Federal Court of Australia

Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49

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| Appeal from: | *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166 |
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| File number: | NSD 125 of 2020 |
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| Judgment of: | **WIGNEY, BEACH, AND O'BRYAN JJ** |
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| Date of judgment: | 9 April 2021 |
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| Catchwords: | **CONSUMER LAW** – admitted contraventions of s 29(1)(a) of the Australian Consumer Law by appellant Volkswagen Aktiengesellschaft – where regulatory proceedings settled as between the regulator, Australian Competition and Consumer Commission, and Volkswagen and its subsidiaries and affiliates – where the parties jointly proposed an agreed pecuniary penalty as part of the settlement – where the primary judge found that the agreed pecuniary penalty was not appropriate within the meaning of s 224(1) of the Australian Consumer Law – where the primary judge held that the agreed pecuniary penalty was manifestly inadequate – where the primary judge imposed a higher civil pecuniary penalty  **APPEAL** – appeal from a judgment imposing a higher penalty than the agreed pecuniary penalty between the parties – whether the primary judge erred in determining that the agreed pecuniary penalty was not appropriate – whether the imposed higher penalty was manifestly excessive – relevant principles regarding the determination of an appropriate civil pecuniary penalty – whether the primary judge considered all relevant matters in determining the civil pecuniary penalty pursuant to s 224(1) of the Australian Consumer Law – where the parties did not demonstrate appellable error by the primary judge – where appellate intervention was not warranted – appeal dismissed |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2, Australian Consumer Law, ss 29(1)(a), 224, 224(1), 224(1)(a)(ii), 224(2), 224(2)(a), 224(2)(b), 224(2)(c), 224(3)  *Evidence Act 1995* (Cth) ss 191, 191(2)(b)  *Motor Vehicle Standards Act 1989* (Cth) s 10A  *Trade Practices Act 1974* (Cth) |
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| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68  *Australian Competition and Consumer Commission v Apple Pty Limited* [2012] FCA 646  *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2016) 118 ACSR 124; [2016] FCA 1516  *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* (2019) 374 ALR 776; [2019] FCA 996  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540; [2015] FCA 330  *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd (No 5)* (1998) ATPR 41-628  *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301; [2005] FCA 265  *Australian Competition and Consumer Commission v McMahon Services Pty Ltd* (2004) ATPR 42-031; [2004] FCA 1425  *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2019) 370 ALR 637; [2019] FCA 786  *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89; [2008] FCA 1976  *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54  *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172  *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54  *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235; [2017] FCA 876  *Fair Work Ombudsman v NSH North Pty Ltd (t/as New Shanghai Charlestown)* (2017) 275 IR 148; [2017] FCA 1301  *House v The King* (1936) 55 CLR 499  *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30  *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41-993; [2004] FCAFC 72  *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285  *R v Adler* (2005) 53 ACSR 471; [2005] NSWSC 274  *R v Gay* (2002) 49 ATR 78; [2002] NSWCCA 6  *R v Hannigan* (2009) 193 A Crim R 399; [2009] 2 Qd R 331  *R v Ronen* (2006) 161 A Crim R 300; [2006] NSWCCA 123  *R v Whitnall* (1993) 42 FCR 512  *Re Application by the Attorney-General (No 3 of 2002)* (2004) 61 NSWLR 305; [2004] NSWCCA 303  *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20  *The Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46  *Trade Practices Commission v CSR Limited* (1991) 13 ATPR 41-076; [1990] FCA 521 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Number of paragraphs: | 218 |
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| Date of hearing: | 12 August 2020 |
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| Counsel for the Appellant: | Mr G Rich SC with Mr I Ahmed |
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| Solicitor for the Appellant: | Clayton Utz |
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| Counsel for the Respondent: | Mr J Kirk SC with Ms J Davidson |
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| Solicitor for the Respondent: | Australian Government Solicitor |
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| Amicus Curiae: | Mr N Owens SC with Mr R Yezerski |

ORDERS

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|  | | NSD 125 of 2020 |
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| BETWEEN: | VOLKSWAGEN AKTIENGESELLSCHAFT  Appellant | |
| AND: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Respondent | |

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| order made by: | WIGNEY, Beach And O’Bryan JJ |
| DATE OF ORDER: | 9 April 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

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

REASONS FOR JUDGMENT

THE COURT:

1. The appellant, **Volkswagen** Aktiengesellschaft, is one of the largest companies in the world. It manufactures the well-known Volkswagen brand of motor vehicles. Those vehicles are sold throughout the world, including in Australia.
2. Over a period of almost five years between January 2011 and October 2015, Volkswagen engaged in a course of conduct which involved the deliberate and dishonest deception of the Australian government and Australian consumers, about the exhaust emissions of certain Volkswagen-branded motor vehicles which were imported into Australia for sale. When that conduct was eventually exposed, the respondent, the Australian Competition and Consumer **Commission,** commenced a civil penalty proceeding against Volkswagen and its Australian subsidiary, Volkswagen Group Australia Pty Limited (**Volkswagen Australia**). The Commission alleged that Volkswagen had contravened s 29(1)(a) of the Australian **Consumer Law**, being Sch 2 to the *Competition and* ***Consumer Act*** *2010* (Cth).
3. Volkswagen initially defended the proceeding. Ultimately, however, it reached a settlement with the Commission. As part of that settlement, Volkswagen admitted that it had contravened s 29(1)(a) of the Consumer Law on 473 occasions. Volkswagen and the Commission jointly filed a Statement of Agreed Facts in relation to those contraventions. They also jointly submitted that a penalty of $75 million was an appropriate penalty in respect of the contraventions.
4. The primary judge found that the penalty jointly proposed by Volkswagen and the Commission was not an appropriate penalty. His Honour found that the proposed penalty was, in all the circumstances, manifestly inadequate and its acceptance by the Commission reflected an “overly pragmatic approach” on its part. His Honour instead imposed a penalty of $125 million: *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166 (**Judgment**).
5. The central issue raised by this appeal is whether the primary judge erred in rejecting the jointly proposed penalty and imposing instead the significantly higher penalty. Volkswagen contended that the primary judge’s exercise of discretion in imposing a penalty of $125 million miscarried in various specific ways and that the penalty imposed was manifestly excessive. The Commission supported Volkswagen’s appeal, though it took issue with the contention that the penalty imposed by the primary judge was manifestly excessive. Given that there was effectively no contradictor, an amicus curiae was appointed.
6. For the reasons that follow, Volkswagen’s appeal must be dismissed. The primary judge’s exercise of discretion did not miscarry in any material way and the penalty imposed was not excessive, let alone manifestly excessive.

# FACTS RELATING TO THE CONTRAVENTIONS

1. The facts relating to the contraventions were for the most part not contentious and were mostly contained in the Statement of Agreed Facts which was taken to have satisfied the requirements of s 191 of the ***Evidence Act*** *1995* (Cth): Judgment at [36]. The parties were accordingly not required to prove the existence of any of the agreed facts and were precluded from adducing evidence to contradict or qualify any of the agreed facts: s 191(2)(b) of the Evidence Act.
2. Following is a short and simplified summary of the material facts.

## Regulatory framework and emissions standards in Australia

1. Volkswagen, a company incorporated in the Federal Republic of **Germany**, carried on business in trade and commerce in Australia as a manufacturer of Volkswagen-brand vehicles.
2. Volkswagen was the licensee on the Road Vehicle **Certification System** administered by the Commonwealth **Department** of Infrastructure and Regional Development. As licensee, it submitted applications to the **delegate** of the **Minister** for Infrastructure and Regional Development and obtained approval under s 10A of the *Motor Vehicle* ***Standards Act*** *1989* (Cth) for identification plates to be placed on vehicles it manufactured and imported into Australia. The identification plates were affixed by Volkswagen Australia. The vehicles were then supplied to authorised dealers for supply to consumers in Australia.
3. New road vehicles can only be supplied in or imported into Australia if they comply with national standards made under the Standards Act. The national standards include standards in relation to exhaust emissions. Those standards, which at all relevant times were set out in Australian **Design** **Rule 79**, regulated emissions of a number of pollutants, including oxides of nitrogen (**NOx**): Judgment at [74].
4. Design Rule 79 specified a test procedure for assessing the quantity of pollutants emitted by vehicles. That test was known as the New European Drive Cycle **Type 1 test**. The relevant parts of Design Rule 79 reflected exhaust emissions standards which applied in Europe. The European standards included the same emissions test: Judgment at [63], [66].
5. When it applied for the relevant approvals from the delegate, Volkswagen submitted a number of documents. The information in those documents included information about approvals granted to Volkswagen under the European standards as evidence of Volkswagen’s compliance with Design Rule 79. The delegate granted Volkswagen identification plate approvals on the basis of the documents and information submitted by it.
6. The Commonwealth, through the Department, published the identification plate approvals issued to Volkswagen on the Certification System website.

## Volkswagen’s “two mode software” and the evasion of emission standards

1. Volkswagen engineers overseas developed software for use in the exhaust systems of certain vehicles, including vehicles that were later supplied to consumers in Australia. That software was known as the “**two mode software**”: Judgment at [63].
2. It is unnecessary to describe the technical features of the two mode software. It suffices to note that the software was designed, created and in due course implemented for the purpose of evading and defeating emissions standards tests.
3. In simple terms, the software caused the exhaust systems in certain engines to operate in two modes. The first mode minimised the NOx emissions. The software caused the engines to operate in that mode when the vehicles were driven in a specific manner which accorded with the Type 1 test. The second mode resulted in higher NOx emissions. The software caused the engines to operate in that mode at all times other than when the vehicles were driven in accordance with the Type 1 test. It followed that, when the vehicles were subjected to emissions tests, they would not be operating in the second mode with the higher NOx emissions.
4. If the relevant vehicles had been tested while operating in the second mode, which was the mode that would be activated when the vehicles were driven on the road outside of the operating conditions of the relevant emissions test, they would have exceeded the NOx limits in Design Rule 79.
5. The decision to develop and install the two mode software was made by Volkswagen employees overseas who were acting within their apparent authority arising from their positions of employment. Those employees occupied senior positions, though they were at a level below that of Volkswagen’s Board of Management: Judgment at [38]. The same can be said of the Volkswagen employees who were directly involved in the development of the software. Six supervisors who were in charge of certain departments at Volkswagen were involved in, or knew about, the design and installation of the software: Judgment at [120], [128].

## Deception of the delegate

1. On 171 separate occasions between 1 January 2011 and 3 October 2015, Volkswagen submitted documents and information to the delegate for the purpose of obtaining identification plate approvals in respect of 57,082 Volkswagen-branded motor vehicles: Judgment at [85]. Those vehicles will generally be referred to throughout these reasons as the **relevant vehicles**.
2. The documents and information represented to the delegate that each of the relevant vehicles, when imported and supplied in Australia, would comply with Design Rule 79.
3. Those representations were false because the vehicles, each of which were fitted with the two mode software, would have exceeded the NOx emissions limits prescribed by Design Rule 79 if driven in the second mode under Type 1 test conditions. The second mode replicated the mode that would be activated when the vehicles were driven on the road outside of the operating conditions of the relevant emissions test.
4. Volkswagen did not disclose to the delegate the existence of the two mode software or that the exhaust emissions of the vehicles in respect of which approval was sought, if subjected to the relevant emissions test while driving in the second mode, which replicated the mode that would be activated when the vehicles were driven on the road, would have exceeded the NOx emission limits prescribed by Design Rule 79.
5. Volkswagen admitted that each of the 171 false representations in respect of the relevant vehicles constituted a contravention of s 29(1)(a) of the Consumer Law, which relevantly provided that “a person must not, in trade or commerce, in connection with the supply or possible supply of goods … or in connection with the promotion by any means of the supply or use of goods … make a false or misleading representation that goods are of a particular standard, quality, value or grade”.

## Deception of Australian consumers – The Green Vehicle Guide website

1. The Department administered a website called the Green Vehicle Guide. The Green Vehicle Guide included information about the environmental performance of light motor vehicles. It rated Australian vehicles based on greenhouse and air pollutant emissions. Those ratings were calculated by using data provided by manufacturers from testing the vehicles against Australian standards: Judgment at [90].
2. The Green Vehicle Guide stated that it could help consumers “choose a cleaner car” by providing information which would help consumers to “compare the level of emissions of different vehicles and consequently the impact on the environment”. The information was said to include an air pollution rating “based primarily on emission standards” to help consumers “compare a vehicle’s contribution to urban air pollution (and associated effects on the environment, human heal [sic] and amenity)”. The guide assigned vehicles three forms of rating: an “air pollution rating”, which was a rating out of 10 based on the carbon monoxide, hydrocarbons, NOx and particulate matter limits prescribed by Design Rule 79; a “greenhouse rating”, which was a rating out of 10 based on carbon monoxide emissions; and an overall “star rating”, with a maximum rating of five stars, based on the sum of the air pollution rating and the greenhouse rating.
3. The Green Vehicle Guide was a voluntary scheme. Vehicle manufacturers could apply online for their vehicle models to be included on the website. To apply, the manufacturers were required to certify that their vehicle models complied with Design Rule 79. Manufacturers could also apply for their vehicle models to have assigned to them a better air pollution rating by certifying that those vehicles complied with a more stringent European standard.
4. On at least 162 occasions, Volkswagen applied for certain Volkswagen-branded vehicles to be published on the Green Vehicle Guide website. On at least 140 separate occasions, Volkswagen applied for Volkswagen vehicles to be published on the website with a better air pollution rating based on the European standard.
5. In making those 302 applications, Volkswagen provided information concerning the vehicles to the Department for publication on the website. It also represented that the vehicles the subject of the applications complied with Design Rule 79. Those representations were false for the reasons referred to in the context of the facts concerning the deception of the delegate: the vehicles were fitted with the two mode software and if operated in the second mode when driven on the road outside of the operating conditions of the relevant emissions test, the vehicles would have exceeded the NOx emission limits prescribed by both Design Rule 79 and the more stringent European standard.
6. The result of the false representations was that the Volkswagen-branded vehicles on the Green Vehicle Guide website were given better ratings than they would otherwise have been entitled to.
7. The Green Vehicle Guide was accessed by approximately 500,000 distinct users during the period 1 January 2011 and 3 October 2015.
8. Volkswagen admitted that each of the 302 false representations made to the Department in respect of the Green Vehicle Guide constituted a contravention of s 29(1)(a) of the Consumer Law.

## Exposure of Volkswagen’s deceptive conduct

1. The operation of the two mode software and the manner in which it evaded or defeated emissions testing was effectively discovered and exposed by the Environmental Protection Agency in the **United States** of America in September 2015 when it issued a public notice which detailed its conclusion that Volkswagen had installed “defeat devices” in vehicles imported and sold in the United States. Shortly thereafter, Volkswagen issued a series of public statements which referred to emissions “discrepancies” and “test manipulations” which were said to be a “moral and political disaster for Volkswagen”.
2. On 2 October 2015, representatives of Volkswagen Australia met with officers of the Department and acknowledged that certain “affected vehicles” were not “fully compliant” with the Australian Design Rules. On 7 October 2015, Volkswagen Australia announced that there would be a “temporary suspension of sale of affected vehicles”.
3. Volkswagen subsequently developed a software update which, if and when installed in a relevant vehicle, had the effect of causing the vehicle’s engine to operate in one mode at all times. In 2016, the Department accepted that vehicles in which the software update had been installed conformed to the requirements of Design Rule 79.

# OTHER RELEVANT FACTS AND EVIDENCE

1. The Agreed Statement of Facts contained some other facts relevant to the imposition of the appropriate penalty. An affidavit sworn by an officer of Volkswagen was also read and a number of documents were tendered.

## Size and profitability of Volkswagen’s business

1. Worldwide, for the fiscal year ended 31 December 2018, Volkswagen: generated an operating profit (before special items) of €17.1 billion; sold 10.9 million vehicles; had sales revenue of €235.8 billion and employed 664,500 staff.
2. Volkswagen’s sales revenue for the fiscal years from 2011 to 2015 was: €159.3 billion (2011); €192.7 billion (2012); €197 billion (2013); €202.5 billion (2014) and €213.3 billion (2015). Its operating profit for those years was €11.3 billion (2011); €11.5 billion (2012); €11.7 billion (2013); €12.7 billion (2014); and €12.8 billion (2015).
3. The Statement of Agreed Facts included a confidential annexure which included financial and other information concerning the sales of the 57,082 vehicles which were the subject of the relevant 171 deceptive applications to the delegate for identification plate approvals.
4. Given the commercial confidentiality of some of the information in that annexure, it suffices to note the joint submission of Volkswagen and the Commission included a submission to the effect that the estimated aggregate profit earned by Volkswagen and Volkswagen Australia from sales of the relevant vehicles over the period 1 January 2011 to 3 October 2015 was less than the amount of the penalty which had been jointly submitted as being an appropriate penalty. A footnote to that submission noted, however, that the aggregate net profit of Volkswagen and Volkswagen Australia had been calculated by Volkswagen Australia and was being “reviewed and verified” by Volkswagen. That review was said to be “incomplete” as at the date of the Statement of Agreed Facts.
5. As discussed in more detail later in the context of the appeal grounds, the primary judge was not satisfied or content with the calculation of aggregate net profit that was included in the annexure to the Statement of Agreed Facts. That prompted Volkswagen to obtain an affidavit from one of its senior employees, Mr Jens **Heinemann**, which included that employee’s estimate of the aggregate net profit derived from the sale of the relevant vehicles. Mr Heinemann explained that it was necessary to estimate or approximate that figure because Volkswagen does not ordinarily “generate information regarding the consolidated operating profit of vehicles on a Volkswagen group level for particular markets such as Australia”. He also provided some explanation of the methodology he employed and the assumptions he made in arriving at the relevant estimate. The Commission did not cross-examine Mr Heinemann or make any submissions concerning his evidence: Judgment at [39].
6. The primary judge was critical of aspects of Mr Heinemann’s evidence, in particular the level of detail he had provided concerning his methodology and assumptions: Judgment at [42]. The primary judge’s concerns in that regard will be considered later in the context of the appeal grounds. It suffices at this point to note that Mr Heinemann’s estimate of the profit derived from the sale of the relevant vehicles was lower than the estimate that had been included in the annexure to the Statement of Agreed Facts. Mr Heinemann stated in his affidavit that he considered that his estimate was “more accurate” than the previous estimate.

## Penalties imposed in other jurisdictions

1. On 11 January 2017, Volkswagen entered into a plea agreement with the United States Department of Justice which resolved criminal charges against Volkswagen in the United States: Judgment at [34]. Those charges related entirely to “legal violation[s]” in the United States. The statement of facts in the plea agreement noted that it did not address “[w]hether and to what extent violations were committed in other jurisdictions”. The plea agreement recorded that Volkswagen agreed to pay a fine of US$2.8 billion: Judgment at [112].
2. A media release issued by Volkswagen on 13 June 2018 recorded that a public prosecutor in Germany had issued an “administrative order” against Volkswagen which provided for a fine of €1 billion “consisting of the maximum penalty as legally provided for €5 million and the disgorgement of economic benefits in the amount of €995 million”. The fine was said to relate to Volkswagen’s conduct in causing 10.7 million vehicles “world-wide being advertised, sold to customers, and placed on the market with an impermissible software function in the period from mid-2007 until 2015”. The content of the media release indicated that Volkswagen had “accepted” the fine effectively in settlement of the “regulatory offence proceedings” which would then be “finally terminated”.

## History of the proceeding

1. The Commission commenced the proceeding on 31 October 2016. A “stage 1” hearing relating to a series of separate questions was conducted in March 2018 over 13 sitting days. The proposed settlement of the proceeding was reached approximately two weeks before the “stage 2” hearing, which was listed to commence on 23 September 2019 and run for seven and a half weeks. The settlement averted the need for that hearing. There had, at that point, been 29 case management hearings and 19 interlocutory disputes during the course of the proceeding.

# The judgment of the primary judge

1. Following is a short overview of the primary judge’s reasons for finding, in effect, that the “agreed” penalty of $75 million proposed by Volkswagen and the Commission was not an appropriate penalty and for imposing instead a penalty of $125 million. Certain aspects of his Honour’s reasoning will be considered in more detail later in the context of specific appeal grounds.
2. The primary judge gave detailed consideration to the facts relevant to Volkswagen’s contraventions: Judgment at [34]-[137]. Neither Volkswagen nor the Commission suggested that the primary judge had misstated any of the relevant facts. His Honour identified the 473 contraventions of s 29(1)(a) of the Consumer Law that had been admitted by Volkswagen: Judgment at [85]-[96]; see also [240]. It would seem that the parties urged the primary judge to find that there were in fact 57,082 separate contraventions covered by Volkswagen’s admissions, though his Honour was inclined to think that the parties’ submission to that effect was not correct: Judgment at [239].
3. The primary judge identified s 224(1)(a)(ii) of the Consumer Law as being the “primary provision which governs the imposition of pecuniary penalties in the circumstances of the present case”: Judgment at [138]. Subsection 224(1)(a)(ii) provided, inter alia, that if a court is satisfied that a person has contravened a provision of Part 3-1 (Unfair practices) of the Consumer Law, the court may order that person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission to which s 224 applies, “as the court determines to be appropriate”.
4. The primary judge referred to s 224(2) of the Consumer Law which provided as follows:

(2) In determining the appropriate pecuniary penalty, the court must have regard to all relevant matters including:

(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; and

(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 this Part to have engaged in any similar conduct.

1. His Honour said as follows in relation to the three “matters” identified in s 224(2) of the Consumer Law (Judgment at [141]-[142]):

Section 224 of the [Consumer Law] is in Pt 5-2 – Remedies of the [Consumer Law]. It is common ground that [Volkswagen] has not hitherto been found by a Court in proceedings under Ch 4 of the [Consumer Law] or under Pt 5-2 of the [Consumer Law] to have engaged in any conduct of a kind which is similar to that in which it has admitted engaging in the present case. For that reason, there is no reason to consider further the matter specified in s 224(2)(c) as relevant to the determination of the appropriate pecuniary penalty.

Thus, in determining ***the*** (emphasis added) appropriate pecuniary penalty in the present case, I “*must have regard to all relevant matters*” including the matters specified in s 224(2)(a) and (b). These latter two matters are mandatory.

1. The primary judge subsequently noted that he was required to have regard to “all relevant matters (s 224(2)) including the specific matters mandated by subpars (a), (b) and (c) of s 224(2)” and then said that: “[a]s I have already noted, subpar (c) is not relevant in the present case”: Judgment at [233].
2. The approach taken by the primary judge to the “matter” referred to in s 224(2)(c) is the subject of appeal ground 1.
3. His Honour also noted that the specific matters referred to in s 224(2)(a), (b) and (c) “must be considered but those matters do not comprise the universe of ‘*relevant matters*’” (emphasis in original): Judgment at [143].
4. The primary judge noted that s 224(3) of the Consumer Law, in the form it was in at the time applicable to Volkswagen’s contraventions, provided that the maximum penalty payable for each contravention of s 29(1)(a) of the Consumer Law by a body corporate was $1.1 million: Judgment at [140]; see also [144]-[146] where his Honour refers to the subsequent amendment to the pecuniary penalty regime. His Honour noted that, given his finding that there were 473 separate contraventions, the “potential maximum pecuniary penalties that might be imposed” was $520.3 million: Judgment at [240].
5. The primary judge referred at considerable length to the applicable principles in relation to the determination of an appropriate civil pecuniary penalty: Judgment at [147]-[218]. It will be necessary to refer to some of those principles and his Honour’s consideration of them in the context of some of the appeal grounds. It suffices at this juncture to note that neither Volkswagen nor the Commission contended that his Honour misstated any of the relevant principles.
6. As has already been noted, the primary judge decided not to “adopt the pecuniary penalty agreed between the parties” (Judgment at [100]) and to instead impose a penalty of $125 million: Judgment at [274]. The important findings and reasoning upon which the imposition of that penalty was based were as follows.

## Nature and extent of the acts or omissions and the loss and damage that resulted from them: s 242(2)(a) of the Consumer Law

1. The primary judge had regard to the “nature and extent” of Volkswagen’s acts or omissions that gave rise to the contraventions and the “loss or damage suffered as a result” of those acts or omissions: cf s 224(2)(a) of the Consumer Law. His Honour found, in that regard, that “the admitted contraventions” constituted “corporate conduct of the worst possible kind” involving as it did “a dishonest scheme deliberately concocted and put into effect which was designed to deceive [the Department]”: Judgment at [234]. His Honour also found that the conduct “inevitably deceived consumers in Australia” and that Volkswagen also “had the gall to claim and thus receive the higher and more valuable endorsements of [the Department] reflected in the certifications published in respect of many of the affected vehicles on the [Green Vehicle Guide] website”: Judgment at [234].
2. The primary judge concluded as follows in relation to the “consequences” of Volkswagen’s contravening conduct (Judgment at [235]):

The consequence of [Volkswagen’s] contravening conduct was that 57,082 diesel-powered Volkswagen-branded vehicles were let loose on Australian roads at the behest of [Volkswagen] and for reasons of profit in circumstances where those vehicles would emit NOx in substantially higher quantities than was permitted under [Design Rule 79]. Those consumers who had purchased one of the affected vehicles would have done so in ignorance of the circumstance that the vehicle was non-compliant and had no doubt assumed that the vehicle was, in fact, compliant. Those who had visited the [Green Vehicle Guide] website and noted the certifications which [Volkswagen] had received in respect of some of the affected vehicles were deceived a second time.

1. It should also be noted in this context that the primary judge specifically rejected the joint submission of Volkswagen and the Commission that there was “no evidence … as to any actual harm to public health or the environment” arising from the contraventions: Judgment at [251]-[252]. His Honour found that that contention was “completely contradictory” to the contents of Design Rule 79 and “contrary to facts which are common ground in the present case concerning the harm to the environment and to human beings of the emission of NOx from motor vehicles”: Judgment at [252].
2. There could be no question that the primary judge considered Volkswagen’s contraventions to be extremely serious and that this was one of the main reasons for his rejection of the agreed penalty on the basis that it was manifestly inadequate. In that context, his Honour noted, in particular, the “egregious nature of the consumer fraud perpetrated by [Volkswagen], the calculated nature of that fraud, the fact that it was perpetrated by senior management personnel, the fact that it involved a very serious deception of Australian government regulatory authorities, the circumstance that its impact on consumers was very significant, [and] the fact that excessive emissions of NOx are harmful to humans and to the environment”: Judgment at [273].
3. In the event that there was any doubt about it, the primary judge affirmed that in his view the admitted contraventions constituted an “egregious breach of Australian consumer law of the worst kind imaginable” (Judgment at [257]) and were “at the most serious end of the spectrum”: Judgment at [258].
4. None of the factual findings that the primary judge made concerning the nature and extent of Volkswagen’s contravening conduct were directly challenged by Volkswagen or the Commission. Nor was there any real challenge to his Honour’s characterisation of the contravention as being a particularly egregious consumer fraud. Some of the primary judge’s findings concerning the loss or damage suffered by consumers as a result of the contravening conduct are the subject of appeal ground 5.

## The circumstances in which the acts or omissions took place: s 224(2)(b) of the Consumer Law

1. The primary judge noted that there was an overlap between the “matters” in s 224(2)(a) and (b) of the Consumer Law: Judgment at [232]. His Honour nevertheless addressed them separately.
2. The primary judge accepted the joint submission of Volkswagen and the Commission that the “[p]rovision of information to the Commonwealth which is false is a matter of grave seriousness” and that Volkswagen’s “conduct undermined the integrity and functioning of the regulatory system, which has the legislative objective of protecting consumers, public health and safety”: Judgment at [254]. His Honour found, however, that that submission did not “tell the whole story”: Judgment at [255].
3. The “whole story” was, according to his Honour, that the “history of the emissions issue” demonstrated unequivocally that Volkswagen’s contravening conduct was “deliberate, dishonest and calculated to deceive [the Department], the Minister and Australian consumers and was entirely actuated by greed because it also cannot be doubted that the only identifiable motivation for the contravening conduct was the generation of profit, and very substantial profit at that”: Judgment at [256].
4. The primary judge also accepted the joint submissions of the parties concerning the following matters: see Judgment at [260].
5. First, Volkswagen was a “very large and highly profitable company which operates globally” and that, given its size, “only a very substantial penalty, the highest awarded to date for contraventions of the [Consumer Law], will be sufficient to achieve specific and general deterrence”. The primary judge also referred to Volkswagen’s size and profitability: Judgment at [220]-[221].
6. Second, the conduct involved in the contraventions was “systematic, deliberate and covert” and occurred over a period of nearly five years: Judgment at [260].
7. Third, the false representations which were made to secure the identification plate approvals were made for financial gain in the sense that the relevant vehicles could not have been imported into or supplied in Australia without those approvals. The false representations in relation to the Green Vehicle Guide website were made for the purpose of promoting the relevant vehicles on the website in circumstances where the vehicles otherwise would not have obtained the ratings they did: Judgment at [260].
8. Fourth, the contraventions involved Volkswagen employees who, while below the level of the Board of Management, were nevertheless “management employees with supervisory duties”: Judgment at [260]. The primary judge also made findings concerning the involvement of senior management in the contravening conduct: Judgment [227]-[229].
9. Fifth, Volkswagen had not been found to have engaged in contraventions of the Consumer Law, the Consumer Act, or its predecessor, the *Trade Practices Act 1974* (Cth). The joint submissions of the parties noted, in that context, that in considering whether there existed any “corporate culture of compliance” at Volkswagen, it was relevant to have regard to the fact that Volkswagen’s contravening conduct was both systematic, deliberate and covert and that it involved senior management. As was noted earlier, the primary judge’s approach to the fact that Volkswagen had not been found to have previously contravened the relevant consumer laws in Australia is the subject of appeal ground 1.
10. None of the factual findings that the primary judge made concerning the circumstances in which Volkswagen’s contravening conduct took place were directly challenged on appeal.

## Other relevant findings and considerations

1. The primary judge accepted that, after the contravening conduct had been exposed, Volkswagen and its affiliates had made available a remedial software update to consumers who had purchased vehicles affected by the two mode software: Judgment at [244]. The effect of that update was to cause the vehicle to operate in one mode at all times. The Department subsequently accepted that vehicles in which the updated software was installed conformed to the requirements of Design Rule 79. His Honour accepted that the development and offering of these technical measures was a factor to be taken into account in Volkswagen’s favour: Judgment at [247] and [261(b)].
2. The primary judge also took into account, in Volkswagen’s favour, that it had admitted its contraventions, albeit “very late in the progress of the litigation”: Judgment at [261(a)]. His Honour noted in that regard that the settlement had occurred three years after the commencement of the proceeding, after the stage 1 hearing had concluded and shortly before the stage 2 hearing was to commence. Accordingly, while some costs had been saved and some inconvenience had been avoided, “a great deal of cost, time and effort had already been expended by the parties” and the litigation had also “required the commitment of very significant resources by the Court”, including 29 case management hearings, the resolution of 19 interlocutory disputes and the making of 90 sets of orders. In those circumstances, his Honour gave “some but not much weight” to the fact that Volkswagen had ultimately admitted its contraventions: Judgment at [261(a)]; see also [264].
3. The primary judge gave some consideration to the fact that Volkswagen had been penalised in Germany and the United States: Judgment at [271]. His Honour noted that the Commission had submitted that the Court could take those penalties into account, but was not obliged to. It does not appear that Volkswagen submitted that the overseas penalties were a relevant consideration; the primary judge noted only that the Commission’s position in relation to this issue was not “supported expressly” by Volkswagen. His Honour also observed that the media release in relation to the penalty imposed in Germany did not provide “sufficient detail” to enable the Court to consider whether that penalty was relevant and that the penalties imposed in the United States “related only to conduct perpetrated in the US and did not cover in any sense whatsoever” any conduct which took place in Australia: Judgment at [272].
4. The primary judge’s consideration of the penalties imposed overseas is the subject of challenge in appeal ground 4.
5. The primary judge found that Volkswagen had “not shown any contrition whatsoever in respect of its admitted contraventions” and that there was “no evidence that it cooperated in any particular way with any investigations conducted by the [Commission] into its conduct”: Judgment at [263]; see also [265].
6. The primary judge accepted the parties’ submission that Volkswagen’s multiple contraventions arose from two courses of conduct; the first related to the making of applications for permission to affix identification plates to motor vehicles on 171 separate occasions and the second related to applications to the Department for ratings on the Green Vehicle Guide website on a total of 302 occasions: Judgment at [266]. His Honour accordingly approached the imposition of the appropriate penalty having regard to the so-called “course of conduct principle”: Judgment at [206]-[214]. The primary judge also accepted that he should have regard to the “totality principle”: Judgment at [267]; see also [215]-[216].

## Deterrence and the appropriate penalty

1. The primary judge proceeded on the basis that the principal object of the imposition of civil pecuniary penalties was to ensure deterrence: Judgment at [198]-[205].
2. The primary judge found, in that context, that there was a “very strong need” in all the circumstances of the case to impose a penalty which was “large enough to deter [Volkswagen] and its subsidiaries and affiliates from engaging in similar conduct in the future”, particularly given the “serious corporate governance problem” revealed by the facts: Judgment at [261(d)].
3. The primary judge also accepted Volkswagen’s submission that, to provide the necessary deterrence, it was necessary to impose a penalty that exceeded by a “substantial margin” the financial benefit derived by Volkswagen from the sale of the relevant vehicles in Australia: Judgment at [262]-[263], [270]. His Honour took into account, in that context, Volkswagen’s estimates of the profit it derived from the sale of the relevant vehicles in Australia, “but only as estimates and inconsistent estimates at that”: Judgment at [270].
4. Significantly, the primary judge concluded that the $75 million “agreed penalty” which had been jointly submitted by Volkswagen and the Commission was “not sufficient to meet the overriding objects of specific deterrence and general deterrence required in matters such as this and is manifestly inadequate”: Judgment at [273]. His Honour then summarised the particular features that had led him to that conclusion: the “egregious nature of the consumer fraud perpetrated by [Volkswagen]”; the fact that the “fraud” was “calculated” and “perpetrated by senior management”; the fact that it involved a “very serious deception of Australian government regulatory authorities”; the fact that the “impact on consumers was very significant” and the fact that “excessive emissions of NOx are harmful to humans and to the environment”; the fact that Volkswagen had shown no contrition; the fact that Volkswagen had “conducted the litigation by taking every point possibly available to it” and had “only adopted a different stance under the pressure of the imminent commencement of the Stage 2 Hearing”; and that Volkswagen was “more than capable of paying a much larger penalty, given its size and wealth”: Judgment at [273].
5. His Honour also reasoned that the penalty jointly proposed by the parties was “not supported by any reasoning (especially by the [Commission]) or any justification other than it was arrived at as a compromise as part of an overall settlement”: Judgment at [273]. As for the fact that the agreed penalty was part of a settlement, his Honour expressed the view that the agreed penalty reflected an “overly pragmatic approach” on the part of the Commission: Judgment at [277]. That observation was plainly a reference to the following observation made by Keane J in *The Commonwealth of Australia v Director,* ***Fair Work*** *Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46 at [110]:

It is because the Commissioner may, on occasion, be too pragmatic in taking such a stance that the court must exercise its function to ensure that the penalty imposed is just, bearing in mind competing considerations of principle, including that of equality before the law and the need to maintain effective deterrence to other potential contraveners. …

1. As has already been indicated, the primary judge determined that, in all the circumstances, a civil penalty of $125 million was warranted: Judgment at [274].

# APPEAL GROUNDS AND SUBMISSIONS IN SUMMARY

1. Volkswagen’s notice of appeal raised seven grounds of appeal. Following is a short summary of those grounds and the submissions advanced in support of them.

## Appeal ground 1 – Failure to take s 224(2)(c) into account

1. Appeal ground 1 is that the primary judge erred in “[f]ailing to have any regard to, and by treating as ‘not relevant’ (J [141]-[142], [234], [261]), the fact that [Volkswagen] had not previously been found by a court to have engaged in any similar conduct, in circumstances where s 224(2)(c) of the [Consumer Law] obliged his Honour to have regard to that matter”.
2. There was no dispute that Volkswagen had not previously been found by a court to have engaged in any similar conduct. The primary judge nevertheless found that there was “no reason to consider further the matter specified in s 224(2)(c) as relevant to the determination of the appropriate pecuniary penalty” (Judgment at [141]; see also [233]) and did not include it in the list of matters to which he was required to have regard: Judgment at [142]; see also [261].
3. Volkswagen submitted that the statutory language in s 224(2) of the Consumer Law is unequivocal and that the “matter” in s 224(2)(c) is a mandatory consideration. The primary judge’s error, it was submitted, was in assuming that s 224(2)(c) could only be an aggravating factor, when it is equally capable of being a mitigating factor.
4. The Commission’s submissions did not address this ground of appeal.
5. The amicus submitted that the primary judge considered the matter in s 224(2)(c) and gave it no weight. There was, in the submission of the amicus, nothing in the circumstances of the case which required the primary judge to give any particular weight to the circumstance that Volkswagen had not previously been found to have engaged in similar conduct. Alternatively, if the primary judge’s conclusion that s 224(2)(c) was not relevant was erroneous, that error would in any event not warrant appellate intervention because the relevant circumstance, if taken into account, would not have led to any different outcome.

## Appeal ground 2 – Rejection of the agreed penalty

1. Appeal ground 2 is that the primary judge erred in “[f]inding that the $75,000,000 pecuniary penalty jointly proposed by the parties was not appropriate or sufficient to meet the statutory objectives of specific and general deterrence (J [273]), in circumstances where: (a) the proposed penalty exceeded, by millions of dollars, the estimated aggregate profit derived from the sale of the Relevant Vehicles by [Volkswagen] and its Australian subsidiary; and (b) the proposed penalty was manifestly a significant amount, apt to deter similar conduct by [Volkswagen] and by others”.
2. Volkswagen submitted that the primary judge “went well beyond what was necessary to achieve deterrence, and strayed into retribution”. The amount of the profits derived from the contraventions was said to be a key consideration in ascertaining how large a penalty needs to be to secure deterrence. The agreed penalty exceeded Volkswagen’s estimates of the profits it derived from the contraventions. It followed, in Volkswagen’s submission, that the agreed penalty “achieved the object of deterrence” and was not manifestly inadequate as found by the primary judge.
3. The Commission submitted that the disgorgement of profit is significant, but not necessarily determinative, in relation to specific deterrence and contended that the jointly proposed penalty was sufficiently above the profit figures in evidence to provide the necessary deterrence.
4. The amicus submitted that there is no principle that the profits earned from the contraventions set a ceiling for the penalty and that, in any event, there were sound reasons why a penalty set by reference to the profits earned by Volkswagen from the contravening conduct would have been insufficient to secure deterrence. The amicus also contended that the parties had failed to adduce sufficiently reliable evidence concerning Volkswagen’s profits.

## Appeal ground 3 – The policy of promoting the predictability of settlements

1. Appeal ground 3 is that the primary judge failed to “take into account or give actual weight to a material consideration, namely, the important public policy involved in promoting the predictability of outcome in civil penalty proceedings (J [191]), and instead impos[ed] a pecuniary penalty which exceeded that jointly proposed by $50,000,000 (which excess was almost double the highest [Consumer Law] penalty previously imposed by the Court)”.
2. Volkswagen submitted that, while the Court is not bound by the agreement of the parties in relation to penalty, the Court must take account of the public policy consideration which favours a predictable outcome. While Volkswagen acknowledged that the primary judge mentioned that public policy favours promoting the predictability of outcome, he did not take that consideration into account, or give it “actual weight”, in determining the appropriate penalty. In Volkswagen’s submission, his Honour erred in dismissing the jointly proposed penalty as a compromise which was not the product of the application of any of the factors which the Court might consider relevant.
3. The Commission also took issue with the primary judge’s finding that the agreed penalty was a compromise and took particular exception to the finding (Judgment at [237]) that the Commission “did not support the agreed penalty with any reasoning, let alone reasoning which encapsulated or reflected views within its expertise as the regulator”. The Commission submitted that the fact that the “figure was struck as part of a negotiated settlement” was neither novel nor inappropriate. The Commission also pointed out that the parties provided detailed written and oral submissions in support of the agreed penalty which provided a “clear explanation” for why the various factors indicated the appropriateness of the agreed penalty.
4. The amicus submitted that the primary judge did not fail to take the relevant public policy consideration into account. Rather, his Honour reasoned that it did not overwhelm the statutory directive that the penalty imposed must be one that the Court considers “appropriate”. His Honour found that the agreed penalty was manifestly inadequate and was therefore not compelled to accept it, notwithstanding the relevant public policy consideration.

## Appeal ground 4 – Penalties in other jurisdictions

1. Appeal ground 4 is that the primary judge erred in failing to take into account “further material considerations, namely: (a) the fact that a fine of US$2.8 billion had already been imposed upon [Volkswagen] by the US District Court in respect of the conduct the subject of the US Plea Agreement referred to at J [101]-[132], [223]-[230], [271]-[272]; and (b) the fact that a fine of €1 billion had already been imposed upon [Volkswagen] by the Braunschweig Public Prosecutor, in circumstances where his Honour relied upon conduct that occurred in those overseas jurisdictions as justifying the pecuniary penalty that he imposed”.
2. Volkswagen submitted that extra-curial punishment that might already have been suffered by a contravener, including penalties that may have been imposed in overseas jurisdictions, are relevant to the assessment of an appropriate penalty. In Volkswagen’s submission, however, the primary judge did not treat the penalties which had been imposed in the United States and Germany as at all relevant to the exercise of his discretion.
3. Volkswagen also contended that the primary judge’s finding that the penalties imposed in the United States did not cover conduct in Australia was not consonant with the way the primary judge otherwise approached Volkswagen’s conduct given that he did not isolate conduct which occurred in Australia from the conduct involved in the United States plea agreement. As for the fines imposed in Germany, Volkswagen submitted that the media release which was in evidence included details which indicated that the contravention in question related to the advertisement and sale of vehicles worldwide, including those involved in this proceeding.
4. The Commission did not support Volkswagen’s submissions in respect of appeal ground 4. It submitted that rarely will overseas penalties be of any significant weight in the assessment of an appropriate penalty for the deception of Australian government authorities, because overseas penalties will not relate to the same conduct as the conduct being penalised in Australia.
5. The submission of the amicus in respect of this ground was effectively the same as the Commission’s submission. In the submission of the amicus, the primary judge was correct to conclude that the circumstance that Volkswagen had been penalised in respect of some conduct in foreign jurisdictions did not warrant a smaller penalty.

## Appeal ground 5 – Consumer harm and loss

1. Appeal ground 5 is that the primary judge erred in “[m]istaking the facts in finding that Australian consumers had suffered losses for which [Volkswagen] ought to have compensated them sooner (J [253], [261(c)], [263], [273]), in circumstances where there was no admission or evidence before the Court of any loss to consumers arising from misleading conduct or any other breach of the [Consumer Law]”.
2. Volkswagen contended, in support of this ground, that there was no evidence in this proceeding as to any loss suffered by Australian consumers and yet the primary judge found, so it was submitted, that consumers had suffered losses for which Volkswagen should have compensated them sooner.
3. The Commission did not advance any submissions in respect of this ground. It did, however, submit, in the context of appeal ground 7, that the Court should not accept that Volkswagen was entitled to be penalised on the basis that its conduct did not cause loss. It submitted, in effect, that while there may have been no evidence of any quantifiable loss to consumers, Volkswagen’s conduct had a broader impact on Australian consumers, the broader community and the environment.
4. The amicus submitted that it was open to the primary judge to find that the impact of Volkswagen’s conduct on consumers was very significant and that his Honour was not bound to accept the parties’ joint submission that there was no evidence of loss to consumers. It was submitted that the natural and ordinary consequence of Volkswagen’s conduct was that consumers would be misled and their choices distorted. The Court did not require “specific evidence” of such harm. There was also, it was submitted, evidence of harm beyond pecuniary loss and the distortion of choice.

## Appeal ground 6 – Extraneous matters

1. Appeal ground 6 is that the primary judge allowed “extraneous or irrelevant matters to affect the exercise of his discretion, namely: (a) the fact that [Volkswagen] had not made a particular admission (J [94], [99], [264]); (b) the manner in which [r]epresentative proceedings NSD 1459/2015, 1472/2015, 1473/2015, 1307/2015 and 1308/2015 had been conducted (J [263], [273]); and (c) the allegations made by the [Commission] in the Audi proceeding, NSD 322 of 2016 (J [276]-[277])”.
2. The “particular admission” that Volkswagen did not make was an admission that the two mode software was a defeat device. Volkswagen submitted that the primary judge referred to the fact that Volkswagen had not made this admission on more than one occasion and that it was linked to his Honour’s finding that it had shown no contrition. In Volkswagen’s submission, the question whether the two mode software was a defeat device was irrelevant because the primary judge’s task was to determine the appropriate penalty having regard to the admitted contraventions and not having regard to admissions that his Honour believed should have been made but were not.
3. As for the representative proceedings, Volkswagen contended that the primary judge took into account the manner in which it had conducted the representative proceedings. Those proceedings had also been heard by his Honour. Volkswagen’s submission, in effect, was that the manner in which it defended the representative proceedings was irrelevant and said nothing about the existence or extent of its contrition in respect of the contraventions.
4. The “Audi proceeding” was a proceeding that the Commission had commenced against Audi AG, which is a wholly owned subsidiary of Volkswagen. The Audi proceeding was dismissed by consent, with no order as to costs, as part of the overall settlement. Volkswagen contended that the dismissal of the Audi proceeding was irrelevant to the determination of the appropriate penalty to be imposed on it, but that the primary judge referred to it on numerous occasions in his reasons. In Volkswagen’s submission, it should be inferred that the primary judge was “unable to put out of his mind” the allegations in the Audi proceeding.
5. The Commission did not make any submissions in relation to appeal ground 6.
6. The amicus submitted that the primary judge’s observations about Volkswagen’s refusal to admit that the two mode software was a defeat device was not a matter which appears to have affected the primary judge’s assessment of the appropriate remedy. As for the conduct of the representative proceedings, the amicus noted that Volkswagen had conceded that its conduct of the penalty proceeding was a factor relevant to the assessment of the appropriate penalty. That concession effectively denuded Volkswagen’s complaint of any real substance given the significant overlap between the two sets of proceedings. As for the Audi proceeding, the amicus noted that the primary judge had expressly renounced any reliance on the allegations in that proceeding and submitted that the mere fact that the primary judge referred to it in his reasons does not provide a basis to doubt his Honour’s express statement.

## Appeal ground 7 – Manifestly excessive

1. Appeal ground 7 is that the primary judge imposed “a penalty that was manifestly excessive in all the circumstances”.
2. Volkswagen submitted that the penalty imposed by the primary judge was excessive because “it is substantially more than necessary to achieve its proper function – deterrence”. In Volkswagen’s submission, the penalty of $125 million materially exceeded Volkswagen’s estimated profit from the contraventions and therefore “went far beyond the amount necessary to convey to [Volkswagen] and the market that misconduct of this kind will not be profitable”. Volkswagen also relied on the fact that the Commission had supported the agreed penalty, on the fact that there was no evidence of loss to Australian consumers, that it had implemented technical measures to reverse the effect of the two mode software and that this was the first occasion that it had been found to have contravened the Consumer Law. Some reliance was also placed on the fact that the penalty imposed on Volkswagen was almost five times higher than any penalty previously imposed for a contravention of the Consumer Law.
3. The Commission did not support this appeal ground. It submitted that the penalty imposed by the primary judge was not manifestly excessive having regard to the seriousness of Volkswagen’s conduct, the need for both general and specific deterrence and the fact that there was no meaningful maximum penalty. As noted earlier, the Commission submitted that Volkswagen was not entitled to be penalised on the basis that its conduct had not caused any loss or harm. It also submitted that penalties imposed in previous cases involving contraventions of the Consumer Law had minimal relevance because those previous cases involved very different facts and circumstances.
4. The amicus submitted that Volkswagen’s contention that the penalty imposed was manifestly excessive effectively relied on the erroneous arguments it had advanced in support of other appeal grounds, in particular appeal ground 2. Like the Commission, the amicus submitted that Volkswagen was not entitled to be penalised on the basis that its conduct had caused no loss or harm and that the penalties imposed in previous cases provided no assistance. The fact that the penalty imposed was significantly higher than penalties imposed in previous cases was, it was submitted, “simply reflective of the circumstance that the egregious and deliberately deceptive nature of the conduct was of an unprecedented kind and scale”.

# CONSIDERATION AND RESOLUTION OF THE APPEAL

1. It is necessary to address a submission advanced by the Commission concerning the standard of appellate review before turning to the specific appeal grounds.

## The nature of the primary judge’s decision and the approach to appellate review

1. Volkswagen’s appeal grounds and submissions proceeded on the basis that, to succeed in the appeal, it was required to demonstrate that the primary judge’s discretionary judgment was affected by an error of fact or principle of the kind identified in ***House*** *v The King* (1936) 55 CLR 499 at 505; that is, that his Honour acted upon a “wrong principle”; or allowed “extraneous or irrelevant matters to guide or affect him”; or mistook the facts; or did not “take into account some material consideration”; or, even if such errors are not apparent, that the result, upon the facts, is “unreasonable or plainly unjust”.
2. The Commission, however, submitted that it was “at least arguable” that the *House* standard does not apply to the appeal from the primary judge’s decision. That was said to be the case because the appeal was not from a contested penalty hearing, but from a decision which rejected a proposed settlement and imposed a “replacement” penalty. The Commission submitted that the primary judge was required to determine whether the jointly proposed penalty was an appropriate penalty, being one within an appropriate range. That determination, in the Commission’s submission, was arguably not a discretionary judgment, just as a court’s determination of whether or not an administrative decision maker has made a legally unreasonable decision is not a discretionary judgment: *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30 at [18], [56]-[57], [85]-[87] and [155].
3. Volkswagen did not embrace the Commission’s submission and maintained that the primary judge was exercising the discretion conferred by s 224(1) of the Consumer Law. The amicus also submitted that to succeed on its appeal, Volkswagen was required to demonstrate a *House* error. Given that, as already noted, Volkswagen’s appeal grounds and submissions were all couched in *House* terms, it is perhaps unnecessary to express a concluded view in respect of this issue. Moreover, as will become apparent, the result of the appeal would be the same even if the Commission’s postulated characterisation of the primary judge’s decision were to be accepted. It is, however, useful to address the Commission’s submission, if only to correct what appears to be a mischaracterisation of the nature of the primary judge’s decision.
4. The Commission’s submission that the primary judge’s decision was not discretionary hinges on the proposition that, because Volkswagen and the Commission had settled the proceeding and had, in that context, agreed and jointly proposed a penalty to the Court, the primary judge’s task was to determine whether that penalty was an appropriate penalty, being one within an appropriate or permissible range. That is not an entirely correct or accurate characterisation of the primary judge’s task or decision.
5. The starting point, even where an agreed or jointly proposed civil penalty is put to the Court as part of a settlement, is s 224(1) of the Consumer Law, which provides that, if the Court is satisfied that a person has contravened a relevant provision of the Consumer Law, the Court may order the person to pay such pecuniary penalty “as the court determines to be appropriate”. Subsection 224(2) of the Consumer Law provides that in “determining the appropriate pecuniary penalty, the court must have regard to all relevant matters”, including those matters specified in subpars (a), (b) and (c). These provisions make it clear that it is always a matter for the Court to determine the appropriate penalty having regard to all relevant matters.
6. The principles that apply where the parties to a civil penalty proceeding have settled that proceeding and agreed and jointly proposed a penalty to the Court were comprehensively explained by the High Court in *Fair Work* and in the earlier decisions of the Full Court in ***NW Frozen Foods*** *Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v* ***Mobil Oil*** *Australia Pty Ltd* (2004) ATPR 41-993 at 48,626-48,627; [2004] FCAFC 72. The primary judge gave detailed consideration to the applicable principles able to be derived from those decisions. None of the parties suggested that his Honour’s analysis of the principles was incorrect. In those circumstances, it suffices to identify the applicable principles without detailed consideration or reference to the judgments in *Fair Work*, *NW Frozen Foods* and *Mobil Oil*. The key points are as follows.
7. First, the Court must be persuaded that the penalty proposed by the parties is appropriate: *Fair Work* at [57]. The agreement of the parties cannot bind the Court in any circumstances to impose a penalty which it does not consider to be appropriate.
8. Second, if the Court is persuaded of the accuracy of the parties’ agreement as to facts and consequences, and that the agreed penalty jointly proposed is an appropriate remedy in all the circumstances, it would be highly desirable in practice for the Court to accept the parties’ proposal and therefore impose the proposed penalty: *Fair Work* at [58]. The desirability of the Court accepting a proposed agreed penalty which it is persuaded is an appropriate penalty derives primarily from a public policy consideration; the promotion of predictability of outcome in civil penalty proceedings: *Fair Work* at [46]. Predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation. It should be emphasised, however, that this public policy consideration is but one of the relevant considerations to which the Court must have regard and, more significantly, it cannot override the statutory directive for the Court to impose a penalty that is determined to be appropriate.
9. Third, in considering whether the agreed and jointly proposed penalty is an appropriate penalty, it is necessary to bear in mind that there is no single appropriate penalty. Rather, there is a permissible range of penalties within which no particular figure can necessarily be said to be more appropriate than another. The permissible range is determined by all the relevant facts and consequences of the contravention and the contravener’s circumstances. An agreed and jointly proposed penalty may be considered to be “an” appropriate penalty if it falls within that permissible range: *NW Frozen Foods* at 290-291; *Mobil Oil* at 48, 625-48, 626; [47], [51]. It is unlikely to be considered an appropriate penalty if it falls outside that range.
10. It should be emphasised in this context, however, that even though the process in determining whether an agreed and jointly proposed penalty is an appropriate penalty involves or includes determining whether that penalty falls within the permissible range of penalties, having regard to all the relevant facts and circumstances, it does not follow that the Court’s task can be said to amount to no more than determining whether the proposed penalty falls within the permissible range, as the Commission’s submission tended to suggest. Nor can it be said that the Court is bound to start with the proposed penalty and to then limit itself to considering whether that penalty is within the permissible range: *Mobil Oil* at 48,627; [54].
11. Fourth, in considering whether the proposed agreed penalty is an appropriate penalty, the Court should generally recognise that the agreed penalty is most likely the result of compromise and pragmatism on the part of the regulator, and to reflect, amongst other things, the regulator’s considered estimation of the penalty necessary to achieve deterrence and the risks and expense of the litigation had it not been settled: *Fair Work* at [109]. The fact that the agreed penalty is likely to be the product of compromise and pragmatism also informs the Court’s task when faced with a proposed agreed penalty. The regulator’s submissions, or joint submissions, must be assessed on their merits, and the Court must be wary of the possibility that the agreed penalty may be the product of the regulator having been too pragmatic in reaching the settlement: *Fair Work* at [110].
12. The Commission’s submission that the Court’s determination of a penalty pursuant to s 224(1) of the Consumer Law does not involve the exercise of discretion where a penalty has been jointly proposed by the parties appears to proceed on the basis that the Court’s task in such a case is limited to determining whether the proposed penalty is or is not an appropriate penalty. That determination in turn depends on whether the proposed penalty is within the permissible range of penalties. It is on that basis that the Commission submitted that, to succeed on the appeal, Volkswagen need only demonstrate that the primary judge erred in concluding that the jointly proposed penalty was not an appropriate penalty, in the sense that it was not within the permissible range. The suggestion appeared to be that there was only one correct answer to that question; that the primary judge’s determination that the agreed penalty was not within the permissible range was either right or wrong.
13. The Commission’s characterisation of the Court’s task in cases involving agreed and jointly proposed penalties is, however, overly simplistic and inaccurate. The Court’s task in such cases is not limited to simply determining whether the jointly proposed penalty is within the permissible range, though that might be expected to be a highly relevant and perhaps determinative consideration. Nor is the Court necessarily compelled to accept and impose the proposed penalty if it is found to be within the acceptable range, though the public policy consideration of predictability of outcome would generally provide a compelling reason for the Court to accept the proposed penalty in those circumstances. The overriding statutory directive is for the Court to impose a penalty which is determined to be appropriate having regard to all relevant matters. The fact that the regulator and the contravener have agreed and jointly proposed a penalty is plainly a relevant and important matter which the Court must have regard to in determining an appropriate penalty. It does not follow, however, that the determination is not discretionary in nature.
14. The Full Court has held that it is necessary to identify the kind of error described in *House* in order to disturb a decision determining the appropriate pecuniary penalty: *Singtel* ***Optus*** *Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20 at [43]; see also *Australian Competition and Consumer Commission v* ***Reckitt Benckiser*** *(Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181. While neither of those cases involved agreed and jointly proposed penalties, there is no indication that the Court’s reasoning concerning the approach to appellate review turned on the fact that the penalty was imposed following a contested hearing.
15. In any event, as has already been noted, Volkswagen’s appeal grounds and submissions proceeded on the basis that the primary judge had made *House* errors. It is, in those circumstances, appropriate to proceed and consider the appeal on that basis.

## Appeal ground 1 - Did the primary judge fail to have regard to the matter in s 224(2)(c) of the Consumer Law

1. It was essentially common ground that the “matter” in s 224(2)(c) of the Consumer Law – whether the person (in this case, Volkswagen) has previously been found by a court in proceedings under Ch 4 or Pt 5-2 of the Consumer Law to have engaged in any similar conduct – was a mandatory consideration in the Court’s determination of the appropriate pecuniary penalty. It was also an agreed fact that Volkswagen had not previously been found by a court to have engaged in any such conduct.
2. There are two ways that the fact that a contravener has not been found by a court to have engaged in similar conduct in the past may be relevant to the determination of the appropriate penalty. The first is that the fact that the contravener *had* been found to have previously engaged in similar conduct could undoubtedly be considered to be an aggravating factor which would tend to suggest that specific deterrence might require the imposition of a higher penalty. The second is that the fact that the contravener *had not* been found to have previously engaged in similar conduct could in some circumstances be considered to be a mitigating consideration; an indication that the contravener was of prior good character, which in turn might suggest that specific deterrence was not as significant a consideration as it otherwise would be.
3. There could be no doubt that the primary judge had regard to the fact that Volkswagen had not previously been found to have engaged in similar conduct. It is tolerably clear, however, that his Honour only had regard to that fact in the limited sense of it amounting to the absence of an aggravating feature. There is no indication that his Honour gave any consideration to whether it amounted to a mitigating circumstance. Indeed, having accepted that Volkswagen’s circumstances were not aggravated by the existence of prior contraventions, his Honour considered that there was “no reason to consider further the matter specified in s 224(2)(c) as relevant to the determination of the appropriate pecuniary penalty”: Judgment at [141].
4. It may, in those circumstances, be accepted that the primary judge erred in adopting an overly narrow interpretation of s 224(2)(c) of the Consumer Law and in not considering whether the absence of prior contraventions on the part of Volkswagen was capable of constituting a mitigating circumstance.
5. It does not, however, follow that appellate intervention is warranted. An “error which has not in some material way affected the outcome will ordinarily result in the appeal court declining to intervene, at least as to the result”: *Reckitt Benckiser* at [53]. In the circumstances of this case, it cannot be accepted that the primary judge’s failure to consider whether the absence of prior contraventions constituted a mitigating circumstance could have had any material effect on the penalty ultimately imposed by the primary judge. That is so for a number of reasons.
6. First, Volkswagen did not submit to the primary judge that the absence of prior contraventions was, or was capable of being, a mitigating circumstance in the particular circumstances of its case. Nor did the Commission. The joint written submissions of the parties were effectively silent on that issue. The only reference in the joint submissions as to the absence of prior contraventions was:

As noted [Volkswagen] has not previously been found to have engaged in contraventions of the [Consumer Law], the [Consumer Act] or its predecessor, the *Trade Practices Act 1974* (Cth). In relation to the presence or absence of any corporate culture of compliance, the matters identified under the two preceding sub-headings are relevant.

1. The “matters identified under the two preceding sub-headings” included that Volkswagen’s development and deployment of the two mode software was “systematic, deliberate and covert”, that the “identification plate approval false representations were for financial gain”, that the “[Green Vehicle Guide] Website false representations were made for the purpose of promoting the Relevant Vehicles” in circumstances where it could be inferred that they would otherwise not have obtained the good ratings they did and that “management employees with supervisory duties” had been involved in the design and authorisation of the use of the two mode software. While the substance and effect of the second sentence of the short submission was regrettably somewhat opaque, the submission appeared to be that, despite the fact that it had not been found to have previously engaged in similar conduct, it could not be accepted or concluded that Volkswagen had any acceptable “corporate culture of compliance”.
2. The oral submissions made to the primary judge by Volkswagen and the Commission did not develop or explain this brief passage in the joint written submissions. Nor, as has already been noted, did either party submit that the absence of any finding of prior similar conduct by Volkswagen was a material mitigating circumstance, or demonstrated Volkswagen’s prior good character as a corporate citizen, or showed that it had a corporate culture of compliance.
3. Second, it is not surprising that neither party submitted that the absence of any finding that Volkswagen had engaged in similar conduct in Australia was a significant or material mitigating circumstance. The fact that Volkswagen had not been found to have engaged in similar conduct in the past did not mean that Volkswagen was entitled to be penalised on the basis that it was a good corporate citizen at the time of the contraventions: *Director of Public Prosecutions (Cth) v* ***Nippon Yusen*** *Kabushiki Kaisha* (2017) 254 FCR 235; [2017] FCA 876 at [284]; *R v Adler* (2005) 53 ACSR 471; [2005] NSWSC 274 at [51]. Nor was Volkswagen entitled to be penalised on the basis that it had an acceptable corporate culture of compliance. Indeed, the agreed facts demonstrated that Volkswagen had been engaged in deliberately deceptive conduct relating to, or arising from, the two mode software in overseas jurisdictions well before it engaged in the contravening conduct in Australia.
4. It has also been held, in the context of criminal sentencing, that prior good character is, in any event, generally not given significant weight in sentencing for offences where general deterrence is a significant consideration: *Nippon Yusen* at [284] and the cases there cited. There is no reason to suppose that this principle would not apply equally in the context of the fixing of an appropriate pecuniary penalty. General deterrence was plainly a significant consideration in determining the appropriate penalty to impose on Volkswagen, particularly given the nature of the contraventions.
5. Third, “a first time contravention does not, as a matter of principle or practice, always require a substantial discount for a first-time contravener”, particularly where the contravention is serious and engaged in over a long period of time: *Fair Work Ombudsman v NSH North Pty Ltd (t/as New Shanghai Charlestown)* (2017) 275 IR 148; [2017] FCA 1301 at [177]. Volkswagen’s contraventions were, as the primary judge found, plainly extremely serious contraventions involving, as they did, systematic, deliberate and covert conduct involving the deception of the Commonwealth and Australian consumers in respect of an important matter over a considerable period of time. In those circumstances, the mere fact that Volkswagen had not been found to have engaged in similar conduct previously was deserving of minimal, if any, weight as a mitigating circumstance. As already noted, it is hardly surprising that neither Volkswagen nor the Commission submitted otherwise to the primary judge.
6. Fourth, and following from each of the preceding points, when consideration is given to the primary judge’s findings and reasoning as a whole, the primary judge’s error was plainly immaterial. Had the primary judge not erred and had given some consideration to whether the fact that Volkswagen had not engaged in similar conduct in the past was capable of constituting a mitigating circumstance, that could not realistically have resulted in a different outcome. It is highly unlikely, in all the circumstances, that his Honour would have considered that this circumstances was a mitigating factor that was deserving of any material weight. It is highly unlikely in those circumstances that his Honour would have imposed a different penalty.
7. It follows that, while it may be accepted that the primary judge erred in his consideration of the matter referred to in s 224(2)(c) of the Consumer Law, that error was, in all the circumstances, immaterial and appellate intervention in respect of that error is unwarranted and unjustified.

## Appeal ground 2 – Finding that the agreed penalty of $75 million was not sufficient to achieve deterrence

1. It is well established that the object of the imposition of a pecuniary penalty “is primarily if not wholly protective in promoting the public interest in compliance”: *Fair Work* at [55]; *Trade Practices Commission v* ***CSR******Limited*** (1991) 13 ATPR 41-076 at 52,152; [1990] FCA 521 at [40]. General and specific deterrence “must play a primary role in assessing the appropriate penalty”: *Australian Competition and Consumer Commission v* ***TPG*** *Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 at [65]. In considering an appropriate penalty, it is necessary to endeavour to “put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act”: *CSR Limited* at 52,152; [40]; *NW Frozen Foods* at 292F.
2. It has also been indicated, in some cases, that the requirements of specific deterrence demand that there be some relationship between the penalty imposed and the profit derived from the contravening conduct: see for example *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540; [2015] FCA 330 at [100]. In *Optus*, the Full Court held (at [62]-[63]) that the primary judge was right to find that “the claims of deterrence … were so strong as to warrant a penalty that would upset any calculations of profitability” and that “[g]enerally speaking, 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”: see also *TPG* at [65]-[66].
3. Those cases, and others like them, should not, however, be construed as laying down an immutable principle that the inquiry as to the appropriate penalty to secure deterrence in any given case is necessarily tethered to, or limited by, the amount of profits found to have been derived from the contravention or contraventions in question. Nor should they be read as requiring that there must necessarily be some direct or linear relationship or correlation between the penalty and the profits derived from the contravention or contraventions, or that the penalty should only exceed the profits derived by a certain amount. That would be to adopt an overly simplistic and narrow approach to deterrence and the determination of appropriate penalties generally.
4. While general and specific deterrence play a primary role in assessing the appropriate penalty, the authorities concerning the assessment of civil penalties also identify a number of factors that are generally considered to be relevant to the assessment of the appropriate penalty. Those factors, which relate to both the objective features of the contravening conduct and the subjective circumstances of the contravener, may be taken to be relevant because they directly bear on the assessment of the penalty that is necessary to achieve general and specific deterrence. In *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2016) 118 ACSR 124; [2016] FCA 1516 (***ACCC v ANZ***), the factors which are generally considered to be relevant to the assessment of the appropriate civil penalty were summarised in the following terms (at [87]-[88]):

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

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

1. As noted, most, if not all, of these factors are considered to be relevant to the assessment of the appropriate penalty precisely because they bear on the assessment of the requirements of, or need for, specific or general deterrence in the circumstances of the case. To give but a few examples, the demands of specific deterrence are generally considered to be particularly significant where the contravening conduct is found to have been deliberate, systematic and covert and to have been engaged in over a prolonged period of time. The appropriate penalty to impose in respect of such a contravention would generally be higher than would be the case if the contravening conduct was the result of careless, isolated conduct which was not concealed. That is because the demands or requirements of specific deterrence are generally more acute in the case of contraveners who have engaged in deliberate or systematic conduct over lengthy periods, or where covert or concealed contraventions which are difficult to detect are involved.
2. Indeed, in cases where the contravening conduct is concealed and not easily detected, deterrence (both general and specific) may justify a penalty that is many multiples of the profits made from the contravening conduct. If the contravening conduct is concealed and the risk of detection is low, a penalty equivalent to or just exceeding the profits earned may be regarded by the contravener as “an acceptable cost of doing business” on a strict cost–benefit analysis because of the overall likelihood of financial gain from the conduct. That principle has been long recognised in the context of cartel contraventions, which are typically concealed and difficult to detect: see for example *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd (No 5)* (1998) ATPR 41-628 at 40,891-2; *Australian Competition and Consumer Commission v McMahon Services Pty Ltd* (2004) ATPR 42-031; [2004] FCA 1425 at 49,228; [15]; *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89; [2008] FCA 1976 at [21]-[24]; *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2019) 370 ALR 637; [2019] FCA 786 at [126]. The principle is equally applicable in the context of contraventions of the Consumer Law that involve concealed conduct.
3. Similarly, a contravener who has displayed no contrition or remorse, and no insight into their contravening conduct, would generally expect a higher penalty than would a contravener who has shown genuine contrition and remorse and good prospects of rehabilitation. That is because the requirement of specific deterrence is generally considered to be greater in the case of a contravener who has shown no contrition or insight into their offending behaviour.
4. It is also generally accepted that the size of a corporation may be particularly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent. The sum required to achieve that object will generally be larger where the company has vast resources: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301; [2005] FCA 265 at [39]; *Australian Competition and Consumer Commission v Apple Pty Limited* [2012] FCA 646 at [38]; *ACCC v ANZ* at [89]. It follows that it may be appropriate to impose a higher penalty on a very large corporation than would be the case if the corporation was small and had limited resources, irrespective of the profit derived from the contravention.
5. The sorts of factors or considerations just referred to are relevant to, and generally affect, the assessment of the size of the penalty necessary to secure effective specific and general deterrence irrespective of the profit that may have been specifically derived from the contraventions in question. The relevance and importance of these factors or considerations demonstrates why the assessment of the appropriate penalty is not limited to an assessment of the profits involved and why there need not always be a direct correlation between the profits and the penalty. It is not sufficient to simply calculate the profits and impose a penalty which exceeds those profits by some amount.
6. The primary judge clearly took the profits that Volkswagen estimated it had made from the contraventions into account in assessing the appropriate penalty: Judgment at [269]. That is despite his Honour’s dissatisfaction with the agreed facts and evidence in that regard, an issue about which more will be said shortly. Volkswagen’s apparent contention that the primary judge was wrong to have concluded that the agreed penalty was manifestly inadequate to secure deterrence simply because, as Volkswagen said, the agreed figure exceeded the estimated profit by a not insignificant amount is based on an overly simplistic and misconceived approach to deterrence. It essentially ignores or subjugates all of the other objective circumstances of the contravening conduct and Volkswagen’s subjective circumstances.
7. Volkswagen’s bare assertion that the proposed penalty was “manifestly a significant amount, apt to deter similar conduct by [it] and others” also has no merit and must be rejected. The agreed penalty, considered in isolation, was indeed a significant amount. Considered in the context of Volkswagen’s vast resources, however, it was not a particularly significant amount. As the primary judge noted, Volkswagen is “one of the half a dozen or so largest corporations in the world” and had, in the period during which the contravening conduct had occurred, generated gross sales revenue of between €159.3 billion and €213.3 billion; for the fiscal year ended 31 December 2018, its gross sales revenue was €235.8 billion: Judgment at [220]. The claim that $75 million was a significant penalty must be considered in that context.
8. Perhaps more importantly, having regard to all of the objective features of the contravening conduct and all of Volkswagen’s subjective circumstances, it was open to the primary judge to conclude that the agreed penalty was manifestly inadequate to secure specific and general deterrence. Virtually every objective feature of Volkswagen’s conduct suggested that a very significant penalty was required, irrespective of the estimated profit derived from the contravening conduct. As has already been noted, Volkswagen’s conduct was deliberate, calculated, systematic and covert, continued over an extended period of time and was known about, and engaged in, by senior management. It involved the deception of the Australian government and, ultimately, consumers about a highly significant matter: harmful NOx emissions generated by relevant Volkswagen-branded vehicles. As for its subjective circumstances, in addition to having vast resources, Volkswagen was found to have shown no contrition, to have provided no assistance to the Commission in its investigations and to have taken a combative rather than cooperative approach to the relevant litigation.
9. There are at least two other reasons why Volkswagen’s heavy reliance on its estimated profits derived from the contraventions was, and is, misconceived.
10. First, there were legitimate issues concerning the reliability of the estimated profit figure relied on by Volkswagen. The primary judge’s “serious reservations” concerning both the agreed facts and the affidavit evidence that addressed this issue were not unwarranted. The Statement of Agreed Facts included a figure for the estimated aggregate profit earned by Volkswagen and Volkswagen Australia from the sale of the relevant vehicles, being the vehicles the operation of which was affected by the two mode software. A footnote indicated that the figure had been calculated by Volkswagen Australia and was being reviewed by Volkswagen, but that the review was “incomplete” as at the date that the statement was finalised. Neither the methodology which was employed, nor the assumptions that were made, in arriving at the estimate were included amongst the agreed facts. Nor was there any indication that the Commission had reviewed the estimate or had any knowledge about the methodology that had been employed.
11. The primary judge expressed his concerns about the agreed fact concerning the estimated profits at the hearing. That no doubt prompted Volkswagen to obtain and to seek leave to file and rely on the affidavit of Mr Heinemann. In that affidavit, Mr Heinemann provided a figure for the estimated aggregate net profit which was significantly lower than the figure that had been included in the Statement of Agreed Facts. Mr Heinemann also provided an outline of the methodology that had been adopted in arriving at his estimate and provided an explanation for how it came to be that his figure was significantly less than the figure that had been arrived at by Volkswagen Australia. That explanation was based on what he had been told about the methodology that had been employed by Volkswagen Australia.
12. Mr Heinemann’s affidavit plainly did not assuage the primary judge’s concern about the material that had been put before him in relation to the profit derived from the contraventions. His Honour noted that, while Mr Heinemann had exposed some of his reasoning “it seems obvious … that there is a great deal more that would need to be looked at” before he could have “any real confidence that [Mr Heinemann’s] figures were correct”: Judgment at [269]. It would also appear that Mr Heinemann’s evidence had not been reviewed or scrutinised in any way by the Commission. The Commission did not seek to cross-examine Mr Heinemann or make any submissions concerning his evidence. The primary judge noted, in that regard, that the Commission “provided no assistance whatsoever in relation to Mr Heinemann’s evidence and literally left it to [him] to do with it what [he] would”: Judgment at [269].
13. The primary judge nevertheless took the estimates into account. His Honour also accepted Volkswagen’s submission that the appropriate penalty would need to be “sufficiently above that figure in order to provide the necessary deterrence”: Judgment at [270].
14. Second, it is doubtful that the relevant inquiry concerning the profits or benefits earned or obtained by Volkswagen as a result of the contraventions should necessarily have been restricted, as it apparently was, to the profits directly earned from the sale of the relevant vehicles. Putting aside the apparent difficulties in estimating those profits, the benefits derived by Volkswagen from deceiving the Commonwealth were likely to have exceeded the profits specifically derived from the sale of the relevant vehicles in Australia. It would, for example, be open to infer that, by deceiving the Australian authorities, Volkswagen avoided having to incur the no doubt significant costs it would have had to incur in redesigning and manufacturing vehicles that complied with the relevant emissions standards. Equally, there is merit in the proposition that Volkswagen may have considered that the risk of its contravening conduct in Australia being detected and penalised was an acceptable cost of doing business having regard to its overall global profits.
15. It should be noted in this context that, in the case which was heavily relied on by Volkswagen in relation to this ground, *Optus*, the Full Court rejected a challenge to the assessment of the penalty which had been imposed on Optus. That penalty was based, in part, on profits that had not been shown to have stemmed directly from the contraventions for which the penalty was being imposed. The Full Court concluded (at [62]) that the “primary judge was right to proceed on the basis that the claims of deterrence in this case were so strong as to warrant a penalty that would upset *any* calculations of profitability” (emphasis added), including calculations based on profits not directly related to the contraventions in question.
16. Appeal ground 2, and the arguments advanced in support of it by both Volkswagen and the Commission must be rejected.
17. Lest there be any doubt about it, and given the Commission’s submissions concerning the relevant standard of appellate review, it should be made clear that there is no basis for concluding that the primary judge was wrong to find that the agreed penalty that was jointly proposed by Volkswagen and the Commission was not an appropriate penalty. The agreed penalty was, in all the circumstances of the case, insufficient to secure or provide general and specific deterrence and was outside the range of permissible penalties for all the reasons given by the primary judge. It was not an appropriate penalty having regard to the objective seriousness of the contravening conduct and Volkswagen’s circumstances.

## Appeal ground 3 – The promotion of the predictability of settlements

1. The primary judge was plainly cognisant of the authorities, including *Fair Work*, which emphasised the importance of the public policy in promoting the predictability of outcome in civil penalty proceedings. His Honour accepted that the Court “should always give careful consideration to and pay due respect to” agreed penalty submissions and accepted that the “Court would normally accept the agreed penalty if it is sufficiently persuaded of the accuracy of the parties’ agreement as to facts and consequences and that the penalty which the parties propose is an appropriate remedy in the circumstances thus revealed”: Judgment at [191]. His Honour was, however, also aware that the authorities made it clear that the Court was “not bound to impose the agreed penalty and must satisfy itself that the agreed penalty is appropriate”: Judgment at [191].
2. The submissions advanced by both Volkswagen and the Commission in respect of this appeal ground appeared to proceed on the basis that, because the primary judge did not accept that the agreed penalty was appropriate and imposed a higher penalty, it must somehow follow that, despite having accepted the importance of the relevant public policy consideration, his Honour either did not take that consideration into account, or did not give it “actual weight” in the course of determining the appropriate penalty. There is no merit in that contention. The simple fact is that his Honour did not consider that the agreed penalty was appropriate: Judgment at [238]. Indeed, he found it to be “manifestly inadequate”: Judgment at [273].
3. The primary judge did not, as contended by Volkswagen, simply dismiss the agreed penalty as a “compromise”. It is true that his Honour was somewhat critical of the approach taken by the parties and highly sceptical of the agreed penalty and the basis upon which it had supposedly been arrived at. His Honour observed, in that respect, that all that could be said about the agreed penalty was that it was the “amount which [Volkswagen] is prepared to pay and which the [Commission] is prepared to accept” and that it was an “agreed figure reflecting a compromise between the amount that would have been sought by the [Commission] had the matters gone to trial and the total amount that [Volkswagen] and Audi AG might have hitherto been prepared to pay (viz nothing)”: Judgment at [238].
4. Fairly read, however, the primary judge’s complaint can readily be seen to be that the parties had not persuaded him that the agreed penalty had, or could have, been arrived at by the proper application of the relevant principles to the facts of the case; that is, that the parties had not persuaded him that the agreed penalty was appropriate in all the circumstances. His Honour was not critical of the fact that the parties had settled and arrived at the agreed penalty by way of compromise. Rather, his Honour was critical of the fact that the penalty that was agreed between the parties as part of that compromise was not, on his Honour’s considered assessment, an appropriate penalty in all the circumstances. It was on that basis, or in that context, that his Honour observed that the settlement, including the agreed penalty, reflected an “overly pragmatic approach” on the part of the Commission: Judgment at [277].
5. The primary judge carefully considered and had regard to the joint submissions, including the jointly proposed penalty. His Honour accepted that the joint submissions to some extent addressed the relevant principles and how they applied in the circumstances of the case: see for example Judgment at [200]-[202]; [259]-[260]. What the parties had not explained to his Honour’s satisfaction, however, was how the agreed penalty could properly be said to be the product of the application of the relevant principles to the facts and circumstances of the case. It may readily be accepted that the task of persuading the Court that an agreed penalty is an appropriate penalty may, in some cases at least, be difficult. That is particularly the case given that there is no single or correct appropriate penalty and that the process involved in settling on an appropriate penalty is far from scientific or mathematical, but instead involves the weighing or balancing of many, often conflicting, features and considerations. It does not follow, however, that the primary judge’s criticism and ultimate rejection of the parties’ jointly proposed penalty was unwarranted.
6. More significantly, it does not follow that, in not accepting that the agreed penalty was an appropriate penalty and instead fixing a significantly higher penalty, the primary judge gave no weight, or insufficient weight, to the agreement or settlement that had been reached between Volkswagen and the Commission, or to the important public policy consideration concerning the promotion of the predictability of outcome in civil penalty proceedings. The contentions of Volkswagen and the Commission to the contrary are rejected.

## Appeal ground 4 – Penalties imposed in other jurisdictions

1. The penalties imposed on Volkswagen overseas appeared to assume much greater significance in Volkswagen’s submissions on appeal than they did before the primary judge. Indeed, it is, at best, unclear if Volkswagen made any submissions in relation to this issue before the primary judge. The Commission, consistent with the approach taken on appeal, submitted only that the Court could take those penalties into account, but was not obliged to do so. Neither party, it appears, submitted that the primary judge was bound to take them into account, or that they were deserving of any particular weight in all the circumstances.
2. It has been accepted, at least in the context of sentencing for criminal offences, that the fact that an offender has already been the subject of extra-curial punishment – loss or damage suffered by the offender as a result of having committed the offence, outside or in addition to the court-imposed sanction – may in some circumstances be a relevant consideration in sentencing the offender: *Re Application by the Attorney-General (No 3 of 2002)* (2004) 61 NSWLR 305; [2004] NSWCCA 303 at [114]; *Nippon Yusen* at [276]. Administrative penalties imposed upon an offender may be considered to be a form of extra-curial punishment: *R v Whitnall* (1993) 42 FCR 512 at 517-518; *R v Gay* (2002) 49 ATR 78; [2002] NSWCCA 6 at [23]-[24]; *R v Ronen* (2006) 161 A Crim R 300; [2006] NSWCCA 123 at [50]-[52]; *R v Hannigan* (2009) 193 A Crim R 399; [2009] 2 Qd R 331 at [25]. This principle has also been accepted in the context of civil penalties: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at [104]; *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172 at [56]-[58].
3. In *Nippon Yusen*, the offender had been subject to criminal, civil or administrative penalties in overseas jurisdictions. The Court gave the following guidance in respect of the factors that may bear on whether or what weight should be given to extra-curial punishment (at [277]):

The weight to be given to any extra-curial punishment depends on the particular facts and circumstances of each case. Relevant considerations include the nature and size of the administrative or other extra-curial punishment, the extent to which the penalty relates to the conduct the subject of the offence, the capacity of the offender to pay, the effect that the administrative penalty had in real terms on the offender and other questions of hardship. Each case must be considered on its own merits.

1. A number of considerations led the Court in *Nippon Yusen* to conclude that the overseas penalties were deserving of little weight. Those considerations included that the overseas penalties were not imposed in respect of the conduct that was the subject of the offence for which the offender was being sentenced and that, while the overseas penalties were large, so too was the offender. The following was also said in relation to deterrence (at [281]):

The second and related reason [for giving the overseas penalties limited weight] is that the sentence imposed on [the offender] must be sufficient to operate as a deterrence, both specific and general, in relation to cartel conduct that relates to Australia and Australia’s laws. Large multinational corporations who engage in global cartels or other anti-competitive conduct must be sent a clear and strong message that they will be punished in Australia in respect of Australian-related conduct irrespective of what penalties may have been imposed in other jurisdictions. Whatever decisions may be made globally, Australia will not tolerate anti-competitive conduct in respect of the supply of goods and services to, or relating to, Australia or Australian consumers: cf. *Visa* [*Australian Competition and Consumer Commission v Visa Inc* (2015) 339 ALR 413; [2015] FCA 1020] at [114].

1. The considerations that led the Court in *Nippon Yusen* to give the overseas penalties limited weight were all present in this case.
2. The primary judge plainly gave some consideration to the penalties imposed on Volkswagen in the United States and Germany. Contrary to Volkswagen’s submission, his Honour did not ignore those penalties. Rather, his Honour considered that they were of little, if any, relevance and gave them little weight in assessing the appropriate penalty. That was because the evidence before the Court in relation to the penalty imposed in Germany was insufficient to determine whether those penalties were imposed in respect of the same conduct as occurred in Australia. As for the penalties imposed in the United States, his Honour concluded that those penalties were imposed in respect of conduct which had nothing to do with Australia.
3. It was open to the primary judge to give the penalties imposed in Germany and the United States little, or no, weight. Even if, as Volkswagen contended, the penalty imposed in Germany was, in a broad sense, in respect of the worldwide sale of vehicles with an “impermissible software function”, that conduct did not overlap in any material sense with the contravening conduct in Australia, which involved the calculated deception of the Australian government and Australian consumers.
4. The primary judge was also correct to conclude that the penalties imposed in the United States related to conduct which had occurred there and did not involve any of the contravening conduct which had occurred in Australia. It is immaterial that the primary judge obviously had regard to some conduct which had occurred overseas in considering the contraventions generally. That is because the overseas conduct was part of the overall factual matrix. It does not follow that the penalties imposed in overseas jurisdictions involved conduct which overlapped in any material way with the contravening conduct in Australia. Nor did this compel the primary judge to give the overseas penalties any particular weight in the overall circumstances of the case.
5. It accordingly has not been demonstrated that his Honour erred in any way in respect of his treatment of the overseas penalties.
6. Even if, contrary to this conclusion, his Honour erred in dismissing the overseas penalties as irrelevant, that error was so immaterial as to not warrant appellate intervention. In all the circumstances, the overseas penalties were deserving of such little weight that it cannot be concluded that they could realistically have resulted in a different outcome.
7. Appeal ground 4 is accordingly rejected.

## Appeal ground 5 – Loss or harm to consumers

1. Volkswagen’s arguments in support of appeal ground 5 proceeded on the basis of two false premises.
2. The first false premise is that the primary judge found that Australian consumers had suffered compensable or quantifiable losses as a result of Volkswagen’s contravening conduct and then weighed that fact against Volkswagen in assessing the appropriate penalty. The primary judge made no such finding. Rather, his Honour took into account, in Volkswagen’s favour, the fact that Volkswagen had settled five representative actions that had been commenced against it “upon terms satisfactory to the applicants”: Judgment [253]. It is true that his Honour then observed that he was “presently unable to judge whether that settlement truly provides reasonable compensation to consumers”: Judgment at [253]. That did not, however, amount to a finding in this proceeding that consumers had suffered a compensable loss, though of course it could perhaps in any event be inferred that the terms upon which Volkswagen settled the representative proceedings were intended to compensate the applicants and group members in those proceedings.
3. The fact that the primary judge did weigh against Volkswagen, albeit in a strictly limited sense, was that it had settled the representative proceedings “so late in the progress of the litigation”: Judgment at [253]. It was open to the primary judge to treat that fact as a “countervailing factor” in assessing the weight to be given, in Volkswagen’s favour, to its settlement of the representative proceedings. That is not to say that the primary judge weighed Volkswagen’s conduct of the representative proceedings against it.
4. The second false premise is that the primary judge was precluded from finding that Volkswagen’s conduct had not resulted in any harm because the parties had jointly submitted that there was “no evidence before the Court in these proceedings as to any actual harm to public health or the environment, or any loss suffered by Australian consumers or any competitors, having arisen specifically in connection with the Relevant Vehicles …”. The primary judge was not required to accept that submission and plainly did not: Judgment at [251]-[252]. Irrespective of that submission, it was clearly open to the primary judge to infer from the agreed facts and circumstances that Volkswagen’s contravening conduct had resulted in harm to consumers and to the environment, albeit harm that was not necessarily quantifiable or monetary in nature.
5. It was, in particular, plainly open to the primary judge to infer that consumers were “inevitably deceived” by Volkswagen’s conduct: Judgment at [234]. That was because it could reasonably be inferred that prospective purchasers of the relevant motor vehicles would have proceeded on the basis that the vehicles complied with Australian emissions standards and that those who had purchased the vehicles would have done so ignorant of the fact that the vehicles were not in fact compliant: Judgment at [235]. Consumers who visited the Green Vehicles Guide website – and the evidence was that some 500,000 persons visited that site during the relevant period – would also have been misled by the fraudulently obtained ratings or endorsements of the relevant Volkswagen vehicles on that website. It was unnecessary for there to be “specific evidence” of this form of harm, given that it was the “natural and ordinary consequence” of Volkswagen’s deceptive conduct: cf *Reckitt Benckiser* at [114].
6. It was also open to the primary judge to infer that Volkswagen’s conduct resulted in non-monetary harm because the natural consequence of that conduct was that “57,082 diesel-powered Volkswagen-branded vehicles were let loose on Australian roads at the behest of [Volkswagen] and for reasons of profit in circumstances where those vehicles would emit NOx in substantially higher quantities than was permitted under [Design Rule 79]”: Judgment at [235]. It was common ground that NOx emissions were harmful to human health and the environment: Judgment at [252]. It is open and often appropriate for the Court to assess penalties for contraventions of the Consumer Law having regard to the need to deter conduct that results in non-economic forms of societal harm: *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* (2019) 374 ALR 776; [2019] FCA 996 at [23], [89]-[93].
7. There is accordingly no merit in Volkswagen’s contention in appeal ground 5 that the primary judge erred by “[m]istaking the facts in finding that Australian consumers had suffered losses for which [Volkswagen] ought to have compensated them sooner”. The primary judge made no such finding or findings. The findings that were made by the primary judge in relation to harm to consumers were findings based on inferences that were open to be drawn, irrespective of the joint submission of the parties.
8. Appeal ground 5 has not been made out.

## Appeal ground 6 – Extraneous and irrelevant matters

1. It is necessary to separately address the three “extraneous or irrelevant matters” that Volkswagen contended the primary judge had regard to in assessing the penalty.
2. As for Volkswagen’s refusal to admit that the two mode software constituted a “defeat device” for the purposes of Design Rule 79, it may be accepted that the primary judge referred to that fact on more than one occasion. It appears to have been a source of frustration for his Honour in the context of the conduct of the proceeding. There is, however, nothing to suggest that the primary judge took that fact into account in any way, or gave it any weight, in assessing the appropriate penalty. When his Honour does refer to it, it is generally referred to merely in the context of, or as part of the description of, the course of the proceeding. It is not listed as a relevant consideration in those parts of his Honour’s reasons where he lists the relevant considerations: see for example Judgment at [273].
3. Even if, contrary to this finding, the primary judge did take into account Volkswagen’s refusal to admit that the two mode software constituted a defeat device, any error arising from that circumstance would be insufficiently material as to warrant appellate intervention. There is certainly no indication that the primary judge gave that fact any weight when it came to assessing the appropriate penalty and no basis to conclude that the primary judge imposed a higher penalty on account of that fact.
4. As for Volkswagen’s conduct of the representative proceedings, the primary judge’s observations concerning Volkswagen’s conduct of those proceedings must be considered in the context of the substantial overlap between those proceedings and the regulatory proceedings. Not only was there was a substantial degree of overlap between the regulatory and representative proceedings, but his Honour heard and case managed both sets of proceedings: see Judgment at [6]-[13], [20]-[22]. In the passages of the primary judge’s reasons that are the subject of Volkswagen’s complaint, his Honour refers to Volkswagen’s defence of the proceedings or the “litigation” generally: Judgment at [263] and [273].
5. The primary judge was plainly entitled to have regard to Volkswagen’s conduct of this proceeding in assessing the appropriate penalty. It was, amongst other things, open to his Honour to find that it was demonstrable of a lack of contrition on the part of Volkswagen: see Judgment at [263]. It is, in all the circumstances, difficult to ascribe any significance to the fact that the primary judge also referred to Volkswagen’s conduct of the representative proceedings in the same context. If his Honour did give any separate weight to that matter, which is, at best, unclear, the weight he gave it would appear to have been minimal.
6. It should also be noted that, as discussed earlier, Volkswagen submitted, before the primary judge, that the fact that it had settled the representative proceedings should be weighed in its favour. The primary judge was clearly entitled to have regard to Volkswagen’s conduct of the representative proceedings in that context in assessing the weight to be given to Volkswagen’s settlement of the proceedings.
7. It follows that it cannot be accepted that his Honour erred in having regard to Volkswagen’s conduct of the representative proceedings. In any event, even if his Honour did err in any way in having regard to Volkswagen’s conduct of the representative proceedings, that error was immaterial and does not justify appellate intervention. There is no indication that the primary judge gave that matter any weight when it came to assessing the appropriate penalty and no basis to conclude that the primary judge imposed a higher penalty on account of it.
8. As for the Audi proceedings, the Commission’s abandonment of that proceeding, as part of the overall settlement, appears to have been another source of frustration or annoyance to the primary judge. Notwithstanding this, his Honour expressly stated that the Court was “not entitled to pay any regard to” the allegations made in that proceeding: Judgment at [93]. There is no sound basis to infer or conclude that, contrary to that express statement, his Honour in fact had regard to those allegations. Aside from the fairly fleeting references to the Audi proceedings, as part of the description of the overall litigation and settlement, there is nothing in the primary judge’s reasons to suggest that his Honour took the allegations in those proceedings into account in assessing the penalty to be imposed on Volkswagen.
9. It follows that appeal ground 6 has not been made out.

## Appeal ground 7 – Manifest excess

1. This appeal ground can be dealt with shortly. The submissions of both the amicus and the Commission to the effect that the penalty of $125 million was not manifestly excessive should be accepted.
2. As Gleeson CJ and Hayne J observed, in the criminal sentencing context, in *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54 at [6]:

Manifest inadequacy of sentence, like manifest excess, is a conclusion. A sentence is, or is not, unreasonable or plainly unjust; inadequacy or excess is, or is not, plainly apparent. It is a conclusion which does not depend upon attribution of identified specific error in the reasoning of the sentencing judge and which frequently does not admit of amplification except by stating the respect in which the sentence is inadequate or excessive. …

1. The same considerations or principles clearly apply in the context of a contention that a civil penalty was excessive: *Reckitt Benckiser* at [55]-[56].
2. Volkswagen’s contention that the penalty of $125 million imposed by the primary judge was manifestly excessive was essentially based on the same arguments it advanced in support of the other appeal grounds. Those arguments are not accepted for the reasons already given.
3. Volkswagen asserted, as it did in the context of appeal ground 1, that the penalty imposed was “substantially more than necessary to achieve its proper function – deterrence” and “went far beyond the amount necessary to convey to Volkswagen and the market that misconduct of this kind will not be profitable”. Those assertions were, and are, unsupported by any meaningful reasoning. In any event, they have no sound basis for the reasons already given.
4. Volkswagen also relied on the fact that the Commission had agreed that a $75 million penalty was sufficient. The stance taken by the Commission does not bind the Court and does not, in any event, support the proposition that the penalty of $125 million was manifestly excessive. It should also be reiterated, in that context, that the Commission submitted that the penalty imposed was not manifestly excessive.
5. Volkswagen relied again on the contention that there was no evidence of loss to Australian consumers. That contention has already been addressed. For the reasons given earlier, it was open to the primary judge to find that Volkswagen’s conduct did cause harm to consumers and the environment, albeit of a kind that was not quantified or not quantifiable.
6. Volkswagen also relied on the fact that it had not previously been found to have contravened the Consumer Law. For the reasons given earlier, that was scarcely a weighty or material consideration in all the circumstances. It did not provide a sound basis for finding that, prior to its contravening conduct, Volkswagen had been a good corporate citizen, or had an acceptable corporate culture of compliance, or that it was unlikely to be a repeat offender. The objective circumstances of the contravening conduct and aspects of Volkswagen’s subjective circumstances, including the absence of any contrition, suggested otherwise.
7. Volkswagen relied on the fact that the primary judge had characterised the 473 contraventions as having been committed in two courses of conduct. Volkswagen did not, however, explain how that finding supported the contention that the penalty imposed was manifestly excessive. The two courses of conduct both involved conduct that was deliberate, calculated, systematic and covert. That conduct was engaged in over a significant period of time. There were scarcely any mitigating circumstances.
8. Finally, Volkswagen relied on the fact that the penalty imposed by the primary judge was five times higher than any penalty previously imposed for a contravention of the Consumer Law. As both the Commission and the amicus submitted, however, the penalties imposed in other cases involving contraventions of the Consumer Law were, and are, of little, or no, relevance in assessing the appropriateness of the penalty in this case. The penalties imposed in previous cases no doubt turned on their own facts and circumstances. The facts and circumstances of this case were fundamentally different. As the amicus correctly submitted, the egregious and deliberately deceptive nature of Volkswagen’s conduct in this case was of an unprecedented kind and scale.
9. There is, in all the circumstances, no basis for concluding that the penalty of $125 million was excessive, let alone manifestly excessive. Volkswagen’s contraventions were, for all the reasons given by the primary judge, extremely grave and serious contraventions of the Consumer Law. There were very few mitigating circumstances.
10. The very serious nature of the contraventions and Volkswagen’s circumstances, including its size and profitability and lack of contrition, compelled the imposition of a very large penalty. In circumstances where the potential maximum aggregate penalty was at least $500 million, the imposition of a penalty of $125 million could not be said to be manifestly excessive.

# CONCLUSION AND DISPOSITION

1. While Volkswagen established that the primary judge made a minor error in construing or applying s 224(2)(c) of the Consumer Law, that error was, in all the circumstances, immaterial and does not warrant appellate intervention. It could not realistically be said that there could have been a different result if that error had not been made.
2. Volkswagen and the Commission otherwise failed to demonstrate any other appellable error on the part of the primary judge. None of Volkswagen’s other appeal grounds were made out. The primary judge was not shown to have acted upon any wrong principle, or to have taken into account any extraneous or irrelevant matters, or to have failed to take into account any material matters. The penalty imposed was not shown to be manifestly excessive.
3. It should finally be noted that neither Volkswagen nor the Commission advanced any submissions as to the penalty that the Court should impose if, contrary to the conclusions that have been reached, the primary judge was found to have erred in a way which warranted appellate intervention and the Court was required to exercise the discretion in s 224(1) of the Consumer Law. It appeared, however, to be implicit in both the orders sought in Volkswagen’s notice of appeal, which included that this Court impose the agreed penalty of $75 million, and the submissions that were made by both Volkswagen and the Commission, that the Court, in those circumstances, should impose the agreed penalty on the basis that it had been shown to be an appropriate penalty. In the event that it is not already abundantly clear from the reasons already given, the submission that the agreed penalty was within the range of permissible penalties is rejected. It was not an appropriate penalty in all the circumstances of the case. Nor is the Court persuaded that any penalty less than the penalty imposed by the primary judge was appropriate.
4. Volkswagen’s appeal must accordingly be dismissed.
5. The Commission supported the orders sought by Volkswagen so it is not entitled to a costs order in its favour. It is also unnecessary to make any costs order in favour of the amicus.

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| I certify that the preceding two hundred and eighteen (218) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Wigney, Beach and O’Bryan. |

Associate:

Dated: 9 April 2021