 said:
3. at [164] to [165]:

… The obligation, expressed as one of good faith and reasonableness, is to be considered in a composite and interrelated sense. To the extent that consideration is given to whether a party’s conduct is reasonable or not, it is directed to the primary component of the obligation, namely of good faith. Reasonableness is not to be approached in a case such as this as akin to a tortious duty to exercise due care and skill or to produce a reasonable outcome. Rather it goes to the quality of the conduct … to discern whether it was capricious, dishonest, unconscionable, arbitrary or the product of a motive which was antithetical to the object of the contractual power. Conduct attended by any of those qualities could never be said to be in good faith. Consideration of the relevant conduct within these confines informs the question whether or not the power has been exercised in good faith.

The converse, in our opinion, also follows. Where, as in this case, there is a finding of good faith (or, specifically, a finding that there was an absence of bad faith: in effect, not having demonstrated that there was a lack of good faith) attaching to the exercise of the contractual power, then that exercise must necessarily also have been reasonable. …

1. at [175]:

… reasonableness is referable to the standard of a party’s conduct or behaviour in relation to the performance of a contractual obligation or exercise of contractual power. It may, for example, include consideration of a party’s real intention or purpose in exercising contractual power. It calls into consideration, for example whether that conduct is or is not honest, capricious, arbitrary or for an extraneous purpose. …

1. The ACCC relies in particular upon the above passages in *Virk* to assert that in a franchising context, the focus of an obligation of good faith should ordinarily be on a franchisor’s use of powers and opportunities available by reason of the franchise relationship. Reliance is also placed by the ACCC on the observations of Dodds-Streeton J in *Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd* [2006] VSC 223 at [212] that “*an implied obligation of good faith would preclude the franchisor from exercising, or threatening to exercise, its literally unqualified power under the franchise agreement … in order to secure* [the franchisees’] *premature determination, negate their extended term and expropriate* [their] *interests at an undervalue*.” Thus, the ACCC submits, a franchisor must not use the powers and opportunities available to it to the detriment of a franchisee in the absence of any objective legitimate interest in doing so; and must co-operate to the extent possible with a franchisee or potential franchisee, providing that such co-operation is not to the detriment of the franchisor.
2. The ACCC cautions that there is no accepted meaning of the phrase “*legitimate commercial interests*” at common law, citing an article by former High Court Justice, the Hon William Gummow AC on the topic (“What is in a Word? ‘Legitimate’ Interests and Expectations as a Common Law Criteria” (2018) 45 *Australian Bar Review* 23), which describes the concept in a number of different contexts and cases. The ACCC submits that:

the obligation to act in good faith requires consideration by the franchisor of the position and interests of the franchisee, however, the franchisor is entitled to prefer its own commercial interests where there is a competition. What is prohibited is conduct that harms the franchisee where such conduct is not necessary for the protection of the franchisor’s interests.

1. That submission should be accepted, especially given the following observations cited by the ACCC of Barrett J in *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17; Aust Contract Reports 90-143 (at [65] and [67], cited with approval in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [147] per Hodgson JA with whom Allsop P and Macfarlan JA agreed; and in *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; 41 WAR 318 at [89] per Murphy JA):

… it becomes necessary to enquire about the extent to which selflessness is required. It must be accepted that the party subject to the obligation is not required to subordinate the party’s own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become), in words used by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, ”*nugatory, worthless or, perhaps, seriously undermined*”. This seems to me to be the principle emerging from paras 172 to 177 of the joint judgment in *Burger King* where the various authorities are collected and discussed.

…

… the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary: *Burger King* at para 187. The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.

1. The burden of the above submissions should be accepted. They provide a clear and coherent way of approaching the now statutory obligation to act in good faith for the purposes of determining the appropriate pecuniary penalty.

#### Consideration – obligation to act in good faith: Franchising Code, cl 6(1)

1. However one looks at Ultra Tune’s conduct, it was not merely a bare failure to comply with the obligation to act in good faith as it would have the Court accept, but strayed into a more serious instance of such a contravention. The ACCC submits, and I accept, that the following may properly be regarded as manifestations of the contravention:
2. Ultra Tune did not advise Mr Ahmed that the deposit was non-refundable, or would become non-refundable at some time prior to the parties agreeing to the final terms of a franchise agreement before the deposit was paid. To the contrary, I find that it was positively represented that it would be refundable.
3. Mr Ahmed paid Ultra Tune a deposit of $33,000 on 4 September 2015. Mr Ahmed was not provided with the disclosure document, the *Franchising Code* or a copy of the franchise agreement in proposed final form until 21 September 2015, well after the deposit had been paid on 4 September 2015, and he was not able to consider those documents in detail until at least 23 September 2015 during gaps in the training course.
4. The documents that were provided to Mr Ahmed revealed the true cost of the franchise, which Mr Ahmed could not afford, and the true nature of the business opportunity with the Parramatta franchise, which Mr Ahmed did not wish to proceed with, contrary to the prior representations:
   1. that the franchise had only been open about six months, when in fact it had been open for 18 months with the existing franchisor:
   2. that rent was only $45,000 plus GST per annum, when in fact it was $50,000 plus GST per annum; and
   3. that the purchase price of $163,000 included all equipment at the site as inspected and training, when in fact there had to be at least enhanced signage, increasing the price to $175,000.
5. Mr Ahmed advised Ultra Tune on 30 September 2015 that he did not wish to proceed with the franchise agreement and requested a refund of the deposit less the training costs, but Ultra Tune refused, asserting that the deposit had been used to pay for signage and equipment for the Parramatta Site and was now non-refundable. This was in circumstances in which Ultra Tune failed to explain why the orders for the equipment and signage could not have been stopped or why the equipment and signage could not be used by another franchisee or resold by Ultra Tune to another franchisee.
6. Ultra Tune sought and retained a large deposit payment, representing close to 20% of the total sum that would have been payable, and was required by Ultra Tune without giving Mr Ahmed a reasonable time to consider the purchase of the franchise, particularly in light of the oral representations that were made to him as outlined above.
7. Ultra Tune therefore breached the obligation to act in good faith by:
   1. failing to honestly disclose information about the franchise;
   2. making the above misrepresentations to Mr Ahmed as to how long the franchise had been open, the rent payable and the purchase price;
   3. putting pressure on Mr Ahmed to pay $33,000 before providing documentation relevant to the purchase of the franchise;
   4. requiring the payment of $33,000 and subsequently treating it as a non-refundable deposit without making it apparent to Mr Ahmed that the money would be treated as non-refundable;
   5. making a decision to expend the $33,000 immediately towards signage (and other equipment), without any apparent need for urgency;
   6. failing to repay to Mr Ahmed the money (or failing to co-operate with Mr Ahmed to recover the money from the person who received the benefit of the equipment purchased).
8. The ACCC has made good its contention that the good faith contravention was serious enough to fall within the worst category, noting that it is not required to be the worst conceivable, so as to justify and warrant the imposition of the maximum penalty. I do not consider that the maximum penalty requires adjustment for totality. Any such adjustment will be considered in relation to other contraventions. The deterrent message in relation to failing to act in good faith should not be diluted.

#### Consideration – false or misleading representations to the effect that the deposit was unconditionally refundable: ACL, s 29(1)(m)

1. The appropriate penalty for the admitted contravention in relation to the deposit not being unconditional is more complicated for at least two reasons. The first is that there is an overlap between that contravention and the good faith contravention, calling for some degree of reduction so as to avoid sanctioning the same conduct twice. The second is one of characterisation of the relative seriousness of the contravention so as to warrant the imposition of the maximum penalty of $1.1 million dollars.
2. The question of characterisation involves a degree of revisiting the factors relied upon by the ACCC in relation to the good faith contravention, but in the context of a much higher maximum penalty, as well as a greater and more specific need to consider the falsity of the representations made (along with whether it was misleading) as an express element of the provision. Plainly enough, representations about conditions attaching to deposits is a serious and fundamental concern, especially if it may be seen to have been used as device to secure the payment of a deposit in circumstances in which key information that could, and undoubtedly in this case, would, have resulted in the payment not being made in the first place. I have no difficulty in characterising Ultra Tune’s behaviour in relation to the deposit as being in the worst category, again noting that it does not have to be the worst imaginable. That is particularly so as the most serious aspects of Ultra Tune’s conduct revolves around the deposit. The first stage was extracting it from Mr Ahmed. The second stage was resisting all attempts to repay it, including through making further false representations to justify not doing so. Such behaviour, arising not just in a franchise context, but in a range of other contexts, needs to be firmly condemned and deterred.
3. The key features inextricably linked to the false representation that the deposit was unconditionally refundable, it being not merely misleading, included putting pressure on Mr Ahmed to pay $33,000 before providing documentation relevant to the purchase of the franchise and going to extreme lengths to avoid repaying it, or being made to repay it. This conduct indicates the malign attitude standing behind the false representation in the first place, and the grim determination to ensure that this false representation would achieve its evident objective of securing the deposit and not giving it back. I am therefore satisfied that as a starting point, the maximum penalty of $1.1 million is justified when due regard is had to the scale of Ultra Tune’s business and the seniority of Mr Tatsis. Once again, this is no mere extension of vicariously liability, but direct liability by Ultra Tune via one of its most senior managers. Such conduct by Ultra Tune and by other franchisors tempted to do the same must be forcefully deterred. However, I consider that the preceding penalty for the good faith contravention, overlapping as it does with this contravention, and totality considerations flowing from the contraventions that are still to be considered, warrants some degree of adjustment downwards. In all the circumstances, I propose to impose a pecuniary penalty of $1 million for the s 29(1)(m) contravention.

### False or misleading representations that the franchise that Mr Ahmed was proposing to buy had been open for only about six months: ACL, s 29(1)(b)

1. For Mr Tatsis to repeatedly represent to Mr Ahmed in August 2015 that a site had been “*open for about six months*” when it had in fact been operating as an Ultra Tune franchise for many years, and by the current franchisor for some 18 months, albeit that it was closed for several months in the second half of 2014 and reopened in early 2015, was not just misleading, but objectively false.
2. A franchise that has genuinely been operating for only six months may readily be seen to have overcome any initial setup difficulties, and to have started to build a customer base, but would still have significant customer growth potential, whereas a long-running site is more likely to have already reached much, if not most, of its potential to increase customer numbers other than slowly and incrementally over time. If Mr Gray, as a very experienced and capable franchisee owner and operator, could not successfully lift the performance of the Parramatta site, the prospect of Mr Ahmed being able to do so was at best speculative and at worst, hopeless.
3. Mr Tatsis was essentially endeavouring to pass off the Parramatta site as being a substantially different and better prospect than it really was. The representations by Mr Tatsis were therefore at least at the mid-range of seriousness in terms of misleading or deceptive conduct or representations.
4. This false representation was undoubtedly a pivotal factor in Mr Ahmed’s decision to proceed with the franchise deal. Mr Ahmed was alive to the more limited scope for growth of a business that had been operating for some time. He was significantly influenced by the greater scope for growth in a franchise that had only been operating for a relatively short period of time. The penalty that the ACCC seeks of $300,000 is proportionate to the conduct, and, if anything, underplays it so as to give effect to totality. No further reduction is called for.

### Obligation to give documents to Mr Ahmed: Franchising Code, cl 9(1)

1. Ultra Tune asserts that there has been no contravention of cl 9(1) of the *Franchising Code* because Mr Ahmed was given a disclosure document. However, that argument ignores the requirement to provide a copy of the *Franchising Code*, a copy of the disclosure document, and a copy of the franchise agreement in final form to a prospective franchisee at least 14 days before the agreement is entered into or before a non-refundable payment, such as a deposit, is paid. The contravention is therefore easily made out because cl 9(1) was plainly breached.
2. The maximum penalty that the ACCC seeks of $54,000 is plainly appropriate as a starting proposition. Had Mr Ahmed been given this necessary information at the outset, there is little reason to doubt that he would not have progressed further. That is the plain purpose of the obligation imposed by cl 9(1) of the *Franchising Code*, yet a major and long established franchisor did not comply. No sensible reason or excuse has been proffered. There is some, but only very limited, scope for adjustment to have regard to this forming part of the good faith contravention conduct and by way of totality. I propose to impose a penalty of $50,000.

### False or misleading representations with respect to the price of services as to rent and the price of the franchise: ACL, s 29(1)(i)

1. Ultra Tune’s defence of these two allegations was not at all easy to understand. In part, reliance was placed on the proposition that such representations were “*cured*” by the provision of the correct information in the disclosure document provided well after the deposit was paid. For the reasons already given at [349] above, such representations cannot be cured, as opposed to their ongoing effect being curtailed. Beyond that, Ultra Tune does not grapple with the gravamen of the allegations, nor give any coherent opposition to the penalties that the ACCC seeks of $100,000 out of a maximum penalty for each of $1.1 million.
2. Each of these representations were objectively false. In the case of the rent, the information provided to Mr Ahmed before he paid the deposit was that the rent was $45,000 plus GST, yet, as the disclosure document made clear after the deposit was paid, the rent was $50,000 plus GST. The situation for the purchase price is in a different category – Mr Ahmed was told that the purchase price was $163,000, but at the training course was told that he would have to pay for new signage at a cost of a further $12,100. That additional cost must have been appreciated some time before Mr Ahmed travelled to Melbourne for the training course. Within a relatively short time, Mr Ahmed was offered a compromise of paying approximately half, or $6,000.
3. In assessing the seriousness of these false representations, there are competing features. On the one hand, both sets of information were plainly wrong and plainly had an important part to play for Mr Ahmed in making the decision to pay the deposit and attend the training course. On the other hand, the extent of the falsity was limited in scale and scope relative to the correct figures, but not unimportant. It serves to emphasise the importance of the disclosure document in ensuring that a prospective franchisee in Mr Ahmed’s position is properly armed to make an informed submission. Those competing considerations have evidently played a part in the ACCC seeking penalties for each that are less than 10% of the maximum. That properly reflects the fact that these contraventions are at the lower end of the range reflected by the maximum penalty. However, the penalties are mounting up, and both proportionality and totality combine to moderate the penalty that would otherwise be appropriate. I have concluded that a penalty of $50,000 for each of these contraventions is a just result in all the circumstances.

## Contraventions of s 18 of the *ACL*

1. The finding that all of the alleged s 29(1) contraventions concerning Mr Ahmed have been established necessarily means that the parallel s 18 contraventions have also been established, but without the sting of pecuniary penalty liability.

## Total pecuniary penalties for the conduct concerning Mr Ahmed

1. The total pecuniary penalties for the conduct concerning Mr Ahmed is therefore $1,504,000, as set out in the following table:

|  |  |  |
| --- | --- | --- |
| **Type of disclosure obligation contraventions** | **Maximum penalty** | **Penalty** |
| Failure to act in good faith: *Franchising Code*, cl 6(1) | $54,000 | $54,000 |
| Making false or misleading representations to the effect that the deposit was unconditionally refundable: *ACL*, s 29(1)(m) | $1,100,000 | $1,000,000 |
| Making false or misleading representations that the franchise had been “*open for about six months*”: *ACL*, s 29(1)(b) | $1,100,000 | $300,000 |
| Failure to give documents to a franchisee or prospective franchisee: *Franchising Code*, s 9(1) | $54,000 | $50,000 |
| Making false or misleading representations as to the price of the rent: *ACL*, s 29(1)(i) | $1,100,000 | $50,000 |
| Making false or misleading representations as to the price of the franchise: *ACL*, s 29(1)(i) | $1,100,000 | $50,000 |
|  | **Total:** | $1,504,000 |

# total pecuniary penalties

1. The total pecuniary penalty to be imposed is therefore $2,604,000. This is marginally above the overall penalty that the ACCC sought of $2,600,500, albeit arrived at in a different way in certain key respects. The ACCC expressly left it open to the Court to exceed the penalties that were proposed below the maximum, so Ultra Tune were on notice that this might occur. Any earlier submission that an opportunity be given to address the Court after the liability determination was expressly not pressed. The difference is not such as to warrant inviting further submissions in any event, especially as counsel for Ultra Tune did not seek to be heard further.

# REDRESS order to mr ahmed

1. It follows from the foregoing that the making of a redress order in favour of Mr Ahmed is appropriate, with interest, pursuant to s 51ADB(1) of the *CCA*. The ACCC will need to devise a means of ensuring that the payment is received, but it would be acceptable for the payment to be made to the ACCC to be on-provided to Mr Ahmed. Subject to any reason given for departing from this approach, I will make an order now to that effect. This payment should be made without further delay, and in any event within 14 days of the publication of these reasons. It is not clear why, if that be the case, that Ultra Tune has not already made the payment given its concession in that regard.

# DECLARATIONS

1. The ACCC has sought declarations in relation to Ultra Tune’s contraventions of the *Pre-2015 Code* and *Franchising Code*, pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth). I am satisfied that such declarations are appropriate, but subject to any modification from what was sought by the ACCC in its pleadings necessary to accord with these reasons.

# Injunctions

1. The ACCC has sought injunctions of three years restraining Ultra Tune, whether by itself, its servants or agents, from engaging in conduct that would constitute contraventions of the *Franchising Code* and the *ACL* that were the subject of these proceedings. The making of such orders, including the reasonably confined duration, is appropriate. However, the precise wording will be affected by these reasons. Of course, the consequences of failure to comply with such orders could be considerably more serious. Gaol is always a possible outcome.

# COMPLIANCE ORDER

1. The ACCC has sought a compliance order for Ultra Tune to, at its own expense, establish, administer and comply with a program of ensuring compliance by the company, its employees and agents with the *Franchising Code*, *CCA* and *ACL*, pursuant to s 86C(2)(b) of the *CCA* and s 246(2)(b) of the *ACL*. I am satisfied that a compliance order is appropriate, especially given the paucity of information furnished by Ultra Tune on this subject. This will be subject to settling upon appropriate wording.

# publication orders

1. The ACCC has sought an order that Ultra Tune, at its own expense, publish a corrective notice on its website and a corrective advertisement in each of the major metropolitan newspapers in every State and Territory in Australia. The ACCC has also sought for Ultra Tune to be ordered to send a copy of the corrective advertisement to each of its current franchisees. I consider that this is appropriate in all the circumstances. These contraventions, and the sanctions imposed, need to be made known to the general public and to the franchisees. This is very much an issue of public, and franchisee, education of what is required and what the consequences of non-compliance can be, although it doubtless also has an impact on specific and general deterrence.

# SUPPRESSION ORDERS

1. With certain qualifications, I am content to make the suppression orders that Ultra Tune seeks under s 37AF(1)(a) of the *Federal Court of Australia Act*, confined as they are to commercial in confidence financial information. The ACCC neither opposes nor consents to the orders being made. The orders are sought over its profit and loss statements and balance sheets, produced to the ACCC under compulsion, upon the basis that this would reveal confidential financial information to competitors that would have the potential to have a serious adverse commercial effect on both Ultra Tune’s business and the businesses of its franchisees. The application does not extend to the profit and loss statements for the 2012-13 financial year, which also include figures for the 2011-12 financial year.
2. I am satisfied, on the basis of the evidence and submissions furnished, that a reasonable case has been made that this is necessary in the interests of justice, including encouraging full compliance in future by both Ultra Tune and by other persons with notices requiring such material to be produced under compulsion to a regulator. I am not convinced that this information would have the secondary asserted impact of lessening competition in the car servicing market and thereby be against the interests of justice.
3. I am not satisfied that a permanent suppression order is necessary or appropriate. In my view, the duration of the order should be confined to five years. By then the information will be over eight years old, which is older than the 2011-12 and 2012-13 figures which are not presently sought to be suppressed. Ultra Tune will have the option of applying to extend the orders before they expire, which seems unlikely.

## COSTS

1. The ACCC seeks indemnity costs, largely arising out of the way in which Ultra Tune conducted its defence. Although this is an unusual application to make, and necessarily would only succeed in exceptional or unusual circumstances, the reasons above demonstrate that this is such a case. The attempt to cover up the deplorable conduct of Ultra Tune towards Mr Ahmed was not abandoned in this Court, but rather was persevered with, and this took up the lion’s share of the evidence, hearing time and submission length and time, as well as preparation by the ACCC. Ultra Tune made many submissions that were simply unsustainable.
2. This was not a case that was prudently defended as to all of the alleged contraventions having taken place. It probably should not have been more than a penalty hearing conducted on an agreed statement of facts. Only a very small proportion of the costs would have been incurred had Ultra Tune approached this litigation in an appropriate fashion. The ACCC should not bear the costs of that forensic decision.
3. In all the circumstances I am satisfied that it is appropriate to order that Ultra Tune pay the ACCC’s costs of this proceeding on an indemnity basis.

# FRANCHISING CODE REQUIREMENTs arising from this decision

1. The disclosure document requirements in item 4 of Annexure 1 to the *Franchising Code*, dealing with the requirement to disclose certain types of past and present litigation, warrant particular mention, because they reflect a serious post and extra-curial consequence for Ultra Tune flowing from this proceeding of some significance. In particular, items 4.2 and 4.3 presently provide as follows:

4.2 Whether the franchisor, a franchisor director, an associate of the franchisor or a director of an associate of the franchisor, has been:

(a) in the last 10 years—convicted of a serious offence, or an equivalent offence outside Australia; or

(b) in the last 5 years—subject to final judgment in civil proceedings for a matter mentioned in paragraph 4.1(a); or

(c) in the last 10 years—bankrupt, insolvent under administration or a Chapter 5 body corporate in Australia or elsewhere.

4.3 For items 4.1 and 4.2—the following details (where relevant):

(a) the names of the parties to the proceedings;

(b) the name of the court, tribunal or arbitrator;

(c) the case number;

(d) the general nature of the proceedings;

(e) the current status of the proceedings;

(f) the date and content of any undertaking or order under section 87B of the *Competition and Consumer Act 2010*;

(g) the penalty or damages assessed or imposed;

(h) the names of the persons who are bankrupt, insolvent under administration or externally administered;

(i) the period of the bankruptcy, insolvency under administration or external administration.

1. The above details relating to this decision must appear in every disclosure document created, maintained and furnished to existing and prospective franchisees for the next five years. This extra-judicial consequence has been taken into account in fixing the penalties that will be ordered to be paid.
2. The reference in item 4.3(c) reproduced above to providing the case number should be understood as meaning the medium neutral citation of these reasons and of the final orders and declarations, to facilitate easy access. The disclosure document will also need to record the final orders made and any further judgment that becomes necessary. Franchisees need to know the character of the company they are dealing with, not least to encourage a real change in the culture at Ultra Tune toward complying with both the letter and the spirit of the *Franchising Code* from now on.

# CONCLUSION

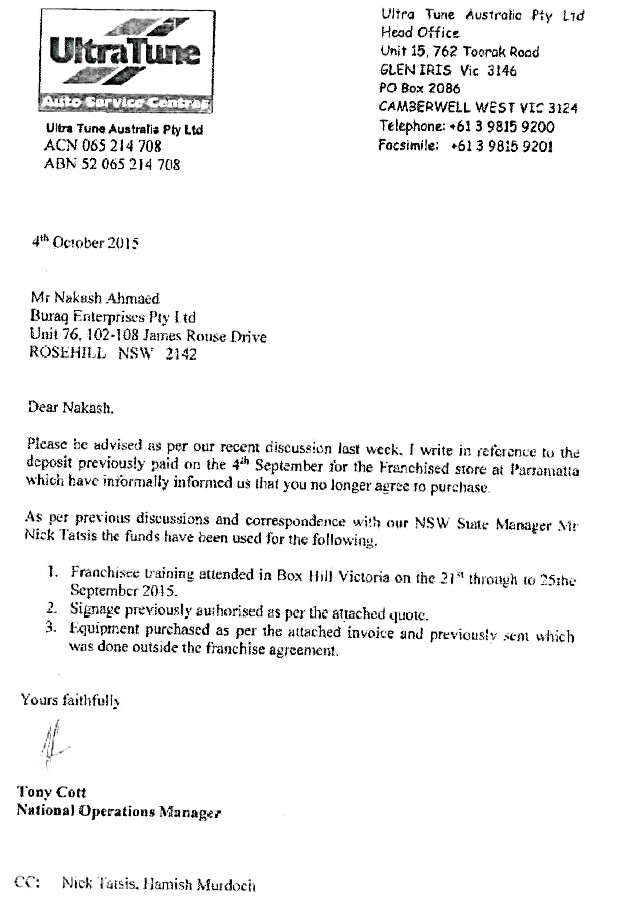
1. The parties should furnish agreed or competing procedural orders to give effect to these reasons within 28 days. The matter will be listed for a case management hearing to finalise the orders and declarations, should that be required.

|  |
| --- |
| I certify that the preceding three hundred and ninety-three (393) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich. |

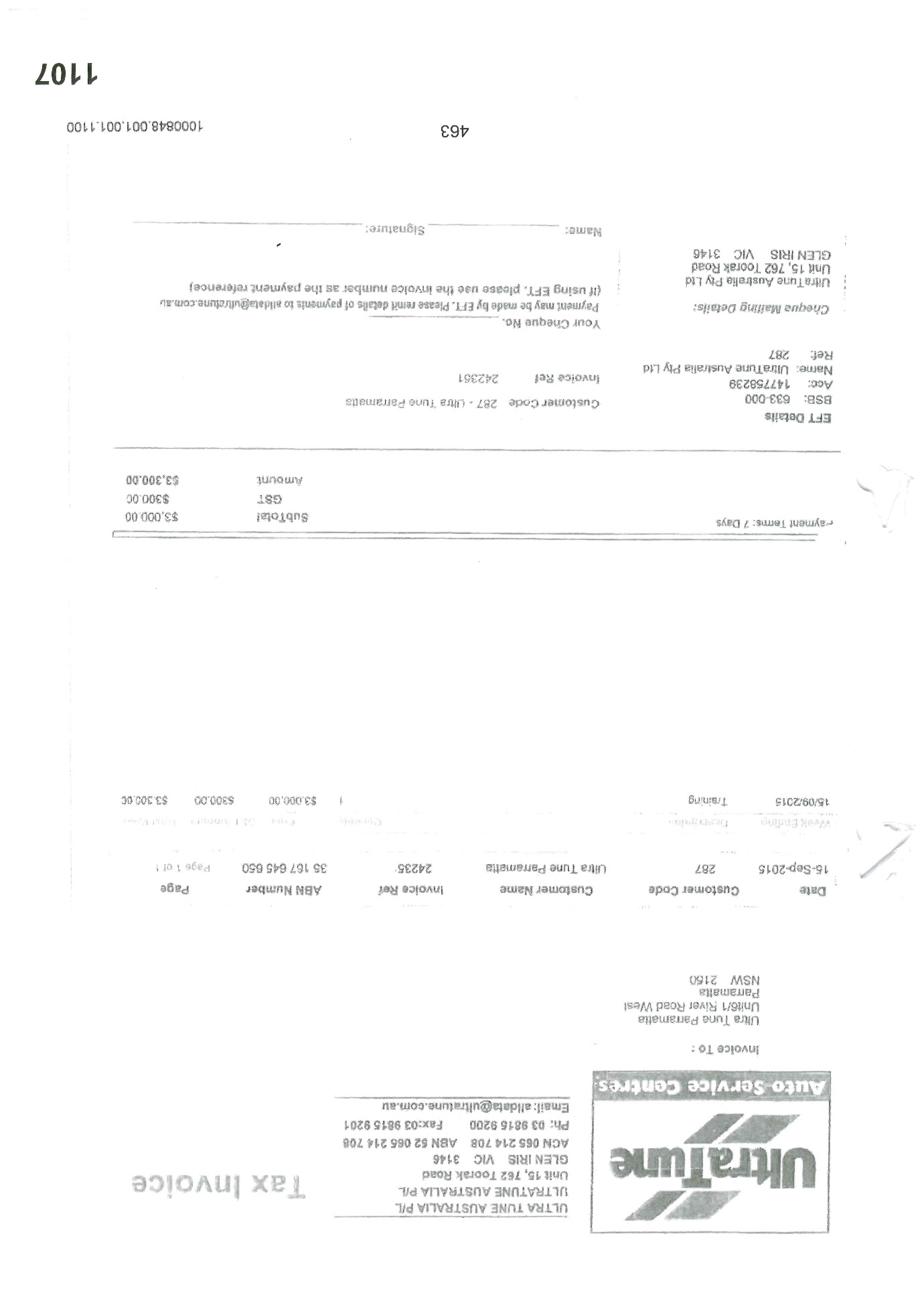
Associate:

Dated: 18 January 2019

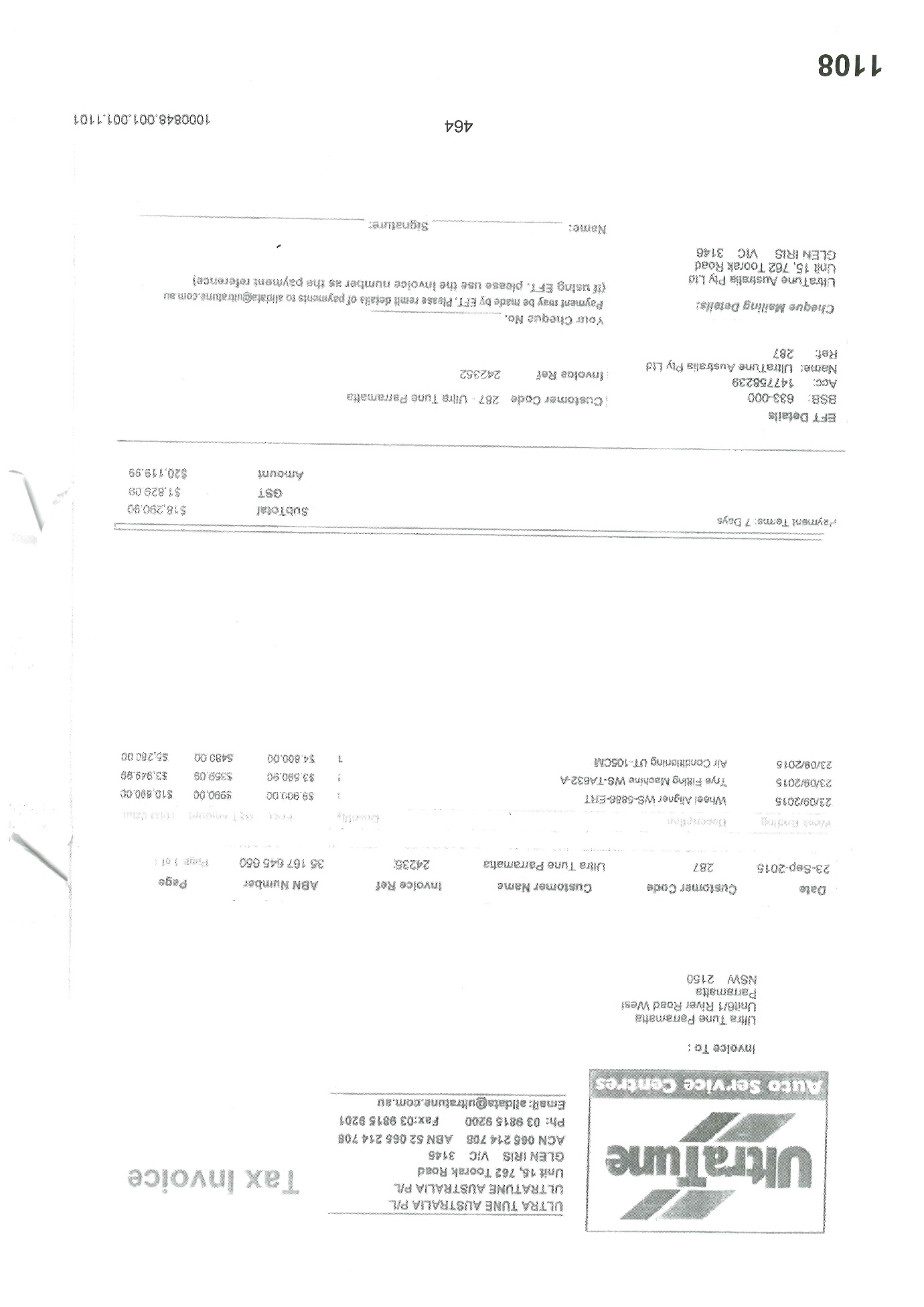
**ANNEXURE A**



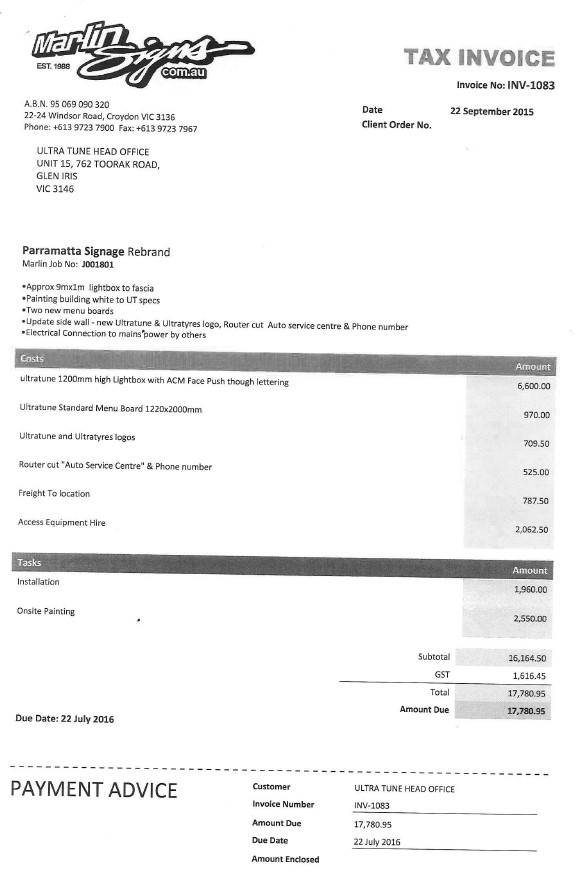
**ANNEXURE B**



**ANNEXURE C**



**ANNEXURE D**

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**ANNEXURE E**

