FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Safe Breast Imaging Pty Ltd (No 2) [2014] FCA 998

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| Citation: | Australian Competition and Consumer Commission v Safe Breast Imaging Pty Ltd (No 2) [2014] FCA 998 |
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| Parties: | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v SAFE BREAST IMAGING PTY LTD (ACN 120 489 410) and JOANNE FIRTH** |
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| File number: | WAD 514 of 2011 |
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| Judge: | **BARKER J** |
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| Date of judgment: | 16 September 2014 |
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| Catchwords: | **CONSUMER LAW** – contraventions of *Australian Consumer Law* (Cth) and *Trade Practices Act 1974* (Cth) – appropriate relief to be granted – whether declarations, injunctions, pecuniary penalties, publication orders, a disqualification order and costs orders should be made – consideration of relevant factors  |
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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 34, s 224, s 224(2)*Competition and Consumer Act 2010* (Cth) s 137H *Trade Practices Act 1974* (Cth) s 52, s 53(c), s 55A, s 76E, s 76E(2), s 83 |
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| Cases cited: | *Australian Competition and Consumer Commission v Apple Pty Ltd* [2012] FCA 646*Australian Competition and Consumer Commission v Artorios Ink Co Pty Ltd (No 2)* [2013] FCA 1292*Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd* [2011] FCA 372*Australian Competition and Consumer Commission v Energy Australia Pty Ltd* [2014] FCA 336*Australian Competition & Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265; (2005) 215 ALR 301*Australian Competition and Consumer Commission v Safe Breast Imaging Pty Ltd* [2014] FCA 238*Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761*Australian Competition and Consumer Commission v SMS* *Global Pty Ltd* [2011] FCA 855*Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 88 ALJR 176*Australian Competition and Consumer Commission v Willesee Healthcare Pty Ltd (No 2)* [2011] FCA 752*Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80*Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2; (2014) 88 ALJR 372*Kerkhoffs v Registrar of Aboriginal and Torres Strait Islander Corporations* [2014] FCAFC 66*Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357*Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41,993*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285*Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249*TPG Internet Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 190; (2012) 210 FCR 277*Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076  |
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| Date of hearing: | 11 June 2014 |
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| Date of last submissions: | 26 June 2014 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 96 |
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| Counsel for the Applicant: | Ms S Russell |
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| Solicitor for the Applicant: | Minter Ellison |
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| Counsel for the Respondents: | Ms J Firth appeared in person on behalf of the respondents |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 514 of 2011 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | SAFE BREAST IMAGING PTY LTD (ACN 120 489 410)First RespondentJOANNE FIRTHSecond Respondent |

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| JUDGE: | BARKER J |
| DATE OF ORDER: | 16 SEPTEMBER 2014 |
| WHERE MADE: | PERTH |

**THE COURT DECLARES THAT:**

1. Assurance Representation
	* + 1. The first respondent (***Safe Breast Imaging***), by publishing various words and images in or on:
2. its website, located at the Uniform Resource Locator (URL) http://www.safebreastimaging.com.au (the ***Safe Breast Imaging Website***) from around August 2010 until around July 2011;
3. a promotional video published in various locations on the internet, including YouTube, from around 5 August 2009 until at least 21 December 2011 (the ***Safe Breast Imaging Video***);
4. a double sided pamphlet (***Pamphlet***) distributed to the public from at least August 2009 until around August 2011;
5. a document titled “Frequently asked questions about breast imaging and breast screening using the MEM” (***FAQ sheet***) provided to its customers from at least March 2011 until around August 2011,

represented that breast imaging using a device known as the Multifrequency Electrical Impedance Mammograph (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 breast imaging using 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 *Trade Practices Act 1974* (Cth) (***TPA***) and s 18 of the *Australian Consumer Law* (***ACL***);
2. falsely represented that its breast imaging service using the MEM Device had performance characteristics, uses or benefits it did not have in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL; and
3. was liable to mislead the public as to the nature, characteristics and suitability for purpose of its breast imaging service using the MEM Device in contravention of s 55A of the TPA and s 34 of the ACL.
4. Risk of Cancer Representation
	* + 1. Safe Breast Imaging by publishing various words and images in or on:
5. the Safe Breast Imaging Website from around August 2009 until around July 2011;
6. the Pamphlet distributed to the public from at least August 2009 until around August 2011;
7. an information package, including an information sheet on the MEM Device (MEM Information) and the FAQ sheet, provided to its customers from at least March 2011 until around August 2011,

represented that breast imaging using 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 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 TPA and s 18 of the ACL;
2. falsely represented that its breast imaging service using the MEM Device had performance characteristics, uses or benefits it did not have in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL; and
3. was liable to mislead the public as to the nature, characteristics and suitability for purpose of its breast imaging service using the MEM Device in contravention of s 55A of the TPA and s 34 of the ACL.
4. Substitute for Mammography Representation
	* + 1. Safe Breast Imaging by publishing various words and images in or on:
5. at least four types of internet advertisements provided by Google AdWords from at least June 2011 until around July 2011;
6. the Safe Breast Imaging Website from around August 2009 until around July 2011;
7. the Safe Breast Imaging Video from around 5 August 2009 until at least 21 December 2011;
8. the pamphlet distributed to the public from at least August 2009 until around August 2011;
9. an information package, including the MEM Information and FAQ sheet, provided to customers from at least March 2011 until around August 2011,

represented that there was and is an adequate scientific medical basis for using the MEM Device for breast imaging as a substitute for mammography when, in fact, there was and is inadequate scientific medical basis for using the MEM Device 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;
2. falsely represented that its breast imaging service using the MEM Device had approval, performance characteristics, uses or benefits it did not have in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL; and
3. was liable to mislead the public as to the nature, characteristics and suitability for purpose of its breast imaging service using the MEM Device in contravention of s 55A of the TPA and s 34 of the ACL.
4. Medical Practitioner Representations
	* + 1. Safe Breast Imaging by publishing various words and images in or on:
5. the Safe Breast Imaging Website from around August 2009 until around July 2011;
6. the Safe Breast Imaging Video from around 5 August 2009 until at least 21 December 2011;
7. the FAQ sheet provided to customers from at least March 2011 until around August 2011,

represented that the preparation of a Breast Health Report, including the interpretation of the customer’s images and questionnaire answers:

1. was performed by a medical doctor named in the Breast Health Report; and
2. was or would be performed by a medical doctor who is registered to practise as a medical practitioner in Australia;

when in fact that interpretation and preparation of the Breast Health Reports was not performed by the doctor named in the report or by a medical doctor registered to practise as a medical practitioner in Australia, 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;
2. falsely represented that its breast imaging service had approval, performance characteristics, uses or benefits it did not have in contravention of s 53(c) of the TPA and s 29(1)(g) of the ACL; and
3. was liable to mislead the public as to the nature, characteristics and suitability for purpose of its breast imaging service in contravention of s 55A of the TPA and s 34 of the ACL.
4. Joanne Firth
	* + 1. The second respondent (***Joanne Firth***) as a person who was the controlling mind of Safe Breast Imaging at the relevant times, and in each instance, caused Safe Breast Imaging to engage in the conduct described in the declarations in paras 1 to 4 of this Order, was directly or indirectly, knowingly concerned in or party to the contraventions by Safe Breast Imaging referred to in the declarations in paras 1 to 4 of this Order.

**THE COURT ORDERS THAT:**

1. Injunctions
	* + 1. Safe Breast Imaging 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:
2. there is an adequate scientific medical basis for any breast imaging service being:
	1. able to assure a customer that they do not have breast cancer;
	2. an effective means of assessing whether a customer may be at risk from breast cancer or the level of such risk;
	3. an effective substitute for mammography; or
3. any part of such breast imaging service is performed by a medical doctor who is registered to practise as a medical practitioner in Australia,

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

* + - 1. Joanne Firth be restrained, whether as an officer, servant or agent of Safe Breast Imaging or otherwise, in trade or commerce, from:
1. representing, whether by distributing promotional material or otherwise, that:
	1. there is an adequate scientific medical basis for any breast imaging service being:
	2. able to assure a customer that they do not have breast cancer;
	3. an effective means of assessing whether a customer may be at risk from breast cancer or the level of such risk;
	4. an effective substitute for mammography services; or
	5. any part of such breast imaging service is performed by a medical doctor who is registered to practise as a medical practitioner in Australia; 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:
	1. there is an adequate scientific medical basis for any breast imaging service being:
3. able to assure a customer that they do not have breast cancer;
4. an effective means of assessing whether a person may be at risk from breast cancer or the level of such risk;
5. an effective substitute for mammography services; or
	1. any part of such breast imaging service is performed by a medical doctor who is registered to practise as a medical practitioner in Australia,

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

1. Penalties
	* + 1. Pursuant to s 76E of the TPA and s 224 of the ACL, Safe Breast Imaging pay to the Commonwealth within 30 days of the making of this Order by the Court a pecuniary penalty in the amount of $200,000 in respect of the conduct described in paras 1 to 4 of this Order.
			2. Pursuant to s 76E of the TPA and s 224 of the ACL, Joanne Firth pay to the Commonwealth within 30 days of the making of this Order by the Court a pecuniary penalty in the amount of $50,000 in respect of the conduct described in para 5 of this Order.
2. Other orders
	* + 1. The applicant (***ACCC***) be at liberty to cause an email in terms of Annexure A to this Order to be sent to all customers of Safe Breast Imaging listed in Annexure AH31 (***AH31***) of the affidavit of Anthony Gerard Hilton affirmed on 1 February 2013. If there is no email address listed in AH31 or the email has been rejected by the customer’s server, the ACCC be at liberty to cause a letter in terms of Annexure A to be sent by post to the postal address listed in AH31.
			2. Joanne Firth shall within 14 days of the date of these orders cause a post to be entered on the Facebook profiles of each of Safe Breast Imaging and Joanne Firth in terms of Annexure A to this Order.
			3. An order pursuant to s 248 of the ACL that Joanne Firth be disqualified from managing corporations for a period of four (4) years from the date of the Court’s order.
			4. 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 CCA.
3. Costs
	* + 1. Safe Breast Imaging and Joanne Firth pay the applicant’s costs of and incidental to the proceeding.

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

Annexure A

As a result of legal action taken by the Australian Competition and Consumer Commission against Safe Breast Imaging Pty Ltd and Joanne Firth, the Federal Court of Australia recently made orders declaring that Safe Breast Imaging engaged in misleading or deceptive conduct and made false representations. The Court also found that Joanne Firth was knowingly involved in the conduct.

Between August 2009 and December 2011, Safe Breast Imaging falsely represented on its website, in a video, in pamphlets and information provided to its customers that its breast imaging service using the MEM device could provide an adequate scientific medical basis for:-

a) assessing whether a person may be at risk from breast cancer;

b) assuring a person that they did not have breast cancer; and

c) using Safe Breast Imaging’s service as a substitute for a mammogram.

The Court found that there was no adequate scientific medical basis for those representations.

Safe Breast Imaging also falsely represented that the interpretation of a customer’s breast images and the preparation of a breast health report that Safe Breast Imaging sent to customers was performed by the doctor named in the report or by a medical doctor who is registered to practise in Australia when this was not the case.

If you are concerned about your risk of breast cancer and/or related breast health issues, you should consult your doctor as soon as possible.

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | SAFE BREAST IMAGING PTY LTD (ACN 120 489 410)First RespondentJOANNE FIRTHSecond Respondent |

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| JUDGE: | BARKER J |
| DATE: | 16 SEPTEMBER 2014 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

1. On 18 March 2014, in *Australian Competition and Consumer Commission v Safe Breast Imaging Pty Ltd* [2014] FCA 238, I found that each of the:
* assurance representation, risk of cancer representation, substitute for mammography representation (together the ***science representations***); and
* the medical doctor representation and the registered medical practitioner representation (together the ***medical practitioner representations***)

were conveyed, as alleged by the Australian Competition and Consumer Commission (***ACCC***), by the promotional materials and the information pack referred to in the reasons for judgment, and were:

1. Misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the *Australian Consumer Law* (Cth) (***ACL***) and s 52 of the *Trade Practices Act 1974* (Cth) (***TP Act***) at material times.
2. False or misleading as to the performance characteristics, uses or benefits (and, in relation to the medical practitioner representations and substitute for mammography representations, approval) of Safe Breast Imaging’s breast imaging, in contravention of s 29(1)(g) of the ACLand s 53(c) of the TP Act at material times.
3. The promotional materials were liable to mislead the public as to the nature, characteristics and suitability for purpose of the breast imaging service using the multi‑frequency electrical impedance mammograph (***MEM device***), in contravention of s 34 of the ACL and s 55A of the TP Act at material times.
4. I further found that Ms Firth was liable as an accessory for Safe Breast Imaging’s contraventions of:
5. section 18 of the ACL and s 52 of the TP Act at material times;
6. section 29(1)(g) of the ACL and s 53(c) of the TP Act at material times;
7. section 34 of the ACL and s 55A of the TP Act at material times,

on the basis that she:

1. caused Safe Breast Imaging to engage in the contravening conduct; and
2. had knowledge of those matters which established the falsity or misleading nature of each of the representations.
3. I then invited submissions from the parties as to the appropriate relief to be granted and the terms of any orders to be made.
4. ACCC lodged a minute of proposed orders (dated 11 June 2014 and amended as of 18 June 2014 at the Court’s invitation) that proposes:
5. declarations concerning the contravening representations and Ms Firth’s conduct as an accessory;
6. injunctions against Safe Breast Imaging and Ms Firth;
7. a pecuniary penalty against Safe Breast Imaging in the amount of $550,000;
8. a pecuniary penalty against Ms First in the amount of $110,000;
9. an order requiring the respondents to send corrective letters to all customers advising of the Court’s judgment, findings and remedies and relief granted;
10. an order to effect similar corrective statements on the Facebook profiles maintained by Safe Breast Imaging and Ms Firth;
11. an order that Ms Firth be disqualified from managing corporations for a period of five (5) years from the date of the Court’s order;
12. an order that the reasons for judgment with the Court’s seal affixed be retained on the Court file for the purposes of s 83 of the TP Act and s 137H of the *Competition and Consumer Act 2010* (Cth) (***CCA***);
13. the respondents pay ACCC’s costs of the proceeding.
14. ACCC also filed a detailed outline of submissions as to the orders sought.
15. Ms Firth, for both Safe Breast Imaging and herself, responded to those proposed orders and submissions in writing.
16. ACCC filed further submissions in reply to those filed by Ms Firth.
17. On 11 June 2014, I received oral submissions from the parties in relation to the appropriate penalty and proposed orders.
18. Ms Firth’s response to ACCC’s submissions in many respects appears to address the earlier findings of contravention made by the Court rather than the penalty consequences of the findings made. What may be discerned from them, however, is that on behalf of the respondents it is said that: declarations and injunctions in appropriate terms may be granted; in relation to the pecuniary penalties, the “period of assessment” should cease at July 2011 when Safe Breast Imaging ceased operating, meaning that the Court should not impose a pecuniary penalty that goes beyond reflecting the actual period of operation of the breast imaging business; the respondents would otherwise abide by the Court’s decision on pecuniary penalty, disqualification and corrective statements, although orders in each case were formally opposed.
19. Ms Firth made submissions concerning the nature and extent of the business of Safe Breast Imaging, and ultimately contended that, while operating from 150 locations in four States over two years, the numbers of consumers at each location were small and the actual number of consumers would be closer to half of the number estimated by ACCC.
20. Otherwise Ms Firth says that Safe Breast Imaging and she were seeking to provide a breast health service to women and that the service provided was “not borne out of greed”.
21. Ms Firth in that regard says in her written outline of submissions:

My vision was to provide a service that encouraged an increase in women’s breast health knowledge, and challenged the thinking that breasts equal cancer. I aimed to increase knowledge, empower women and reduce their anxiety levels.

In hindsight, I concede that the purposes represented in publications may have been misleading for some consumers. The actual service provided did not pose a grave risk of serious harm to the health of clients and the MEM device is non-invasive.

I concede that the conduct may have had the potential to divert some consumers in the BreastScreen target group from solely using medically recognised breast cancer screening imaging, namely mammography.

1. The question now before the Court, in light of the contraventions, is what orders the Court should make.

### Should declarations be made?

1. There is no real dispute between the parties that declarations, as sought by ACCC, are appropriate.
2. I have given careful consideration to the declarations proposed to ensure that they are framed appropriately and reflect the contraventions and other findings made by the Court.
3. I am satisfied that, in each case, the declarations proposed by ACCC should be made in respect of both Safe Breast Imaging and Ms Firth. They convey to the public at large the nature and extent of the contraventions found in this case and their seriousness.
4. Accordingly, there will be declarations made in accordance with the minute of proposed orders submitted by ACCC.

### Should injunctions be granted?

1. I consider this is a case where injunctions, as sought by ACCC, should be granted.
2. While it is perhaps not unusual, in proceedings such as these, for respondents who have been found to have contravened the consumer legislation, both to cease a contravening course of conduct and/or to say that they are unlikely to contravene again, there is reason in this case for injunctions to be granted in order to communicate both to the respondents particularly and to the public more generally that the conduct engaged in was serious and should not be repeated. The granting of injunctions is calculated to emphasise those messages, along with the declarations.
3. Additionally in this case, as her submissions on penalty tend to indicate, Ms Firth appears to remain defensive so far as the company’s and her contravening conduct is concerned. While Ms Firth and the company hold strong views about the validity of breast health research and technologies extending beyond mammography, the findings of the Court are such that they should not be left to think that they, or others, remain free to engage in conduct of the type found in this case to have contravened the consumer laws.
4. The injunctions as sought by ACCC are appropriate and should be granted.

### Should the pecuniary penalties sought be ordered?

1. ACCC seeks orders that Safe Breast Imaging pay a pecuniary penalty of $550,000 and Ms Firth pay a pecuniary penalty of $110,000.
2. Under s 224 of ACL (or s 76E of the TP Act), the maximum penalty for a corporation is $1.1 million for each act or omission. The maximum penalty for an individual is $220,000 for each act or omission.
3. ACCC submits that for penalty purposes it is appropriate for the Court to consider the science representations and the medical practitioner representations as, respectively, separate and distinct courses of conduct engaged in by Safe Breast Imaging, each deserving of sanction.
4. ACCC accepts that the conduct engaged in by Safe Breast Imaging formed part of one continuous marketing campaign in respect of its use of the MEM device for breast imaging. It submits, however, that because of the different character of the science representations, on the one hand, and the medical practitioner representations, on the other, each class of representation amounts to a separate course of conduct for the purpose of assessing the appropriate penalty to be imposed.
5. ACCC says the science representations falsely stated there was an adequate scientific medical basis for using the MEM device for certain purposes, when there was no such basis. It says the medical practitioner representations falsely stated that trained doctors would interpret the images and prepare a medical report, giving the impression that medical doctors, registered to practise in Australia, would interpret the images and provide the reports, when that was not the case.
6. ACCC submits that treating each type of representation as a course of conduct is consistent with the approach taken to multiple contraventions in such cases as *Singtel Optus Pty Ltd v Australia Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [52]‑[54] (***Singtel Optus***); *Australian Competition and Consumer Commission v Apple Pty Ltd* [2012] FCA 646 at [45]; and *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 190; (2012) 210 FCR 277 at [151] (***TPG Internet***).
7. ACCC says it should also be noted that by making each of the representations, Safe Breast Imaging contravened two separate provisions of the TP Act and ACL, to which penalty provisions apply (being ss 53(c) and 55A of the TP Act and ss 29(1)(g) and 34 of the ACL).
8. ACCC notes that Ms Firth has been found to have been knowingly concerned in, or party to, each of those contraventions.
9. ACCC submits that, in these circumstances, based on two separate and distinct courses of conduct, rather than each advertising medium by which representations are conveyed itself amounting to a separate contravention, the maximum penalty for Safe Breast Imaging should be seen as being $2.2 million, and for Ms Firth as being $440,000.
10. In appropriate circumstances, it is no doubt open to a court to consider whether a number of contraventions should be treated as separate contraventions for penalty purposes, or falling within one or more courses of conduct. The purpose of approaching penalty on the one or the other basis, to put it simply, is to ensure the punishment fits the contravention and the penalty outcome is not artificially, and unjustly, inflated because of the sheer number of contraventions found.
11. In *Singtel Optus*, the Full Court (Keane CJ, Finn and Gilmour JJ) cited with approval what Middleton J had said in *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2010] FCA 790; (2010) 188 FCR 238 (***Telstra Corporation***). Middleton J, at [250] of *Telstra Corporation* observed that, in that case, a number of different approaches could be taken to imposing a penalty. His Honour pointed out that the Court could look to each contravention, consider the appropriate penalty, taking into account the totality principle, and then apply any appropriate discount. Alternatively it could treat the admitted contraventions as all following from the same cause, with the maximum penalty being identified, and then consider the appropriate discount. His Honour added, at [251], that there was no scientific approach or arithmetic formula to be applied in determining the appropriate penalty and that the circumstances of each contravention needed to be looked at, taking into account all the circumstances pertaining to the contravention.
12. In *Singtel Optus*, the Full Court considered it was appropriate, in the circumstances of that case, to group Optus’ offending conduct into 11 contraventions “in order to reflect the extent and variety of Optus’ departure from the standards of commercial conduct required by the Act having regard to the magnitude of Optus’ campaign and the deployment of different media and messages in the prosecution of Optus’ campaign”.
13. In my view, in the circumstances in this case, there was in reality one extended course of conduct that involved Safe Breast Imaging marketing to the public, in various ways, the breast imaging service that it offered, which carried with it the impugned representations, including those which have been called the medical practitioner representations. I do not consider that the medical practitioner representations are easily separated from the science representations. Rather, they added weight to the science representations and, in a sense, amplified them. But they were part of the one general course of conduct. As a result, I consider there is in substance only one course of conduct, not two. I consider to impose a punishment for each set of representations, as contended for by ACCC, would produce an artificial and unjust outcome.
14. In those circumstances, the starting approach to a pecuniary penalty assessment is that the company is liable to a maximum pecuniary penalty of $1.1 million and Ms Firth to a pecuniary penalty of $220,000 for the contraventions.
15. There remains to be considered, however, exactly what the pecuniary penalty should be taking into account all relevant factors.
16. In some statutory circumstances where a pecuniary penalty may be imposed under legislation, the Court necessarily has regard to a series of factors that are inferred on a proper understanding of the objects, purposes, intent and operation of the legislation in question. In this case, s 224(2) of the ACL and s 76E(2) of the TP Act provided at material times that in assessing penalty the Court must have regard to all relevant matters, but then specifically required three to be considered, namely:
17. the nature and extent of the act or omission and any loss or damage suffered;
18. the circumstances in which the act or omission took place; and
19. whether the person has previously been found by a Court in proceedings under the relevant parts of the legislation to have engaged in similar conduct.
20. Relevant matters have in the course of many decisions of this Court been generally identified as including:
* the nature and extent of the contravening conduct;
* the amount of loss or damage caused;
* the circumstances in which the conduct took place;
* the size of the contravening company;
* the degree of power it has, as evidenced by its market share and ease of entry into the market;
* the deliberateness of the contravention and the period over which it extended;
* whether the contravention arose out of the conduct of senior management or at a lower level;
* whether the company has a corporate culture conducive to compliance with the TP Act or CCA as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;
* whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the legislation in relation to the contravention;
* whether the respondent has engaged in similar conduct in the past;
* the company’s financial position; and
* whether the conduct was systematic, deliberate or covert.

See *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 (***CSR Ltd***); *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (***NW Frozen Foods***).

1. It may be seen therefore that by considering all relevant matters the three matters to which the Court must have regard are also taken into account.
2. ACCC submits, and I accept, that with the exception of the relevant matter to do with the degree of power of a company, each of the matters identified above may be considered relevant to the assessment of a penalty under s 224 of the ACL and s 76E of the TP Act in this case. See *Australian Competition and Consumer Commission v* *Singtel Optus Pty Ltd* *(No 4)* [2011] FCA 761 at [75].
3. It is well understood that consideration of the relevant matters is designed to assist the Court in determining what the appropriate penalty is, the primary objective of a penalty being to impose a penalty that recognises the seriousness of the contravention and which provides deterrence, both specific and general. See *Singtel Optus* at [62]; *Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd* [2011] FCA 372 at [31]‑[32].
4. The authorities firmly indicate that the penalty imposed should be sufficiently high and substantial enough that the parties realise the seriousness of their conduct and are not inclined to repeat it. See *CSR Ltd* at 52,152; *Australian Competition & Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265; (2005) 215 ALR 301 at [39] (Goldberg J).
5. Nor should the penalty be so low as to constitute in the eyes of the contravener (and others) an acceptable cost of doing business. See *Singtel Optus* at [62].
6. At the same time it is also well understood that the penalty should not be “crushing” or, as stated in *NW Frozen Foods* at 293, so high as to be oppressive.
7. These principles were reflected in the recent decision of the High Court in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 88 ALJR 176 at [65] where the plurality (French CJ, Crennan, Bell and Keane JJ) confirmed that general and specific deterrence must play a primary role in assessing the appropriate penalty in cases of calculated contravention of legislation where commercial profit is the driver of the contravening conduct.
8. There is, however, recognition that, all other things being equal, similar contraventions should incur similar penalties and so there is a parity principle at play when pecuniary penalties are imposed. See *NW Frozen Foods* at 295. But, it is equally well understood that the Court does not seek to identify a “tariff” or a “range” of penalties by reference to earlier decisions in order to select the penalty that appears to carry with it parity with earlier penalties, instead of identifying what the appropriate penalty is having regard to the seriousness of the contravention in question and the need for deterrence. See *Singtel Optus* at [60].
9. In that regard it is also appropriate to note the recent decision of the High Court in *Barbaro v The Queen*; *Zirilli v The Queen* [2014] HCA 2; (2014) 88 ALJR 372 (***Barbaro***). There, in the context of criminal sentencing, the plurality (French CJ, Hayne, Kiefel and Bell JJ) made statements that appeared to make impermissible the practice of prosecutors making submissions as to the ‘available’ range of sentences. I agree with what Middleton J recently said in *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* [2014] FCA 336, that the dicta in *Barbaro* should not be taken to be relevant to the imposition of civil penalties. Rather, the High Court not having overruled *NW Frozen Foods* or *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41,993, the principles established in those cases remain applicable to the imposition of pecuniary penalties in this Court and indeed this Court is bound to follow those authorities.
10. In my view, as a matter of principle, in a civil penalty case such as this, submissions made on behalf of a body such as ACCC as to what pecuniary penalty and other outcomes might be considered appropriate having regard to the seriousness of a contravention can be of considerable assistance to the Court because they are likely to assist the Court to focus on what penalty is just and appropriate in the circumstances of the case. Reference to apparently like cases is also of assistance in regarding the parity principle. The Court is more likely to be assisted, rather than constrained or misled, at least in a civil contravention context, by such submissions. In no way is a particularised penalty submission on behalf of a body such as the ACCC in a proceeding such as the present likely to disable the Court from exercising its judicial discretion to impose a just and appropriate pecuniary penalty.
11. Finally, I should mention the totality principle. It is well understood that the totality principle operates as something of a “final check” to ensure that penalties imposed on a wrongdoer, when considered as a whole, are just and appropriate. See *Kerkhoffs v Registrar of Aboriginal and Torres Strait Islander Corporations* [2014] FCAFC 66.
12. In the result the process for determining penalty follows a fairly well‑trodden path:
* The Court’s assessment of the appropriate penalty is a discretionary judgement based on all relevant factors involving an “instinctive synthesis” of those factors.
* Careful attention must be paid to maximum penalties.
* However, it will rarely be appropriate for a court to start with the maximum penalty and proceed by making a proportional deduction from it.
* The Court should not adopt a mathematical approach of increments or decrements from a pre-determined range, or assign specific numerical or proportionate value to the various relevant factors.
* It is not appropriate to determine an “objective” sentence and then adjust it by some mathematical value given to one or more factors such as pleas of guilty or assistance to authorities.
* The Court “may not add and subtract item by item from some apparently subliminally derived figure” to determine the penalty.
* Since the law strongly favours transparency, accessible reasoning is necessary and while there may be occasions where some indulgence in an arithmetical process will better serve the end, it does not apply where there are numerous and complex considerations to be weighed.

See *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [27]‑[39].

1. In this case, in my view, the contravening conduct is serious, notwithstanding the submission made on behalf of the respondents that the case is related to a “long standing and still current political issue internationally”.
2. It is plain that in this case Ms Firth, on behalf of each of the respondents, at material times has held strong views as to the efficacy of mammography and a preference for other means of advancing breast health for women.
3. That, however, is not the issue in this proceeding, as pointed out in the findings on contravention.
4. The fact is that representations of a scientific type were made which were false, misleading or deceptive; as were the allied medical practitioner representations.
5. I accept the submission of ACCC that each of the science representations were designed to inform consumers about the device used by Safe Breast Imaging and to encourage consumers to choose its service over more conventional breast imaging methods, such as mammography. In doing so, Safe Breast Imaging 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. These representations, as I have said above, were fortified or amplified by the medical practitioner representations, which were also false. It is reasonable in these circumstances to see the representations as calculated to direct women or at least some women to take up the service offered by Safe Breast Imaging.
6. It is also reasonable to conclude that the respondents saw commercial advantage in the strategy, albeit the strategy was based on their strong beliefs in alternative strategies and technologies. The fact is Safe Breast Imaging offered its service as a business, and the means by which it promoted its activities were not without cost. Indeed, Ms Firth is at pains in her written submissions to emphasise the extent to which she travelled, met women and sought to advance the health service objectives of Safe Breast Imaging. This must have been a costly exercise and I infer that it was. So too was the apparent cost of using Google AdWords as a means of soliciting business. Notwithstanding that Ms Firth also submits that at material times the company and she did not make any or any large profits from the business, that commercial gain was an objective of the business cannot be gainsaid.
7. Ms Firth says in her written submissions that Safe Breast Imaging lodged tax returns which show that in 2010 its total profit was -$2,358, in 2011 it had a total profit of $517 and in 2012 it had no income. As to her personal tax returns, she says they show total income of $14,981 in 2010, $17,107 in 2011, and that in 2012 no tax return was required.
8. Notwithstanding these submissions I am unable to draw the conclusion, if the respondents mean to invite it, that the company was not intending to make a profit and indeed, as I have stated above, did not incur real business expenses in pursuing the business. The expenses, I infer, may well explain why, assuming their general accuracy, the company did not make a profit or made only a small profit in the relevant years. It should also be noted that the company employed three report writers at different times.
9. The fact is that Safe Breast Imaging attracted many customers across four States of Australia (Western Australia, Queensland, Victoria and New South Wales) in some 150 locations. At the penalty hearing, ACCC effectively accepted the estimate made by Ms Firth that the actual customers attracted to the business was closer to 1271. I proceed on that basis.
10. When one bears in mind that consumers to whom the service was directed would expect or be likely to expect that there was an adequate scientific basis to support the use of the MEM device for the purposes represented, when there was not, the seriousness of the conduct is underscored.
11. So too the medical practitioner representations that Australian registered doctors were involved in the evaluation of images or the writing of reports, when they were not, and any comfort that customers of the business may have drawn from that, was entirely misplaced.
12. As ACCC submits, women who are interested in breast imaging services ought to be able to make informed medical decisions based on accurate claims made by medical service suppliers. Their personal health and safety is potentially at risk if they are unable to do so.
13. So far as the circumstances in which the conduct took place are concerned, these tend to overlap with the matter just discussed. Even though there is no evidence of actual injury, illness or harm to any particular person to whom representations were made, this is a case where risk of serious harm to the health and safety of consumers is at play.
14. I accept the submission made on behalf of ACCC that the conduct of Safe Breast Imaging and Ms Firth had the potential to pose a grave risk of serious harm to the health of consumers, who were or were likely to be misled into believing the MEM device could be used for the purposes represented when there was no adequate scientific medical basis for those representations.
15. Indeed Ms Firth accepts that the contravening conduct had the potential to divert consumers from using medically recognised and more reliable means of breast imaging, such as mammography and ultrasound.
16. As to the amount of any loss or damage caused, there is no specific loss or damage identified by the evidence.
17. So far as the size of the contravening company is concerned, Safe Breast Imaging is, on the evidence, a small business set up by Ms Firth and owned and operated by her. While she employed three report writers at different times, that fact tends to emphasise the company was busy, rather than large.
18. So far as the deliberateness of the contravention is concerned, in finding contravention, I have already found that Ms Firth engaged in conduct knowing that the representations could not be supported.
19. The point may also be taken that, if the fact that there was an inadequate basis for the scientific representations, and that there were not in fact doctors engaged in the evaluative process, had been known, then there would have been limited, if any, consumer interest in the service offered.
20. It cannot be said, in the circumstances, that Ms Firth’s engagement in the acts of the company was anything but deliberate and serious. Ms Firth, as her submissions on penalty emphasise, has a passionate commitment to the advancement of women’s health and at material times she passionately believed that the service the company offered would assist women along a “journey of health and prevention”.
21. The company being a small company, owned and operated by Ms Firth, the matter about the extent to which senior management or lower level management were involved in the contravention does not really arise for separate consideration. Ms Firth and the company were effectively the one and the same contravener.
22. In this case there is no suggestion that either the company or Ms Firth has been the subject of any prior legal proceedings by ACCC.
23. To Ms Firth’s credit, she closed the business not long after the ACCC commenced an examination of its activities.
24. In relation to the principle of parity, ACCC refers in its submissions to cases where false and misleading contraventions have attracted penalties of between $30,000 and $3.61 million. Of these, the one case that provides some assistance is that of *Australian Competition and Consumer Commission v Willesee Healthcare Pty Ltd (No 2)* [2011] FCA 752, where the respondents cooperated with the ACCC and civil penalties were ordered by consent in the sum of $185,000 for representations that were considered false or misleading in relation to the diagnosis, treatment and cure of allergies. The corporate respondents consented to penalties of $125,000 and each individual to $30,000.
25. Dodds-Streeton J, in confirming the consent outcome, noted there were a number of factors in mitigation including the cooperation of the respondents with the ACCC, the acknowledgement of liability which avoided the need for lengthy litigation, and the expressions of regret and an undertaking not to repeat the contraventions. ACCC reasonably submits none of those mitigating factors are present in this case.
26. ACCC also notes that Dodds‑Streeton J stated that the agreed penalties were towards the lower end of the range given the seriousness of the contraventions.
27. In this case, in the result, taking into account the various relevant matters and my discussion of them above, I consider that Safe Breast Imaging should be ordered to pay to the Commonwealth within 30 days of the making of the order by the Court a pecuniary penalty in the amount of $200,000 in respect of the conduct described in paras (1) to (4) of the order in the declarations.
28. I would further order that Ms Firth be ordered to pay to the Commonwealth within 30 days of the making of the order by the Court a pecuniary penalty in the amount of $50,000 in respect of the conduct described in para (5) of the order.
29. While the respondents may consider the pecuniary penalties imposed on them to be high or harsh, I consider them, with the other orders to be made, to be necessary to ensure others who might be inclined to engage in similar behaviour to the cost of consumers are deterred from doing so.
30. I consider that pecuniary penalties in these terms, combined with the declarations made and the injunctions issued provide a sufficient general and specific deterrent having regard to the contraventions involved, and that such pecuniary penalties, when considered with the other penalties imposed, and the disqualification of Ms Firth from being a company officer, which I will order (and deal with below), will not be “crushing” in any relevant sense.

### Should publication orders be made?

1. It is entirely appropriate that letters should be sent to each of Safe Breast Imaging’s customers who were provided with breast imaging to correct the misrepresentations conveyed. I have considered alternative letters proposed by the parties. I consider the letter sent should be in the form of the letter that is annexure A to the orders made in order to correct the misrepresentations conveyed.
2. Rather than require Safe Breast Imaging and Ms Firth to send the letter, I will authorise ACCC to send the letter by email or ordinary post in accordance with an order to that effect.
3. I also consider it appropriate to order that Ms Firth should update the Facebook profiles of Ms Firth and Safe Breast Imaging by causing a post to be entered on each profile in terms of annexure A to the orders to be made.
4. The purpose of these corrective communications is to protect the public interest in dispelling incorrect or false impressions created by misleading conduct, in alerting consumers to the fact that there has been false and misleading conduct and aiding enforcement of the primary orders and preventing repetition of the contravening conduct. See *Australian Competition and Consumer Commission v SMS Global Pty Ltd* [2011] FCA 855.

### Should Ms Firth be disqualified from managing corporations?

1. Ms Firth should be so disqualified. While she has not previously been disqualified from managing a corporation, the extent of the contravening conduct in this case, and Ms Firth’s continued defensive attitude towards the findings of the Court demonstrated by her penalty submissions, do not give the Court any great confidence that Ms Firth fully appreciates the seriousness of the contraventions with which she has been involved.
2. Whether or not a person should be disqualified from managing corporations requires a court to consider the nature and seriousness of the contraventions, recognising that disqualification is a consequence imposed both to prevent future occurrences, as well as to provide deterrence to persons involved in managing corporations. See *Australian Competition and Consumer Commission v Artorios Ink Co Pty Ltd* *(No 2)* [2013] FCA 1292.
3. This is not a case such as *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 where a director disregarded his legal obligations which reflected a lack of understanding of the proper role of a company director and had the potential to cause significant harm to the public through the use of misleading statements in the payment of substantial investment amounts, but it does involve a case where a person, as a director of a company, has caused the company to engage in serious contravening conduct that could possibly have serious consequences for consumers dealing with the company.
4. It is also well understood that the power to disqualify a person from managing corporations is not a power to be exercised purely for protective purposes, but also as a punitive measure. See *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129.
5. In this case, I consider it appropriate to disqualify Ms Firth from managing companies for a period of four (4) years. This penalty, when considered in the context of the other penalties imposed above, will ensure that Ms Firth is adequately punished for her contravening conduct overall, and consumers and the public will be suitably protected in the future.
6. As stated above, I consider the result of the declarations, the injunctions, the pecuniary penalties, the publication orders and the disqualification order together constitute a just and appropriate penalty outcome that responds to the seriousness of the contravening conduct overall. On a final check, I do not consider that any further adjustment is necessary to the final set of orders to be made.

### Is an order for retention of 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. The result of such an order is that any persons affected by the conduct of Safe Breast Imaging or Ms Firth who wish to take further action will be able to use the findings of fact in these proceedings as prima facie evidence of those facts in subsequent proceedings.
3. An order to that effect is appropriate and should be made.

### Should costs be ordered against the respondents?

1. ACCC seeks its costs of the proceedings which it submits should follow the event and that Safe Breast Imaging and Ms Firth should pay the costs of and incidental to the proceedings.
2. In my view, in circumstances where the proceedings have been contested throughout, there is no reason why ACCC should not have its costs of the proceedings and there will be an order accordingly.

# Order

1. There will be orders made in terms of the further minute of proposed orders of ACCC received 18 June 2014 in respect of declarations, injunctions, pecuniary penalties and other orders and costs sought, save that Safe Breast Imaging should pay a pecuniary penalty of $200,000 and Ms Firth a pecuniary penalty of $50,000 and the correction letter and notice should be as proposed above and the period of disqualification from managing corporations should be four (4) years.

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| I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker. |

Associate:

Dated: