FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Breast Check Pty Ltd (No 2) [2014] FCA 1068

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| Citation: | Australian Competition and Consumer Commission v Breast Check Pty Ltd (No 2) [2014] FCA 1068 |
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| Parties: | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v BREAST CHECK PTY LTD ACN 119 038 274 and ALEXANDRA BOYD** |
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| File number: | WAD 515 of 2011 |
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| Judge: | **BARKER J** |
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| Date of judgment: | 3 October 2014 |
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| Catchwords: | **CONSUMER LAW** – contraventions of *Australian Consumer Law* (Cth) and *Trade Practices Act 1974* (Cth) – penalty hearing – appropriate relief to be granted – whether declarations, injunctions, pecuniary penalties and non-punitive orders should be made  |
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| Legislation: | *Australian Consumer Law* (Cth) (Sch 2 to the *Competition and Consumer Act 2010* (Cth)) s 18, s 29(1)(g), s 224, s 232, s 246*Competition and Consumer Act 2010* (Cth) s 137H, s 155 *Federal Court of Australia Act 1976* (Cth) s 21*Trade Practices Act 1974* (Cth) s 52, s 53(c), s 76E, s 83, s 86C  |
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| Cases cited: | *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* [2003] FCA 850; (2003) 200 ALR 491*Australian Competition and Consumer Commission v Breast Check Pty Ltd* [2014] FCA 190*Australian Competition and Consumer Commission v Fila Sport Oceania Pty Ltd* [2004] FCA 376; [2004] ATPR 41-983*Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCAFC 247; [2006] ATPR 42-091*Australian Competition and Consumer Commission v Safe Breast Imaging Pty Ltd (No 2)* [2014] FCA 998*Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296 |
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| Date of hearing: | 10 June 2014 |
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| Place: | Perth |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 127 |
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| Counsel for the Applicant: | Ms SE Russell |
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| Solicitor for the Applicant: | Minter Ellison |
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| Counsel for the First Respondent: | Mr T Brennan |
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| Solicitor for the First Respondent: | Culshaw Miller Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent appeared in person |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 515 of 2011 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | BREAST CHECK PTY LTD ACN 119 038 274First RespondentALEXANDRA BOYDSecond Respondent |

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| JUDGE: | BARKER J |
| DATE OF ORDER: | 3 OCTOBER 2014 |
| WHERE MADE: | PERTH |

THE COURT DECLARES THAT:

***Risk of Cancer Representation***

1. The first respondent (***Breast Check***), by publishing the following pamphlets to a section of the public, being women interested in the breast imaging service offered by Breast Check, by making the pamphlets available in its business premises and by providing them to those who enquired about its services:
	1. a Breast Imaging Pamphlet providing information on its breast imaging service using a device known as the Multifrequency Electrical Impedance Mammograph (***the MEM Device***) together with various infrared devices for digital thermography (***Thermography Devices***), which was made available or provided from 18 October 2010 until May 2011; and
	2. a Thermography Pamphlet providing information on its breast imaging service and its use of Thermography Devices for breast imaging, which was made available or provided during May 2011,

represented that breast imaging using either a Thermography Device alone, or in conjunction with the MEM Device, could provide an adequate scientific medical basis for assessing whether a customer may be at risk from breast cancer, and if so, the level of such risk when, in fact, there was and is inadequate scientific medical basis for breast imaging using either a Thermography Device alone, or in conjunction with the MEM Device, as a means of assessing whether a customer is at risk of breast cancer, or the level of any such risk and, thereby, engaged in conduct, in trade or commerce, that:

* 1. was misleading or deceptive, or was likely to mislead or deceive, in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (***TPA***) and s 18 of the *Australian Consumer Law* (***ACL***); and
	2. falsely represented that its breast imaging services using either a Thermography Device alone, or in conjunction with the MEM Device had performance characteristics, uses or benefits they did not have in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL.

***Assurance Representation***

1. Breast Check, by publishing the following pamphlets to a section of the public, being women interested in the breast imaging service offered by Breast Check, by making the pamphlets available in its business premises and by providing them to those who enquired about its services:
	1. a Breast Imaging Pamphlet providing information on its breast imaging service using a device known as the MEM Device together with Thermography Devices, which was made available or provided from 18 October 2010 until May 2011; and
	2. a Thermography Pamphlet providing information on its breast imaging service and its use of Thermography Devices for breast imaging, which was made available or provided during May 2011,

represented that breast imaging using either a Thermography Device alone, or in conjunction with the MEM Device, could provide an adequate scientific medical basis for assuring a customer that they do not have breast cancer, when, in fact, there was and is inadequate scientific medical basis for using a Thermography Device, either alone or in conjunction with the MEM Device, to assure a customer that they do not have breast cancer and, thereby, engaged in conduct in trade or commerce that:

* 1. was misleading or deceptive, or was likely to mislead or deceive, in contravention of s 52 of the TPA and s 18 of the ACL; and
	2. falsely represented that its breast imaging services using either a Thermography Device alone, or in conjunction with the MEM Device had performance characteristics, uses or benefits they did not have in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL.

***Substitute for Mammography Representation***

1. Breast Check, by publishing the following pamphlets to a section of the public, being women interested in the breast imaging service offered by Breast Check, by making the pamphlets available in its business premises and by providing them to those who enquired about its services:
	1. a Breast Imaging Pamphlet providing information on its breast imaging service using a device known as the MEM Device together with Thermography Devices, which was made available or provided from 18 October 2010 until May 2011; and
	2. a Thermography Pamphlet providing information on its breast imaging service and its use of Thermography Devices for breast imaging, which was made available or provided during May 2011,

represented that there is an adequate scientific medical basis for using either a Thermography Device alone, or in conjunction with the MEM Device, for breast imaging as a substitute for mammography, when, in fact, there was and is inadequate scientific medical basis for using either a Thermography Device alone, or in conjunction with the MEM Device, for breast imaging as a substitute for mammography and, thereby, engaged in conduct, in trade or commerce that:

* 1. was misleading or deceptive, or was likely to mislead or deceive, in contravention of s 52 of the TPA and s 18 of the ACL; and
	2. falsely represented that its breast imaging services using either a Thermography Device alone, or in conjunction with the MEM Device had approval, performance characteristics, uses or benefits they did not have in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL.

***Alexandra Boyd***

1. The second respondent (***Alexandra Boyd***), by her involvement in the development of the promotional pamphlets and in the administration of Breast Check, was knowingly concerned in or involved in or party to each of Breast Check's contraventions referred to in the declarations in paragraphs 1 to 3 of this Order and is liable as an accessory for each contravention.

**THE COURT ORDERS THAT:**

**Injunctions**

1. Breast Check be restrained, whether by itself, its servants, agents or howsoever otherwise, in trade or commerce in Australia, from representing, whether by publishing or distributing promotional material or otherwise, that there is an adequate scientific medical basis for any breast imaging service:
	1. being an effective means of assessing whether a customer may be at risk from breast cancer or the level of such risk;
	2. being able to assure a customer that they do not have breast cancer; or
	3. being a substitute for mammography,

unless, at the time of making the representation, reasonable grounds exist for making such a representation.

1. Alexandra Boyd be restrained, whether as an officer, servant or agent of Breast Check or otherwise, in trade or commerce, from:
	1. representing, whether by distributing promotional material or otherwise, that there is an adequate scientific medical basis for any breast imaging service:
		1. being an effective means of assessing whether a customer may be at risk from breast cancer or the level of such risk;
		2. being able to assure a customer that they do not have breast cancer;
		3. being a substitute for mammography; or
	2. aiding, abetting, counselling or procuring, or being directly or indirectly knowingly concerned in, or party to, any person or corporation from representing, whether by publishing or distributing promotional material or otherwise, that there is an adequate scientific medical basis for any breast imaging service:
		1. being an effective means of assessing whether a customer may be at risk from breast cancer or the level of such risk;
		2. being able to assure a customer that they do not have breast cancer; or
		3. being a substitute for mammography,

unless, at the time of making the representation, reasonable grounds exist for making such a representation.

**Penalties**

1. Pursuant to s 76E of the TPA and s 224 of the ACL, Breast Check pay to the Commonwealth within 30 days of the making of this Order by the Court a pecuniary penalty in the amount of $75,000 in respect of the conduct described in paragraphs 1 to 3 of this Order.
2. Pursuant to s 76E of the TPA and s 224 of the ACL, Alexandra Boyd pay to the Commonwealth within 30 days of the making of this Order by the Court a pecuniary penalty in the amount of $25,000 in respect of the conduct described in paragraph 4 of this Order.

**Other orders**

1. The Reasons for Judgment, with the Court's seal affixed, be retained on the Court file for the purposes of s 83 of the TPA and s 137H of the *Competition and Consumer Act 2010* (Cth).

**Costs**

1. The parties bring forward a minute of proposed orders regarding costs or written submissions on costs.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 515 of 2011 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | BREAST CHECK PTY LTD ACN 119 038 274First RespondentALEXANDRA BOYDSecond Respondent |

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| JUDGE: | BARKER J |
| DATE: | 3 OCTOBER 2014 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

1. On 10 March 2014, in *Australian Competition and Consumer Commission v Breast Check Pty Ltd* [2014] FCA 190, I found that:
2. By publishing a breast imaging pamphlet and a thermography pamphlet to the public containing the statements pleaded by Australian Competition and Consumer Commission (***ACCC***), ***Breast Check*** Pty Ltd engaged in conduct which was misleading or deceptive or which was likely to mislead or deceive in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (***TP Act***) and s 18 of the *Australian Consumer Law* (Cth) (***ACL***);
3. Breast Check made false representations in contravention of s 53(c) TP Act (from 18 October to 31 December 2010) and s 29(1)(g) ACL (after 1 January 2011) by:
	1. In respect of each of the representations as pleaded by ACCC, making representations as to the performance characteristics, uses or benefits of the devices used by Breast Check for breast imaging that the devices did not have;
	2. In respect of the substitute for mammography representation as pleaded by ACCC, making a representation as to the approval of the devices used by Breast Check for breast imaging which they did not have; and
4. ***Dr Boyd*** was knowingly concerned in or involved in, or party to each of Breast Check’s contraventions and is liable as an accessory for each of Breast Check’s contraventions.
5. I then invited submissions from the parties as to the appropriate relief to be granted and the terms of any orders to be made and heard from the parties and received evidence from ***Mr*** William Simon ***Boyd***, the son of Dr Boyd, at a penalty hearing.
6. ACCC lodged written submissions as to relief proposing that there should be:
7. Declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth).
8. Injunctions under s 232 ACL.
9. Pecuniary penalties under s 76E TP Act and s 224 ACL.
10. An order for publication under s 86C TP Act and s 246 ACL.
11. An order that a copy of the sealed reasons for judgment be retained by the Court for the purposes of s 83 TP Act and s 137H of the *Competition and Consumer Act 2010* (Cth) (***CCA***).
12. Costs.
13. ACCC set out the orders it proposed in a further minute of proposed orders lodged 29 May 2014, which was further amended at the invitation of the Court by the further amended proposed minute of orders lodged 20 June 2014.
14. In its responding submissions as to relief, Breast Check does not dispute that this is an appropriate case for declarations, although it submits that each of the declarations sought by ACCC is too broad. It disputes, however, whether:
* an injunction should be made against Breast Check;
* any penalty should be ordered against either respondent;
* a corrective order should be made against either respondent.
1. It further says that depending on other orders made by the Court, Breast Check may apply for a special costs order and so proposes that the question of costs be deferred to be dealt with on the papers, something ACCC accepts.
2. Breast Check submits there are three factual issues between the parties which are common to each of the disputes just identified.
3. It says the Court found that in assessing the meaning of the two pamphlets, an objective standard should be applied because they had been made available to a class of members of the public; about which there is no issue.
4. Breast Check submits the first difference between the parties is that Breast Check says ACCC has inappropriately elided from that finding to propose orders on the basis that there had been publication of the pamphlets by distribution of them to the public generally. Submissions made on behalf of Breast Check are intended to show that the findings and evidence do not support that approach. Rather, the evidence goes no further than establishing that the pamphlets were made available to a small number of individuals.
5. Breast Check says the second difference is related to the first. It says ACCC says that the primary evil done by the pamphlets was to place the health of members of the public at risk. Breast Check however says the pamphlets could not have had that effect upon the recipients of them. If they had an effect, it was to mislead individuals to buy the “breast health assessment” service offered by Breast Check when cheaper alternatives (attendance at their own GP or at a Breast Screen service) might otherwise have been chosen.
6. Third, Breast Check submits ACCC proceeds on the basis that the contravening conduct was the publication of the pamphlets simpliciter. Breast Check says that the Court has found that the conduct was the making available of those pamphlets in a context in which it had failed to put in place a system adequately to control distribution.
7. In addition to the evidence received at trial, Breast Check also indicated it wished to rely upon [8]-[14] and [16]‑[22] of the affidavit of Mr Boyd, which were not read at trial. However, Mr Boyd was subsequently called for cross‑examination and further direct evidence was adduced at the penalty hearing.
8. ACCC responded to those submissions, saying that it was not correct to say that the breast imaging and thermography pamphlets were not “distributed to the public” or that the Court’s findings are (or should be) limited to the pamphlets “being made available” to “a small number of individuals”. Nor has the Court found, ACCC submits, that “the conduct was the making available of those pamphlets in a context in which Breast Check had failed to put in place a system adequately to control distribution”.
9. Rather, ACCC submits, the Court has found that (relevantly) the breast imaging and thermography pamphlets were published to a section of the public, being women interested in the breast imaging service offered by Breast Check. In that regard, ACCC refers to the relevant findings to be found at [93], [94], [96], [109] and also at [112], [161] and [162].
10. ACCC submits there are no specific findings to the effect that Breast Check suggests in its submissions as to the context or cause of the contravention – Breast Check’s failure to put a system in place to control distribution of the pamphlets. ACCC notes that at trial, Breast Check argued that the class to whom the promotional brochures were distributed should be limited to existing patients/customers and that any other distribution was in response to specific inquiries and preceded by a conversation to the effect stated by ***Ms*** Robyn ***Coyle*** in her evidence – something the Court did not accept.
11. ACCC submits that, at most, the Court concluded that while there may have been efforts to introduce procedures of the sort described by Ms Coyle, they were not necessarily utilised or followed on all occasions.
12. It submits the Court’s finding on the issue is that there was no controlled distribution of the materials available in the waiting room of the Breast Check clinic. Further, the Court also found that it is clear from the evidence that promotional pamphlets were sent by post to persons who would inquire of the business by telephone and there is no evidence to suggest that what Ms Coyle believed a receptionist should impart by way of information was in fact imparted.
13. ACCC further submits there is no finding to the effect that the contraventions arose because of a failure of any system to control distribution of the pamphlets. The contraventions arose, ACCC submits, and as the Court found, from Breast Check’s publication of the pamphlets and the false, misleading or deceptive representations conveyed by them.
14. The ACCC repeats those submissions in relation to other similar submissions made on behalf of Breast Check.
15. I accept the submissions of ACCC just set out as to what the Court found and the relative significance of the findings. There is no need for me to repeat the evidence. The submissions of Breast Check by which it seeks to limit the findings of the Court to an administrative or clerical failure within the Breast Check clinic to limit distribution, and to suggest that a very limited group of women only had access to the pamphlets, are rejected.
16. While there is no clear evidence as to how many people may have been the subject of the publication of the relevant pamphlets, they were at least published to people who made inquiries at the clinic, or who accessed the clinic’s waiting room and took pamphlets, or who telephoned the clinic and received them by post.
17. What the Court did decide, at [98], was that the provision of breast health reports, report information and other accompanying documents to customers of Breast Check who had already received breast imaging did not constitute a separate publication to the public.
18. As to the effect of the contravening conduct, ACCC expressly addresses, in its reply submissions, the submission of Breast Check as to “the evil done by the pamphlets”. ACCC maintains its submission that each of the relevant representations was designed to inform consumers about the devices used by Breast Check for breast imaging and to encourage consumers to choose those services over more conventional breast imaging methods, notably mammography; and that in so doing Breast Check sought to take advantage of perceived negative characteristics of mammography and offered what it represented to be a viable alternative or substitute for mammography, when that was not the case.
19. ACCC submits that Breast Check, by its submissions, seeks to reargue its case at trial, which was not accepted by the Court, to the effect that what was being promoted in the pamphlets was a “breast health assessment”. It says that Breast Check also seeks to rely on its contentions, which were not accepted at trial, that the service it promoted included a breast examination and in some cases a referral to have a mammogram or ultrasound.
20. Again, I accept the submissions made on behalf of ACCC as to the effect of the contravening conduct. In particular, I accept that the risk to the relevant section of the public was that the representations made in the pamphlets had the potential to divert, and may well have diverted, members of the class from using a medically recognised and more reliable means of breast imaging, such as mammography or ultrasound. Instead, members of the relevant class may have undertaken breast imaging with Breast Check using its thermography device or Multifrequency Electrical Impedence Mammograph (***MEM***) device or a combination of the two.
21. I accept the further submission made on behalf of ACCC, that while the Court did not accept that those who actually received breast imaging from Breast Check fell into a separate section, or second class, of the public, it does not follow that women who may have been, or were, diverted to Breast Check by the representations made in the promotional pamphlets are excluded from the section of the public that picked up or were given a pamphlet at a Breast Check clinic or received one in the post following an inquiry about Breast Check’s services, being in the first class of members of the public found to exist by the Court.
22. Thus, I accept the submission made by ACCC that to suggest that the only “evil” was a commercial one – the additional cost of going to Breast Check rather than a “cheaper alternative”, such as “their own GP” – detracts from the real issues.
23. I accept as constituting a proper characterisation of the issues, the submission of ACCC that first, the impugned representations relate to the use of the devices for breast imaging for the purposes stated, not the “breast health assessment” or “profiling” services Breast Check unsuccessfully contended for at trial. As such, “buying” services such as a physical breast examination or a doctor’s referral for a mammogram from Breast Check, rather than the “cheaper alternatives” suggested, is not the issue as to the effect of the impugned conduct.
24. Secondly, and importantly, the question of any increased costs incurred by consumers is not the key issue. The key issue is the potential to divert consumers from using a medically recognised form of breast imaging and the harm or potential harm caused by that.
25. Thus, I accept that even if only one consumer has been so diverted to their detriment, the consequences to a person’s health may be very serious and at worst, fatal. That is not something that can be measured solely in monetary terms and it is of no assistance to say the conduct was only directed to “a small number of individuals”. In any event, it certainly is not something that can be assessed by seeking to calculate the additional income Breast Check may have derived from providing its service. The service it represented in the pamphlets was the use of the devices for breast imaging, for which there is no adequate scientific medical basis – not the “breast health assessment” Breast Check bases its “loss” calculations on.
26. I also accept the submissions of ACCC in relation to other similar submissions of Breast Check concerning the effect of the contraventions.
27. I should also note that Dr Boyd was self‑represented at the penalty hearing and generally adopted the submissions made on behalf of Breast Check.
28. The orders proposed will be considered in light of these observations.

# Should declarations be made?

1. The parties agree that this is an appropriate case for declarations. The Court agrees.
2. The value of declarations being made in the present circumstances is that they help to convey to the public at large the nature and extent of the contraventions found in this case and their seriousness.
3. I have considered the terms of the declarations as to the relevant representations and the involvement of Dr Boyd set out in (1), (2), (3) and (4) of the further amended proposed minute of orders lodged by ACCC on 20 June 2014. In my view, the amendments proposed to the minute lodged 29 May 2014 are appropriate and should be made.

#  should injunctions be granted?

1. Breast Check submits that injunctions should not be made against it because:
2. Contrary to ACCC’s submissions it would not be designed to prevent a repetition of the contravening conduct and would not be appropriate to deter a repetition of the contraventions.
3. Contrary to ACCC’s submissions it follows that the making of the injunction would have no effect on the protection of consumers.
4. Contrary to ACCC’s submissions the injunction is neither clearly nor precisely stated and would operate by reference to broad evaluative terms of “adequate” and “reasonable grounds” and it would be impossible for anyone to determine with any certainty the scope of conduct to be enjoined.
5. Breast Check says that a submission made by ACCC that where the public interest warrants the making of an injunctive order, it is irrelevant that the contravener does not intend to or is not likely to engage in contravening conduct again, is wrong and if the Court were to accept it, it would fall into error. Breast Check notes that in *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296, Toohey J (upon whose reasoning ACCC relies for its injunction submissions) said, at the bottom of p 299, that s 80(4) TP Act provided the power of the Court to grant an injunction restraining a person from engaging in conduct and may be exercised “whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind”. But at the top of p 300, his Honour also said that it was clear that in determining whether to grant an injunction the Court is not restricted because of the factors mentioned in subs (4). His Honour said the question must still be asked, where those factors were absent, what purpose an injunction was intended to serve. Breast Check submits that while the Court has power to grant an injunction, its intentions remain centrally relevant to the Court’s exercise of discretion. This would only be an appropriate case for injunctive relief if the contraventions found were particularly flagrant.
6. In relation to that submission, ACCC maintains that the contraventions are flagrant, or, at the very least, of a sufficiently serious nature that it would be appropriate for the Court to mark its disapproval by granting an injunction as well as a monetary penalty.
7. It submits that while Breast Check seeks to minimise the seriousness of the conduct, as noted above, those submissions should not be accepted.
8. I generally accept the submissions made by ACCC. I consider that it is not appropriate in effect to minimise the seriousness of the conduct in the manner that Breast Check has contended for. I consider that it is appropriate that injunctive relief be granted in the circumstances, even if it be the case that Breast Check is no longer engaged in the business that has led to the contraventions in question.
9. To the extent that Breast Check submits that an injunction is unnecessary because in this case Mr Boyd, as the director and shareholder of Breast Check, lent his company’s good offices to his mother and in light of everything that has happened, an injunction to restrain his activities is unnecessary, I do not consider that those very personal circumstances should guide the exercise of the discretion whether or not to grant an injunction in the circumstances of this case.
10. As discussed further below, it is Breast Check, as an entity, that contravened. While to some extent the particular circumstances in which Dr Boyd found herself led to her operating the breast examination clinic as part of the business as Breast Check, the reality is that the company nonetheless ran the business and is liable for the contraventions.
11. I note that in *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* [2003] FCA 850; (2003) 200 ALR 491, Selway J accepted that a declaration may achieve the same result as an injunction but so long as it is otherwise appropriate there is no reason why an injunction should not also be made if it is in the public interest to do so. In my view, it is in the public interest to grant an injunction as it appropriately reinforces the understanding in the public mind, and to other would be operators of such businesses, that considerable care needs to be taken to comply with the consumer laws so as not to put the public interest at risk.
12. In my view, injunctive relief is appropriate and there is nothing in the terms of the injunctions sought, so far as the expressions used are concerned, that suggests they lack certainty. In particular, I accept the submission made by ACCC that expressions such as “adequate” and “reasonable grounds” can be readily understood.
13. In those circumstances, I would make orders granting injunctions in terms of (5) and (6) of the further amended proposed minute of orders lodged 20 June 2014.

# Should pecuniary penalties be ordered?

1. ACCC seeks orders that Breast Check pay a pecuniary penalty in the amount of $250,000 and Dr Boyd pay a pecuniary penalty in the amount of $50,000 in respect of the relevant contravening conduct, such amounts to be paid within 30 days of the making of the Court’s order.
2. Breast Check accepts the submissions made by ACCC in its primary submissions on the principles governing the imposition of a pecuniary penalty. It says, however, the dispute between the parties is as to the application of the principles to the facts in question.
3. Breast Check notes that the submission of ACCC is that the period in which the breast imaging pamphlet and the thermography pamphlet were published was from 18 October 2010 until at least 19 May 2011, but this is unsupported by a finding and is contrary to the pleaded case concerning the thermography pamphlet. It says that at [2] the Court recorded the pleaded case was that it was published from at least around early May 2011 until around 19 May 2011 and there is no evidence of its use over a longer period. It also notes that a submission of ACCC that women who were interested in breast imaging services ought to be able to make informed medical decisions based on accurate claims made by doctors and medical service suppliers, is one of policy which is insufficiently related to the “legal norm in question”. Breast Check says the legal norm operates in the circumstances of this case such that women who are interested in breast imaging services ought to be able to make medical decisions without being misled or deceived by claims made by doctors and medical service suppliers. It says there is no law which operates in the federal jurisdiction which requires doctors or medical service suppliers to provide information to their patients or potential patients.
4. Again, Breast Check submits that ACCC has failed to grapple with the nature and extent of the contraventions as found by the Court and fails to identify any risk of harm to the health of consumers let alone any potentially serious such risks. It repeats its submission that while posing a commercial risk to the consumers affected by its conduct, it did not pose a health risk.
5. Again, having regard to the above consideration of similar submissions, I reject the characterisation of the conduct contended for on behalf of Breast Check.
6. So far as the relevant period for assessment of pecuniary penalties is concerned, the relevant period is seven months, from 18 October 2010 until at least 19 May 2011, being the period in which the breast imaging and thermography pamphlets were published. As ACCC notes, this is comprised of:
7. from 18 October 2010 to around May 2011 in respect of the breast imaging pamphlet; and
8. from at least around early May 2011 to until around 19 May 2011 in respect of the thermography pamphlet.
9. ACCC does not suggest the thermography pamphlet was published for any longer period.
10. So far as the imposition of pecuniary penalty is concerned, it is now well established that the penalty must have regard to the seriousness of a contravention, that the principal object of imposing the penalty is deterrence, both general and specific, and that a range of factors must be considered: see *Australian Competition and Consumer Commission v* ***Safe Breast Imaging*** *Pty Ltd* ***(No 2)***[2014] FCA 998.
11. In *Safe Breast Imaging (No 2)*, I set out the range of principles and factors which should be considered in relation to the imposition of a pecuniary penalty. In their submissions, the parties have addressed submissions to each of the factors that are accepted as relevant in the circumstances of this case.
12. *Nature and extent of contravening conduct*: Breast Check repeats a range of submissions concerning the seriousness of the conduct referred to above and finally submits that the conduct found to be in contravention was the conduct of making pamphlets available to women who call at the clinic and collect such a pamphlet and by sending the pamphlets by post to women who telephoned and requested the pamphlet and it is in that context that the conduct was to be assessed.
13. ACCC, in effect, accepts that submission but submits that even if the pamphlets were published to a limited number of consumers, the potential for serious risk of harm arises.
14. As to the point made by the respondents to the effect that Dr Boyd invariably conducted a physical breast examination and referred customers for mammography and/or ultrasound as appropriate, that is not the issue. The issue is what Breast Check represented and whether there was an adequate scientific medical basis for the particular representation. In any event, as ACCC submits, it is apparent from the evidence that Breast Check did not refer all customers to mammography and/or ultrasound.
15. I generally accept the submissions made by ACCC, but note that this is a case in which the relevant publication of the pamphlets, especially the breast imaging pamphlet, occurred in relatively circumscribed circumstances to persons who physically sought out the pamphlet at the Breast Check clinic or telephoned the clinic to obtain it. This was not a case, for example, where the service was marketed widely through other means, such as the internet. The factual circumstances of publication in this regard may be contrasted with those found to exist in *Safe Breast Imaging (No 2)*.
16. *The size of the contravening company*: Breast Check says it is common ground that it is a small company and its sole director and shareholder is Mr Boyd. It says it is the vehicle through which Mr Boyd operates his practice as a physiotherapist in Darwin. Breast Check says that in March or April 2009, Mr Boyd permitted his company to be used to conduct the clinic, which had been operated by his mother for some years and he did so in order to assist her administratively.
17. Breast Check says that the clinic operated by Dr Boyd closed in September 2011 when Dr Boyd’s medical registration was not renewed as the result of a coronial inquiry into the death of a number of patients of Dr Boyd in 2005. It says the economic burden of any penalty imposed on the first respondent falls solely on Mr Boyd as the sole shareholder and his mother’s dealings have cost him dearly. He has provided $500,000 in financial support to her in respect of the coronial inquest. He has also incurred the cost of the current proceeding which is about $75,000 at the commencement of the trial and estimated it will be some additional $40,000 or $50,000 for the conduct of the trial.
18. ACCC submits, however, that the extent of financial support provided by Mr Boyd to his mother is not relevant to the determination of the amount of any penalty to be paid by Breast Check, nor is it supported by evidence. They say that Breast Check is a separate legal entity and it is the company that engaged in the contravening conduct.
19. In any event, it assumes that it is Breast Check rather than Mr Boyd personally who has incurred any legal expenses in relation to the proceeding.
20. The circumstances of Breast Check and Mr Boyd are dealt with below in relation to the financial position of the respondents.
21. In broad terms, however, Breast Check is a small company that primarily engages in the provision of a physiotherapy service.
22. *The deliberateness of the contravention*: ACCC maintains that the conduct can only be viewed as deliberate.
23. Breast Check submits that ACCC continues to confuse the contravention as found with the case ACCC ran. It says the contravening conduct was not the publication of pamphlets to the public: it was the making available of those pamphlets to a section of the public in circumstances where steps which Ms Coyle had described were not effectively implemented. I have already rejected that characterisation of the relevant conduct.
24. Further, Breast Check submits that the submissions of ACCC fly in the face of the evidence that Dr Boyd and Ms Coyle in fact conducted a “breast health assessment” which often resulted in referral to mammography and/or ultrasound. I have also dealt with that submission above and rejected it.
25. There can be little doubt that the contraventions were deliberate in that the publications plainly were made and represented what they represented, as found.
26. *Whether the contraventions arose out of the conduct of senior management or at a lower level*: ACCC maintains its submission that Dr Boyd was responsible for managing the business and was primarily responsible for and knowingly concerned in the contravening conduct.
27. Again, Breast Check submits that the contraventions arose from the failure to implement the controls of which Ms Coyle gave evidence and the failure was primarily attributable to her and the receptionists, neither of whom can be described as senior management.
28. I reject the submission made in that regard by Breast Check and Dr Boyd and accept the submission and characterisation of the evidence as put by ACCC.
29. *Past conduct*: It is agreed between the parties that neither Breast Check nor Dr Boyd has been the subject of any prior or subsequent investigations or legal proceedings by ACCC.
30. *Financial position*: Mr Boyd gave evidence concerning the financial circumstances of Breast Check.
31. Mr Boyd is a physiotherapist who lives and practises in Darwin.
32. He produced financial statements for Breast Check for the years 2010, 2011 and 2012.
33. Counsel for Breast Check first took him to the statement of financial position at 30 June 2010 which included three pieces of real estate: one in Como being a residence, he said, originally bought by his mother; another, being the Mosman Park premises which was used as the clinic the subject of this proceeding; and a third in Mosman Park that was formerly his mother’s address. Mr Boyd said each of those properties had been purchased not long before the 2010 statements had been prepared.
34. He also identified under financial liabilities a commercial bill for some $2.45 million, which he said was an arrangement made with a bank to allow those properties to be secured.
35. He was then taken to a statement of financial position as at 30 June 2011, and said that the Como and Mosman Park premises were sold, but not the clinic premises. He noted that the commercial bill balance had been reduced to some $705,000, as a result of the sale of those properties.
36. He was then taken to the 2012 accounts which showed a unit in Darwin owned by the company which he confirmed had been acquired in the year ending 30 June 2012 by Breast Check. That property he explained is partly rented and partly lived in by him.
37. He further said that the 2012 accounts showed that there were some shares owned by the company but it no longer held those shares and indeed there was a loss of $20,000 on them as a result of a margin loan call.
38. Mr Boyd further explained the drawings he takes from the company, the interest payable on the Darwin unit and mentioned the time he spends on his physiotherapy business through the company. He also mentioned a loan made to a family trust company apparently controlled by his father. He said there was no prospect of recovery of that loan.
39. In cross‑examination, Mr Boyd identified his weekly drawings from the company, confirmed that he did not pay rent for the unit he lived in in Darwin and said that the current value of the unit in Mosman Park at which the clinic had been run according to a valuation done some 12 to 18 months earlier was $450,000.
40. He considered that the Darwin unit’s last estimate of valuation was about $550,000 for both parts of the strata title.
41. He mentioned the securities held for financing in respect of the Mosman Park clinic and the Darwin unit.
42. He was also asked about a director’s loan of $263,004 shown in the 2012 statement but could not clarify what that entry concerned without speaking with his accountant.
43. Counsel for Breast Check submitted that the potential effect of any penalty on the company and its employees might reasonably be taken into account and in that regard referred to what Heerey J said in *Australian Competition and Consumer Commission v Fila Sport Oceania Pty Ltd* [2004] FCA 376; [2004] ATPR 41-983.
44. He also referred to what Mr Boyd said in his evidence to the effect that the clinic had been operated by Dr Boyd in her own right before 2009, but that activity was not relevant to the current proceeding.
45. He emphasised that the imposition of any penalty will be carried by Mr Boyd and if the company is liquidated then Mr Boyd and his physiotherapy employees in Darwin would carry the economic cost.
46. Counsel noted that Dr Boyd was bankrupt and so would not be contributing to the penalty imposed. In those circumstances, counsel submitted that there should be no penalty at all imposed on Breast Check.
47. Counsel for ACCC emphasised that the fact that Breast Check was a small company and that there might be an effect on the personal circumstances of Mr Boyd or the fortunes of the company should not result in the Court declining to impose a pecuniary penalty on the company.
48. Counsel accepted, however, that personal circumstances were not irrelevant but submitted the question of general deterrence remained important. See *Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCAFC 247; [2006] ATPR 42-091.
49. Counsel submitted that similar issues arose with regard to Dr Boyd’s bankruptcy and her inability to pay a penalty at this time. She submitted, however, that the same principles apply and just because Dr Boyd is not able to pay or is insolvent, the object of general deterrence should still be met.
50. *Cooperation*: Breast Check says that a submission made by ACCC that Breast Check has not been cooperative with it is incorrect and it points to the interviews under s 155 CCA where both Ms Coyle and Dr Boyd cooperated by gathering documents and formulating a written response to ACCC before the interviews, as well as the withdrawal of pamphlets in issue immediately after Breast Check became aware of ACCC’s concerns and additionally in the conduct of the proceeding Breast Check voluntarily responded to all requests for provision of customer files and financial records.
51. Breast Check also submits that what is said by ACCC in this regard needs to be understood in the context of ACCC having pursued and failed to establish its principal case that by its dealings with each of its customers Breast Check contravened the consumer laws.
52. In my view, the question of cooperation is a neutral factor. It cannot be said that the respondents have in any significant or relevant way failed to cooperate such that that should be a factor bearing on the imposition of penalty.
53. *Dr Boyd’s submissions on penalty*: Dr Boyd emphasised in her oral submissions that the company never made money and the work she did in the clinic was supported by the extra medical work she was doing on two other days when she was not at the clinic and also at nights and on locum work. She said it was never a financial success.
54. Dr Boyd also emphasised that the clinic was never set up in opposition to mammography but was set up because a friend of hers had been diagnosed with breast cancer at a late stage and the mammogram taken when she was younger had failed to pick up the breast cancer. She referred to some other circumstances concerning screening for breast cancer in younger women.
55. She also said that she had taken steps to try and set up a proper study into the use of the MEM device.
56. *Penalty*: The submissions of ACCC about proposed penalty specifically recognised that the circumstances of each case must be regarded and comparisons with other cases should not be drawn.
57. Breast Check says that in this case the evidence supports a finding that if there was any commercial advantage derived from the contravening conduct it was an increase in the number of “breast health assessments” conducted by the clinic by a very small amount. There is no basis for a penalty greater than needed to affect calculations of profitability of that small number of breast health assessments.
58. I have already ruled above that the circumstances of contravention are not to be looked at purely from a “commercial advantage” point of view or a “breast health assessments” analysis. It is not simply a matter in a case such as the present of looking at what financial gain may have been achieved by the operation of the Breast Check clinic by Dr Boyd on behalf of Breast Check. The potential for serious harm to flow from the representations found to have contravened the consumer laws, is the key issue.
59. That said, the factual circumstances here are that the thermography pamphlet was issued for a very short period of time. For present purposes it may be ignored. Rather, it is the publication of the breast imaging pamphlet that is of importance. The relevant period of its publication was from 18 October 2010 to around May 2011 – a period of seven months.
60. It is accepted by the Court that the evidence does not establish a wide publication of the breast imaging pamphlet. While persons who came into the clinic and inquired of the reception desk may have obtained a copy of it, as may have potential customers who simply entered the clinic and took a pamphlet from the waiting room, as well as persons who telephoned the clinic and received a copy by post, there is no evidence to suggest how large or small that group was. The fact that Ms Kathleen Melia, an ACCC investigator, was able to obtain a pamphlet in the relatively simple way that she did, suggests perhaps that it was not difficult to obtain the pamphlet.
61. What should also be noted is that, on the evidence, this is not a case where other, more pervasive forms of advertising were used, for example, internet advertising.
62. Taking into account these various relevant factors, as well as the circumstances in which Breast Check as an entity came to be involved in this business, and acknowledging the financial circumstances of Breast Check and Mr Boyd, I consider a pecuniary penalty in the order of $75,000 should be imposed on Breast Check. I make that assessment noting the maximum penalty for a corporation is $1.1 million for each act or omission.
63. Given the seven month period of contravention involved, the relatively limited evidence going to the number of persons to whom publication was made, and the other factors noted above, I consider that a pecuniary penalty in the sum of $75,000 is an appropriate penalty having regard to the seriousness of the contraventions.
64. I also consider, taking into account the declarations to be made and the injunctions to be ordered, that such a pecuniary penalty should not be considered oppressive.
65. I consider that a penalty in at least that sum is appropriate to send a message that a pecuniary penalty should not be seen as a mere cost of doing business in contravention of the consumer laws and provides suitable personal and general deterrence.
66. As to the question of a pecuniary penalty against Dr Boyd, the maximum penalty that can be imposed on an individual is $220,000 for each act or omission. In this case, ACCC submits that a pecuniary penalty of $50,000 is appropriate.
67. In all the circumstances, again having regard to the limited period of publication and the fact that the evidence does not disclose that publication was in fact made to a large number of persons, and taking into account the financial position of Dr Boyd (which includes her current bankruptcy), I consider that a pecuniary penalty is appropriate, but it should be in the sum of $25,000.
68. Again, taking into account all relevant factors, I do not consider that the imposition of such a pecuniary penalty on Dr Boyd is in any relevant sense oppressive.

# Should a publication order be made?

1. The respondents submit a publication order as proposed by ACCC in the further amended minute of proposed orders is inappropriate because it would be directed to those very people in respect of whom the Court declined to find that there was any contravention.
2. They submit the difficulty is highlighted by the submission of ACCC and the proposal that the order required would result in the letter being sent to “all customers to whom Breast Check provided breast imaging services from October 2010 to May 2011”. The submission refers to “letters to be sent personally addressed to each prospective customer” (emphasis added).
3. Breast Check notes that the submission continues, “it is imperative that those that may have relied on the false representations and the breast imaging pamphlet and the thermography pamphlet are alerted to the contravening conduct as directly and expeditiously as possible”. It submits it is to be recalled that the very people to whom the order would have letters addressed are the people with respect to whom the Court declined there had been any false representation.
4. ACCC maintains that publication orders are an appropriate remedy in this case. It says that it is important that anyone in the first class of the public to whom the impugned representations were made who may have received or relied on breast imaging using either of the devices is informed of the Court’s findings so that those who were diverted from having, for example, a mammogram, are made aware that there is no adequate scientific medical basis for using the devices for the purposes represented by Breast Check.
5. ACCC submits that whilst this may include women who were not in the section of the public the Court has found the impugned representations were conveyed to, given the potential risk of serious harm, ACCC submits that any burden imposed by writing to more women will be outweighed by the potential benefit of informing those who may have relied on the breast imaging received from Breast Check to their detriment.
6. In that regard, ACCC proposes that the letter to customers should be amended.
7. In my view, in all the circumstances, it is inappropriate to have a publication order in this case as the only known persons to whom a letter would go are those customers in respect of whom I have found did not fall into a relevant section of the public for contravention purposes.
8. I will therefore not make a publication order.

# is an order for sealed reasons for judgment required?

1. ACCC seeks an order that a copy of the sealed reasons for judgment be retained by the Court for the purposes of s 83 of the TP Act and s 137H of the CCA.
2. It seeks this order so that any persons affected by the conduct of Breast Check or Dr Boyd who wish to take further action will be able to use findings of fact in this proceeding as prima facie evidence of those facts in any subsequent proceeding.
3. An order to that effect is appropriate and should be made.

# should costs be ordered against the respondents?

1. The parties have agreed in principle that depending on the basis upon which the Court proposes that relief should be granted, it may be appropriate for further submissions to be made on costs in writing.
2. On the face of the relief that the Court is prepared to grant, and the basis upon which it would do so, I would expect that ACCC should have the costs of the proceeding. I will, however, await either a further minute of consent orders from the parties in relation to costs, or written submissions upon which I will then rule in relation to costs.

# order

1. There will be orders made in terms of the further amended proposed minute of orders of ACCC submitted 20 June 2014 in terms of (1), (2), (3), (4), (5), (6), (7) (but so that a pecuniary penalty in the amount of $75,000 only shall be imposed against Breast Check), (8) (but so that a pecuniary penalty in the amount of $25,000 only shall be imposed against Dr Boyd) and (10).
2. I will hear from the parties in relation to the question of costs.

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| I certify that the preceding one hundred and twenty-seven (127) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker. |

Associate:

Dated: 3 October 2014