Federal Court of Australia

 Australian Competition and Consumer Commission v viagogo AG (No 3) [2020] FCA 1423

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| File number: | NSD 1489 of 2017 |
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| Judgment of: | **BURLEY J** |
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| Date of judgment: | 2 October 2020 |
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| Catchwords: | **CONSUMER LAW** – misleading or deceptive conduct – false or misleading representations relating to price – part-price representation – remedies – declarations – pecuniary penalties – principles relevant to imposition of a penalty – injunctions – principles relevant to imposition of an injunction – publication orders – compliance program orders  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) s 137H(3)*Competition and Consumer Act 2010* (Cth) Schedule 2, ss 18, 29, 34, 48, 224*,* 232, 246*Evidence Act 1995* (Cth) s 135(a)*Federal Court of Australia Act 1976* (Cth) s 21*Trade Practices Act 1974* (Cth) s 80*Convention on the Service Abroad of Judicial and Extrajudicial documents in Civil or Commercial Matters*, done at the Hague on 15 November 1965 |
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| Cases cited: | *ACCC v AirAsia Berhad* [2012] FCA 1413*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68*Australian Competition and Consumer Commission v Cement Australia Ltd* [2017] FCAFC 159; 258 FCR 312*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540*Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 5)* [2019] FCA 1544*Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2007] FCAFC 146; 161 FCR 513*Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2*) [2020] FCA 724*Australian Competition and Consumer Commission v Meriton Property Services Ltd (No 2)* [2018] FCA 1125*Australian Competition and Consumer Commission v On Clinic Australia Pty Limited* [1996] FCA 721; 35 IPR 635*Australian Competition and Consumer Commission v Real Estate Institute (WA) Inc* [1999] FCA 1387; 95 FCR 114*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25*Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 7)* [2016] FCA 484*Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No2)* [2012] FCA 629; ATPR ¶42-402*Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 5)* [2013] FCA 1109; ATPR ¶42-450*Australian Competition and Consumer Commission v Valve Corporation (No 7)* [2016] FCA 1553*Australian Competition and Consumer Commission v viagogo**AG* [2019] FCA 544*Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; 262 FCR 243*Australian Consumer and Competition Commission v 4WD Systems Pty Ltd* [2003] FCA 850; 200 ALR 491*Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306*BMW Australia* *v Australian Competition and Consumer Commission* [2004] FCAFC 167; 207 ALR 452*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482*Flight Centre Limited v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; 260 FCR 68*ICI Australia Operations Pty Limited v Trade Practices Commission* [1992] FCA 707; 38 FCR 248*Markarian v The Queen* [2005] HCA 25; 228 CLR 357*Mill v The Queen* [1988] HCA 70; 166 CLR 59*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285*Royer v Western Australia* [2009] WASCA 139; 197 A Crim R 319*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249*TPG Internet Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 190; 210 FCR 277*Trade Practices Commission v Mobil Oil Australia Ltd* [1984] FCA 403; 4 FCR 296 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Number of paragraphs: | 148 |
|  |  |
| Date of hearing: | 24 April 2020  |
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| Counsel for the Applicant: | Dr K. Stern SC with Ms V. R. Brigden |
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| Solicitor for the Applicant: | Corrs Chambers Westgarth |
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| Counsel for the Respondent: | Ms K. C. Morgan SC with Ms S. Palaniappan |
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| Solicitor for the Respondent: | MinterEllison |

ORDERS

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|  | NSD 1489 of 2017 |
|   |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | VIAGOGO AGRespondent |

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| order made by: | BURLEY J |
| DATE OF ORDER: | 2 OCTOBER 2020 |

THE COURT DECLARES THAT:

**Official Site Representation**

1. During the period 1 May 2017 to 26 June 2017, the Respondent:
	1. by using the phrase “Buy Now, viagogo Official Site” in its advertisements on Google, and
	2. by failing to disclose, or adequately disclose in its advertisements that it was not a primary ticket seller,

represented to consumers located in Australia (**Consumers**) that:

* 1. they could purchase official original (i.e. not resold) tickets through <https://www.viagogo.com/au/> (the **viagogo Australian website**); and/or
	2. the Respondent had the sponsorship of, approval from, or was affiliated with, the relevant team, musician, entertainer or event promoter, organiser or venue (**Host**) as an “official” agent of the Host to sell original (i.e. not resold) tickets to the Host’s event(s) directly to the public;

when, in fact:

* 1. the tickets available from the viagogo Australian website were being resold via an online secondary ticketing platform; and/or
	2. the Respondent did not have any such sponsorship, approval or affiliation;

and thereby:

* + 1. in trade or commerce, engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the **Australian Consumer Law**, being Schedule 2 to the *Competition and Consumer Act 2010* (Cth);
		2. in trade or commerce, engaged in conduct that was liable to mislead the public as to the nature of the services the Respondent provided, in contravention of s 34 of the Australian Consumer Law; and
		3. in trade or commerce, in connection with the supply or possible supply of services or in connection with the promotion of that supply of services, made false or misleading representations that the Respondent had the sponsorship, approval or affiliation of a Host in contravention of s 29(1)(h) of the Australian Consumer Law.

**Quantity Representations**

1. During the period 1 May 2017 to 26 June 2017, by making statements such as the following (where “X” is a variable number):
	1. “Less than [X]% of tickets left for this event”;
	2. “Less than [X]% tickets remaining”;
	3. “Only [X]% of tickets left”;
	4. “Tickets are likely to sell out soon”;
	5. “Only a few tickets left”;
	6. “Only [X] tickets left”;
	7. “LAST CHANCE!”; and
	8. “Tickets for this event are selling fast”

in circumstances where the Respondent did not adequately disclose that the references to the number or percentage of tickets still available for any of the events were references to the number or percentage of tickets available for purchase through the viagogo Australian website only, and not for the venue as a whole, the Respondent:

* + 1. in trade or commerce, engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the Australian Consumer Law; and
		2. in trade or commerce, engaged in conduct that was liable to mislead the public as to the quantity of tickets available to events advertised on the viagogo Australian website, in contravention of s 34 of the Australian Consumer Law.

**Total Price Representation**

1. During the period 1 May 2017 to 26 June 2017, the Respondent, by making representations on the “Tickets and Seating Selection Page” of the viagogo Australian website that a Consumer could purchase tickets for the amount stated on that webpage, when, in fact, Consumers could not purchase tickets for the amounts stated on that webpage because Consumers had to pay additional fees:
	1. in trade or commerce, engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the Australian Consumer law; and
	2. in trade or commerce, in connection with the supply or possible supply of services, made false or misleading representations with respect to the price at which Consumers could acquire event tickets through the viagogo Australian website, in contravention of s 29(1)(i) of the Australian Consumer Law.
2. On 18 May 2017, the Respondent, by making representations on the “Tickets and Seating Selection Page” of the viagogo Australian website that a Consumer could purchase:
	1. a ticket for a seat in the Grand Circle section at the Princess Theatre in Melbourne to see a performance of the musical “The Book of Mormon” on Saturday, 20 May 2017 through the viagogo Australian website for A$135 per ticket;
	2. three tickets for seats in the Bronze section of the Gabba cricket ground in Brisbane to attend the Ashes cricket test match on Sunday, 26 November 2017 through the Viagogo Australian website for A$110.05 per ticket;
	3. two tickets for seats in the Upper Tier section at Rod Laver Arena in Melbourne to attend a Cat Stevens concert on Monday, 27 November 2017 through the viagogo Australian website for A$225 per ticket;

when, in fact, a Consumer could not purchase any of those tickets from the viagogo Australian website for the relevant prices because Consumers had to pay additional fees:

* + 1. in trade or commerce, engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the Australian Consumer Law; and
		2. in trade or commerce, in connection with the supply or possible supply of services, made false or misleading representations with respect to the price at which Consumers could acquire each of the tickets referred to in (a), (b) and (c) above through the viagogo Australian website, in contravention of s 29(1)(i) of the Australian Consumer Law.

**Part Price Representation**

1. On 18 May 2017, the Respondent, in trade or commerce, in connection with the supply or possible supply to another person of goods or services of a kind ordinarily acquired for personal or household use or consumption, by stating on the “Delivery Page” of the viagogo Australian website a price for each of the tickets in declaration 3 that excluded further fees payable, without also specifying, in a prominent way and as a single figure, the price for each of those tickets that included the additional fees payable, made a part-price representation in contravention of s 48(1) of the Australian Consumer Law.

THE COURT ORDERS THAT:

**Injunction**

1. Pursuant to s 232 of the Australian Consumer Law for a period of five years from the date of this order the Respondent, whether by itself, its officers, employees, agents or otherwise howsoever, be restrained, in the course of the supply or possible supply of services to Consumers for the sale of tickets on the viagogo Australian website, from representing, in trade or commerce, that:
	1. Consumers can purchase official original (i.e. not resold) tickets through the viagogo Australian website, when that is not the case;
	2. the Respondent is affiliated with or has approval from a particular Host as an “official” agent of the Host to sell original (i.e. not resold) tickets to the Host’s event(s) directly to the public, when that is not the case;
	3. Consumers can purchase tickets for a stated price on a webpage on the viagogo Australian website when they cannot do so without paying further fees to purchase the tickets;
	4. Consumers can purchase tickets for a stated price on a webpage on the viagogo Australian website which exclude further fees payable without also specifying, in a prominent way and as a single figure, the price for each of those tickets including the additional fees payable; or
	5. Only a set number or percentage of tickets are available without expressly stating that the reference to tickets is to those available for purchase through the viagogo Australian website and not the total number or percentage of tickets remaining for the event.

**Pecuniary Penalties**

1. Pursuant to s 224(1)(a)(ii) of the Australian Consumer Law, within 30 days of the date of this order, the Respondent pay to the Commonwealth of Australia pecuniary penalties in the amounts of:
	1. A$2.5 million in respect of the Respondent’s contravention of ss 29(1)(h) and 34 of the Australian Consumer Law set out in the declaration at paragraph 1 above;
	2. A$2.5 million in respect of the Respondent’s contravention of s 34 of the Australian Consumer Law set out in the declaration at paragraph 2 above;
	3. A$1.5million in respect of the Respondent’s contraventions of s 29(1)(i) of the Australian Consumer Law set out in the declarations at paragraphs 3 and 4 above; and
	4. A$500,000 in respect of the Respondent’s contravention of s 48(1) of the Australian Consumer Law set out in the declaration at paragraph 5 above.

**Compliance Program**

1. Pursuant to s 246(2) of the Australian Consumer law, the Respondent is:
	1. within 90 days of this order, to establish and implement an Australian Consumer Law Compliance Program to be undertaken by each employee of the Respondent or other person involved in the Respondent’s business who deals or who may deal with Consumers, being a program designed to minimise the Respondent’s risk of future contraventions of ss 18, 29, 34 and 48 of the Australian Consumer Law in relation to the sale of tickets on the viagogo Australian website; and
	2. for a period of 3 years from the date of this order, maintain and continue to implement the Australian Consumer Law Compliance Program referred to in order 8(a) above.

**Costs**

1. The Respondent pay the ACCC’s costs of these proceedings as agreed or as assessed.

**Further Order**

1. A copy of the reasons for judgment, with the seal of the Court affixed thereon, be retained on the Court file for the purposes of s 137H of the *Competition and Consumer Act 2010* (Cth).

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

REASONS FOR JUDGMENT

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BURLEY J:

##### INTRODUCTION

###### The issues

1. In *Australian Competition and Consumer Commission v viagogo**AG* [2019] FCA 544 (**liability judgment**) I concluded that viagogo had engaged in conduct that contravened ss 18(1), 29(1)(h), 29(1)(i), 34 and 48(1) of the *Australian Consumer Law* (**ACL**) (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)). These reasons assume familiarity with the liability judgment.
2. The parties agree on the form of declarations that should be made following the liability judgment, but disagree on other aspects of the orders to be made. The Australian Competition and Consumer Commission (**ACCC**) submits that the pecuniary penalty to be paid by viagogo pursuant to s 224(1)(a)(ii) of the ACL should be in the range of $12.1 to $13.4 million. Viagogo contends that the penalty should be no more than $3 million.
3. The ACCC further contends that the Court should:
	1. grant injunctions restraining viagogo from engaging in the impugned conduct;
	2. make orders pursuant to s 246(2)(a) to (d) of the ACL that viagogo publish, amongst other things, information about the findings of the Court on its website;
	3. engage in a compliance program; and
	4. pay the ACCC’s costs of the proceedings.
4. Viagogo opposes the making of orders in relation to (a) and (b), but not (c) and (d).
5. In the reasons that follow I have determined: that the appropriate penalty in respect of viagogo’s contravening conduct is $7 million; that in addition to the agreed declarations it is appropriate to grant an injunction restraining viagogo from engaging in the impugned conduct; that viagogo must participate in a compliance program; and that viagogo must pay the ACCC’s costs of the proceedings.

###### Viagogo’s contravening conduct

1. In the liability judgment I found that viagogo had engaged in four contraventions. The first arose from the “Official Site Representation” that appeared in sponsored advertisements (**viagogo ad**) that viagogo placed with Google. The conduct was found to have taken place during the **relevant period** which was 57 days from 1 May 2017 until 26 June 2017. The viagogo ad appeared as the first result when a person searched Google using the name of an event or performance. Upon clicking on the link provided by viagogo in the advertisement, the consumer was taken to the **viagogo Australian website** (https://www.viagogo.com/au/). The viagogo Australian website is viagogo’s virtual shopfront in Australia. It is the place where consumers see what it has on offer and, by navigating through it, can learn about available tickets for specified events and then acquire them. Samples of the viagogo ad and an overview of the manner in which the viagogo Australian website is navigated are set out in section 3 of the liability judgment.
2. The conclusion reached in the liability judgment in relation to the Official Site Representation is conveniently summarised in the form of declaration that will be made:

During the period from 1 May 2017 to 26 June 2017, viagogo:

(a) by using the phrase “Buy Now, viagogo Official Site” in its advertisements on Google, and

(b)     by failing to disclose, or adequately disclose in its advertisements that it was not a primary ticket seller,

represented to consumers located in Australia (**Consumers**) that:

(c)    they could purchase official original (i.e. not resold) tickets through the viagogo Australian website; and/or

(d)     viagogo had the sponsorship of, approval from, or was affiliated with, the relevant team, musician, entertainer or event promoter, organiser or venue (**Host**) as an “official” agent of the Host to sell original (i.e. not resold) tickets to the Host’s event(s) directly to the public;

when, in fact:

(e)     the tickets available from the viagogo Australian website were being resold via an online secondary ticketing platform; and/or

(f)     viagogo did not have any such sponsorship, approval or affiliation;

and thereby:

(i)     in trade or commerce, engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL;

(ii)     in trade or commerce, engaged in conduct that was liable to mislead the public as to the nature of the services viagogo provided, in contravention of s 34 of the ACL;

(iii)     in trade or commerce, in connection with the supply or possible supply of services or in connection with the promotion of that supply of services, made false or misleading representations that viagogo had the sponsorship, approval or affiliation of a Host in contravention of s 29(1)(h) of the ACL.

1. The remaining contraventions arose from the content of the viagogo Australian website. In section 3.3.2 of the liability judgment I described the process by which a consumer interacted with the nine web pages on the viagogo Australian website and ultimately purchased tickets. I concluded in section 3.4 at [75]:

... Each of the webpages is rich in information and provides access to additional information by clicking on links available. None of the pages can be seen in its entirety on a single screen or device likely to be used by the ordinary consumer. The consumer is directed to select links that meet his or her desire in terms of ticket acquisition. As one moves through the process, the website encourages, with increasing urgency, the consumer to advance through the acquisition so that the opportunity to acquire the desired tickets is not lost. This process has the effect, if not the design, of distracting the consumer from content that is available (or that might be available by following other links) beyond that which is immediately needed to progress through the site, and corralling him or her towards speedy completion of the purchase. The use of an interactive website is to be contrasted with other media by which goods or services are promoted and sold. In the present case the website serves the function of both promoting the sale of tickets and also enabling a consumer to enter the transaction. The consumer is drawn not only into a marketing web, but also into a transactional web. The site encourages the consumer to commit to a transaction; he or she selects the event of interest, then in the Tickets and Seating Selection Page is invited to choose the desired number of tickets and, once selected, commit (or at least signify an interest in doing so) to “Buy” them for a nominated price. At each stage the consumer is assured that tickets are running short, that time is running out to buy, and that the tickets that they have selected will soon be released to other, competing purchasers. The increasing urges to completion and the “hurry up” messages create such an impression that the consumer is at risk of missing out on tickets, that he or she is likely increasingly to confine attention to only that information necessary to enter details and complete the transaction.

1. The second contravention arose from the “Quantity Representations” and concerned the quantity of tickets that viagogo said that it had available for sale. In short, viagogo misrepresented on its website that the seats remaining for sale were the seats available for the event or performance at the venue, when in fact they were only the seats that viagogo had available for sale via its website.
2. The declaration that I will make is in the following form, and again captures the conclusion that I reached:

During the period 1 May 2017 to 26 June 2017, by making statements such as the following (where “X” is a variable number):

(a)     “Less than [X]% of tickets left for this event”;

(b)     “Less than [X]% tickets remaining”,

(c)     “Only [X]% of tickets left”;

(d)     “Tickets are likely to sell out soon”;

(e)     “Only a few tickets left”;

(f)     “Only [X] tickets left”;

(g)     ‘'LAST CHANCE!”; and

(h)     “Tickets for this event are selling fast”

in circumstances where viagogo did not adequately disclose that the references to the number or percentage of tickets still available for any of the events were references to the number or percentage of tickets available for purchase through the viagogo Australian website only, and not for the venue as a whole, viagogo:

(i) in trade or commerce, engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL; and

(ii)     in trade or commerce, engaged in conduct that was liable to mislead the public as to the quantity of tickets available to events advertised on the viagogo Australian website, in contravention of s 34 of the ACL.

1. The third contravention arose from what was defined in the liability judgment as the “Total Price Representation”. The effect of the representation is that viagogo falsely represented on the “Tickets and Seating Selection Page”, that the price displayed was the total price, when in fact further fees were charged.
2. The two declarations that I will make capture my conclusions in relation to liability for the Total Price Representation. The first declaration is as follows:

During the period 1 May 2017 to 26 June 2017, viagogo, by making representations on the “Tickets and Seating Selection Page” of the viagogo Australian website that a Consumer could purchase tickets for the amount stated on that webpage, when in fact Consumers could not purchase tickets for the amounts stated because they had to pay additional fees:

(a)     in trade or commerce, engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL; and

(b)    in trade or commerce, in connection with the supply or possible supply of services, made false or misleading representations with respect to the price at which Consumers could acquire event tickets through the viagogo Australian website, in contravention of s 29(1)(i) of the ACL.

1. The second declaration that I will make concerns the same conduct and relates to the total price for three specific transactions that occurred on 18 May 2017.
2. The fourth contravention arose from the “Part Price Representation” and concerned the content of the “Delivery Page”. It is confined to the three transactions that occurred on 18 May 2017. The declaration that I will make again captures the conclusions that I have reached:

On 18 May 2017, viagogo, in trade or commerce, in connection with the supply or possible supply to another person of goods or services of a kind ordinarily acquired for personal or household use or consumption, by stating on the “Delivery Page” of the viagogo Australian website a price for each of the three 18 May 2017 transactions that excluded further fees payable without also specifying, in a prominent way and as a single figure, the price for each of those tickets that included the additional fees payable, made a part-price representation in contravention of s 48(1) of the ACL.

##### THE EVIDENCE

1. In support of its case on relief and penalty, the ACCC relies on identified parts or the whole of the affidavits of Mr Aherne, Ms Bolding, Ms Burke, Mr McDowell and Ms Symons, whose evidence was also read at the liability hearing. It also relies on an affidavit of Kerri Lyn McKeon sworn on 13 August 2019, an affidavit of Yasmin Murry affirmed on 13 August 2019 and an affidavit sworn by Frances Millicent Williams on 5 August 2019.
2. Ms McKeon is Acting Director of Enforcement Queensland and Northern Territory for the ACCC. She gives evidence of video captures that she made of the viagogo Australian website on 12 August 2019. In them, she recorded the booking process for two tickets to a concert to be given by Elton John at the Brisbane Entertainment Centre on 18 December 2019 (**Elton John video capture**) and for four tickets to a concert to be given by Fleetwood Mac at the same venue on 24 August 2019 (**Fleetwood Mac video capture**). She also gives evidence that after the end of the relevant period, from 27 June 2017 until 19 June 2019, the ACCC received a total of 1,990 complaints in relation to viagogo concerning each of the representations as found in the liability judgment. In [16] of her affidavit Ms McKeon exhibits copies of examples of these complaints. Objection is taken to these examples. I explain why I have rejected that paragraph in [108] of these reasons.
3. Ms Murry is a Senior Analyst employed by the ACCC. She gives evidence of video captures that she recorded on 5 June 2019 of the booking process for two tickets to Queen and Adam Lambert at AAMI Park, Melbourne to be held on 19 February 2020 (**Queen video capture**) and also for two tickets to the Ashes at Lord’s Cricket Ground in London to be held on 14 August 2019 (**Lord’s video capture**).
4. Images taken from the video captures made by Ms McKeon and Ms Murry were separately in evidence.
5. Ms Williams is a partner of Corrs Chambers Westgarth, the solicitors for the ACCC. She gives evidence in relation to the ACCC’s requests for information and the provision of documents by viagogo pursuant to orders that I made on 5 June 2019.
6. Viagogo relies on an affidavit affirmed by Jihan Al-Saleh, a lawyer at MinterEllison, the solicitors for viagogo, on 10 September 2019. She gives evidence of changes made to the viagogo Australian website following the liability judgment, and a video capture made on 10 September 2019 of the booking process for two tickets to the La Dispute concert at 170 Russell, Melbourne (**La Dispute video capture**).
7. Viagogo also relies on an affidavit sworn on 23 April 2020 by Katrina Mary Groshinski, a partner at MinterEllison, who refers to what she describes as “ACL training slides” that her firm prepared to address compliance issues associated with the ACL. She gives no admissible evidence as to what, if anything, was done with these by viagogo.
8. The materials relied upon by the parties also included Exhibit 3 from the liability hearing, which was the image capture booklet from the various video captures in evidence.

##### THE CONFIDENTIAL INFORMATION FROM VIAGOGO

1. In the course of preparation for the hearing in relation to penalty, viagogo supplied the ACCC with information providing details of the operation of the viagogo Australian website and in relation to its business. Such information is confidential to viagogo and has been the subject of a suppression order and where reproduced in the published form of these reasons has been redacted. I summarise some of the information below. Although viagogo provided the confidential information in United States dollars, unless otherwise stated, dollar amounts set out in these reasons are in Australian dollars determined using the average United States to Australian dollar exchange rate over the relevant period.
2. During the relevant period XXXXXX clicks were recorded on advertisements that included the phrase “Buy Now, viagogo Official Site”, where the user was taken to the viagogo Australian website. During the relevant period XXXXX transactions were completed on the viagogo Australian website as a result of clicks on these advertisements. This information is to be read with three qualifications: first, that the transaction may not necessarily be related to an event that occurred in Australia; secondly, that it is not necessarily the case that only consumers in Australia were directed to the Australian website; and, thirdly, that the data relates to clicks rather than unique visitors. A single user may have clicked on multiple advertisements during the relevant period. I take these qualifications into account in my consideration of penalty.
3. The total number of transactions on the viagogo Australian website during the relevant period was XXXXX, the total number of tickets sold was XXXXX, the total value of those tickets including the viagogo fees was about $XXXXXX and the value of the tickets without the fees was about $XXXXXX.
4. Viagogo’s worldwide total revenue in the calendar year 2017 was $XXXXXXXXX and its gross profit was $XXXXXXXXX.
5. Viagogo’s total revenue from consumer transactions on its Australian website during the relevant period was $XXXXXX being the viagogo fees plus shipping charges. Viagogo’s profit from transactions on the website during the relevant period was said in a document dated 8 August 2019 to be about $XXXXXX. In a communication dated 21 August 2019 the profit was said to be $XXXXXXX. This discrepancy was explained by viagogo in a communication dated 9 September 2019 as being as a result of the difference between the viagogo group’s consolidated financials as opposed to viagogo AG’s financials (which the ACCC requested). The larger figure, which is said to be correct, does not include certain expenses which were recharged to the Swiss operating subsidiary. There is no transparency as to the manner in which either profit figure for viagogo has been calculated. Without more information as to the basis for its calculation, I am not satisfied that either figure represents an accurate indication of profit earned.
6. Viagogo conducted a manual review of its records and reports that it received XXX “contacts” that “raised concerns including as to the matters addressed in the liability proceedings” from consumers who purchased tickets during the relevant period on the viagogo Australian website. Of those, XXX received no redress and XXX received a refund or another form of compensation, such as a replacement ticket, a partial refund or a chargeback. In some cases a consumer received more than one form of compensation in respect of the same transaction. The total value of compensation provided to consumers is $XXXXXX. That figure excludes instances where a consumer received a replacement ticket.

##### DECLARATIONS

1. The parties have agreed that declarations should be made, and have agreed as to their form. Nevertheless it is for the Court to decide whether this relief is appropriate. The broad discretionary power to make declarations of right is conferred on the Court by s 21 of the *Federal Court of Australia Act 1976* (Cth). That power will generally be properly exercised when the question in issue is real and not theoretical, when the person raising the question has a real interest in raising it, and where there is a proper contradictor: see *Australian Securities and Investments Commission v* ***MLC Nominees*** *Pty Ltd* [2020] FCA 1306 at [110] (Yates J).
2. For the reasons set out in the liability judgment, I am satisfied that these requirements are met in the present case, as are the facts necessary to underpin each declaration.

##### PENALTY

###### Relevant law on penalty

1. Each of ss 29, 34 and 48 is within Part 3-1 of the ACL and accordingly is a pecuniary penalty provision: s 224(1)(a)(ii). In the liability judgment, I have found that each of the representations contravenes one or more of these provisions. The Court may order the person contravening those provisions to pay such pecuniary penalties in respect of each act or omission as the Court determines appropriate.
2. As a corporate respondent, the maximum penalty that may be imposed on viagogo for each contravention of ss 29, 34 and 48 during the relevant period was $1.1 million: s 224(3), item 2.
3. The High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 confirmed (at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ) that the principal purpose in the imposition of a civil penalty is the capacity to deter so as to promote the public interest in compliance. The targets of such deterrence are both the contraveners before the Court and any other would-be contraveners, the dichotomy being between specific and general deterrence: *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2*) [2020] FCA 724 at [21] (Bromwich J).
4. In relation to offences of calculation by a corporation, the punishment must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business. Those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention: ***Singtel Optus*** *Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at [62] – [63] (Keane CJ, Finn and Gilmour JJ).
5. One factor of the need for deterrence arises where there is a potential distortion of competition in the market on the part of the contravener, who gains an unfair advantage over competitors who complied with the law: *Australian Competition and Consumer Commission v* ***Reckitt*** *Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [149] (Jagot, Yates and Bromwich JJ). As the Full Court said in that case at [151]:

All others [sic] things being equal, the greater the risk of consumers being misled and the greater the prospect of gain to the contravener, the greater the sanction required, so as to make the risk/benefit equation less palatable to a potential wrongdoer and the deterrence sufficiently effective in achieving voluntary compliance. Tipping the balance of the risk/benefit equation in this way is even more important when the benefit in contemplation is profit or other material gain. It is especially important if there are disadvantages, including increased costs or lesser sales or profits, in complying with legal obligations for those who “decide” to be law-abiding.

1. Section 224(2) of the ACL requires that in determining the appropriate pecuniary penalty, the Court has regard to all relevant matters including:
	1. the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
	2. the circumstances in which the act or omission took place; and
	3. whether the person has previously been found by a court in proceedings under Chapter 4 or Part 5-2 to have engaged in any similar conduct.
2. Section 224(4) provides:

(4) If conduct constitutes a contravention of 2 or more provisions referred to in subsection (1)(a):

(a)  a proceeding may be instituted under this Schedule against a person in relation to the contravention of any one or more of the provisions; but

(b)  a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

1. Relevant factors beyond those specifically identified in s 224(2) ACL have been identified in numerous cases. In *Australian Competition and Consumer Commission v* ***Coles Supermarkets*** *Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 Allsop CJ said at [8]:

A convenient summary of the other matters that will usually be relevant in such cases can be found in the judgment of Perram J in *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761; 282 ALR 246 at 250 [11]:

(1)     The size of the contravening company.

(2)     The deliberateness of the contravention and the period over which it extended.

(3)     Whether the contravention arose out of the conduct of senior management of the contravener or at some lower level.

(4)     Whether the contravener has a corporate culture conducive to compliance with the Act (or the new Australian Competition and Consumer Law) as evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention.

(5)     Whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention.

(6)     Whether the contravener has engaged in similar conduct in the past.

(7)     The financial position of the contravener.

(8)     Whether the contravening conduct was systematic, deliberate or covert.

1. These matters are not exhaustive, and may overlap: see, for instance, *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 190; 210 FCR 277 at [140] – [141] (Jacobson, Bennett and Gilmour JJ). 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 contravener in question: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 (***ABCC Case***) (Dowsett, Greenwood and Wigney JJ) at [102]. As the Full Court said in that case:

[103] 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.

[104] 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.

1. In the *ABCC Case* the Full Court provided a summary of the process for determining civil penalties (at [98], [100] – [107]). In relation to the general task and the often cited “instinctive synthesis” required, the Full Court said at [100]:

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 at 378 [51] (per McHugh J). Or, as the plurality put it in *Markarian* (at 374 [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 611-612 [74]-[76].

1. The **totality principle** and the **course of conduct principle** are both relevant to the present case. It is also a fundamental principle of sentencing that double punishment should be avoided for the commission of multiple offences. Section 224(4) provides that a person is not liable for more than one pecuniary penalty in respect of the sameconduct.
2. Each of the representations were made numerous times. A contravention occurs each time a false representation is made in breach of one of the relevant provisions of the ACL: *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 5)* [2013] FCA 1109; ATPR ¶42-450 at [23] (Tracey J); *Coles Supermarkets* at [17]. There is no dispute between the parties that the number of individual contraventions was so great in the present case (numbering many thousands of clicks on the viagogo ad and the website pages) such that if they were taken as an approximation of the number of instances a consumer saw each representation, to multiply the number of contraventions by the maximum penalty of $1.1 million per offence would be impractical and wrong: see *Reckitt* at [157].
3. The course of conduct principle is commonly referred to as the recognition that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality: *Australian Competition and Consumer Commission v* ***Cement Australia*** *Ltd* [2017] FCAFC 159; 258 FCR 312 at [421] (Middleton, Beach and Moshinsky JJ). The interrelationship may be legal, in the sense that it arises from the elements of the contraventions. It may also be factual, because of a temporal or geographical link or the presence of other circumstances compelling the conclusion that the crimes arise out of essentially the same act, omissions or circumstances: *Cement Australia* at [422], citing *Royer v Western Australia* [2009] WASCA 139; 197 A Crim R 319 at [22]. In *Cement Australia* the Full Court noted at [423] that the Court must be cautious in the application of the course of conduct principle in a civil penalty context, given it uses the language of the criminal law. Nevertheless, the course of conduct principle is, as the Court noted at [424], commonly employed and is a useful tool in the determination of appropriate civil penalties.
4. The Court is not limited to ordering a penalty fixed by the number of courses of conduct established. A course of conduct may attract a maximum penalty which exceeds the maximum penalty for an individual contravention: *Coles Supermarkets* at [15], [16] and [20]. In *Reckitt* at [157], the Full Court noted that the theoretical maximum was in the trillions of dollars given that there were over 5 million contraventions. Accordingly, the appropriate range for penalty was best assessed by reference to other factors, there being no meaningful maximum. See also *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; 262 FCR 243 at [231] and [234] (Allsop CJ, Middleton and Robertson JJ).
5. In addition to the foregoing, the totality principle requires the Court to consider the entirety of the underlying contravening conduct to determine whether the total or aggregate penalty is appropriate: *Mill v The Queen* [1988] HCA 70; 166 CLR 59 at 63 [8] – [9].
6. Viagogo places considerable emphasis on the **parity principle**, which requires that persons or corporations guilty of similar contraventions should incur similar penalties and that “there should not be such an inequality as would suggest that the treatment meted out has not been even-handed”: *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285at 295 (Burchett and Kiefel JJ, with whom Carr J agreed at 299). The ACCC submits that caution should be exercised in this regard.
7. In *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 5)* [2019] FCA 1544 Gleeson J said at [55]:

By application of the parity principle, assessments of penalty in analogous cases may provide guidance to the Court to ensure that there is parity of treatment of similar circumstances. However, as Hill J observed in *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd (No 2)* [2002] FCA 192; (2002) 201 ALR 618 at [34], “while pecuniary penalties imposed in one case provide a guide, that guide will seldom, if ever, be able to be used mechanically”. Furthermore, “other things are rarely equal where contraventions of the [TPA] are concerned”: *NW Frozen Foods* at 295. In *Singtel* at [60], the Full Court observed that:

…the Court is not assisted by… citation[s] of penalties imposed in other cases, where the combination of circumstances were different from the present, as if that citation is apt to establish a “range” of penalties appropriate in this case.

###### The Submissions

1. The parties each addressed the mandatory considerations under s 224(2) of the ACL and a number of other circumstances said to be relevant to the assessment of penalty. The ACCC emphasised that a contravention occurred every time a consumer saw a representation. Having regard to the number of clicks on the viagogo ad and the transactions completed via the viagogo Australian website, the ACCC submits that there were an exceedingly large number of contraventions. The theoretical maximum penalty for each contravention is $1.1 million pursuant to s 224(3), item 2 of the ACL. Accordingly, the ACCC submits that the maximum penalty in the present case is “effectively limitless”.
2. The ACCC submits that each of the four contraventions should be considered to be a separate course of conduct. It makes specific submissions directed to the following factors: (a) the nature, extent and duration of the conduct; (b) the deliberateness of the conduct; (c) the loss or damage caused; (d) the size and financial position of viagogo, and the benefits to viagogo of the conduct; (e) the role of senior management; (f) prior similar conduct; (g) whether there is a corporate culture conducive to compliance; and (h) co-operation with the ACCC. I outline the ACCC’s submissions in relation to those factors in section 5.3 below.
3. The ACCC submits that having regard to each of these matters the appropriate penalty in total should be between $12.1 and 13.4 million, where the penalty for the course of conduct arising from the Official Site Representations should be between $4 to 4.5 million, the penalty arising from the Quantity Representations should be between $3.5 to 4 million, the penalty arising from the Total Price Representations should be between $2.95 to 3.25 million, and the penalty arising from the Part Price Representations should be $1.65 million.
4. Viagogo disputes the ACCC’s submission that, having regard to the number of contraventions and the statutory maximum, the maximum penalty is “effectively limitless”. It submits that the Full Court in *Reckitt* rejected as inappropriate an attempt to calculate the number of contraventions in terms of the number of representations and instead concluded that the penalty is best assessed by reference to other factors. Viagogo engages with and disputes factual matters and points of emphasis arising from each of the factors raised in the submissions made by the ACCC. It also submits that changes it has made to the viagogo Australian website after the liability judgment is a factor to be taken into account in the assessment of penalty. I outline viagogo’s submissions in relation to those factors in section 5.3 below.
5. Viagogo submits that a course of conduct approach has limited utility, but if it is adopted then each of the representations should be considered to amount to only one multi-faceted course of conduct, citing *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No2)* [2012] FCA 629; ATPR ¶42-402 (***TPG Internet (No 2)***) at [71] (Murphy J). Viagogo emphasises the importance of parity of outcome to achieve consistency across similar cases. It submits that the contraventions do not relate to an extended period of time, nor to conduct which could be characterised as deliberate, predatory or unconscionable, or on the very serious end of contraventions. Nor, it submits, may the Court infer that all purchasers of tickets in the relevant period were affected by the conduct and would have been able to find alternative tickets or if not, would have preferred not to attend the live event at all.
6. Viagogo submits that the Total Price Representations and Part Price Representations should be considered together as one course of conduct, and that they were the most serious of the four representations. It submits the appropriate penalty for these is $1.25 million. It submits that there is limited evidence as to the prevalence of the Quantity Representations and the Court should not assume that there is a relevant nexus between the total number of completed transactions in the 57 day period and the Quantity Representations. It submits that the appropriate penalty for this course of conduct is $1 million. Viagogo submits that the Official Site Representations were the least serious of the representations having regard to there being an “element of ambiguity” about them (citing the liability judgment at [129]) and the evidence that only a very small proportion of clicks on the viagogo ad resulted in a completed transaction. It submits that the appropriate penalty for this course of conduct is $750,000. The result, viagogo submits, is a total penalty of $3 million which is proportionate having regard to the total profit that it earned during the relevant period and the range of penalties awarded in other cases.
7. I first consider the factors raised by the parties before turning to assess the appropriate penalty.

###### Consideration

Nature, duration and extent of the contravening conduct: s 224(2)(a)

The Official Site Representation

1. In section 3 of the liability judgment various aspects of the viagogo ad, which contained the Official Site Representation, and the dynamic operation of the viagogo Australian website are described. A substantial method by which consumers encountered the viagogo Australian website during the relevant period, as described in section 4 of the liability judgment, was to put into a Google search the name of an event or performance. In the results produced on the Google results page would be the sponsored viagogo ad. In other instances, a Google search that included the event name and the word “viagogo” would similarly produce results with the sponsored viagogo ad. In each individual instance there was a contravention. The contraventions took place for the entirety of the relevant period.
2. As I have noted, the confidential evidence of viagogo indicates that there were over XXXX XXXX clicks on the viagogo ad and a proportion of those clicks resulted in completed transactions for the sale of tickets. I infer that notwithstanding that some consumers may have deliberately performed a Google search in order to find the viagogo Australian website, in the overwhelming number of cases each click on the viagogo ad, irrespective of whether that click resulted in a completed transaction, was performed by a consumer who read the viagogo ad and was accordingly the subject of contravening conduct in breach of s 29(1)(h) and s 34 of the ACL. While the number of clicks on the viagogo ad and the number of transactions completed as a result of such clicks provides useful guidance in assessing the harm suffered by consumers, I note that those figures do not necessarily represent the universe of consumers who were exposed to the Official Site Representation. More consumers may have seen the viagogo ad and, although they did not click on the link, have been misled.
3. Although the Official Site Representation contravened two penalty provisions (ss 29(1)(h) and 34 of the ACL), viagogo cannot be punished twice for the same contravention. The ACCC submits that the question of penalty should be determined by reference to the breach of s 34 of the ACL alone. I agree. It captures the gravity of viagogo’s misconduct because the representation was positively liable to mislead the public: see liability judgment at [192].
4. The Official Site Representation misrepresented that the consumer could purchase official, not resold, tickets through the viagogo Australian website. I characterise this as qualitatively a very serious misrepresentation, because it fundamentally misled consumers as to the nature of viagogo’s business in order to attract consumers to acquire tickets. Viagogo was far from an authorised vendor of tickets. By making the Official Site Representation it drew consumers to the viagogo Australian website by engendering the erroneous belief that the tickets made available for sale were authorised by the venue or host to be sold by viagogo when in fact viagogo was providing a platform for third parties to sell tickets second hand: liability judgment at [142]. The consequence of being so drawn-in led to the consumer being exposed to further misleading conduct on the part of viagogo on its website. Contrary to the suggestion made by viagogo in its submissions, my observation at [129] of the liability judgment that there was perhaps an element of ambiguity about the advertisement does not provide an ameliorating factor. As I noted, the room for ambiguity was slight, and my finding was that the ordinary consumer would be misled.
5. During the relevant period a very substantial number of individual clicks (XXXXXXXXX) were made on the viagogo ad and a proportion (XXXX) of transactions were completed on the website as a result of clicks on the viagogo ad during the relevant period. Viagogo points out that it ceased using the word “official” in its Google advertisements in December 2017, after the relevant period, but completed transactions rose in number in December 2017. It submits that this supports an inference that the word “official” in the Official Site Representation was not material to consumers who entered into a transaction. In my view it is not appropriate to draw such an inference. There is simply not enough information available to make such a comparison in any meaningful way. The rise in transactions could be seasonal, the result of other changes to the website, because more attractive events were promoted, or due to any other number of reasons.
6. In my view one must be careful with what may be drawn from statistics like these. Little in the way of complex information can be gleaned on the basis of the numbers alone and in the absence of expert evidence interpreting them.
7. I accept that the number of clicks on the viagogo ad indicates that there was a very large number of incidents where consumers were exposed to the Official Site Representation. Each click is likely to signify that a consumer read the advertisement and was exposed to the Official Site Representation. It is likely that this was the first point at which a consumer would encounter viagogo. Even making a discount (which I do) for the likelihood that some consumers who were familiar with viagogo’s services as a ticket re-seller, or who were repeat visitors to the viagogo Australian website, did so by clicking on the viagogo ad link, the number of people who encountered the misrepresentation is very substantial.
8. Viagogo submits that allowance should be made for the fact that, because tickets sold by it were second hand or re-sold, some consumers are likely to have obtained tickets they would not otherwise have been able to get. To the extent that a proportion of those consumers were aware that the tickets were being resold, that is a relevant consideration and I allow for it.
9. I also accept that the figures reveal that a very low percentage of consumers who initially clicked on the viagogo ad ultimately concluded with an acquisition of tickets on that occasion. However, the number of people who entered a transaction is still very large, which is a factor relevant to the assessment of penalty.

The Quantity Representations

1. In [150] of the liability judgment I reviewed the Quantity Representations.These were misrepresentations in contravention of s 34 of the ACL because whilst they led consumers to believe that limited tickets were remaining in the venue, the true position was that the Quantity Representations were references to the tickets available on the viagogo Australian website only. The misrepresentations were made on numerous occasions during a consumer’s journey from the commencement of the booking process to the point of purchase of tickets. Furthermore, as I describe in section 3.3 of the liability judgment, the Quantity Representations were made in a variety of forms with the effect that consumers were induced to believe that because of the limited availability of tickets at the venue, unless they completed a purchase, they would lose the opportunity to acquire tickets at all. The effect of the manner in which the misrepresentations were made was to distract consumers from the inadequate disclaimers present on the viagogo Australian website. They were productive of anxiety on the part of consumers: see liability judgment at [75], [150] and [152]. They continued for the relevant period. The confidential evidence indicates that many (XXXXXXXXXXXXXX) people clicked through the viagogo Australian website and a lesser number (XXXXXXXXX) of people acquired tickets during the relevant period. I regard this too as qualitatively a very serious misrepresentation.
2. Viagogo submits that apart from the evidence of the five ACCC lay witnesses, who gave evidence about seeing some of the impugned statements, the nature and extent of these misrepresentations is unknown and that it is also unknown as to how often they appeared and whether they had an impact upon consumers. However, whilst the precise numbers are unknown, for the purposes of assessing penalty it is sufficient to make the following observations as to the extent and duration of the Quality Representations.
3. First, the misrepresentations were made for the whole of the relevant period. As much was admitted by viagogo in its pleaded case.
4. Secondly, each of the ACCC lay witnesses observed the representations, and gave evidence of the effect that they had on their approach to the offering on the website. Mr Aherne was worried that he would miss out on tickets and tried to rush through the booking process. Ms Bolding found the warnings distracting and they made her feel anxious that she was running out of time to make a purchase. Ms Burke also rushed through the booking process for that reason. Ms Symons thought that she would miss out if she did not purchase the tickets quickly. Mr McDowell had the same reaction. These reactions serve to confirm my own impression when looking at the video captures in evidence. From the point when an “event” was clicked on by a consumer, the Quantity Representations were repeatedly made throughout progress through the website (see liability judgment at [52], [54] – [58], [66], [68], [69], [72] and [73]). I found that it was all but impossible for the Quantity Representations to escape the notice of the consumer. As I described in section 3.3.2 and [150] of the liability judgment, the Quantity Representations had the effect of hurrying the consumer on. In their various iterations the Quantity Representations had the effect of drawing the consumer further into a marketing web and also a transactional web, lured by repeated assurances that the only tickets available at the venue are going fast; if the consumer did not convert the interest in the tickets to an acquisition, the opportunity to acquire tickets would be lost: see liability judgment at [75], [150].
5. Thirdly, the confidential evidence indicates that in the relevant period there was a very large number (XXXXX) of transactions involving the sale of a larger number (XXXXX) of tickets. These were tickets for thousands of consumers. The total value of the transactions was about $XXXXXXXX. The number of transactions entered does not account for the number of consumers who entered the website, were misled, but did not complete a transaction.
6. Having regard to the frequency of the representations, and the manner in which they pop up on the screen, in my view the Quantity Representations are not likely to have escaped the attention of any consumer. The misrepresentations were on an industrial scale for the relevant period.

The Total Price Representation

1. The Total Price Representationmisrepresented that a consumer could buy tickets for the price stated on the Tickets and Seating Selection Page when they could not, because substantial additional fees – notably a booking fee of about 28% of the advertised price of the ticket – was added. It was also made during the entirety of the relevant period. The misrepresentation was made at a significant time in the journey of the consumer through the website, when the consumer was invited for the first time to click on the “buy” option for the tickets. At this point consumers would perceive that they were beginning to commit to an acquisition. As noted at [171] of the liability judgment, by selecting the “buy” button, the consumer was brought further into the web. The misrepresentation seduced the consumer with a misleading impression of the price, induing consumers to become further committed to a transaction.
2. However, whilst the Total Price Representation had the effect of drawing consumers in, the total price of the transaction was ultimately revealed on the Review page: liability judgment at [173]. At that point consumers learned the true price of the tickets. Viagogo submits that given this correction, the misrepresentation lasted only a short period, and that consumers therefore cannot be said to have suffered harm as a result of the misrepresentation. However, by the time consumers reached the Review page they had invested significant time in navigating the five other pages of the booking process. They had not been adequately notified that the price was set by a re-seller of the ticket at a price selected by them, or that substantial further fees were yet to be added. The observations that I have made above at [68] in relation to the number of transactions entered applies equally here. Nevertheless, whilst the misrepresentation was serious because it was in clear breach of the requirements of the specific obligation imposed by s 29(1)(i) of the ACL, it was not at the same level as the first two misrepresentations.

The Part Price Representation

1. The Part Price Representationarose on the Delivery Page of the viagogo Australian website. The ACCC’s case was based on only three transactions that occurred on 18 May 2017. The contravening conduct was that the price for each of the tickets was displayed on the Delivery Page, but it did not in a prominent way and in a single figure specify the total price, including the additional fees payable, in contravention of s 48(1) of the ACL. These representations amounted to a clear breach of specifically prohibited conduct on the part of viagogo. Viagogo submits that these representations were “fleeting in time” as, like the Total Price Representation, they were corrected on the final Review page. However, consumers were nonetheless subjected to the representations on the Delivery Page, and were drawn further into the transactional web as a result of the representations. Nevertheless, having regard to the limited duration of the established contravention, this is on the lesser scale of breaches in terms of nature, duration and extent.

Loss or damage caused: s 224(2)(b)

1. The ACCC submits that a precise assessment of loss to consumers or the competitors of viagogo (being authorised ticket sellers and venues) is impossible to determine. It submits that there is evidence of the significantly higher ticket prices the ACCC lay witnesses paid for their tickets, compared to the face value of the tickets, which is consistent with viagogo’s VAT and Booking Fee being nearly an additional 28% of the price of the ticket. Ms Bolding paid $410.98 for two tickets with a combined face value of $134 and attended the event but had a restricted view. Ms Symons paid $1,068.70 for five tickets with a face value totalling $534.75. Mr Aherne paid $553.90 for two tickets that he was unable to use and which were not refunded by viagogo after they were cancelled by Cricket Australia. He purchased two replacement tickets from the authorised seller for a combined $112.00. Ms Burke and Ms McDowell were not given refunds from viagogo, but obtained them from their financial institutions instead. The ACCC submits that it may be inferred that other consumers also paid more for tickets from viagogo than they would have had to pay for tickets from authorised ticket sellers or venues.
2. The ACCC further submits that consumers also suffered a loss of opportunity to make a different purchasing decision which may have led to their purchasing tickets at a lower price. In this regard it relies on confidential information provided by viagogo about complaints that it had received during the relevant period from consumers in respect of matters that were the subject of the liability proceedings. It submits that the confidential information provided indicates that for most complaints, no refunds were paid, and the basis upon which refunds were provided were not explained. The ACCC also relies on evidence as to the cumulative total number of tickets purchased by consumers on the viagogo Australian website during the relevant period and the total value of those tickets. It submits that whilst it is not possible to know what consumers would have had to pay for the tickets elsewhere, the total figure provides some assistance in assessing penalty.
3. Viagogo agrees that the quantum of loss is impossible to determine but it submits that no inference may be drawn that consumers other than the ACCC lay witnesses paid more than the face value of the tickets, or from the other propositions put by the ACCC. It submits that it is not open for the Court on the evidence to reach the conclusion that alternative tickets to the same live event were available at a cheaper price. For instance, all official tickets for the event Ms Burke sought to attend were sold out. It contends that the correct approach is not to consider the face value of the tickets, but rather to consider the cost of an official ticket to the live event at the time the viagogo ticket was purchased by the consumer, which cannot be ascertained. Further, it submits that the total number of tickets sold is irrelevant to the loss or damage caused to consumers. It is probable that at least a portion of consumers intended to purchase tickets using the viagogo Australian website and were thus not misled. It submits that, more importantly, a portion of consumers will have not suffered any loss, and it is inappropriate to seek to calculate loss by reference to ticket price when there is no evidence that consumers did not obtain valid tickets that allowed them entry into the various events, and that tickets were otherwise available from other sources.
4. I am satisfied that the conduct of viagogo in making the representations has caused damage.
5. First, there is harm to consumers. It is not possible, having regard to the available information, to quantify it. The evidence of the ACCC lay witnesses to which the ACCC refers in its submissions demonstrates that each not only was led to explore the website to look for tickets, but also consummated transactions in the belief that these were the tickets available from the authorised vendor and under misapprehensions as to price. They paid substantially more for tickets on the basis of those misapprehensions than they would have if they had bought official tickets from the authorised sellers. The fact that viagogo received XXXX complaints from consumers during the relevant period concerning matters the subject of the liability proceedings supports the proposition that the experiences of the lay witnesses were not isolated events, or that they were idiosyncratic. They are confirmed by my review of the website and video captures, as found in the liability judgment. These matters lead me to the view that a substantial number of consumers are likely to have entered transactions under the misapprehensions engendered by the representations. Furthermore, the fact that the Official Site Representations, the Quantity Representations and the Total Price Representations were themselves liable to mislead intrinsically speaks of harm to consumers.
6. Secondly, an ordinary and natural consequence of such conduct is that consumers were harmed insofar as they were deprived of the opportunity to buy tickets from another source, from someone who did not misrepresent the true position.
7. Thirdly, there is harm to competitors. These are the authorised ticket sellers, re-sellers and venues. The evidence of the lay witnesses was that at least some venues do not sanction or approve the second-hand resale of tickets to events held at their venues, and may refuse entry to the holders of re-sold tickets. The harm to competitors arises also where consumers are misled to believe that viagogo is authorised to sell them tickets that are overpriced (by the addition of the about 28% booking fee), and where consumers are misled to believe that there are fewer tickets available at the venue than there are in fact available from the authorised vendor. Competitors who comply with the requirements of the ACL are also harmed insofar as the final price of the tickets available from viagogo is not clearly disclosed to consumers at an appropriate stage when navigating the viagogo Australian website. The harm is not limited to the lost opportunity for the authorised ticket seller to make a sale. It is also reputational, not least because, as I can comfortably infer, of the anxiety caused by the misrepresentations made by viagogo to consumers.
8. Fourthly, I accept the submission advanced by the ACCC that the harm to consumers will in some measure be assessed by reference to the total value of the sales of tickets during the relevant period rather than by reference only to the revenue flowing to viagogo. That is because in engaging in the contravening conduct viagogo was promoting the sale of tickets, not simply its services as a “marketplace” or seller of second-hand tickets. The consumers who were misled by that conduct not only paid the (about) 28% additional booking fee: they paid the full price for tickets that they expected to be getting from a source that they did not expect. Against this may be balanced the prospect that some tickets were re-sold at less than face value, although it may be noted that in order for a consumer to benefit from the sale the seller would need to offer a discount of approximately 28% of the face value of the ticket, because otherwise the addition of the viagogo fees would still result in the consumer paying more than the face value of the ticket.
9. Care must be taken, however, not to overstate the value of the harm. It does not amount to the total value of sales, because not all consumers were frustrated in their expectations. A number will have obtained tickets that were otherwise not available. Some too, may have been alert to the fact that viagogo was a secondary ticket marketplace. Some may have paid less than the face value of the tickets. Others may have received refunds or other forms of compensation. However, I infer that all consumers were exposed to at least one of the representations, and a substantial portion of them will have been misled. The total value of the ticket sales provides a broad figure that, when discounted for these matters, provides an indication of the extent of the harm suffered. This factors into the assessment of the quantum of penalty.
10. Care must also be taken to ensure that there is no double counting. The value of the total of the XXXXX transactions entered during the relevant period was about $XXXXXXX. Of those transactions, XXXXX were commenced by a consumer clicking through the viagogo ad. The sheer number of clicks (approximating, I find, even with a healthy discount, to a very large number of individual representations), and the sheer number of transactions entered, suggests a strong case for ensuring the ends of both specific and general deterrence by the imposition of a large penalty.

Prior similar conduct: s 224(2)(c)

1. Viagogo has not previously been found by an Australian court to have engaged in any similar conduct. This weighs in favour of viagogo.

Circumstances of the contraventions: s 224(2)

Size, financial position and benefits

1. The ACCC notes that viagogo describes itself as the “world’s largest ticket marketplace”. Relying on figures provided by viagogo, it notes that in the 2017 calendar year, viagogo’s total worldwide revenue was $XXXXXXX, its profit was $XXXXXXX, that its revenue attributable to the Australian website was about $XXXXXXX (the total value of Australian ticket sales by viagogo in 2017 was about $XX XXXXX), and the total revenue from the Australian website during the relevant period was $XXXXXX. It submits that considerations of specific deterrence require that the revenues of a company, including worldwide revenue, particularly those broadly related to the contraventions, be considered in order to deter it from future conduct, citing *Australian Competition and Consumer Commission v Valve Corporation (No 7)* [2016] FCA 1553 (Edelman J) at [7] and [53] and the Full Court of this Court in *Reckitt* at [158(2)].
2. The ACCC submits that in circumstances where the maximum penalty is effectively limitless, the value of the benefit viagogo obtained from its contravening conduct provides guidance for determining the penalty range. It submits that it may be inferred that the “vast majority” of the transactions processed on the viagogo Australian website during the relevant period would not have occurred had the contraventions not taken place, because consumers would not have purchased tickets from viagogo.
3. Viagogo contends that the worldwide revenue figures are irrelevant to the calculation given that it is not “broadly related” to the contraventions, and the relevant period was only 57 days in 2017. It also submits that no inference can be drawn that the vast majority of transactions would not have occurred had the representations not been made. It submits that there is danger in placing weight on an inferential extrapolation of data absent actual evidence of matters underlying that data. As an instance, it identifies that a significant percentage of the transactions that occurred in the relevant period did not result from a consumer clicking on the Official Site Representation, and that in December 2017, after the Official Site Representation had ceased, there were more transactions than during the relevant period.
4. Viagogo also submits that the state of revenue of viagogo in 2017 is not a useful guide to the financial size of viagogo, having regard to the fact that penalty is being determined in 2020, and in the midst of a global pandemic which has seriously affected the entertainment industry. Viagogo emphasises that it is a ticket re-seller and so total revenue from ticket sales is not the relevant measure of benefit to it of sales. When the revenue from the viagogo fees (being the booking fee and shipping and delivery fees) is considered, the revenue is modest and the profit during the relevant period is small. This is a factor that I take into account.
5. I do not accept viagogo’s submission that the worldwide size of viagogo and its international revenue are irrelevant to the calculus, although I accept that more weight should be put on the revenue from its Australian operations. The financial size of a corporation is relevant to the assessment of penalty as a factor in considering the principal aim of specific deterrence: *Coles Supermarkets* at [92]. The penalty must be substantial enough that the party realises the seriousness of the conduct and is not inclined to repeat it. However, in this respect I accept that some allowance may be made for recent events. I take judicial notice of the fact that the entertainment industry has been devastated by the restrictions brought about by the COVID-19 global pandemic in 2020. This is a factor also to be taken into consideration.
6. I have reservations about arriving at a conclusion in line with the submission advanced by the ACCC that the vast majority of the transactions entered in the relevant period would not have occurred if the contraventions had not taken place: see [81] above. The evidence does not permit that inference. Nevertheless, all of the consumers who completed transactions on the viagogo Australian website during the relevant period were exposed to each of the Quantity Representations, the Total Price Representation and the Part Price Representation, and all of the consumers who completed the XXXXX transactions after clicking first on the viagogo ad were also exposed to the Official Site Representation. I accept that a not insignificant proportion of those consumers were deprived of the opportunity to consider choosing an alternative source of tickets, were harried by reason of the Quantity Representations into making purchases that otherwise they would not have made, and were drawn further into the marketing web and transactional web by the Total Price Representation and Part Price Representation. Viagogo was a substantial beneficiary of that conduct, because of the fees that it charged. Its revenue in the relevant period was considerable. Furthermore, whilst the benefit to viagogo may be indirectly aligned with its revenue in terms of booking fees and delivery charges, the harm or loss to consumers is not likely to be confined to that amount.
7. Finally, I note that the representations provided benefits beyond the direct financial benefit of making sales. Viagogo promotes itself as the largest online ticket seller in order to attract more people to its website, not only to buy tickets, but also to sell them. The benefit of the representations provided it with competitive advantages over those competitors who did not engage in contravening conduct, and those advantages assisted it to grow, no doubt to the disadvantage of competitors who had not contravened the provisions of the ACL.

Deliberateness

1. There is no dispute that the conduct of viagogo was deliberate in the sense that the design and implementation of the viagogo ad and the viagogo Australian website were deliberate and not inadvertent.
2. The ACCC submits that there is a spectrum of possibilities available to the Court when considering whether conduct was deliberate, and that those should not be limited to characterisation as merely knowing, reckless or innocent conduct, citing *Reckitt* at [129]. It submits that the absence of a positive intention to contravene, or any other state of mind such as recklessness or wilful blindness is not mitigatory, but simply means that the neutral state of mind required for liability has not been disturbed for the purposes of penalty, citing *Reckitt* at [131]. It submits that the Court should find that viagogo’s conduct was deliberate, although it accepts that there is no evidence that viagogo set out with the intention to contravene the ACL.
3. Viagogo submits that the Court would not make any finding that its conduct was “deliberate” in the sense of deliberately flouting the law or wilfully acting in breach of the ACL, absent any evidence to support that proposition, citing *Australian Competition and Consumer Commission v Meriton Property Services Ltd (No 2)* [2018] FCA 1125 (Moshinsky J) at [33] and [73(e)]. It repeats its submission that in relation to the Official Site Representation the Court accepted that there was “perhaps an element of ambiguity about the advertisement”.
4. Whilst no knowledge of the falsity or misleading nature of a representation is necessary to make out a contravention of ss 29(1)(h), 29(1)(i) or 34 of the ACL, knowledge or an intention to mislead will clearly be an aggravating factor: *Coles Supermarkets* at [73]. The question is not whether viagogo intended to engage in the conduct that in fact contravened the provisions in question, but whether it “courted the risk” of doing so: *Coles Supermarkets* at [74]. In relation to s 48 penalties, in *ACCC v AirAsia Berhad* [2012] FCA 1413 at [51] Tracey J said “it is not, in my view, appropriate to treat inadvertence as a mitigating factor in fixing a penalty. A deliberate contravention of such a provision may, on the other hand, properly be regarded as an aggravating factor”.
5. On 7 March 2016, well before the relevant period, the ACCC wrote to viagogo about aspects of its website. The letter said that in particular the ACCC was concerned about “drip pricing" practices which, it said, had the potential to cause detriment to both consumers and competition because consumers may be misled about the total price of the goods or services they were seeking to purchase, and it may also make it difficult for businesses with more transparent pricing practices to compete on a level playing field. Attention was specifically drawn to ss 18, 29(1)(i) and 48 of the ACL. The ACCC’s concerns also specifically identified the difference between the headline price represented to the consumer on the event description page and the additional fees charged on later pages. The letter said, “The disclosure of the existence of these fees does not appear until a consumer progresses to one page before the payment page of [v]iagogo’s online booking flow, after they have entered their personal details”. The letter concludes by urging viagogo to review its advertising and its online booking processes. No response appears to have been provided to this letter.
6. On 7 February 2017 the ACCC again wrote to viagogo. This time, it referred to complaints that it had received alleging that viagogo had engaged in misleading or deceptive conduct and made false or misleading representations about the price of tickets for sale on its website. Particular concern was raised about the manner in which viagogo disclosed extra fees. The letter indicated that about 100 complaints had been received, primarily concerning drip pricing, which is a practice that is in contravention of ss 18, 29(1)(i) and 48 ACL, with detailed examples of viagogo’s practices provided. The letter also referred to complaints that viagogo was representing that concerts and other events were sold out, or close to selling out, when this was not the case. It said, “Concerns have been raised that [v]iagogo is inducing a misleading sense of urgency to consumers using its website”. Amongst the matters specifically criticised was a reference to the statement that there are “Less than 2% of tickets remaining”. Another matter raised was that viagogo did not clearly state anywhere during the booking process that it is a secondary ticketing platform, rather than an official primary ticket sales agency. The letter stated that consumers had allegedly been misled into thinking they were purchasing official tickets from the official authorised seller, especially having regard to viagogo’s promotion of “official tickets” in their advertisements.
7. Through its lawyers, viagogo responded to the 7 February 2017 letter on 5 March 2017. Although it offered to make some modifications to its website, plainly any changes made to its advertisement or website did not resolve the concerns raised. It also denied that other aspects of its website were likely to mislead or deceive consumers.
8. Having regard to these matters, I consider first, that viagogo, through its legal department and management, to whom the letters were addressed, knew or ought reasonably to have known that the Official Site Representation ran the risk of misleading consumers about the services that viagogo was offering, and was prepared to take that risk. That risk was patent from the language of the viagogo ad, but to the extent that it was not, the letter from the ACCC ought to have provided explicit notice. Secondly, I consider that the design of the website, by making the Quantity Representations, ran the risk of engendering in consumers the belief that the available tickets were from the venue, and not just from viagogo. Indeed, in my view the layout and design of the website could not have been accidental. It was calculated to distract consumers from any disclaimers or clarification as to the services offered by viagogo, and to corral them into ticket acquisition, regardless of the risk of any confusion or misapprehension: liability judgment at [75]. Again, the ACCC letter of 17 February 2017 alerted viagogo explicitly to this risk, to the extent it was not already aware (as it ought to have been) of it. Thirdly, the drip pricing design of the website represented by the Total Price Representation and the Part Price Representation fall into the same category. These were also the subject of notice from the ACCC from March 2016.
9. These matters demonstrate a level of deliberateness on the part of viagogo that tends in favour of the need for a significant penalty to deter it from further such conduct. Viagogo’s responses give it the appearance of being a company that is indifferent to the interests of Australian consumers and which prefers to elevate its own profit motives above those interests, even when on notice of the potential for harm being done. There is a need for a strong message to be sent by way of general and specific deterrence.
10. Finally, I should again refer to the submission advanced by viagogo concerning the “slight” ambiguity in the Official Site Representation. In *Coles Supermarkets* at [87] the Court observed that even where the impugned phrases are open to interpretation, a debate about their misleading quality was real and objectively evident, and should have been appreciated by Coles. In the present case, the window for debate was far narrower.

Role of senior management

1. The confidential information provided in evidence by viagogo indicates that, in relation to the viagogo ad, there was a team of XX people who were engaged by viagogo and involved in the process of approving the viagogo ad. XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XX
2. The confidential information provided in evidence by viagogo also gives an indication of the personnel involved during the relevant period in relation to the appearance of the viagogo Australian website, and who were engaged in relation to decisions as to the point at which the viagogo fees were disclosed, and the form and substance of statements regarding the quantity or percentage of the tickets available for an event. XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XXXXX XXXXXX XX XXX XX
3. The information provided does not indicate whether or not the people identified were employees of viagogo, whether they were located in Australia, whether they were full time or part time contractors or whether or not they were the subject of the supervision of any senior management within viagogo.
4. I accept the submission advanced by the ACCC that it would be surprising if viagogo senior management were unaware of the representations, particularly in circumstances where the ACCC had raised its concerns specifically in its letters of 7 March 2016 and 7 February 2017, and in subsequent correspondence between the ACCC and viagogo’s lawyers dated 5 March 2017 and 5 April 2017. Indeed I consider it inconceivable that senior management did not have a good understanding of the user experience aspects of the viagogo Australian website during the relevant period. As I have noted, the website is viagogo’s virtual shopfront. It is the means through which the profits for viagogo are generated. I find that viagogo senior management are likely to have been acutely aware of the look and feel of the website. No officer of viagogo came forward to give evidence on behalf of viagogo to explain how it operated, the role of senior management, or to express contrition for its conduct.

Corporate culture conducive to compliance

1. The ACCC submits that there is no evidence that viagogo has a corporate culture conducive to compliance with the ACL. It submits that several of the ACCC lay witnesses gave evidence about experiencing difficulty in contacting viagogo to make complaints, and difficulty in having those complaints resolved by viagogo. Viagogo confirmed that it did not have any training, instructions, information or other guidance provided to its call centre staff who communicated with consumers during the relevant period. These matters, the ACCC submits, demonstrate an environment that is not conducive to compliance and demonstrate the lack of effective safeguards for viagogo to ensure compliance. The ACCC also submits that viagogo continued to use the Official Site Representation until December 2017, after the proceedings were commenced, and that there were complaints made by consumers after the liability judgment was handed down, upon which it relies.
2. Viagogo “largely accepts” that there is no evidence that viagogo has a corporate culture of compliance, and that no relevant compliance training or materials were provided to call centre staff. However, it contends that the difficulties encountered by the ACCC’s lay witnesses cannot be used to draw an inference that there is a corporate culture not conducive to compliance, disputes that it is relevant to consider conduct after conclusion of the relevant period, and submits that the ongoing concerns should be set to one side. In this regard it objects to evidence of complaints from consumers after the relevant period.
3. I accept that there is no real culture of corporate compliance with the requirements of the ACL on the part of viagogo. In this regard the following matters are of relevance. First, viagogo did not deign to respond to the correspondence from the ACCC prior to the commencement of the proceedings as set out in the 7 March 2016 letter. Its response to the 7 February 2017 letter largely denied that it was engaged in any misleading or deceptive conduct. Secondly, viagogo had no training materials for its call centre staff in order to assist in compliance. Thirdly, viagogo adduced no evidence of any sort of training or compliance given to persons engaged by it to develop the viagogo Australian website or who were engaged in the placement of advertisements. Fourthly, viagogo adduced no evidence of any training that has been given to any of its employees, contractors or management personnel since the liability judgment has been delivered. Fifthly, viagogo chose not to adduce any evidence of its training, approval or other compliance programs. The evidence of Ms Groshinski falls far short of doing so.
4. These matters are sufficient to conclude that viagogo’s culture was not and is not one of proactive compliance and I make no allowance in mitigation of its penalty on this basis.
5. Viagogo objects to [16] of the affidavit of Ms McKeon. In [14] and [15] Ms McKeon states that since the relevant period the ACCC has continued to receive complaints from consumers in relation to the issues the subject of the liability judgment. She states that during the period from 27 June 2017 until 19 June 2019 the ACCC received a total of 1990 complaints relating to each of the Official Site Representation, the Quantity Representations, the Total Price Representation and the Part Price Representation. On 2 July 2019 the ACCC’s solicitors wrote to viagogo in relation to those complaints. Ms McKeon then exhibits in [16] what she describes as examples of these complaints. The evidence is in the form of standardised reports, which include anonymised complaint details. The evidence of the complaints is hearsay. It cannot be tested by viagogo. I reject [16] and the documentary materials to which that paragraph refers pursuant to s 135(a) of the *Evidence Act 1995* (Cth). I therefore have not considered these complaints in assessing viagogo’s corporate culture or otherwise.

Co-operation with the ACCC

1. Viagogo submits that it has co-operated with the ACCC by responding to all enquiries and consistently engaging with it. It submits that it has co-operated to narrow the issues in dispute, prompting the observation in [9] of the liability judgment that this took place. It submits that this is a factor to be taken into account in mitigation. For its part, the ACCC submits that viagogo has shown minimal co-operation: although initially responding to voluntary requests during the ACCC’s investigation, viagogo declined to accept service in Australia and obliged the ACCC to file an application for service outside the jurisdiction pursuant to the *Convention on the Service Abroad of Judicial and Extrajudicial documents in Civil or Commercial Matters*, done at the Hague on 15 November 1965 (**Hague Convention**).
2. In my view it was unimpressive that viagogo put the ACCC to the trouble of complying with the requirements of the Hague Convention to effect service. Where an entity plainly does business in Australia, it hardly equates to co-operation to place obstacles in the path of the commencement of proceedings of that nature. Otherwise, the co-operation supplied by viagogo was little more than fulfilling its obligations to the Court in the conduct of the litigation, including the provision of information summarised in section 3 above. Furthermore, I observe that it was not until 9 September 2019, some five months after the liability judgment was delivered, that the solicitors for viagogo notified the ACCC that viagogo had implemented changes to address the issues the subject of the proceedings. It is not clear precisely when those changes were implemented, but there was certainly no rush to inform the regulator that viagogo had made changes to conform with the judgment given.
3. I consider that when pressed viagogo demonstrated a modest disposition to cooperate. I give this factor slight weight in viagogo’s favour.

Changes made to the viagogo Australian website

1. Viagogo submits that it has undertaken corrective action by making changes to its website and offering to provide an undertaking confirming that those changes have been made. It relies on a letter sent by its solicitors to the ACCC on 9 September 2019 and summarises the changes as being: (a) disclosure of the existence of the viagogo fees at the outset of the booking process, with GST and the booking fee included at the first point where the price is shown to consumers, along with the fact that a handling and delivery fee will apply and the minimum value of that fee. It submits that the fees are displayed in a way to disclose that the ticket price is set by the seller and not viagogo; (b) clarification provided regarding statements about the demand for and availability of tickets, including that such statements relate to the availability of tickets on the viagogo Australian website and not on other platforms, and clarification about the time period relevant to the statement; and (c) ceasing to use the term “official” in advertising since December 2017, and making changes to the website homepage to explain that viagogo is a “secondary ticket marketplace” with prices being “set by sellers and may be below or above face value”.
2. The ACCC accepts that corrective amendments to the viagogo Australian website have been made, but criticises the form of the undertaking and raises **ongoing concerns** about the website. Those concerns are described by reference to the video captures set out in the evidence of Ms McKeon and Ms Al-Saleh and are said to be that:
	1. there remains a lack of clarity of disclosure in that statements similar to those found to amount to the Quantity Representations continue to be made; and
	2. there is a lack of clarity concerning prices to be charged.
3. The four video captures prepared on behalf of the ACCC are the Elton John video capture and Fleetwood Mac video capture, both taken on 12 August 2019 by Ms McKeon, and the Queen video capture and the Lords video capture, both taken by Ms Murry on 5 June 2019. Viagogo presented via the evidence of Ms Al-Saleh the La Dispute video capture taken on 10 September 2019. I have viewed each of them. They are quite different. In particular, the La Dispute video capture indicates that changes were made to the viagogo Australian website after August 2019, when the ACCC witnesses prepared their evidence. The Elton John, Fleetwood Mac, Queen and Lords video captures in turn show that certain, lesser, changes were made to the website after the liability judgment but before 10 September 2019.
4. The ACCC submits that the website as it appeared in the video captures taken in June and August 2019 did not remedy the Quantity Representations as found in the liability judgment because there was not a sufficiently clear disclosure that the references to remaining tickets were references to those available at the viagogo Australian website and not the venue. It also submits that there was insufficient disclosure of the approximately 28% booking fee, as well as other defects in the website. The ACCC makes slightly different submissions, but to similar effect, in respect of the La Dispute video capture. In my view these submissions might tempt one to be distracted from the task at hand, which is to assess an appropriate penalty for contraventions proved during the relevant period, and not to assess penalty by reference to unpleaded conduct that has taken place subsequently. That temptation has perhaps been encouraged by viagogo, having regard to the evidence going to compliance. However, it should be resisted. For present purposes I note that viagogo now proffers a version of the website as demonstrated by the La Dispute video capture that shows that it is now prepared to alter its behaviour as a result of the findings of the Court. I note also that the version of the website offered in evidence comes considerably after the delivery of the liability judgment and was not reflected in changes made earlier, as seen in the other post-judgment video captures. I say nothing as to whether the version of the website as evinced by the evidence of Ms McKeon, Ms Murry and Ms Al-Saleh cures the contraventions found in the liability judgment. However, the timing of the amendments to its website upon which viagogo now relies leads me to the view that viagogo’s corrective action was taken very late and for it was the legal equivalent of drawing teeth. I make no allowance in viagogo’s favour in this regard.

###### Assessment of penalty

1. I have referred in section 5.1 above to some of the relevant legal principles applicable to the assessment of penalty. The principal object of imposing a pecuniary penalty in civil proceedings is deterrence, both specific and general. In relation to assessing a penalty of appropriate deterrent value the factors set out in s 224(2) of the ACL and the other considerations raised by the parties which I have addressed in section 5.3 above are to be taken into account.
2. During the relevant period the maximum penalty was fixed at $1.1 million per contravention by s 224(3) of the ACL. In ***Markarian*** *v The Queen* [2005] HCA 25; 228 CLR 357 the plurality observed at [30] that “legislatures do not enact maximum available sentences as mere formalities”. Careful attention to maximum penalties will almost always be required, not only because the legislature has provided for them, but also because they invite comparison between the worst possible case and the case before the Court, and in that sense provide a yardstick when taken into account with other factors: *Markarian* at [31].
3. As the Full Court said in *Reckitt*:

[156] Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one.  Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty.  Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively.  However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed.

[157] In this case, the theoretical maximum was in the trillions of dollars (some 5.9 million contraventions at $1.1 million per contravention). By way of example only, even if the appropriate penalty per contravention for each sale was $1, the penalty would approach $6 million. It follows that the assessment of the appropriate range for penalty in the circumstances of this case is best assessed by reference to other factors, as there is no meaningful overall maximum penalty given the very large number of contraventions over such a long period of time. ...

1. It is in this context that the course of conduct principle is presently relevant to the assessment of penalty. There is no meaningful maximum penalty given the very large number of contraventions, which number in the XXXXXXXXXXXXX in the case of the Official Site Representation, and the XXXXXXXXXXX for the Quantity Representations and Total Price Representation.
2. As I have noted, the course of conduct principle recognises that where there is a factual or legal interrelationship between two or more contraventions, care must be taken to ensure that the offender is not punished twice for effectively the same conduct. To put it another way, the Court may penalise a contravention as a single course of conduct where there is sufficient interrelationship between the legal and factual elements of the contraventions. This provides a mechanism by which proportionality may be achieved in assessing penalty in circumstances where the consideration of the maximum penalty applied to each contravention is of no assistance: see *MLC Nominees* at [130].
3. I am satisfied that a course of conduct approach provides assistance to the analysis in the present case, and that the courses of conduct may be identified by reference to the separate Official Site Representation, Quantity Representations, the Total Price Representation and the Part Price Representation. The Official Site Representation arises from the viagogo ad that is legally and factually separate to and independent of the viagogo Australian website. The Quantity Representations are littered throughout the viagogo Australian website and appear to the consumer during interaction with it. They are to be regarded as separate and distinct conduct, both factually and legally, to the Total Price Representation, which appear on the Tickets and Seating Selection Page. There is room for argument that the Total Price Representation and Part Price Representation form part of the same course of conduct, being the representation of the cost of tickets to be acquired. However the better view is that they are separate, having regard to the quite different legal requirements of ss 29(1)(i) and 48, and the factual circumstance that the ACCC’s case in respect of the Total Price Representations was based on conduct which occurred throughout the relevant period, while the case in respect of the Part Price Representations was limited to three specific transactions that occurred on 18 May 2017. I take into account the potential overlap between courses of conduct when I consider the totality principle, to which I refer below.
4. In assessing penalties set out below I take into account all of the factors to which I have referred in section 5.3. Viagogo is a substantial worldwide corporation which had significant revenue in Australia in 2017. It generated significant sales in Australia during the relevant period of about $XXXXXXX, which provides some indication of the order of magnitude of harm caused (with the other allowances to which I have referred). Against that is to be balanced the relatively lower revenue to viagogo ($XXXXXXX). The contravening conduct was deliberate in the manner that I have described in section 5.3.4.2 above. There was no material corporate culture of compliance with the ACL. Indeed, viagogo conducted its operations on the internet via its website in a manner that indicates a disregard for the ACL. A strong need for specific deterrence is required. Furthermore, there is a need for a strong signal to be sent to other corporations which conduct internet based operations that, despite the borderless operation of the internet, they are nonetheless subject to the ACL when they conduct business in Australia.
5. In my view condign penalties are:
6. Official Site Representation: $2.5 million;
7. Quantity Representations: $2.5 million;
8. Total Price Representation: $1.5 million; and
9. Part Price Representation: $500,000.

Totality

1. The cumulative total of penalties above is **$7 million**. It is necessary to consider whether or not the course of conduct principle properly accounts of the significant overlap in wrongdoing. In my view it does. In reaching this assessment, I have taken into account the other orders that I propose to make against viagogo, which are dealt with later in these reasons.

Parity

1. Viagogo submits that a fundamental consideration that is important to the administration of justice is ensuring consistency of outcomes in similar cases. In this regard, it submits that although there are no equivalent “co-contravenors” to assess parity, the Court should have regard to the range of cases dealing with representations on television and the internet, including those involving price considerations. It refers to eight decisions of this Court and to the penalties imposed in those cases. I have given consideration to each. They provide for penalties ranging from $200,000 to $3 million. None is closely factually related to the present case. I derive little assistance from them.
2. Viagogo further submits that the Court should have regard to the circumstances of cases in which penalties in the range proposed by the ACCC have been ordered. It provides examples of four cases where the Court imposed pecuniary penalties of $10 million, and sought to contrast the scope of the contraventions, and size of the respondent corporation with those in the present case.
3. The authorities make plain that it is it is the consistent application of principle that is relevant to the assessment of penalty, rather than the range of penalties given in disparate circumstances that cannot be said to be analogous: *Flight Centre Limited v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; 260 FCR 68 (Allsop CJ, Davies and Wigney JJ) at [63]; *Singtel Optus* at [60]; *NW Frozen Foods* at 295 (Burchett and Kiefel JJ, with whom Carr J agreed at 299).

##### INJUNCTIONS

1. The ACCC submits that the Court should make an order restraining viagogo from engaging in further conduct in breach of the ACL. The form of injunction that its seeks is as follows:

Pursuant to s 232 of the ACL for a period of five years from the date of this order viagogo, whether by itself, its officers, employees, agents or otherwise howsoever, be restrained, in the course of the supply or possible supply of services to Consumers for the sale of tickets on the viagogo Australian website, from representing, in trade or commerce, that:

(a) Consumers can purchase official (i.e. not resold) tickets through the viagogo Australian website, when that is not the case;

(b) Viagogo is affiliated with or has approval from a particular Host as an “official” agent of the Host to sell original (i.e. not resold) tickets to the Host’s event(s) directly to the public, when that is not the case;

(c) Consumers can purchase tickets for a stated price on a webpage on the viagogo Australian website when they cannot do so without paying further fees to purchase the tickets;

(d) Consumers can purchase tickets for a stated price on a webpage on the viagogo Australian website which exclude further fees payable without also specifying, in a prominent way and as a single figure, the price for each of those tickets including the additional fees payable; or

(e) Only a set number or percentage of tickets are available without expressly stating that the reference to tickets is to those available for purchase through the viagogo Australian website and not the total number or percentage of tickets remaining for the event.

1. Section 232(1) of the ACL empowers the Court to grant an injunction, in such terms as the Court considers appropriate, if the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of, relevantly, a provision of Chapters 2 or 3 of the ACL.
2. Section 232(4) provides:

The power of the court to grant an injunction under subsection (1) restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of a kind referred to in that subsection; and

(b) whether or not the person has previously engaged in conduct of that kind; and

(c)     whether or not there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind.

1. The statutory injunction for which s 232(1) of the ACL provides is not one that it is limited by the characteristics of the injunction developed by courts of equity. Rather, it is a modification of that remedy which s 232(4) itself recognises it can be granted, for example, whether or not it appears to the Court that a person intends to engage again, or to continue to engage in, contravening conduct or whether or not there is imminent danger of substantial damage to any person because of the contravening conduct. Such relief can be granted to deter future similar conduct: ***ICI Australia*** *Operations Pty Limited v Trade Practices Commission* [1992] FCA 707; 38 FCR 248 at 268 (per French J). Such relief can also be granted to mark the Court’s disapproval of a respondent’s particular conduct: *Trade Practices Commission v Mobil Oil Australia Ltd* [1984] FCA 403; 4 FCR 296 at 299 – 300 (Toohey J); or to reinforce to the market place that the restrained behaviour is unacceptable: *Australian Consumer and Competition Commission v 4WD Systems Pty Ltd* [2003] FCA 850; 200 ALR 491 at [217] (Selway J); see also *Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 7)* [2016] FCA 484 (Yates J) at [53] – [55].
2. In *ICI* *Australia* at 256 Lockhart J (with whom French J agreed at 268) said of s 80 of the *Trade Practices Act 1974* (Cth), which was the cognate provision to the present s 232 of the ACL:

In my opinion subss (4) and (5) are designed to ensure that once the condition precedent to the exercise of injunctive relief has been satisfied (ie contraventions or proposed contraventions of Pt IV or V of the Act), the court should be given the widest possible injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly.

1. In *BMW Australia* *v Australian Competition and Consumer Commission* [2004] FCAFC 167; 207 ALR 452 at [39] Gray, Goldberg and Weinberg JJ explained:

The purpose of granting an injunction to restrain conduct already prohibited by legislation can only be to add to whatever consequences the legislation attaches to that conduct the additional consequences of a possible finding of contempt of court by failure to comply with an injunction. In each case, it is a question whether the conduct concerned warrants the application of those more stringent consequences.

1. The ACCC is not entitled to an injunction as a matter of course to reflect that it has succeeded in establishing the contraventions. Whilst it is unnecessary to show that repetition of the contravening conduct is threatened or apprehended for a grant of injunctive relief, the authorities are clear that an injunction should not be granted unless it will serve a legitimate purpose: *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2007] FCAFC 146; 161 FCR 513 (Moore, Dowsett and Greenwood JJ) at [107] – [111].
2. The ACCC submits that the injunctive relief sought is designed to prevent a repetition of the contravening conduct, has a sufficient nexus or relationship between the relief and the contraventions found by the Court, and relates to the controversy. It submits that the injunction serves to protect the public, it is specifically and clearly expressed and it is appropriate to be made, because the conduct was seriously misleading and affected a diverse and widespread range of consumers and viagogo continues to operate its business. Furthermore, whilst viagogo has offered to provide an undertaking confirming that it has made changes to the viagogo Australian website, it has not offered an undertaking that no changes will be made in the future which would reintroduce the elements which were found to contravene the ACL. It also raises the ongoing concerns to which I have referred.
3. Viagogo opposes the grant of an injunction. It accepts that the form of injunction proposed by the ACCC is very specific to the contravening conduct, but submits that the making of declarations is sufficient and that there is no real risk of repetition of the conduct such that it is warranted for an injunction to be granted, with the attendant risk of contempt of Court in the event that there is a breach. It further notes that references to “official” in the viagogo ad have been removed, thus removing the suggestion that it is affiliated with or has the approval of a particular event organiser or venue, such that paragraphs (a) and (b) of the proposed injunction are not warranted.
4. In my view, having regard to the seriousness of the contravening conduct, the form of the injunction sought and the policy of consumer protection underlying the applicable provisions of the ACL it is appropriate to make the injunction sought. In this regard, although I take into account all of the matters identified in section 5.3 of these reasons, I am influenced by:
5. the deliberateness of viagogo’s conduct, to which I have referred in section 5.3.4.2;
6. the role of senior management, including the probability that senior management was aware of, but did not respond to the continuing conduct, despite being informed of it by the ACCC, to which I have referred in section 5.3.4.3;
7. the lack of contrition expressed by viagogo, to which I have referred in section 5.3.4.3;
8. the ongoing lack of any signs of a corporate compliance program, even after the liability judgment was delivered, to which I have referred in section 5.3.4.4; and
9. the lateness of the corrective action taken by viagogo after the liability judgment was delivered, to which I have referred in section 5.3.4.6.
10. In these circumstances I consider that it is appropriate as a matter of discretion to reinforce the need for adherence to the ACL by making the injunction.

##### PUBLICATION ORDERS

1. The ACCC submits that the following publication orders should be made so as to alert consumers to the fact of viagogo’s contravening conduct, aid the enforcement of the orders, and prevent repetition of the contravening conduct:

Pursuant to s 246(2)(a), (b), (c) and/or (d) of the ACL, viagogo prominently publish information on the viagogo Australian website homepage, in a form and in terms to be agreed between the parties, and including information for consumers concerning the following matters:

(a) The findings of the Court;

(b) Viagogo’s conduct which is the subject of the proceedings;

(c) Viagogo’s obligations under the ACL;

(d) Viagogo’s obligations under these orders; and

(e) The manner in which consumers can make a complaint to viagogo regarding its conduct.

1. The reasons for the making of orders for corrective advertising include to alert consumers to the fact that there has been misleading or deceptive conduct, to protect the public interest by dispelling the incorrect or false impressions that were created by a wide and far reaching advertising campaign, and to support the primary orders and assist in preventing repetition of the contravening conduct: see *TPG Internet (No 2)* at [143] and the authorities cited there. In *Australian Competition and Consumer Commission v On Clinic Australia Pty Limited* [1996] FCA 721; 35 IPR 635 Tamberlin J said at 640:

There is no principle that any particular period is appropriate as a point beyond which corrective advertising is not warranted. In the context of advertising it is necessary to examine the nature, extent and intensity of the advertising and the media in which it has been released with a view to deciding whether there could reasonably be any current misapprehension as a result of the advertisements.

1. Furthermore, corrective advertising should do more than merely announce a “win” for the ACCC and the contrition of the respondent: *Australian Competition and Consumer Commission v Real Estate Institute (WA) Inc* [1999] FCA 1387; 95 FCR 114 at [49] (French J).
2. In the present case, I take into account the seriousness of each of the contraventions as described in section 5.3.1 above. The Official Site Representation and the Quantity Representations were particularly pervasive: the evidence shows that a large number of consumers (XXXXXXXXXXX) clicked on the viagogo ad which contained the Official Site Representation. I have found that the Quantity Representations occurred on an industrial scale during the relevant period: see [69] above. While the Total Price Representation and Part Price Representation were less pervasive, I still consider them to be serious for the reasons set out in section 5.3.1 above.
3. Nevertheless, the relevant period in this proceedings was just 57 days, and occurred more than three years ago, from 1 May to 26 June 2017. Furthermore, although the four representations were made online and thus reached many consumers, there is no evidence before me to suggest that viagogo engaged in a widespread advertising campaign in other media forms, such as in newspapers, magazines, television, film or billboards.
4. In those circumstances, and having regard to the other orders I will make which are directed to preventing the repetition of the contravening conduct, I do not consider that it is appropriate to make orders for corrective advertising.

##### COMPLIANCE PROGRAM ORDERS

1. The ACCC submits that an order for a compliance program ought to be made in the following terms:

Pursuant to s 246(2) of the ACL, viagogo is:

(a) within 90 days of this order, to establish and implement an ACL compliance program to be undertaken by each employee of viagogo or other person involved in viagogo’s business who deals or who may deal with consumers, being a program designed to minimise viagogo’s risk of future contraventions of ss 18, 29, 34 and 48 of the ACL in relation to the sale of tickets on the viagogo Australian website; and

(b) for a period of 3 years from the date of this order, maintain and continue to implement the ACL compliance program referred to in (a) above.

1. Viagogo does not oppose the making of this order. I consider it to be appropriate.

##### DISPOSITION

1. For the reasons set out above, I grant the following relief:
2. Declarations in the form set out at paragraphs [7], [10], [12] and [14] above;
3. An injunction in the form set out in [130] above;
4. Pecuniary penalties in the amount of AUD$7,000,000.00;
5. A compliance program order in the form set out at paragraph [147] above; and
6. Viagogo pay the ACCC’s costs of these proceedings as agreed or as assessed.

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| I certify that the preceding one hundred and forty-eight (148) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Burley. |

Associate:

Dated: 2 October 2020