FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7) [2016] FCA 424

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| File number: | NSD 180 of 2015 |
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| Judge: | **EDELMAN J** |
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| Date of judgment: | 29 April 2016 |
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| Catchwords: | **CONSUMER LAW** – pecuniary penalties – courses of conduct and totality principle – allegedly similar conduct in the supply of other products not found to be contravening – method of calculating profits from contravening conduct – assumption by parties that “but for” test for calculating profits applies – importance of conduct being intended to make profits – relevance of sales, earnings before interest and taxation (EBIT), and profit figures |
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| Legislation: | *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) ss 18, 33, 87B, 224(1), 224(2), 224(3), 224(4)(b)*Therapeutic Goods Act 1989* (Cth)*Trade Practices Act 1974* (Cth)  |
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| Cases cited: | *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540*Australian Competition and Consumer Commission v EDirect Pty Ltd (in liq)* [2012] FCA 976; (2012) 206 FCR 160*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 5)* [2016] FCA 167*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 4)* [2015] FCA 1408*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640*Australian Competition and Consumer Commission v Visa Inc* [2015] FCA 1020*Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560*Brosnan v Katke* [2016] FCAFC 1*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 90 ALJR 113*Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1*Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; (2009) 191 IR 445*Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213*Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998*Johnson v The Queen* [2004] HCA 15; (2004) 205 ALR 346*Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59*Postiglione v The Queen*[1997] HCA 26; (1997) 189 CLR 295*Royer v Western Australia* [2009] WASCA 139; (2009) 197 A Crim R 319*SC Johnson & Son Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd* *(No 2)* [2012] FCA 1362*SC Johnson & Son Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd* [2012] FCA 1266*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249Kahneman D, *Thinking, Fast and Slow* (Penguin, 2012)Thomas DA, *Principles of Sentencing* (2nd ed, Heinemann Educational Books Ltd, 1979) |
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ORDERS

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|  | NSD 180 of 2015 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | RECKITT BENCKISER (AUSTRALIA) PTY LTDRespondent |

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| JUDGE: | EDELMAN J |
| DATE OF ORDER: | 29 APRIL 2016 |

THE COURT ORDERS THAT:

1. For the contraventions of s 33 of the *Australian Consumer Law* (schedule 2 to the *Competition and Consumer Act 2010* (Cth))the respondent pay to the Commonwealth of Australia within 30 days a pecuniary penalty of $1,700,000

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

REASONS FOR JUDGMENT

|  |  |
| --- | --- |
| Introduction | [1] |
| The facts of the contraventions | [9] |
| The Packaging Representations and the Website Representations | [17] |
| The Packaging Representations | [17] |
| The Website Representations | [20] |
| Legal principles concerning pecuniary penalties | [21] |
| Maximum penalty, totality and courses of conduct | [24] |
| Specific and general deterrence | [39] |
| The particular factors relevant to penalty | [47] |
| Nature, extent and circumstances of the contravening conduct | [47] |
| Size of Reckitt Benckiser | [50] |
| Sales and profit from contravening conduct, and potential losses to consumers and competitors | [51] |
| The conduct was not deliberate or covert | [67] |
| Cooperation with the ACCC | [68] |
| Compliance programs and the involvement of senior management | [70] |
| Prior contraventions | [88] |
| Conclusions on penalty | [91] |

EDELMAN J:

## Introduction

1 Reckitt Benckiser markets and sells products including four Nurofen Specific Pain Relief products. These products are sold to the public at thousands of pharmacies and retail stores. Reckitt Benckiser represented that each of the four Nurofen Specific Pain Relief products was specifically formulated to treat (respectively) back pain, period pain, migraine pain, and tension headaches. They are not so specifically formulated. Each product contains the same active ingredient, is of the same formulation, and has the same Australian Register of Therapeutic Goods approved indications. None of the four products is any more or less effective than the others in treating any of the particular symptoms.

2 On 11 December 2015, I made orders which included declarations that Reckitt Benckiser had contravened s 33 of the *Australian Consumer Law*. Reckitt Benckiser consented to the orders and essentially agreed to the facts upon which they were based. Section 33 is a penalty provision. These reasons concern the appropriate penalty to be imposed upon Reckitt Benckiser for its contraventions from January 2011.

3 One of the central issues between the parties during this penalty hearing was the profits made by Reckitt Benckiser from its contravening conduct. Reckitt Benckiser submitted that its profits from sales of the Nurofen Specific Pain Range were irrelevant unless the Australian Competition and Consumer Commission (**ACCC**) could prove the profits that it made by its contravention on a counterfactual (but for) basis. In other words, Reckitt Benckiser submitted that the ACCC’s profit calculation needed to deduct the profits that it would have made if it had not contravened the *Australian Consumer Law*.

4 One matter relied upon by Reckitt Benckiser in support of this submission might involve a high stakes gamble. Reckitt Benckiser pointed out that it continues to sell the Nurofen Specific Pain Range in packaging which is similar in a number of respects to the contravening packaging. On the assumption that its current packaging does not involve any contravention, Reckitt Benckiser submitted that it is unlikely that its sales and profitability would have been affected by the contraventions. Reckitt Benckiser’s packaging still contains the description “Fast Targeted Relief from Pain”. The packaging still contains reference to a particular condition (such as “Nurofen Migraine Pain”). And the packaging still appears to be marketed in close proximity to the each of the other products in the range, and nearby to other products with very similar ingredients but with a much lower price. Reckitt Benckiser says that the Nurofen Specific Pain Range products no longer infringe the *Australian Consumer Law* because they now contain the description (at the top of the package) “Also suitable for general pain relief”. There has not been any allegation by the ACCC that the products as they are currently sold involve any contravention, and there has been no such finding by any court. In the absence of any such finding, or any submissions that Reckitt Benckiser is running an obvious risk with its current packaging, I must proceed in these reasons on the basis that no contravention is currently occurring and that Reckitt Benckiser is not running any risk. Although I proceed on that basis, I do so in the absence of any detailed submissions on the point and I make no finding about whether or not the current packaging of Nurofen Specific Pain Range involves any contravention of the *Australian Consumer Law*.

5 Ultimately, I accept the submission by Reckitt Benckiser that any attempt to quantify profits caused by its contravening conduct would be either an impossible task or so speculative as to be useless. One reason for this is the assumption of the parties that profits from contravening conduct must be proved on a counterfactual or “but for” basis, so that it would not be sufficient merely to show that the contraventions *contributed to* the profit made. It is not necessary to examine that assumption in these reasons. Another reason why I accept the submission by Reckitt Benckiser is the difficulty involved in any attempt to determine, without any evidence, the likely behaviour of consumers if there had been no contravening conduct. Some of the relevant consumers in the class might nevertheless have purchased the Nurofen Specific Pain Relief product despite the conduct that I have found to be contravening, particularly with the very similar current packaging. There might also be a number of reasons for a consumer choice. It is unnecessary to speculate on these matters. It suffices to note, however, that some aspects of Reckitt Benckiser’s submissions on this point were, themselves, highly speculative and potentially questionable. For instance, Reckitt Benckiser submitted that consumers may have been prepared to pay up to double the price for Nurofen Specific Pain Relief products because they preferred to obtain 342 mg of ibuprofen lysine rather than the equivalent dosage as 200 mg of ibuprofen or the equivalent dosage as 256 mg of ibuprofen sodium.

6 Although profits from contravention cannot be quantified on a “but for” basis in this case, the attempt by the ACCC to do so must be understood in light of the sharp denial by Reckitt Benckiser that it had made *any* profit from the contravening conduct. I do not conclude, in the negative terms that Reckitt Benckiser submitted, that it was unlikely that *any* profits were made. Rather, the important point is that Reckitt Benckiser had marketing processes which involved considerable thought and strategy in respect of which confidential evidence was given. The labelling of its products was a choice (as with all commercial decisions) motivated in part by an intention to profit. In this case the marketing processes were part of an intention to make substantial profits.

7 During the penalty hearing, there were also submissions made concerning the need to preserve confidentiality in relation to almost every aspect of all sales and financial information relating to Reckitt Benckiser before the Court. The overreach in claims of confidentiality was such that parts of these reasons would have been impossible to express with any lucidity without the communication of some information which was said to be confidential. A core purpose of penalty proceedings is general deterrence. If Reckitt Benckiser’s submissions were accepted in their entirety, and every aspect of claimed confidentiality respected, then the Court could not have made any reference to any of the financial information relating to Reckitt Benckiser’s contraventions. However, following oral submissions, Reckitt Benckiser filed written submissions on 13 April 2015 in which it conceded, quite properly, that “the following information is available to competitors of [Reckitt Benckiser] either because the information is in the public domain or because competitors have access to research data collated by organisations such as the Nielsen Corporation which contains the information”:

(1) the recommended retail price (**RRP**) for the Nurofen Specific Pain Range products, Nurofen Zavance caplets, Nurofen tablets and Nurofen caplets;

(2) the volume of each product sold (that is, the number of packs sold);

(3) therefore the total revenue (gross sales) for each product;

(4) the average trade margin (the percentage mark-up from the wholesale price compared with the RRP) which is generally constant in the market; and

(5) therefore, the net sales figures for each product (the wholesale price of each product).

8 With that background, and for the detailed reasons below, my conclusion in these reasons is that the appropriate total penalty for the contraventions is $1,700,000.

## The facts of the contraventions

9 Many of the facts concerning Reckitt Benckiser’s contraventions were agreed between the ACCC and Reckitt Benckiser and also the subject of my findings in the liability judgment. It is unnecessary to repeat all of the detail and basis for Reckitt Benckiser’s concession, and my findings, of contravention and non-monetary relief. Those details are set out in my reasons for decision in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 4)* [2015] FCA 1408. Some of the pertinent background can be summarised as follows below. Other matters are considered in more detail in relation to particular factors relevant to the assessment of penalty.

10 Since at least 2007, Reckitt Benckiser has marketed and supplied a range of Nurofen branded over-the-counter pain relief products throughout Australia, including the following four products in the Nurofen Specific Pain Range:

(1) Nurofen Migraine Pain ibuprofen lysine 342 mg tablet blister pack (**Nurofen Migraine Pain**);

(2) Nurofen Tension Headache ibuprofen lysine 342 mg tablet blister pack (**Nurofen Tension Headache**);

(3) Nurofen Period Pain ibuprofen lysine 342 mg tablet blister pack (**Nurofen Period Pain**); and

(4) Nurofen Back Pain ibuprofen lysine 342 mg tablet blister pack (**Nurofen Back Pain**).

11 The Nurofen products were regulated by the Therapeutic Goods Administration (**TGA**) which is part of the Commonwealth Department of Health. After approval by the TGA, they were also registered on the Australian Register of Therapeutic Goods (**ARTG**).

12 Each of the products comprising the Nurofen Specific Pain Range was first registered as an over-the-counter medicine on the ARTG on the following dates: Nurofen Migraine Pain was registered on 12 August 2003; Nurofen Tension Headache was registered on 22 June 2005; Nurofen Period Pain was registered on 30 January 2007; and Nurofen Back Pain was registered on 4 July 2007.

13 Products are registered on the ARTG with ‘approved indications’, being the types of pain or other conditions in respect of which the product is suitable for treating. The ARTG approved indication for each product comprising the Nurofen Specific Pain Range is:

The temporary relief of pain and/or inflammation associated with headache (including migraine and tension headache), dental pain, period pain, arthritis, aches and pains associated with the common cold or flu, backache, sinus pain, muscular and rheumatic pain. Reduces fever.

14 The Nurofen Specific Pain Range was advertised on the “Product Comparator” page and the “Specific Pain Relief” page on the Nurofen website from at least December 2012. On 9 May 2014, Reckitt Benckiser withdrew those pages from the Nurofen website.

15 The products in the Nurofen Specific Pain Range were sold as over-the-counter pain relief products in pharmacies, grocery stores and convenience stores. They were typically displayed for sale together, or in close proximity to each other, in the same location in the retail outlet.

16 At 31 July 2015, the outlets selling the Nurofen Specific Pain Range were approximately 3,000 retail outlets (excluding pharmacies) in metropolitan and non-metropolitan regions, and approximately 5,500 pharmacies (2,000 in metropolitan regions and 3,500 in non-metropolitan regions). Reckitt Benckiser has a sales team of approximately 40 full-time employees who visit the pharmacies located in metropolitan regions.

## The Packaging Representations and the Website Representations

### The Packaging Representations

17 The representations which involved contraventions of s 33 of the *Australian Consumer Law* were described in my reasons for decision, and pictured in the attached annexures, in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 4)*. Since there is some dispute about how those representations should be characterised as courses of conduct it is necessary to repeat some them below.

18 My findings in relation to each product in the Nurofen Specific Pain Range reflected the pleadings and agreement which were broadly common to all four products. Apart from some minor differences such as additional packaging statements for tension headache and migraine pain that required “dosage” to be taken with water at the first onset or sign of the headache or migraine, I concluded consistently with the admitted pleading that:

(1) each product was coloured differently;

(2) each product referred to a different pain condition;

(3) each product bore the statement “FAST TARGETED RELIEF FROM PAIN”;

(4) each product bore the statement that the product “...IS FAST AND EFFECTIVE IN THE TEMPORARY RELIEF OF PAIN ASSOCIATED WITH...” the relevant pain condition; and

(5) each product stated, expressly on the front of the pack, that the active ingredient is “ibuprofen lysine 342 mg (equiv ibuprofen 200mg)”.

19 Reckitt Benckiser conceded, and I found, that the two representations conveyed by the packaging were:

(1) each product in the Nurofen Specific Pain Range is specifically formulated to treat the particular type of pain specified on the packaging relevant to that product; and

(2) the product solely or specifically treats the particular type of pain specified on the packaging relevant to that product and not other types of pain.

### The Website Representations

20 As I explained in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 4)*, the website representations were made between December 2012 and May 2014 on the Nurofen website which contained a “Product Comparator” page and a “Specific Pain Relief” page. The pleaded case and admissions, and the findings and declarations of contravention I made, concerned the misleading nature of the Nurofen website, incorporating both of those pages. The same representations as the Packaging Representations were found to have been made on the Nurofen website, although the wording of the Nurofen website was considerably more detailed.

## Legal principles concerning pecuniary penalties

21 Under s 224(1) of the *Australian Consumer Law*,a pecuniary penalty can be imposed on a person who has contravened s 33 of the *Australian Consumer Law*. The Court must have regard to all relevant matters (s 224(2)) which include: (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; (b) the circumstances in which the act or omission took place; and (c) whether the person has previously been found by a court in proceedings under Chapter 4 or Part 5-2 to have engaged in any similar conduct. There are numerous other factors which will commonly be relevant, and (where relevant) will be matters to which the Court must have regard. Those factors were described in the cases which I surveyed in *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44 [124]-[126]. They include the following:

(1) the size of the contravening company;

(2) the deliberateness of the contraventions and the period over which they extended;

(3) whether the contraventions arose out of the conduct of senior management of the contravener or at some lower level;

(4) whether the contravener has a corporate culture conducive to compliance with the *Australian Consumer Law* as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;

(5) whether the contravener has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contraventions;

(6) whether the contravener has engaged in similar conduct in the past;

(7) the financial position of the contravener;

(8) whether the contravening conduct was systematic, deliberate or covert;

(9) the extent of contrition for the conduct;

(10) whether, and the extent of profit made by the contravening company from the contraventions (the details of which factor are considered below); and

(11) whether the contravening company engaged in the conduct with an intention to profit from it.

22 The imposition of a pecuniary penalty requires an assessment of all the relevant factors, in a process akin to that which in criminal law is described as “instinctive synthesis”. Although there are basic conceptual differences between criminal and civil proceedings which might prevent the transplant of ideas from one area into another (see *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 90 ALJR 113, 127 [56] (French CJ, Kiefel, Bell, Nettle and Gordon JJ)), a common process of instinctive synthesis of the facts to a result applies. The process is common because, as with criminal sentencing, the civil penalty decision necessarily requires the assessment of incommensurable factors including for one shared purpose with the criminal law which is deterrence. In this area, as in the criminal law, the courts have avoided excessive subtleties and refinements in a process which is already complicated. An approach which applies an instinctive synthesis has been endorsed and applied in many cases: see, for example, *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560, 567-568 [27] (Gray J); 572 [54]-[55] (Graham J); *Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998 [11] (Flick J); *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 [14]-[16] (Tracey J).

23 The “instinctive synthesis” approach is not wholly instinctive. Courts set out the relevant factors and their circumstances. Those factors are also assessed in light of fundamental principles sometimes described as “totality” and “courses of conduct” as well as the operation of specific and general deterrence. The penalty is also assessed in light of any range of penalties which emerges from the cases and compared with any closely comparable cases. These principles are essential in the instinctive synthesis approach. I turn now to some of those principles before examining below the relevant factors raised by the parties.

### Maximum penalty, totality and courses of conduct

24 Section 224(3) of the *Australian Consumer Law* has the effect that the maximum civil pecuniary penalty for each contravention of s 33 by a body corporate is $1.1 million. In this case it is common ground that there were a large number of contraventions of s 33 committed by Reckitt Benckiser. This is so even if the contraventions are confined to those 5.9 million consumers who bought the product and were likely to be misled. The statutory maximum penalty is many, many millions of dollars. Although the statutory maximum is a relevant consideration, there are underlying principles which operate as a constraint upon the amount of any penalty. One of those principles is that where the same conduct contravenes two or more provisions of the *Australian Consumer Law*, the contravener is only liable to pay one pecuniary penalty in respect of that conduct: s 224(4)(b) of the *Australian Consumer Law*. In this case, the only alleged contraventions by Reckitt Benckiser’s conduct involve s 33 of the *Australian Consumer Law*. However, two other principles in this area about which submissions were made were the totality principle and the “courses of conduct” principle.

25 The totality principle and the principle concerning courses of conduct are not wholly separate principles. The proportionality motivation underlying the totality principle is the same motivation for the principle concerning courses of conduct. Indeed, the courses of conduct principle might properly be understood as one aspect of the totality principle. Another aspect of the totality principle is that the ultimate penalty must not be crushing. But the totality principles does not only operate in cases which would otherwise result in an “overly crushing burden”: *Johnson v The Queen* [2004] HCA 15; (2004) 205 ALR 346, 355 [22] (Gummow, Callinan, and Heydon JJ). The underlying and ultimate concern of the totality principle is the proportionality of the penalty to all the circumstances of the contravening conduct: *Postiglione v The Queen*[1997] HCA 26; (1997) 189 CLR 295, 307-308 (McHugh J).

26 In the context of the common law principles of totality underlying criminal sentencing statutes, a joint judgment of the High Court in *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59, 63, said, by reference to Thomas DA, *Principles of Sentencing* (2nd ed, Heinemann Educational Books Ltd, 1979) 56-57 (footnotes and quotation marks omitted):

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is just and appropriate. The principle has been stated many times in various forms: when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong; when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.

27 In *Royer v Western Australia* [2009] WASCA 139; (2009) 197 A Crim R 319, 328-331 [21]-[30], Owen JA in the Western Australian Court of Appeal described the operation of the “course of conduct principle” or the “one transaction principle” in the following terms which indicate the underlying proportionality concern:

[22] ... At its heart, the one transaction principle recognises that, where there is an interrelationship between the legal and factual elements of two or more offences with which an offender has been charged, care needs to be taken so that the offender is not punished twice (or more often) for what is essentially the same criminality. The interrelationship may be legal, in the sense that it arises from the elements of the crimes. It may also be factual, because of a temporal or geographical link or the presence of other circumstances compelling the conclusion that the crimes arise out of substantially the same act, omission or occurrences.

...

[24] Because of the wide variety of circumstances in which the principle can arise it is not always easy to reconcile the way it has been applied in individual cases. But what can be detected in each case is an examination of the closeness of the interrelationship and the danger of double jeopardy in so far as punishment (not criminal liability) is concerned…

[25] … There will be instances in which it is obvious that the interrelationship of multiple offences is so intimate that they can only be said to arise from a single course of criminal conduct. In those instances injustice can only be avoided by imposing concurrent terms. Not to do so would inevitably result in the offender being punished more than once for the same criminality. …

[30] … how is the one transaction principle to be understood and applied? Save for the instances in which the interrelationship between multiple offences is so close that injustice can only be avoided by concurrency of terms, the answer will usually emerge from considerations of proportionality to or with the criminality of the offender’s conduct viewed in its entirety. Looked at in this way, the one transaction principle and the totality principle are closely connected.

28 Although these paragraphs were expressed in a criminal law context, they were cited with approval in the context of civil penalties by the Full Court of the Federal Court in *Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; (2009) 191 IR 445, 453-455 [17]-[18]. They were again approved by Middleton and Gordon JJ in *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1, 12 [38]-[39].

29 Whether the proportionality concerns of sentencing are expressed as “totality” or “course of conduct” principles, they do not alter the total statutory maximum. Nor do they require the court to start from the position that the maximum fine for a course of conduct is $1.1 million. However, the principles inform the ultimate penalty to be imposed because of the need to ensure proportionality between the contravening conduct and the penalty imposed.

30 The exercise of characterising the conduct to determine the number of courses of conduct requires evaluative judgement. In some cases, reasonable minds might reach different conclusions about the number of courses of conduct involved in a series of contraventions. In other cases, the contravening conduct might clearly illustrate a particular number of courses of conduct. An example of a fine line in characterisation is the decision in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540. In that case, the ACCC submitted that Coles had engaged in four different contravening courses of conduct: (i) *packaging* of bread products as “Baked Today, Sold Today”; (ii) *packaging* of bread products as “Freshly Baked In-Store”; (iii) *packaging* of bread products making both statements; and (iv) *signage* saying “Freshly Baked” and “Baked Fresh”. Coles argued that this was all part of a single advertising campaign so it was a single course of conduct. The Chief Justice imposed a penalty on the basis that the conduct could “be seen as four courses of conduct” although, his Honour also recognised that at a higher level of generality, it “formed part of a single marketing strategy” (559 [85]). The penalty ultimately imposed of $2.5 million was also supported on the basis that it was “above the mid-range for four courses of conduct with a notional maximum penalty of $4.4 million” (563 [89]).

31 Ultimately, a decision about the number of courses of conduct involved is an exercise of evaluation which requires consideration of the extent to which the interrelationship between the legal and factual elements of the contraventions overlap so that the imposition of multiple penalties would be disproportionate to the contravening conduct and could resemble double punishment. At a high level of generality it might be possible to characterise many cases as involving only one contravention. But this high level of generality will rarely reflect the concern to ensure proportionality and to avoid double punishment. For instance, Reckitt Benckiser did not make the submission that at a high level of generality the packaging and website representations each formed a single course of advertising. I would not have accepted that submission. The conduct involved in the website representations and the packaging representations was sufficiently distinct.

32 Reckitt Benckiser submitted that there were two courses of conduct involved in its contraventions (one for its packaging contraventions and one for its website contraventions). The ACCC submitted that there were six courses of conduct involved (four for its packaging contraventions and two for its website contraventions).

33 At a low level of generality it is possible to characterise Reckitt Benckiser’s conduct as involving six courses of conduct as the ACCC described. However, the most accurate characterisation of Reckitt Benckiser’s conduct involves two distinct courses of contravention, each of which involves conduct which is not merely making contravening representations of identical content but which is interrelated with, and dependent upon, the other representations. My conclusion in this respect is based in part upon the pleadings which assume particular importance because no evidence was tendered for the purposes of the hearing when findings of liability were made. The findings were based on the pleaded facts, as admitted.

34 **First**, the Packaging Representations admitted, and I found, that the products in the Nurofen Specific Pain Range contained functionally identical statements (other than the two statements as to dosage which, by themselves, would not have been contraventions) which gave rise to two closely related representations which were identical over the four products. The two identical representations were misleading for the same reasons across all four products. It was not submitted by the ACCC that the two closely related representations, dependent upon the same facts, formed two different courses of conduct.

35 **Secondly**, the conduct involved in Reckitt Benckiser’s making of the Packaging Representations was very closely related. It was the process of packaging the related products as part of a single, and inter-related, marketing strategy.

36 **Thirdly**, the Packaging Representations which were admitted, and which I found had been made, concerned each product in the Nurofen Specific Pain *Range*. Nurofen’s representations were relied upon by the ACCC, and found by me to be contraventions, not merely for their character as representations on each of the four products but for their character as representations over the *range* of four products.

37 **Fourthly**, the ACCC’s pleaded case in its Fast Track Statement in relation to the Packaging Representations was a pleading of representations in relation to statements on each Nurofen Specific Pain Range product *together with* statements on the other Nurofen Specific Pain Range products. My findings were based upon those particulars of the packaging representations which included the contrast in the different colours used for each product in the Nurofen Specific Pain Range and the “manner and location of the display” of the four products in retail stores where those products were displayed together. During this hearing, senior counsel for the ACCC gave a powerful example of the interrelated nature of the statements which reinforced their misleading quality. This was that the products were typically displayed together in stores and were intended by Reckitt Benckiser to be displayed together. This reinforced the representation that each product was specifically formulated to treat a particular type of pain. Senior counsel for the ACCC also submitted, and I accept, that approval for the products given by organisations such as the TGA was *individual* approval and that the TGA did not consider whether the products, when considered *collectively,* involved misrepresentations (ts 85-86).

38 It is less clear whether the Website Representations relevantly involved one course of conduct or two. On the one hand, there were different statements made on the Specific Pain Relief page and the Product Comparator page. But, on the other hand, (i) the two pages were part of a single Nurofen website, (ii) the statements made the same representations over both those pages and involved very closely related conduct, (iii) the representations were misleading for the same single set of reasons, and (iv) the pleaded and admitted case, and the contraventions found, were that the representations were misleading due to the effect of the statements on both the Specific Pain Relief page and the Product Comparator page. At the appropriate level of generality Reckitt Benckiser’s conduct in making the Website Representations involved a single course of conduct.

### Specific and general deterrence

39 It is well established that considerations of specific and general deterrence are vital in the assessment of pecuniary penalties. In *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249, 265 [62]-[63], the Full Court of the Federal Court said that:

There may be room for debate as to the proper place of deterrence in the punishment of some kinds of offences, such as crimes of passion; but in relation to offences of calculation by a corporation where the only punishment is a fine, the punishment must be fixed with a view to ensuring that the penalty is not such as to be regarded by that offender or others as an acceptable cost of doing business… those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention

40 These comments were reiterated with approval in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640, 659 [66] (French CJ, Crennan, Bell and Keane JJ).

41 There is a need for general deterrence of s 33 contraventions by product packaging and marketing, particularly where companies should have adequate compliance programs in place (a point which is considered below). However, the ACCC submitted that there was a heightened need for general and specific deterrence in this case for two reasons concerning current sales of analgesic products.

42 **First**, the ACCC submitted that there are currently a number of other analgesic products available for sale in retail outlets throughout Australia, which employ similar marketing techniques. Essentially this was a submission that the need for general deterrence was heightened due to the proliferation of contravening conduct. I do not accept this submission for two reasons. The first is that the marketing of the products to which the ACCC referred are not identical to, or nearly identical to, the contraventions in this case. Secondly, a finding or an assumption that those other products involve contraventions which necessitates general deterrence would be to make an assessment of liability in the absence of hearing any submissions from the person in the best position to address whether the conduct amounted to a contravention (the alleged contravenor). It would be appropriate for the relevant person to be given notice of the precise allegation and the opportunity to respond to it.

43 **Secondly**, the ACCC referred to an alleged continued lack of care by Reckitt Benckiser in placing its products on the market (ts 8). The continued lack of care alleged involved an arrangement between the ACCC and Reckitt Benckiser concerning the process of removal of the contravening products from pharmacies and retail outlets. Part of that arrangement involved an “interim packaging agreement” by which a sticker would be placed on contravening products which, underneath the particular type of product (eg “Back Pain”) clearly bore the words in similar font size “Equally effective for Tension Headache, Migraine, Period Pain & General Pain”. On 6 April 2016, the ACCC provided Reckitt Benckiser with a photograph taken the previous month of the placement of the Nurofen Specific Pain Range at a Coles supermarket. The products were placed in such a way that the top of the package could be clearly read (eg “Fast Relief from Back Pain”) and the brand could be clearly read (“Nurofen”) but all the information on the sticker was hidden below a ridge on a “shelf ready display tray” or behind other boxes.

44 Reckitt Benckiser’s Australia and New Zealand legal director provided an affidavit on this matter. She explained that Coles was the only retailer that supplied Nurofen products on a shelf ready display tray. She said that Reckitt Benckiser had not told Coles to display the products in that way or on those trays. Two days after receiving the letter from the ACCC, Reckitt Benckiser ceased supply to Coles. It will not resume supply until the issue is corrected. And representatives of Reckitt Benckiser are going to visit Coles to correct the problem.

45 In these circumstances, and since Coles stores represent fewer than 10% of outlets which stock the Nurofen Specific Pain Range, I do not consider that the issue that arose was caused by, or is evidence of, any lack of care taken by Reckitt Benckiser.

46 I do not accept that the heightened need for deterrence suggested by the ACCC is present for either of these two reasons.

## The particular factors relevant to penalty

### Nature, extent and circumstances of the contravening conduct

47 There are some significant matters in relation to the nature and extent of the contravening conduct. The contravening conduct concerning packaging was for a long duration of almost 5 years from 1 January 2011 until my judgment on 11 December 2015. The Website Representations were made for 17 months. All of the representations involved a product with a strong brand name. The Packaging Representations were made at the point of sale, and based on prominent advertising. Whether or not they caused profits to be made (which I consider below), the representations were prominent, they were made as part of a general marketing approach designed to profit, and they were likely to have been considered by many consumers who purchased the product or visited the website.

48 The contravening conduct involving the Packaging Representations was also widespread. The Nurofen Specific Pain Range was available at 5,500 pharmacies and an additional 3,000 retail outlets. The widespread nature of the representations means that many of the consumers exposed to the representations would not have had a high degree of knowledge and understanding of pharmaceutical ingredients. Indeed, even those consumers with such knowledge might have been misled.

49 The ACCC also pointed to some circumstances of the contravening conduct which it submitted led to an increased need for specific deterrence. Those circumstances included (i) criticism of the Nurofen Specific Pain Range by a consumer group, (ii) a television show, and (iii) complaints to the TGA. Those matters are considered below in relation to Reckitt Benckiser’s culture of compliance.

### Size of Reckitt Benckiser

50 From 2011 to 2015, Reckitt Benckiser had a large share of the market for oral analgesics in retail and grocery stores. Its sales amounted to many millions of dollars. Reckitt Benckiser Group’s total annual revenue figures for each year from 2011 to 2015 ranged between 8 and 10 billion pounds worldwide. It was not in dispute that Reckitt Benckiser’s sale of Nurofen Specific Pain Range products was only a very small fraction of its total sales and its total profit. I deal with the revenue and earnings before interest and taxation (EBIT) from those sales in more detail later in these reasons.

### Sales and profit from contravening conduct, and potential losses to consumers and competitors

51 A substantial part of the ACCC’s submissions focused upon an elaborate exercise, based on volumes of evidence, directed to estimating the profit made by Reckitt Benckiser as a result of its contravening conduct. With some adjustments such as for interest and taxation, the ACCC estimate would likely have been a total of some millions of dollars (although certainly less than $10 million).

52 The task pursued by the ACCC was a labour of Hercules. Without expert evidence it was an impossible task. Even with expert evidence it would have been, at best, an extremely rough approximation of profit and, at worst, an informed guess. Very few penalty hearings ever descend into this level of detail. In many cases, the court will simply adopt the profit made by sales of the contravening products as a very broad approximation of the profit to which the contravention contributed in the appreciation that this is a maximum or outer limit to any causal enquiry.

53 It is likely that the elaborate exercise was undertaken by the ACCC in this case because Reckitt Benckiser’s submission was that it made *no* profit from its contravening conduct. I will explain later in this section of my reasons why I do not accept Reckitt Benckiser’s submission in those absolute terms. However, it is first necessary to explain why I do not consider that it is of any assistance to attempt to engage with the calculations suggested by the ACCC.

54 **First**, although many cases (including decisions of mine) speak of the relevant factor as “profit from contravening conduct”, this label conceals two different factors. One factor is any *intended* profits. Another is any *actual* profits. If contravening conduct is engaged in for the purpose of making particular profits then the intention to profit must be deterred even if no actual profit is made. An attempt to calculate actual profit will make no difference to deterrence based upon intended profit: see *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640, 659 [66] (French CJ, Crennan, Bell and Keane JJ).

55 In this case, the contravening conduct was part of the marketing and promotion of the Nurofen Specific Pain Range. Like most marketing and packaging endeavours, it was plainly engaged with the intention of increasing profits. To that extent, deterrence is required even if it were the case that the conduct did not ultimately result in any profit.

56 This is not an inference where Reckitt Benckiser knew or was reckless that its conduct involved a contravention. It is simply that the conduct (however innocently committed) was intended to make a profit from consumers. A comparison can be drawn with the circumstances in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*. In that case, one question before the Court was whether competitors had suffered any loss. The ACCC did not contend that the par-baked bread products for which the consumers paid were of any lower quality than goods baked from scratch (554 [57]). However, consumers lost the opportunity to make a different purchasing choice than they would have made with accurate information. When considering possible loss to competitors, Allsop CJ said that the demonstration of a causal link “is nearly impossible in these circumstances” (554 [58]). It was sufficient to conclude that some harm occurred because Coles had *intended* to improve its market share at the expense of its competitors and part of that strategy involved the contravening conduct.

57 **Secondly**, the ACCC’s profit calculations were based on an assumption of a perfect elasticity of demand once there was a removal of only that part of the product differentiation that concerned the contraventions in packaging of the Nurofen Specific Pain Range products compared with other non-contravening Nurofen products. There was no expert evidence to support this large assumption. It may be that the demand for pharmaceutical products of this type is inelastic by reference to the non-contravening aspects of the marketing and packaging. Or it may be that some consumers purchased the Nurofen Specific Pain Range product without any reference to the contravening qualities.

58 Even if the elasticity of demand without the contravening conduct could be calculated, there would also need to be a determination of the product to which the consumer would switch. The ACCC assumed, most favourably to Reckitt Benckiser, that the consumer would switch to another Nurofen product. But Reckitt Benckiser markets and supplies approximately 50 Nurofen branded stock keeping units, including in different dose forms (tablet, capsule, caplet and liquid), in different packaging sizes (eg 10, 12, 20, 24, 30, 40, 48, 72 and 96 packs), in different dosage strengths and in different combinations with other active ingredients (eg codeine, phenylephrine and pseudoephedrine). Although the ACCC generally assumed (also favourably to Reckitt Benckiser) a switch by the consumer to a similar priced Nurofen product, this assumption was ultimately only speculation.

59 **Thirdly**, the ACCC did not dispute the submission by Reckitt Benckiser that the appropriate test of causation was the counterfactual or “but for” test for the purposes of determining the profit caused by the contravening conduct. No submission was made that the appropriate connection might be the profit which was caused or *contributed to* by the contravening conduct where the uncertain aetiology of human decision making is involved: see *Brosnan v Katke* [2016] FCAFC 1 [123]-[124] (the Court). Even if a test of contribution were not sufficient to establish *losses* caused by the relevant conduct, there is a powerful argument that the profits to which the contravening conduct has contributedare relevant considerations for the purposes of deterrence. That approach would also reduce the need for a sometimes complex, and perhaps ultimately futile, exercise in many cases of attempting to quantify with any precision the actual profits from a contravention.

60 Assuming a counterfactual approach to profit from contravening conduct, if the contravening conduct were able to be remedied by minor changes then it is arguable (and I put it no higher than that) that little profit could be attributed to the contravening conduct. Senior counsel for Reckitt Benckiser gave a concrete example which illustrates the significance of this point to the impossibility of calculating profit from contraventions. He pointed to the new packaging of the former Specific Pain Range products. In relation to the Migraine Pain product, for example, that product still contains the description “Fast Targeted Relief from Pain”. It still contains the description “Nurofen Migraine Pain”. But it now also contains the description (at the top of the package) “Also suitable for general pain relief”. He submitted, and I accept, that there may be consumers who are prepared to pay a substantial price premium for Nurofen Specific Pain Range products which are not contravening but which are chosen for reasons such as ease of selection for the relevant condition, product placement, advertising, and so on.

61 There may still be questions that arise from this packaging. For instance, should the words “Fast targeted relief from pain” be read together with the words “Migraine Pain” above them? If so, then if the product is “also” suitable for general pain relief, how is it “targeted” to the relief from migraine pain? Would any representation be affected by the proximity of a product packaged in this way to products that are much cheaper but packaged in a different way? However, two points must be made. First, no allegation has been made by the ACCC that the new packaging is misleading. Secondly, it was not alleged and has not been found that any representation was made that, based on the packaging and higher pricing, the Nurofen Specific Pain Range products are more *effective* than other Nurofen pain relief products. In the absence of any finding of such contraventions, and indeed any allegation of such contraventions, I proceed on the basis that neither matter is a proved contravention.

62 There are other causal difficulties that would arise in an attempt to quantify any profit. As I have mentioned, the ACCC did not allege (and I did not find) that any representation was made that the Nurofen Specific Pain Range was any more effective than any other Nurofen product. But, again *assuming* a counterfactual approach to the question of the profits from contravention, further questions arise on which I did not receive submissions. For instance, if a consumer were misled into believing that a Nurofen Specific Pain Range product was specifically formulated to treat a particular type of pain then, even though no effectiveness representation was made, would it be irrational for that consumer to follow a process of reasoning that the specific formulation might mean that the product is more effective and that the premium price should be paid for that reason?

63 **Fourthly**, the estimation of EBIT by the ACCC is a measure of operating profit. It is not a measure of net profit. If the estimate were to be one of net profit there would need to be adjustments to reflect interest on earnings and a deduction to reflect taxation. No submission was made concerning the measure of profit which would most closely serve the purpose of deterrence.

64 **Fifthly**, the absence of a quantified profit figure which estimates the profit gained from the contravening conduct does not prevent the court from having regard to revenue figures, or preferably EBIT figures, from the sales of the products involved in the contraventions. Reckitt Benckiser submitted that those figures were irrelevant because they could not prove any amount of profit from contravening conduct. This does not make these figures irrelevant. It is not necessary to examine how the use of those concepts might cause effects involving “anchoring” or “framing” such as those described by Professor Kahneman (see Kahneman D, *Thinking, Fast and Slow* (Penguin, 2012)). No submissions were made about these concepts. It suffices to say that notions of specific or general deterrence of contravening conduct involve abstract considerations. Although profit is highly relevant, any attempt to tie notions of deterrence only to a precise profit assessment is bound to cause error.

65 An example of the relevance of EBIT figures is that in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd.* Over the three year period during which the par-baked products were marketed with misleading phrases, the EBIT derived was around $7.28 million. Although no accurate profit from the contravening conduct was quantifiable, Allsop CJ explained that the EBIT was “the only measure of the gains that may have been made by Coles from the sale of the par-baked goods” (562 [100]). Although no causal relationship could be identified with profit, the EBIT from the contravening goods served a purpose of framing the considerations of deterrence. For similar reasons, in this case it remains relevant to consider the revenue and EBIT from the sales of the contravening products even though any profit from the contraventions is unquantifiable.

66 For these reasons it is neither necessary, nor appropriate, in this case to attempt to engage in an exercise of attempting to quantify any amounts of (i) profit to Reckitt Benckiser from the contravening conduct, (ii) loss to consumers, or (iii) loss to competitors. It is sufficient to say that the Nurofen Specific Pain Range recommended retail prices between 2011 and 2015 was $11.29 for a 24 caplet pack and $6.29 or $6.59 for a 12 caplet pack. Between 2011 and 2015 Reckitt Benckiser sold approximately 5.9 million units of the Nurofen Specific Pain Range products. And the total revenue from sales of the Nurofen Specific Pain Range from 2011 to 2015 was $45 million.

### The conduct was not deliberate or covert

67 There was no allegation in this case that the conduct by Reckitt Benckiser was deliberate or covert in the sense that the contraventions were made knowing that they were contrary to the *Australian Consumer Law* or that Reckitt Benckiser “courted the risk” of contravention. As I explained in relation to the discovery issues in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 5)* [2016] FCA 167, even where liability is to be determined separately from remedy this is one matter which should be pleaded. It has the potential to affect dramatically the conduct of the case. No pleaded allegation concerning these matters was made by the ACCC at any stage of these proceedings. And, at a late stage in the proceedings after my decision on the discovery issues, the ACCC understandably did not seek to amend its pleadings.

### Cooperation with the ACCC

68 There are a number of respects in which Reckitt Benckiser provided commendable and significant cooperation with the ACCC. From July 2013 and prior to the ACCC instituting proceedings, Reckitt Benckiser helpfully responded to document and information requests made by the ACCC, including by provision of information relating to the ACCC’s investigation of the Nurofen Specific Pain Range on at least nine occasions. Reckitt Benckiser met with the ACCC on a number of occasions before proceedings began on 4 March 2015. Reckitt Benckiser made a number of offers concerning changes to its packaging. Reckitt Benckiser also proposed and attended mediation with the ACCC. Finally, during the hearing of the matter Reckitt Benckiser made admissions and consented to the orders made by the Court, including injunctions, corrective advertising, modification of its compliance program and costs. It subsequently agreed to an interim packaging arrangement with the ACCC and helped devise a statement of agreed facts for this penalty hearing.

69 The most substantial cooperation was Reckitt Benckiser’s admissions of liability. Although these admissions came early in the trial, there are two reasons why those admissions are substantial matters. First, although the admissions might be characterised as close to bowing to the inevitable, the ACCC abandoned other allegations against Reckitt Benckiser. In that respect, Reckitt Benckiser’s capitulation was not a complete admission on the first day of trial after months of preparation. Secondly, as Wigney J said in *Australian Competition and Consumer Commission v Visa Inc* [2015] FCA 1020 [121]:

Whilst the settlement only occurred on the eve of the trial, that is sometimes to be expected and is not altogether unusual. In any event, it has saved the ACCC, the Court and ultimately the community the cost and burden of litigating to finality a complex, lengthy and difficult case. It has facilitated the administration of justice. Parties should be encouraged to co-operate in this manner in appropriate cases. Sensible settlements may be fostered by the Court by making it clear that such co-operation is a relevant and weighty consideration in the fixing of an appropriate penalty. The penalty that would otherwise have been imposed in this matter should be, and has been, substantially discounted in recognition of this co-operation and the facilitation of the administration of justice.

### Compliance programs and the involvement of senior management

70 As I explain below, Reckitt Benckiser had, and has, detailed compliance programs, with which senior management were and are involved. Although the Nurofen Specific Pain Range products were approved before the period of contraventions, in 2013 and 2014 after events I describe below, decisions were made to maintain the status quo. The compliance programs failed at basic levels.

71 The high-level marketing strategies were developed by a global analgesics team and implemented by local marketing teams in Australia. Reckitt Benckiser personnel involved included those in regulation, sales and marketing, and legal. The Australian and New Zealand management personnel at Reckitt Benckiser involved included the Marketing Director, the Sales Director, the Trade Marketing Manager, the Regulatory and Medical Affairs Director, the Category Manager, and from May 2012, the Legal Director. These people authorised packaging changes including a colour change to one of the Nurofen Specific Pain Range products. The latter three personnel approved website changes. In December 2012, the Product Comparator page and the Specific Pain Relief page were approved by the Category Manager.

72 Reckitt Benckiser’s compliance program consisted of policies, procedures and codes of conduct that included requirements for legal and regulatory compliance for all product packaging and advertising of therapeutic goods. Employees have been required to undertake training related to the compliance program. Employees were made aware of laws and regulations governing their activities.

73 One difficulty with Reckitt Benckiser’s compliance program may have been its lack of any specific reference to the *Australian Consumer Law*.The benefit of a compliance program, even one as detailed as that which Reckitt Benckiser had, is substantially reduced if it cannot detect serious potential risks, particularly where there are obvious warnings.

74 One matter which ought to have sounded warning bells for Reckitt Benckiser is the “Shonky Award” for “pain in the hip pocket” awarded to Reckitt Benckiser by Choice in 2010. The Nurofen Specific Pain Range products were criticised for claiming to work on specific pain and for being sold at a higher price than other products. The award is not a badge of honour.

75 The Shonky Award details included the following:

**Nurofen**

*Shonky for pain in the hip pocket? Nurofen*

*Got a headache?*

*Backache? Neck ache?*

*A trip to your pharmacy or supermarket reveals there are specific painkillers for all sorts of pains: back pain, tension headache pain, migraine pain, period pain, osteoarthritis pain, neck pain, little toe pain… Panadol has a few pain-specific products, but Nurofen has more, with a range of caplets for migraine, back, tension headache and period pain. Yet a closer look at the ingredients shows they’re identical from product to product.*

*So does the back pain version somehow magically go straight to your back – and only your back – as soon as you’ve swallowed it? Could you, say, choose to treat only your back pain while keeping your headache? If you want to treat both, do you need to take a dose of each? The answers are no, no and definitely no. When you take these pain killers, the active ingredient spreads through your whole body, attacking whatever pain it comes across, wherever it is. Filling up your medicine cabinet with different painkillers for every type of pain is unnecessary, not to mention wasteful, should they expire before you’ve used them all. But the shonkiest aspect of this type of marketing is that the fast-acting painkillers labelled for specific pain types are more expensive – costing almost twice as much in some stores we surveyed – than their “all-pain” fast-acting equivalent, Zavance caplets, which contain a comparable fast-acting form of ibuprofen. Our advice? Stick with Zavance – and see your doctor if pain persists. See the video.*

76 Reckitt Benckiser submitted that there was no evidence that it was aware of this award. I do not accept this submission. Given the size and careful detail of Reckitt Benckiser’s marketing strategies, its team and management personnel, it would be remarkable if no-one at Reckitt Benckiser had become aware of this “award”. Reckitt Benckiser then submitted that the award did not concern the Packaging Representations or the Website Representations. I accept that submission but the award ought to have increased the focus of Reckitt Benckiser on the detail of the marketing of these products, particularly in light of the 2012 TGA complaints and the 2013 television show to which I refer below.

77 In 2012, the TGA received two complaints about advertising of products on the Nurofen website including those in the Nurofen Specific Pain Range. One of the complainants said:

Reckitt Benckiser sell at least four different Nurofen-branded products containing the exact same active pharmaceutical ingredient, namely ibuprofen. These products merely differ in their tradename, e.g. Nurofen Tension headache versus Nurofen Migrain pain. Given that these products all contain the same ingredient, I consider this misleading and deceptive, and promotes overpurchasing of their products. This marketing strategy is also underpinned by their slogan, “Target relief” [sic], which is similarly misleading given than [sic] ibuprofen does not exert a targeted action at one area of the body and not another (assuming this is what targeted means, given the existence of different products for different types of pain).

78 On 12 June 2013, the TGA Complaints Resolution Panel made findings including that:

in the absence of clear and prominent statements to the contrary, the use of the descriptive names Nurofen Back Pain, Nurofen Migraine Pain, Nurofen Period Pain, and Nurofen Tension Headache Pain in the advertisement would convey to an ordinary and reasonable consumer that:

a. The products so named were different in their ingredients or effects, and did not differ solely because of the consumer to which advertisements about them were directed;

b. The advertised products would have an effect in the named area or site of pain, and would not have an effect on other pain or act elsewhere in the body other than in the named area.

79 On 11 April 2014, a delegate of the Secretary of the Department of Health made orders that Reckitt Benckiser withdraw any representations that imply that any two or more Nurofen products that contain equivalent ibuprofen quantities and include the same product specific indications on the Australian Register of Therapeutic Goods (i) are effective only in treating a particular condition or conditions or pain in a particular part or parts of the body; or (ii) are not effective in treating other conditions or pain in other parts of the body. The delegate explained her reasoning in part as follows:

In order to ensure that consumers are not misled, I consider that it is necessary to order [Reckitt Benckiser] to withdraw any representations, including implied representations, that imply that any two or more Nurofen products that contain equivalent quantities of ibuprofen and include the same product indications, are effective only in treating particular conditions or pain in particular parts of the body and/or are not effective in treating other conditions or pain in other parts of the body.

80 Reckitt Benckiser emphasised in its submissions that these findings had concerned only the Nurofen website. Reckitt Benckiser correctly observed that the website considered by the Complaints Resolution Panel contained much lengthier descriptions and marketing than the summary packaging of the product. And within a month, Reckitt Benckiser removed the two contravening webpages.

81 I accept that the representations on the website were different to the Packaging Representations. They are sufficiently different to constitute a different course of conduct. But, again, the findings and orders of the Complaints Resolution Panel ought to have prompted Reckitt Benckiser to consider its packaging. The packaging was expressly mentioned by the delegate as a matter not considered. The remarks of the delegate must have been recognised as having potential implications for packaging and labelling (see also court book at 233). The following remarks should have prompted a review:

I note that the Panel did not specifically consider the individual labels of the products featured in the advertisement, which was the subject of the complaint, and whether or not these labels breached the Code in their own right. However, given my findings that the Nurofen website advertisement at www.nurofen.com.au, even without the ‘Head, Shoulders, Knees and Toes’ and ‘Live Well’ video advertisements, breaches the Code, I do not think it necessary for the purposes of this decision to specifically consider whether the individual labels of the products featured in the advertisement breach the Code in their own right.

82 Instead, around mid-July 2013, the Australian Regulatory and Medical Affairs Director decided that Reckitt Benckiser would maintain the products in the Nurofen Specific Pain Range in their current packaging, and would maintain the Product Comparator page and the Specific Pain Relief page, pending a final review of the determination. And in May 2014, following the review by the delegate of the Secretary of the Department of Health, which reviewed the determination of the Complaint Resolution Panel, senior management in the positions I have described in Australia decided that Reckitt Benckiser would maintain the Nurofen Specific Pain Range products in their existing packaging.

83 A third matter which should have sounded warning bells was the television show, “The Checkout”. In 2013, this television show broadcast a show which criticised Reckitt Benckiser for selling products that claim to work on specific pain at a higher price than other products. Reckitt Benckiser submitted that there was no evidence that anyone at Reckitt Benckiser had seen this show. This is a surprising submission. I have watched the show which was a tendered exhibit on DVD. The presenter said that no-one from Reckitt Benckiser was willing to go on camera to defend its products. She also said that Reckitt Benckiser’s public relations company gave a statement and asked them to attribute it to a Reckitt Benckiser spokesperson, referring to evidence-based science. Documents were then provided by the public relations company. It is a very simple inference to conclude, as I do, that Reckitt Benckiser wasaware of the program about which it had been contacted and to which it responded through a public relations company.

84 Reckitt Benckiser referred in detail to regulatory matters which mitigate the effect of these warnings. The regulatory matters involve the approval of each of the products in the Nurofen Specific Pain Range by the TGA under the *Therapeutic Goods Act 1989* (Cth). The TGA is a Commonwealth regulatory authority with statutory responsibilities including regulating the supply, import, export, manufacturing and advertising of therapeutic goods in Australia. Before therapeutic goods can be imported and supplied in, or exported from, Australia, the TGA must be satisfied that they meet applicable standards.

85 In relation to the approval of Nurofen Migraine Pain in 2003, that approval would have taken into account a duty to refuse to list the product for unacceptable presentation (“…labelling and packaging of the goods and any advertising or other informational material…”) if the product did not conform to the appropriate standard under the Ministerial Order (which included the labelling of the “purposes for which it is intended that the goods be used”) and the Therapeutic Goods Advertising Code (which included requirements that the packaging did not “mislead or deceive the consumer”). Similar consideration, under similar provisions, would have been given to the approvals of each of Nurofen Tension Headache, Nurofen Period Pain, and Nurofen Back Pain products.

86 These matters reduce the concerns about laxity of the compliance program in relation to the *Australian Consumer Law.* But, as the ACCC observed, the regulatory approvals were given to each product individually. The essence of the contraventions involving the Packaging Representations in this case was the combined, and interrelated, effect of the four different Nurofen Specific Pain Range products. This is one of the reasons why the Packaging Representations involved a single course of conduct and it is also a reason why it could not have been sufficient to rely upon regulatory approval for individual products which were not considered collectively.

87 In considering Reckitt Benckiser’s compliance program, I also take into account that Reckitt Benckiser has agreed to update its compliance program in accordance with the orders of this Court made on 11 December 2015.

### Prior contraventions

88 The ACCC has never previously alleged any contravention of the *Australian Consumer Law* or its predecessor by Reckitt Benckiser. Reckitt Benckiser has never been required to pay a pecuniary penalty. It has never previously given an undertaking to the ACCC under s 87B of the *Competition and Consumer Act 2010* (Cth) or the *Trade Practices Act 1974* (Cth).

89 The ACCC relied upon the decisions of this Court in *SC Johnson & Son Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd* [2012] FCA 1266and *SC Johnson & Son Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd* *(No 2)* [2012] FCA 1362 to suggest a pattern of previous conduct. Those decisions were the basis for a declaration that in 2012 Reckitt Benckiser had made a false representation on the packaging of a refill of a pest control product (Mortein) that part of the active ingredients of the product was natural. That representation was made in contravention of s 18 of the *Australian Consumer Law*. Reckitt Benckiser ceased supply of the product prior to the judgments.

90 On the one hand, the conduct involved a different type of product, was limited to one of the refills of that product, and the supply ceased prior to judgment. These matters significantly limit the force and relevance of the 2012 declaration. However, that declaration of contravening conduct should still be taken into account. It demonstrates, to a limited extent, the need for stronger compliance measures to have been employed by Reckitt Benckiser.

## Conclusions on penalty

91 The assessment of a pecuniary penalty involves close consideration of a multitude of factors which are sometimes incommensurable. I have discussed the relevant factors described by the parties above. Reckitt Benckiser submitted that the appropriate pecuniary penalty was $1.1 million. The ACCC submitted that the pecuniary penalty should be $6 million. The large difference is in part because there is no range of penalties for comparable breaches of s 33 of the *Australian Consumer Law*.

92 Few cases were cited by the parties because none is closely comparable. Reckitt Benckiser referred to *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*. The contraventions in that case involved 11 courses of conduct committed “on a grand scale” ([66]). The purpose of the contravening conduct was for Optus to increase its market share. Optus was not a first time offender, its conduct was contrary to an express undertaking that it had given, and there was an acute need for specific deterrence. Optus did not co-operate with the ACCC in the proceeding. The Full Court imposed penalties of up to $600,000 for each of the 11 courses of conduct. The total penalty was $3.61 million.

93 The ACCC referred to *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited*. I have already discussed that case in some detail. The penalty imposed was $2.5 million. The decision differs in some material respects. In some respects the infringements in this case were more serious. For instance, the infringements in this case concerning packaging occurred over a longer period of time. On the other hand, matters which increased the penalty in *Coles* were: (i) *Coles* involved four courses of conduct compared with two in this case although, as I have explained, the characterisation of courses of conduct may depend upon evaluative assessments of the appropriate level of generality; (ii) there were prior breaches of the *Australian Consumer Law* by Coles which heightened the need for specific deterrence, including undertakings, penalty notices, and pecuniary penalties of $10 million on another occasion (involving penalties for contraventions of s 22 of the *Australian Consumer Law* ranging from $600,000 to $900,000); and (iii) the contraventions in *Coles* were contested so there was no mitigation for cooperation with the ACCC.

94 In this case, if it were not for three particular matters, the penalty would be far greater than that which I now impose. The first matter is the absence of any pleading or submission that the conduct involved an intentional or a reckless contravention.

95 The second matter is that the contraventions essentially involved two courses of conduct. I reiterate that the course of conduct principle is only an evaluative tool which does not mean that the maximum penalty of $1.1 million is restricted to $2.2 million for two courses of conduct, especially where there can sometimes be fine distinctions between the appropriate level of generality at which to characterise the conduct. Nevertheless, there are important considerations of proportionality that must be taken into account when determining the total penalty imposed for all contraventions. A multiple of the maximum penalty for the number of courses of conduct has sometimes been described as a “notional maximum penalty” to illustrate the importance of these considerations (*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* 563 [103]). I emphasise, however, that these are principles to be considered in all the circumstances, not set rules. In some cases, courts have awarded pecuniary penalties for a course of contraventions beyond the maximum for a single contravention where the course of conduct involved many contraventions. An example is the penalty in *Australian Competition and Consumer Commission v EDirect Pty Ltd (in liq)* [2012] FCA 976; (2012) 206 FCR 160 where a pecuniary penalty of $2.5 million was imposed for a single course of conduct involving a “deception” by the receipt of money from 219 customers for phone services that the respondent knew or ought to have known were non-existent.

96 In this case, within the course of conduct concerning the Packaging Representations, the contraventions were not committed in identical circumstances. Later contraventions, where Reckitt Benckiser’s compliance procedures should have operated to require a review of its packaging, were more serious. And, as I have explained, the contravening conduct, although not a deliberate infringement, was part of a course of marketing designed for profit in relation to a range of products which led to $45 million in sales and many millions of dollars of profit from sales over the period of the Packaging Representations.

97 The third matter is that the products were effective to treat the pain that they represented so that the only potential effect of the conduct on consumers or competitors was monetary. Although the packaging and website promotion was designed for profit, the contravening conduct did not cause any physical harm to any consumer (compare *Australian Competition and Consumer Commission v Woolworths Limited*).

98 The penalty that I impose is $1,200,000 for the course of conduct involving the Packaging Representations at the point of sale, and $500,000 for the course of conduct involving the Website Representations. The total penalty is $1.7 million.

99 As a concluding comment, I would emphasise that it was necessary in these reasons to consider a very large volume of tendered material. A considerable amount of that material was concerned with the ACCC’s attempted profit calculation. These reasons explain how communication between counsel should permit many such documents in future cases to be reduced to a handful with some summarised agreed facts.

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| I certify that the preceding ninety nine (99) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edelman. |

Associate:

Dated: 29 April 2016