FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3) [2019] FCA 996

|  |  |
| --- | --- |
| File number: | NSD 425 of 2018 |
|  |  |
| Judge: | **PERRY J** |
|  |  |
| Date of judgment: | 26 June 2019 |
|  |  |
| Catchwords: | **CONSUMER LAW** – contraventions of ss 29(1)(a), 33, Australian Consumer Law (ACL) – where respondent wholesaler engaged in conduct likely or liable to mislead or deceive potential purchasers by implying that five product lines were hand-painted by Australian Aboriginal persons and were made in Australia – consideration of principles for assessing appropriate pecuniary penalties where respondent engaged in a multitude of overlapping contraventions – consideration of the primacy of deterrence in setting an appropriate penalty – where penalties still have general deterrent effect despite the respondent being in liquidation – where public importance in sending a strong message of deterrence is heightened given the economic, social and cultural harms to Indigenous Australians which may flow from misrepresentations regarding the provenance of art and souvenirs as Australian Indigenous art and artefacts – total pecuniary penalties of $2.3 million imposed |
|  |  |
| Legislation: | *Australian Consumer Law* ss 29(1)(a), 33, 224  *Resale Royalty Right for Visual Artists Act 2009* (Cth) |
|  |  |
| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157  *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595  *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (No 2)* [2018] FCA 1785  *Australian Competition and Consumer Commission v Cement Australia* [2017] FCAFC 159; (2017) 258 FCR 312  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2015] FCA 330; (2015) 327 ALR 540  *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513  *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2019] FCA 797  *Australian Competition and Consumer Commission v* *Jetstar Airways Pty Limited (No 2)* [2017] FCA 205  *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25  *Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 7)* [2016] FCA 484  *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761; (2011) 282 ALR 246  *Australian Competition and Consumer Commission v SIP Australia Pty Limited* [2003] FCA 336; (2003) ATPR 41-937  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640  *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 357 ALR 55  *Australian Energy Regulator v Snowy Hydro Limited (No 2)* [2015] FCA 58  *Commissioner of Taxation v International Indigenous Football Foundation Australia Pty Ltd* [2018] FCA 528; (2018) 107 ATR 769  *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482  *Flight Centre Limited v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; (2018) 356 ALR 389  *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357  *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285  *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412  *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249  *Australian Competition and Consumer Commission v High Adventure* *Pty Limited* [2005] FCAFC 247; (2006) ATPR 42-091  *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076 |
|  |  |
| Date of hearing: | 14 June 2019 |
|  |  |
| Date of last submissions: | 18 June 2019 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 108 |
|  |  |
| Counsel for the Applicant: | Mr T M Begbie with Ms V R Brigden |
|  |  |
| Solicitor for the Applicant: | Australian Government Solicitor |
|  |  |
| Counsel for the Respondent: | The Respondent filed a submitting notice |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 425 of 2018 |
|  | | |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | BIRUBI ART PTY LTD ACN 118 654 366 (IN LIQUIDATION)  Respondent | |

|  |  |
| --- | --- |
| JUDGE: | PERRY J |
| DATE OF ORDER: | 26 June 2019 |

THE COURT ORDERS THAT:

1. The respondent is to pay to the Commonwealth of Australia a pecuniary penalty of:
   1. $700,000 in respect of the conduct in contravention of s 33 of the Australian Consumer Law (the **ACL**) relating to the Didgeridoos referred to in paragraph [2] of the declarations made on 7 November 2018;
   2. $475,000 in respect of the conduct in contravention of s 33 of the ACL relating to the Boxed Boomerangs referred to in paragraph [2] of the declarations made on 7 November 2018;
   3. $475,000 in respect of the conduct in contravention of s 33 of the ACL relating to the Message Stones referred to in paragraph [2] of the declarations made on 7 November 2018;
   4. $450,000 in respect of the conduct in contravention of s 29(1)(a) of the ACL relating to the Loose Boomerangs referred to in paragraph [1] of the declarations made on 7 November 2018; and
   5. $200,000 in respect of the conduct in contravention of s 29(1)(a) of the ACL relating to the Bullroarers referred to in paragraph [1] of the declarations made on 7 November 2018;

being penalties cumulatively totalling $2,300,000.00 for the said contraventions.

1. The respondent is to pay the applicant’s costs as agreed or assessed.
2. The applicant is not to take steps against the respondent to enforce Order 1 or Order 2 hereof without further leave of the Court.

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

REASONS FOR JUDGMENT

PERRY J:

|  |  |
| --- | --- |
| 1 INTRODUCTION | [1] |
| 2 EVIDENCE | [11] |
| 3 CONSIDERATION OF THE APPROPRIATE PENALTY | [16] |
| 3.1 The primacy of deterrence | [16] |
| 3.2 General deterrence considerations | [26] |
| 3.2.1 Consumer and market concerns | [28] |
| 3.2.2 Economic, social and cultural harms | [34] |
| 3.2.2.1 The report of Professor Altman | [35] |
| 3.2.2.2 The evidence of Dr Marika | [47] |
| 3.2.2.3 Conclusions as to economic, social and cultural harms | [55] |
| 3.3 Specific deterrence | [56] |
| 3.4 The appropriate approach to the multiple contraventions engaged in by Birubi | [58] |
| 3.4.1 The issues | [58] |
| 3.4.2 “*The same conduct*” for the purposes of s 224(4), ACL | [62] |
| 3.4.3 The course of conduct principle and the maximum penalty | [65] |
| 3.4.4 Consideration of the statutory maximum as a guide where the course of conduct principle applies | [69] |
| 3.5 Relevant factors and the intuitive synthesis approach | [73] |
| 3.5.1 Relevant principles | [73] |
| 3.5.2 The nature, extent and duration of the conduct | [80] |
| 3.5.3 Relevant circumstances including deliberateness and the role of management | [84] |
| 3.5.4 Loss or damage caused | [89] |
| 3.5.5 Prior similar conduct | [94] |
| 3.5.6 Size, financial position and benefits | [95] |
| 3.5.7 Co-operation with the ACCC | [99] |
| 3.6 Consideration of penalties to reflect the various factors | [100] |
| 4 CONCLUSION | [108] |

##### INTRODUCTION

1. The respondent, Birubi Art Pty Ltd (**Birubi**), operated as a wholesaler of approximately 1,300 product lines of wide variety to a large number of retail outlets across Australia.
2. On 23 October 2018, I published reasons for holding that Birubi had breached certain provisions of the Australian Consumer Law (the **ACL**), being Schedule 2 to the *Competition and Consumer Act 2010* (Cth). Those breaches occurred by reason of implied representations made by Birubi to consumers over the period 1 July 2015 to 14 November 2017 (the **relevant period**) about the provenance and characteristics of five product lines sold to retailers which contained visual images, symbols and styles of Australian Aboriginal art: *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595 (***Birubi (No 1)***). The five product lines in question were loose boomerangs (the **loose boomerangs**), boomerangs presented in boxes (the **boxed boomerangs**), bullroarers, bamboo didgeridoos, and message stones (cumulatively, **the Products**). Three of these products, namely the loose boomerangs, boxed boomerangs and bullroarers, reproduced artwork designed by an artist, Trisha Mason, who identifies, and is recognised, as an Aboriginal Australian (the **Trisha Mason Products**), pursuant to a royalty agreement concluded between Birubi and Ms Mason (*Birubi (No 1)* at [3]).
3. I summarised my conclusions in *Birubi (No 1)* as follows:

163. … Birubi, by representing in trade and commerce during the relevant period to consumers that the loose boomerangs, boxed boomerangs, bullroarers, didgeridoos and message stones were hand painted by Australian Aboriginal persons, engaged in misleading or deceptive conduct in breach of s 18 and subs 29(1)(a) of the ACL. As to the latter, the implied representation that the Products were hand painted by Australian Aboriginal persons was a false or misleading representation that they were of a particular style or had a particular history. I also consider that Birubi engaged in conduct that was “*liable*”(in the sense of more likely than not) to mislead the public into inferring that the boxed boomerangs, didgeridoos and message stones were hand painted by Australian Aboriginal persons in contravention of s 33 of the ACL, but do not consider that any breach of s 33 with respect to the loose boomerangs and bullroarers has been established.

164. Furthermore, during the relevant period, by representing to consumers that the loose boomerangs, boxed boomerangs, bullroarers, didgeridoos and message stones were made in Australia, Birubi, in trade or commerce, engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL; and made false or misleading representations concerning the place of origin of goods in connection with the supply or possible supply of goods, or the promotion of the supply of goods, in contravention of subs 29(1)(k) of the ACL.

1. Shortly after judgment was delivered in *Birubi (No 1)*, Birubi resolved to enter voluntary liquidation as of 29 October 2018 under s 491(1) of the *Corporations Act 2001* (Cth) (the **Corporations** **Act**) and a liquidator, Mr David Hambleton, was appointed on the same day.
2. On 7 November 2018, I made declarations giving effect to my reasons in *Birubi (No 1)* that Birubi had contravened ss 18, 29(1)(a) and (k), and 33 of the ACL. Those declarations were not opposed by the liquidator who on 9 November 2018 filed a submitting appearance in line with the position which he had explained that he would take to the litigation at the case management hearing held on 7 November 2018 and in earlier correspondence with the applicant, the Australian Competition and Consumer Commission (the **ACCC**).
3. On 7 December 2018, I granted leave to the ACCC to pursue the proceedings against the respondent in liquidation under s 500 of the Corporations Act: *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (No 2)* [2018] FCA 1785 (***Birubi (No 2)***).
4. In addition to declaratory relief, in its originating application filed on 22 March 2018 the ACCC sought injunctive relief, civil penalties, a disclosure order, and a compliance program order under the ACL. Given that Birubi is in liquidation, the ACCC does not press the injunctive, disclosure and compliance orders set out in paragraphs 3, 5 and 6 of its amended originating application (ACCC’s submission on penalty dated 7 June 2019 (**ACCC’s penalty submissions**) at [3]). Furthermore and for the same reason, while the ACCC presses its claim for pecuniary penalties to be awarded against Birubi under s 224 of the ACL, it does so only to serve the purposes of ***general*** deterrence (ibid). In this regard, as the ACCC submitted, under s 224 of the ACL the Court may order a person to pay to the Commonwealth “*such pecuniary penalty, in respect of each act or omission by the person to which [s 224]* *applies, as the court determines to be appropriate*”*.*  Furthermore, as the ACCC submitted, the power to impose pecuniary penalties under s 224 applies relevantly only to the contraventions of ss 29 and 33 of the ACL, and not to the contraventions of s 18.
5. The ACCC submits that total penalties in the range of $2 million to $2.5 million would have an appropriate deterrent value given in particular that:

Contraventions of this kind are serious, not only for their immediate potential to mislead consumers, but particularly for their potential to thereby undermine the integrity of the Indigenous arts sector. Such conduct puts at risk an array of economic and social benefits which are vital to Indigenous communities, particularly those in remote areas. It is also liable to cause offence and cultural harm to Australian Aboriginal persons. A strong deterrent message is therefore important to ensure that other would-be contraveners are not tempted to prioritise their own short-term profits over the risk of such harms. …

(ACCC’s penalty submissions at [2])

1. As I noted above, the liquidator has filed a submitting notice stating that the company will abide by the orders of the Court including on the question of costs.
2. For the reasons set out below, I consider that total penalties in the sum of $2,300,000.00 are appropriate.

##### EVIDENCE

1. In support of its submissions on penalty, the ACCC relied upon the affidavit of Holly Aisatullin Ritson, solicitor, affirmed on 7 June 2019 annexing a copy of the liquidator’s report to creditors of Birubi and other documents.
2. The ACCC also relied upon the evidence of a number of expert witnesses in support of its submissions as to penalty, namely:
3. the affidavit of Elia Lytras sworn on 26 April 2019, forensic accountant, who gave evidence about sales of the five Birubi product lines considered in *Birubi (No 1)*;
4. the affidavit of Dr Wananamba Banduk Mamburra Bitjwurrurru Marika AO sworn on 23 May 2019, who is a Rirratjinu woman of North-East Arnhem Land and gave evidence about cultural responsibilities with respect to the use of Indigenous Australian designs and artefacts, and about the consequences and impacts of misuse of such designs; and
5. the affidavit of Emeritus Professor Jon Charles Altman affirmed on 3 June 2019, academic economist and anthropologist, Australian National University, who gave evidence about the direct and indirect benefits to Australian Aboriginal people and communities of producing and selling Australian Aboriginal art and/or artefacts, and about the effect that conduct of the kind undertaken by Birubi in breach of the ACL is likely to have upon Australian Aboriginal people or communities receiving these benefits.
6. All three witnesses gave their expert evidence in accordance with the Practice Note regarding expert opinions.
7. By way of further elaboration, Dr Marika is a senior cultural leader with over 40 years’ experience in making and supporting Indigenous art in many significant formal roles. These include as a custodian for the designs belonging to her mother’s clan, an artist, a cultural advisor, and a board director of the National Gallery of Australia, the South Australian Museum, the Art Gallery of the Northern Territory, the Aboriginal Arts Board of the Australia Council for the Arts, and the Buku-Larnngay Mulka Arts Centre and Museum in Yirrkala. Dr Marika has also been a board director of Indigenous Art Code Limited for approximately 4 years. Indigenous Art Code Limited is a company which maintains standards for ethical dealings with Indigenous artists by administering the Indigenous Art Code. Dr Marika’s role with this company includes providing opinions based on her knowledge and experience as to how laws can be used to protect art and artists. Through this role she has also been involved with the “*Fake Art Harms Culture*” campaign and, with the other board directors, she considered the importance of promoting this campaign and gave advice on the harm which could occur to culture from fake Indigenous Australian art. As such, Dr Marika was amply qualified to give her expert opinion under s 79 of the *Evidence Act 1995* (Cth) (the **Evidence Act**) on the matters which she addressed in her affidavit regarding Australian Indigenous art and culture, and I accept her cogent and compelling evidence.
8. I also accept the equally impressive expert evidence of Professor Altman. His qualifications, experience, research, and extensive publications, demonstrate that he is well-qualified to address the direct economic benefits of producing and selling Australian Aboriginal art and artefacts from the perspective of Australian Aboriginal artists’ livelihoods, as well as the indirect and wider economic, cultural, social, and political, benefits for other individuals, communities, regions and diverse stakeholders.

##### CONSIDERATION OF THE APPROPRIATE PENALTY

###### The primacy of deterrence

1. As indicated above, the purpose of civil penalties “*is primarily if not wholly protective in promoting the public interest in compliance*”: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (***FWBII***) at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ (with whose reasons Keane J agreed at [79])). Thus as Keane, Nettle and Gordon JJ explained more recently in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 (***ABCC***) at [116] (with whose reasons Kiefel CJ agreed at [50]):

… Other things being equal, it is assumed that the greater the sting or burden of the penalty … the more potent will be the example that the penalty sets for other would-be contraveners and therefore the greater the penalty's general deterrent effect. Conversely, the less the sting or burden that a penalty imposes on a contravener, the less likely it will be that the contravener is deterred from further contraventions and the less the general deterrent effect of the penalty. Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the raison d'être of its imposition.

1. Such considerations as to the risk/benefit equation from the perspective of a potential wrongdoer are especially relevant where the benefit in contemplation is, as in this case, profit or other material gain: *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 (***Reckitt***) at [151] (the Court).
2. It follows that the various statutory and other penalty factors to which I later refer fall to be considered in the context of setting a penalty of appropriate deterrent value so as to ensure that the penalty is not regarded relevantly by others as an acceptable cost of doing business: see further e.g. *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 (***TPG Internet***) at [66], *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 (***Singtel Optus (FCAFC)***) at [62] (the Court); and *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2019] FCA 797 (***Jetstar (2019)***) at [50] (Perry J). It also follows that “*the penalty should not be greater than is necessary to achieve this object; severity beyond that would be oppression*”: *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (***NW Frozen Foods***) at 293 (Burchett and Kiefel JJ).
3. The primary object of deterrence leaves little scope, if any, for the Court to take into account matters such as personal hardship which the setting of particular penalty may impose upon the wrongdoer. Thus in *Australian Competition and Consumer Commission v High Adventure* *Pty Limited* [2005] FCAFC 247; (2006) ATPR 42-091 the Full Court held that:

11. … as deterrence (especially general deterrence) is the primary purpose lying behind the penalty regime, there inevitably will be cases where the penalty that must be imposed will be higher, perhaps even considerably higher, than the penalty that would otherwise be imposed on a particular offender if one were to have regard only to the circumstances of that offender. In some cases the penalty may be so high that the offender will become insolvent. That possibility must not prevent the Court from doing its duty for otherwise the important object of general deterrence will be undermined.

(See further the helpful discussions of the authorities in *Federal Commissioner of Taxation v Arnold (No 2*) [2015] FCA 34; (2015) 324 ALR 59 at [200]-[204] (Edmonds J); and *Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 7)* [2016] FCA 484 (***SensaSlim***) at [20]-[29] (Yates J).)

1. Similarly, by analogy in *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412 (***Matcham***) Jacobson J considered the imposition of penalties upon the respondent CEO of a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), for contraventions of statutory duties imposed by that Act, including breaches of good faith and the duty not to act improperly to gain an advantage for himself. At [250]-[251], Jacobson J reviewed relevant authorities involving the ACL and similar statutory contexts providing for the imposition of civil penalties and concluded at [254] that their effect was to “*leave very little room for any allowance for personal hardship in the circumstances of the present case*”.
2. Thus, as the ACCC submitted in supplementary submissions filed after the hearing:

4. … the mere fact that a penalty is greater than a cost of doing business for the particular wrongdoer does not mean it will be of appropriate deterrent value. Thus courts have regularly imposed penalties on contraveners, particularly by reference to the yardstick of the statutory maximum, which can be seen to far outweigh the financial means of the wrongdoer or the benefits gained from the wrongdoing.

1. Given that Birubi is in liquidation, it is unlikely that Birubi would be able to pay any pecuniary penalty in any event. However, even if Birubi were not already in liquidation, it follows from this and other authorities to like effect that the fact that the penalties proposed would have significantly exceeded Birubi’s annual income (see [95] below) and may have caused it to become insolvent, would not have constituted a mitigating factor that might have justified a lesser penalty if the Court were satisfied that penalties at the level proposed were necessary in order to have the appropriate deterrent effect.
2. Nor, as the ACCC submits, should the fact that Birubi is now in liquidation dissuade the Court from assessing appropriate penalties because they may still have an important general deterrent effect even though they may not be recovered. For reasons I develop below, that deterrent effect is of particular importance in the present context given the economic, social and cultural harms to Indigenous Australians which may flow from businesses misrepresenting the provenance of art and souvenirs as Australian Indigenous art and artefacts. Thus, as the Full Court explained in *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513:

20. … a court may impose a penalty on a company in liquidation if, to do so, would clearly and unambiguously signify to, for example, companies or traders in a discrete industry that a penalty of a particular magnitude was appropriate (and was of a magnitude which might be imposed in the future) if others in the industry sector engaged in the same or similar conduct. …

1. By way of illustration, the Full Court referred to the decision of O’Loughlin J in *Australian Competition and Consumer Commission v The Vales Wine Company Pty Ltd* (1996) ATPR 41-528 (***Vales Wine***) in which his Honour observed that even though the company was in liquidation and there would be no hope of recovering any penalties or costs, that should not dissuade the Court from assessing appropriate penalties to “*serve as a warning throughout the wine industry and elsewhere of the attitude of the Court to offences of this nature*” (at 42,776).
2. In *Australian Competition and Consumer Commission v SIP Australia Pty Limited* [2003] FCA 336; (2003) ATPR 41-937 Goldberg J agreed with the approach in *Vales Wines*, holding that:

59. … Even though SIP is in liquidation, it is still appropriate to order that it pay penalties for its contraventions of the Act as a measure of the Court’s disapproval of the contraventions established and as a measure of the seriousness with which the Court regards those contraventions. If the principal object of the imposition of penalties is deterrence, not only of the participants, but also others who might be influenced to contravene the Act, then it is quite appropriate to order that a company in liquidation pay pecuniary penalties for contraventions of the Act. If general deterrence is to have any meaning, a company in liquidation which has contravened the Act must be ordered to pay an appropriate pecuniary penalty as a deterrent to others who might be tempted to engage in similar conduct: *Australian Competition and Consumer Commission v The Vales Wine Company Pty Ltd* (1996) ATPR 41‑528 at 42,776.

(See further the helpful discussion in *SensaSlim* at [20]-[28] (Yates J).)

###### General deterrence considerations

1. As earlier intimated, the ACCC submits that two major categories of concern highlight the need for a penalty which will strongly deter other businesses from misrepresenting the provenance of Australian Indigenous art and souvenirs, namely:
2. the immediate consumer and market protection concerns; and
3. concerns as to the economic, social and cultural harm to Indigenous Australian persons, being a matter of particular concern in this case.
4. I consider each of these in turn below.

Consumer and market concerns

1. The ACCC submits that strongly deterrent penalties are necessary to ensure that consumers are not misled, and consumer choices are not distorted, in relation to the purchase of Indigenous Australian art and souvenirs. There are a number of aspects to their submission.
2. First, the ACCC submits that “*it is axiomatic that the maintenance of a fair, reliable and efficient market depends upon consumers having confidence that they are being given reliable truthful and accurate information. It is therefore important that businesses recognise this in how they choose to present their goods. If misrepresentations in the industry are not seen to attract appropriate penalties, the necessary consumer confidence will be undermined*” (ACCC’s penalty submissions at [11](a)). I agree.
3. In this regard, I note that I was not persuaded that on the balance of probabilities an ordinary consumer would reasonably be misled into thinking that the loose boomerangs and the bullroarers were hand-painted or made by an Aboriginal person but only that there was a real risk that a member of the class acting reasonably would be misled(*Birubi (No 1)* at [107]-[117] and [137]-[144]). As such, I accepted that a reasonable member of the class may not have been misled into inferring that these products were hand-painted by, or made by, a person of Aboriginal ethnicity. However, that does not in itself suggest that any lesser penalty should be imposed. Rather, as Allsop CJ emphasised in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2015] FCA 330; (2015) 327 ALR 540 (***Coles Supermarkets***) with respect to the representations in that case:

95. … Although the interpretation of the impugned phrases is a matter about which minds could differ, the fact that a debate that the phrases were misleading was objectively open indicate that the impugned phrases should never have been deployed in the way that Coles chose to deploy them. Corporations that market goods and services to consumers have an obligation to ensure that they do not mislead or deceive the public about the goods and services they are marketing. The existence of alternative constructions of the phrases they use is a matter they must take into account in their decision-making processes. The fact that some people may not be misled is not the point. It is important that sellers in the market recognise that consumers are entitled to reliable, truthful and accurate information. Confidence in such is a matter of importance for the Australian community and economy. It is an important factor in market efficiency. …

1. Secondly, in the context of an object presented as one of Aboriginal cultural significance, the misrepresentations were designed to enhance the cultural value and attractiveness of the products to potential purchasers: *Birubi (No 1)* at [75], [95], [116] and [153]. Professor Altman explained how this may entice uninformed customers to prefer the inauthentic Products over those in fact made by Australian Aboriginal artists: see further below at [44].
2. Thirdly, as I later explain, the potential impact of misrepresentations such as those made in this case are significant, with the Indigenous art and souvenirs sector having grown rapidly over the last 50 years and now generating revenue in the order of $300-500 million per year: see further below at [38]. As the ACCC submits:

An industry of that scale presents an obvious potential temptation for sellers of such artwork and souvenirs to misrepresent that particular products were made in Australia or made by Indigenous Australians in order to generate sales by enticing more customers into buying products that they incorrectly believe are “authentic” examples of Aboriginal art. There should be no room for the impression that it is worth courting the risk of such contravention (because it may not be detected or because the penalties could be treated as a mere cost of doing business).

(ACCC’s penalty submissions at [11](c))

1. As such, as the ACCC also submits, the imposition of a strong penalty is more likely to prevent any such cynical profit/risk calculus: see the discussion earlier above at [16]-[17]. It will also send a strong warning to businesses that they cannot, through non-compliance with the ACL, gain a competitive advantage over those businesses which comply with their obligations.

Economic, social and cultural harms

1. In support of its case as to the heightened need for a penalty at a level likely to achieve general deterrence, the ACCC relied upon the expert evidence of Professor Altman and Dr Marika addressing the economic, social and cultural harms which conduct of the kind engaged in by Birubi may cause directly and indirectly for Australian Aboriginal people and communities. This evidence emphasises the need in assessing such impacts to have regard in particular to the significant, systemic disadvantage suffered by Indigenous Australians especially in remote rural areas, and to the interrelationship between specific designs, personal identity, and connection to country, under Indigenous Australian lores and customs. It is therefore important to explain that evidence in some detail.

The report of Professor Altman

1. Professor Altman was asked to advise on:
2. the benefits to Australian Aboriginal people or communities of producing and selling Australian Aboriginal art and/or artefacts (Question 1); and
3. to assess the effect that the making of false and misleading representations of the kind upheld in *Birubi (No 1)* (the **Conduct**) is likely to have had, or may continue to have, on Australian Aboriginal people or communities in earning any such benefits (Question 2).
4. Professor Altman summarised his opinion on these questions as follows:

2. … for a significant portion of the adult Australian Aboriginal population, producing and selling aboriginal art is of considerable direct livelihood benefit. This is especially the case for impoverished Aboriginal Australian people who often live in remote circumstances where there are few other economic opportunities. The production and sale of art is one area where Aboriginal Australian people have a distinct competitive advantage. The production and sale of art also has demonstrable indirect community and wider economic, social and cultural benefits. …

3. … the Conduct … will have undermined the benefit to Australian Aboriginal people and communities who are looking to expand their involvement in the Indigenous Australian visual arts sector generally and in the expanding tourism merchandising segment in particular. These entrepreneurial efforts are being undertaken under difficult circumstances hindered by remoteness and associated poor market linkage. Such Conduct is likely to directly reduce financial benefits to Aboriginal artists and their communities and diminish emerging Aboriginal ‘brand equity’ with unfair competition based on false and misleading representations. It is also likely to enhance the risk of broader consumer uncertainty resulting in reduced demand for Aboriginal art more generally. Unfair market advantage and false representations that are elements of the Conduct will cause pain and suffering to Aboriginal artists who are especially sensitive to the unfair appropriation of their cultural property.

1. It is helpful to elaborate upon the basis identified by Professor Altman for these views.
2. First, while acknowledging that the financial value of the Australian Indigenous visual arts sector or number of Indigenous people engaged in the sector cannot be precisely identified, Professor Altman considered that a reasonable, broad assessment of the overall scale of the sector is as follows:

* Total revenue generated by the Australian Indigenous visual arts sector is currently in the order of $300-500 million per annum.
* The total numbers of Indigenous people engaged in work in the sector is likely to be in the order of 10,000-14,000 who are being paid for that work and as many as a further 80,000 who are not being paid for that work.
* The number of reported paid Australian Aboriginal artists as a proportion of the adult population is currently up to five times higher in remote Australia than in non-remote Australia.
* The employment situation for Indigenous Australians documented in the 2016 Census is dire, particularly in very remote Australia where only 3 in 10 adults are in jobs. Under such circumstances, any available opportunities for employment and income generation in the visual arts sector are of paramount importance.

(Altman report at [18])

1. Professor Altman also referred to what he explained was a “*more limited but more robust estimate*” of the value of sales to Indigenous Australian artists by reference to data from art centres over 14 years. While these figures excluded sales outside art centres including by commercial galleries, commercial tourism outlets, online and by individual Aboriginal Australian artists working independently, primary sales from art centres in the 2017/2018 financial year were estimated nationally at about $30m with approximately 60% of that turnover returned directly to artists, demonstrating the financial benefits to artists supported by community based art centres (Altman report at [22]). I also note in this regard that in submissions filed with leave after the hearing, the ACCC explained that these figures did not include royalties paid on resale under the *Resale Royalty Right for Visual Artists Act 2009* (Cth) (the **Resale Royalty Act**). That Act provides for a royalty of 5% to be paid to an Australian artist when the artist’s artwork is sold in a commercial resale (i.e. the second or subsequent sale in circumstances involving an art market professional), provided that the sale price of the artwork meets a specified amount: see ss 7, 8, 10 and 18 of the Resale Royalty Act.
2. Professor Altman also emphasised that the available data at the national level “*needs to be interpreted in the broader context of Indigenous socioeconomic marginality reflected in high levels of unemployment, high dependence on welfare income support, and high rates of household poverty*” (Altman report at [30]). Specifically, Professor Altman considered that:

31. Recent analysis of 2016 Census data shows that the employment gap between Indigenous and non-Indigenous Australians (measured by the employment to population ratio) has not closed and may be widening especially in remote and very remote Australia; and that poverty rates in remote and very remote Australia have consistently increased over the past three censuses, even as they have declined slowly for Indigenous people nationally. In 2016, for the first time, more than 50 per cent of the Indigenous population in very remote Australia are living in poverty.

32. Nationally the 2016 Census shows an Indigenous employment/population proportion of 46.7 per cent (compared to 71.8 per cent for non-Indigenous Australians), but this rate declines to 30.7 per cent in very remote Australia (compared to a non-Indigenous rate of 85.5 per cent, a massive disparity of nearly 55 per cent). Such employment disparities are indicative of the scarcity of employment opportunity for Indigenous Australians in remote Australia; and the relative importance of engagement in the visual arts sector both for activity and monetary income.

1. Secondly, building upon three case studies, Professor Altman highlighted the significant indirect economic and non-economic benefits for Aboriginal people and communities associated with engagement with the arts:

60. In situations where there are few formal employment opportunities and people live in deep poverty, successful engagement with the arts has extraordinary benefit. Artists are engaged and productive, and while often still on full or part welfare support, they cannot be categorised by demeaning terms such as the idle unemployed. Under current policy settings where the unemployed, especially in remote Australia, are required to work for the dole under the Community Development Program and where income is managed for many with the BasicsCard and the Cashless Debit Card, earnings from the arts give individuals a degree of economic autonomy and pride. Unrestricted dollars earned from the arts have higher value than quarantined dollars received as income support. Such economic autonomy provides artists the freedom to share their arts income with kin in a manner that is consistent with enduring Aboriginal custom.

1. Professor Altman also highlighted the multiple roles often fulfilled by art centres in remote Australia for Indigenous people including “*as a meeting place, a place of work and a place of cultural gravitas where art that often depicts highly valued regional cultural and political capital is produced and stored and marketed*” (Altman report at [63]). Such centres also generate indirect and intangible benefits for other community enterprises such as employment and training, as well as administrative support for the proper documentation of art thereby assisting in identifying and protecting the intellectual and cultural property of artists. In addition, art centres actively document and demarcate distinct regional art styles which become identity markers and “*sources of forms of power and prestige*” for arts communities (Altman report at [66]-[67]). Government funding for over 30 years has been premised upon recognition of the high economic and social rates of return on the investment of public funds in such centres (Altman report at [63]).
2. Thirdly, Professor Altman explained that misleading and deceptive conduct of the kind engaged in by Birubi:

71. … will have contributed to the undermining of benefits to Australian Aboriginal people and communities who are looking to expand their involvement in the Indigenous Australian visual arts sector generally and in the expanding tourism merchandising segment in particular. These entrepreneurial efforts are being undertaken under difficult circumstances hindered by remoteness and associated poor market linkage. Such Conduct is likely to directly reduce financial benefits to Aboriginal artists and their communities and diminish emerging Aboriginal ‘brand equity’ from unfair competition and misleading representations. It is also likely to enhance the risk of broader consumer uncertainty resulting in reduced demand for Aboriginal art more generally and potentially putting downward pressure on prices. Unfair market advantage and a sense of being exploited that could result from the Conduct will cause pain and suffering to Aboriginal artists who are especially sensitive to the unfair appropriation of their cultural property.

1. Professor Altman expanded upon his reasons as to why the conduct is likely to have direct and indirect negative impacts on the benefits accruing to Aboriginal artists and their communities and might jeopardise future growth of Aboriginal involvement in the sector.
2. In situations of information asymmetry exacerbated by misleading or ambiguous labelling, buyers may choose the inauthentic product, Product B, over the authentic product, Product A, and may do so influenced by inaccurate information. The misleading conduct of the manufacturer of the inauthentic product is thereby rewarded, resulting in a “*perverse and inequitable* *outcome*” (Altman report at [92]). That outcome,in turn, is likely to be exacerbated if the misrepresented Product B is also cheaper than the authentic Product A with the result that Product A may ultimately be driven out of the market. Accordingly, the direct financial consequence of such unethical practices may be a decline in demand for the authentic Product A with a consequential and potentially substantial reduction in financial returns to Australian Aboriginal artists whose income earning possibilities may, as earlier observed, be extremely limited.
3. Indirect impacts of such conduct include the possibility of a decline in consumer confidence in the sector generally at a time when some distinct Aboriginal brands are emerging, thereby unfairly reducing the commercial value of “*brand equity*” in the market. Professor Altman accepted that such impacts on one segment of the market may have limited impact upon other segments of the market such as handcrafted tourist art and fine art clearly attributed to named Aboriginal artists. However, he did not consider that such a possibility could be dismissed, especially where diverse products are displayed together, “*thus reducing the physicality of market segmentation and enhancing the possibility that the authenticity of all products will be questioned*” (Altman report at [97]).
4. Furthermore, Professor Altman pointed out that “*[j]ust as the benefits for Aboriginal artists of producing and selling art can extend beyond the direct to the indirect and wider induced benefits, so can the costs of the Conduct. It can have wider ramifications beyond the direct costs to the artists, such as to emerging Indigenous Australian Enterprises and to the reputation of Australian Indigenous tourism product more generally*” (Altman report at [98]).
5. Fourthly, Professor Altman commented on the pain and suffering that may be experienced by Aboriginal artists who become aware that some manufacturers are intentionally misleading consumers who make choices which undermine the current and future livelihoods of those artists. In this regard, Professor Altman expressed the view that:

102. … Given the socioeconomic disadvantage and deep poverty experienced by many Aboriginal people, it is unsurprising that they aspire to convert their cultural property into livelihood opportunities. Conversely, it is unsurprising that there is general resentment when unethical conduct reduces or eliminates prospects to gain livelihood benefits from the production and sale of Aboriginal art. Many Aboriginal artists resent any unfair requirement that they need to bear the additional burden of proving the “authenticity” of their merchandise that has resulted from misleading conduct by others.

The evidence of Dr Marika

1. Dr Marika explained that an Indigenous person’s right to produce specific designs is related to their connection to a specific place or country. As such, that right is integral to their identity such that the right should be carefully controlled by that person to protect their identity and that of future generations. As Dr Marika explained, “*[t]hese traditional lores exist because the designs are specific or sacred to an individual person from a specific place and clan and therefore need to be protected. The designs can be used to identify someone and are part of their own identity to their country*” (Dr Marika’s affidavit at [36]).
2. Dr Marika gave several examples to which she could speak, as follows:

34. … I inherited my father’s clan’s designs that relate to the “two sisters” creation story. As a woman, I am only allowed to depict the public parts of the story that relate to the sisters’ journey to Yirrkala, that is, their appearance, what they saw on their journey, their boat, and the morning star that guided them. The parts of the story relating to the sisters’ activities at Yalanbara (Port Bradshaw) is restricted to be used by men only. This site is registered as a sacred site and my family applied for registration of it as a National Heritage site based on its cultural history.

35. Additionally, from my father’s clan I have inherited a cross hatching design that uses 3 lines that are then etched. The other half of the Marika family clan (from the bay side of Yalanbara) use 4 lines. I am not allowed to use 4 lines, and they are not allowed to use 3 lines, as those designs belong to separate clans. This rule is understood and respected. If I used 4 lines, I would be seen by both sides of the Marika family as breaking the family’s law.

1. She explained that similar traditional lores exist across Australia so that a person from another clan or part of Australia, such as Central Australia, would not use North-East Arnhem land designs without permission, just as she would not use Central Australian designs without permission because she did not know or understand the lores governing the use of those designs (Dr Marika’s affidavit at [38]).
2. Dr Marika explained that the risk if the designs are used by a person who does not know the traditional lores about a design is that they would misuse or make a mistake when using the designs because “*they do not know the lores, the country or the songlines that relate to the design and are not worthy or initiated to use the design. Songlines are narratives that are used to describe the stories and activities of our ancestors*” (Dr Marika’s affidavit at [37]). As such, she said that it would be entirely inappropriate for a person to use a design which did not belong to them, whether they were a person from a different clan or the same clan, or were a non-Indigenous person.
3. She said that the traditional punishment for those who used or misused someone else’s design would be very serious and may result, for example, in a spearing, and that the owner of the specific design or their family could be held to account even if they did not grant permission. Today, she explained, the artist might use Western legal ways, such as copyright protection, to protect their design.
4. Importantly, Dr Marika explained that:

43. These lores and consequences relating to the use of Indigenous art without permission are due to the fact that protecting designs is important to protect the cultural identity associated with the design, both for present and future owners.

44. It is important to note that every clan design has guardians and caretakers who are responsible for directing how cultural items are made or designed, like a director of a theatre piece. These people have the knowledge as to how the design should be used or not used.

1. Dr Marika gave compelling evidence as to the cultural harm which may flow from the misuse of a design by someone without the requisite knowledge which it is necessary to set out in full:

45. If a design is used by someone who does not know or understand the lores, country or songlines relating to the design, they could risk misappropriating the art and conveying a meaning that is wrong or that is harmful to the meaning the design is meant to convey. Such use would mean that the design had been used without the permission of the design’s guardians or the appropriate family or clan.

46. Use of a design in this way can result in bad outcomes for the traditional owner of the design or their family, including due to breaching rules around whether designs are intended for public or non-public use. These outcomes could include being disowned or rejected by family or the clan and, traditionally, spearing or, in the worst case, death. This is even if the misuse is not the owner of the design’s fault, as the harm is done by the owner having allowed something sacred and private to be shown to the public in a way that could result in the breach of lore. The owner has exposed something that they did not have the rights to expose.

47. The impact of the misappropriation of art in a meaningless way that does not represent lore and culture is the dismantling of Indigenous cultural heritage. Indigenous Australians have, as described above, their own rules about their people and their country. Art identifies who you are and how you fit into Indigenous society. Misappropriation of art dismantles the cultural structure of Indigenous communities and causes damage to our identity.

1. Finally, Dr Marika considered that the types of risks to which she averted more generally in her evidence were realised by the use of the designs on the five product lines because Birubi had, in her view, misused cultural representations which may have bad consequences for those Indigenous persons responsible for the designs. However, as counsel for the ACCC emphasised, Dr Marika’s opinions in this regard are relevant to the question of general deterrence in that they demonstrate the kinds of risks that may ensue when designs, art and artefacts are presented as authentic when they are not. The insult and harm which such misuse may have caused and the consequences under Indigenous Australian lores and customs are not, however, matters which ought to be taken into account otherwise against Birubi in assessing the penalty as they are not factors which in themselves align with the conduct which is the subject of the contraventions, namely, misrepresenting the product lines as having been made in Australia and hand-painted by Australian Indigenous artists.

Conclusions as to economic, social and cultural harms

1. The economic, social and cultural harms to Indigenous persons and communities which may be occasioned by the misrepresentation of art and artefacts as made in Australia by Indigenous Australians, as so eloquently explained by Professor Altman and Dr Marika, highlight the need in the present case of sending a robust deterrent message. The Indigenous arts sector is, as the ACCC submits, of vital importance to Indigenous people, particularly in remote regions, in providing significant economic and social benefits to Indigenous designers, artists and art makers.

###### Specific deterrence

1. As earlier mentioned, the ACCC does not contend for a penalty greater than that necessary to secure general deterrence, given that Birubi is in liquidation. Nonetheless I accept the ACCC’s submission that:

20. … it is relevant to observe that, prior to liquidation, Birubi’s business assets were sold to Gifts Mate Pty Ltd, a company established and controlled by Birubi’s former Director, Mr Wooster. Specific deterrence may not, strictly speaking, extend to Gifts Mate. Nonetheless, the importance of ensuring that it does not follow Birubi’s choices as to presentation of products underscores the need for general deterrence.

1. Mr Wooster was the sole director of Birubi (*Birubi (No 1)* at [17]).

###### The appropriate approach to the multiple contraventions engaged in by Birubi

The issues

1. In the present case, every time a misleading representation was made as to one of the Products, there was a contravention of s 29(1)(a) or s 33 as applicable. As Birubi sold approximately 50,000 of the Products, it follows that there were at least tens of thousands of breaches of these provisions. Indeed, as the ACCC submitted, it may be the case that a contravention was made every time that a person examined one of the Products on public display: *Coles Supermakets* at [17] (Allsop CJ). If so, the number of contraventions would be well in excess of 50,000 and cannot be precisely identified.
2. In similar circumstances where there were a multitude of contraventions, Allsop CJ adopted the following approach in *Coles Supermarkets*:

18. Put simply, the position of the parties was that there were so many contraventions it was not helpful to seek to make a finding as to the precise number or to calculate a maximum aggregate penalty by reference to such a number. Rather, the better approach was to determine the penalty assisted by understanding the extent to which there was a certain number of courses of conduct leading to potentially a huge number of contraventions. The instinctive synthesis endorsed by the High Court in *Markarian* should then be conducted by reference to a recognition of the multiplicity of breaches, a broad view of the course or courses of conduct, and an assessment of the overall extent and seriousness of offending, together with all other relevant considerations, in particular deterrence. The comments of the Full Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at 262-263 [52]-[55] support this approach.

1. In line with this approach, the ACCC did not submit that the Court should identify a precise number of contraventions so as to determine the maximum penalty that could be imposed in aggregate (even if this were possible). Rather, it submitted that the contraventions were closely factually interrelated and therefore that attention should be given to three issues:
2. the extent to which the conduct was truly “*the same conduct*” for the purposes of s 224(4) of the ACL;
3. whether the separate acts giving rise to separate contraventions are nonetheless inextricably interrelated and may appropriately be grouped as a “*course of conduct*” for the purposes of assessing the appropriate penalty; and
4. the totality principle which requires the Court to make a “*final check*” of the penalties to be imposed on a wrongdoer considered as a whole.
5. The first two issues are addressed below, while the totality principle is addressed at the conclusion of these reasons.

“*The same conduct*” for the purposes of s 224(4), ACL

1. Section 224(4) of the ACL provides that if conduct constitutes a contravention of two or more provisions (relevantly ss 29 and 33), a proceeding may be instituted under the ACL against a person in relation to the multiple contraventions but “*a person is not liable to more than one pecuniary penalty under this section in respect of* ***the same conduct***” (emphasis added). As such, the section is directed to preventing multiple, and therefore cumulative, penalties being imposed on one contravener for the same conduct that constitutes a contravention of two or more provisions of the Act: *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 357 ALR 55 at [224] (the Court) (by analogy); *Australian Competition and Consumer Commission v* *Jetstar Airways Pty Limited (No 2)* [2017] FCA 205 at [13]-[17] (Foster J). As such, the provision is different from the course of conduct principle as the conduct must be truly “*the same*”, and not merely similar or repeated.
2. In *Birubi (No 1)* I found contraventions of different provisions of the ACL resulting from the same conduct for the purposes of s 224(4). As such, consistently with this provision the ACCC sought penalties in relation to the provision which it submitted most fully encapsulates the wrongdoing with respect to each product, namely:

a. ***Section 33 breaches***: In light of the Court’s findings in respect of the overwhelming impression conveyed by the Boxed Boomerangs and the Didgeridoos ([*Birubi (No 1)*] at [128] and [154]) and the findings in relation to the Message Stones ([*Birubi (No 1)*] at [162]), the s 33 contraventions most fully capture the gravity of Birubi’s conduct, which was positively liable to mislead. In respect of these Products, the ACCC seeks penalties in relation to s 33 but not in relation to ss 29(1)(a) and (k).

b. ***Section 29(1)(a) breaches***: With respect to the remaining two Products, the [loose] Boomerangs and Bullroarers, the contraventions of ss 29(1)(a) and 29(1)(k) arose from the misrepresentations that those products were hand-painted by Australian Aboriginal persons and made in Australia: [*Birubi (No 1)*]at [115] and [144]. Given that an Aboriginal cultural object hand-painted by Aboriginal persons would naturally be taken to have been made in Australia (see [*Birubi (No 1)*]at [91], [109] and [139]), penalties are sought for the s 29(1)(a) contraventions because they most fully capture the gravity of Birubi’s conduct with respect to these two products.

1. I agree with these submissions for the reasons given by the ACCC and have proceeded accordingly.

The course of conduct principle and the maximum penalty

1. As earlier indicated, the course of conduct principle has frequently been applied in imposing penalties for breaches of the ACL, particularly when the number of legally distinct breaches is large: see e.g. *Reckitt* at [139]-[145] (the Court); *TPG Internet* at [60]-[61]; and *Singtel Optus (FCAFC)* at [51]-[55]. The Full Court recently considered the course of conduct principle in *Yazaki,* explaining that:

234. The “course of conduct” or “one transaction” principle means that consideration should be given to whether the contraventions arise out of the same course of conduct or the one transaction, to determine whether it is appropriate that a “concurrent” or single penalty should be imposed for the contraventions. The principle was explained by Middleton and Gordon JJ in *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 194 IR 461 at [39]:

The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is “the same criminality” and that is necessarily a factually specific enquiry.

(Emphasis omitted.)

1. However, the course of conduct principle is a useful “tool of analysis” in the civil penalty process which can, but need not necessarily, be used in the particular case: *Yazaki* at[235]; *Australian Competition and Consumer Commission v Cement Australia* [2017] FCAFC 159; (2017) 258 FCR 312 (***Cement Australia***)at [424] (the Court).
2. As the ACCC also submitted, however, when applied, the principle does not convert the many separate contraventions into only five contraventions; nor does it impose a “cap” upon the available maximum penalty. Ultimately, the object is to ensure that the penalties imposed are of appropriate deterrent value having regard to the actual, substantive wrongdoing: *Cement Australia* at [428] (the Court) (ACCC’s penalty submissions at [28]).
3. In the present case, I agree with the ACCC’s submission that it is appropriate to group the myriad of contraventions into five groups corresponding to each of the Products. As the ACCC submits, this grouping “*takes into account the significantly overlapping nature of contraventions which relate to the same product, the repetition of the same misrepresentations over time, and the same underlying decision as to choice of packaging and labelling for the product*” (ACCC’s penalty submissions at [27]).

Consideration of the statutory maximum as a guide where the course of conduct principle applies

1. In *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [31], Gleeson CJ, Gummow, Hayne and Callinan JJ held that:

… careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. …

1. It is well established that this reasoning applies equally to civil penalties, as has been accepted in numerous decisions of the Federal Court (*Reckitt* at [155] (the Court)). Furthermore as the Full Court emphasised in *Reckitt* at [155]-[156]*,* the maximum penalty must not be applied mechanically but rather “*as one of a number of relevant factors, albeit an important one*”. In this regard, the Court further explained that:

156. … Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed.

1. The maximum penalty for contraventions by a corporation of a provision in Part 3-1 of the ACL was $1.1 million at the time of the contraventions in this case: item 2, s 224(3). As the $1.1 million maximum applies to each contravention notwithstanding the course of conduct principle, this case is analogous to *Reckitt* insofar as the Full Court found that there was no meaningful overall maximum penalty given the very large number of contraventions in that case over a long period of time (at [3] and [157]). The amount of the penalty, in other words, is well beyond that which the Court would ever impose (*Coles Supermarkets* at [82] (Allsop CJ)).
2. Nonetheless, as the ACCC submits, I accept that the maximum penalty for a single contravention can appropriately operate as a guide against which to consider the whole of the overlapping wrongdoing in each course of conduct: see e.g. *Coles Supermarkets* at [82]-[84] and [103] (Allsop CJ). As, for example, Beach J held in *Australian Energy Regulator v Snowy Hydro Limited (No 2)* [2015] FCA 58 in applying the course of conduct principle:

119. This approach does not convert the maximum penalty for one contravention into the maximum penalty for the course of conduct as a whole. Nonetheless, the statutory maximum of $100,000 for each separate contravention operates as a guide to the seriousness with which Parliament regards wrongdoing of that kind. Additionally, given the significant overlap in the wrongdoing, it is appropriate to look at how the proposed penalties for the course of conduct sit against the maximum for a single contravention.

###### Relevant factors and the intuitive synthesis approach

Relevant principles

1. Section 224(2) of the ACL provides that in determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:
2. the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission;
3. the circumstances in which the act or omission took place; and
4. whether the person has previously been found by a court in proceedings under Chapter 4 or Part 5-2 of the ACL to have engaged in any similar conduct.
5. Other potentially relevant factors include (but are not limited to):
6. the size of the contravening company;
7. whether the conduct was systematic, deliberate or covert;
8. the period over which the conduct extended;
9. the involvement (or absence thereof) of senior management of the contravener; and
10. whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of the ACL in relation to the contravention.

(See e.g. *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076 at [52,152] (French J (as his Honour then was)); *NW Frozen Foods* at 292 (Burchett and Kiefel JJ); *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761; (2011) 282 ALR 246 (***Singtel Optus (FCA)***) at [11] (Perram J) (reversed on appeal in *Singtel Optus (FCAFC)*, but not in a relevant respect); and *Jetstar (2019)* at [52] (Perry J).)

1. In addition, as the ACCC submits, a consideration of the actual and potential benefits from the wrongdoing will often be relevant to ensuring that a penalty has an appropriate deterrent value (ACCC’s penalty submissions at [34]).
2. There is, as Allsop CJ pointed out in *Coles Supermarkets* at [9], a degree of overlap between these factors and the statutory mandatory considerations.However, as his Honour further explained: “*[t]hese factors do not necessarily exhaust potentially relevant considerations; nor do they regiment the discretionary sentencing function*”(ibid).
3. Importantly, all of these factors ultimately fall to be considered in furtherance of the primary, if not sole, object of the civil penalty provisions to secure compliance through deterrence: see the earlier discussion, especially at [16]-[18] above.
4. Furthermore, as I recently explained in *Jetstar (2019)* at [54], in common with criminal sentencing, the process of arriving at the appropriate civil penalty under the ACL (and its predecessor, the *Trade Practices Act 1974* (Cth)) involves an intuitive or instinctive synthesis of all of the relevant factors rather than a sequential mathematical process: *Coles Supermarkets* at [6] (Allsop CJ). This does not of course mean that all of the considerations which are relevant to criminal sentencing are also relevant to assessing an appropriate civil penalty. Rather it is the process itself which is the same. Instinctive synthesis in this sense was helpfully described by McHugh J in *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 as meaning:

51. … the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case” (at [51])

(See also by analogy *Barbaro v The Queen* [2014] HCA 2; (2014) 253 CLR 58 (***Barbaro***)at [34]-[35] (French CJ, Hayne, Kiefel and Bell JJ).)

1. This does not mean that the final result is a “*gut reaction*”, as the Full Court explained in *Reckitt* at [175]. Rather, it must be the outcome of a reasoned and transparent process.

The nature, extent and duration of the conduct

1. I have referred earlier to the summary of the conduct engaged in by Birubi contrary to the ACL (see above at [3]). In essence, Birubi represented that each of the Products were hand-painted by Australian Aboriginal persons and that they were made in Australia when in fact neither was true. The Products were manufactured in Indonesia and were not hand-painted by Australian Aboriginal persons. The representations were made by implication from the nature of each of the Products as traditional Aboriginal cultural objects (save for the message stones), the use of, and prominence given to, particular words (e.g. “*AUSTRALIA*”, “*HAND PAINTED*”, “*HAND MADE*”, and “*Authentic Aboriginal art*”), the use of images, symbols, and designs which are characteristic of Aboriginal artwork, and the absence of any reference on the Products or their labels or packaging to the products having been made in Indonesia.
2. The misrepresentations went to a claimed measure of authenticity which would enhance the cultural value of the Products and therefore their attractiveness to potential purchasers (*Birubi (No 1)* at [75], [95], [116] and [153]). As I held for example in *Birubi (No 1)* at [116] with respect to the loose boomerangs, “*it can be inferred that prospective purchasers, whether international or Australian, would be attracted to the loose boomerangs precisely because they recognise the cultural association between the object, and the art, designs and symbols used, on the one hand, and Australian Aboriginal people and culture, on the other hand*.” This claimed authenticity was, as the ACCC submits, more serious for the boxed boomerangs, didgeridoos and message stones where the inference was so compelling or overwhelming that it was more probable than not that a member of the class would be misled (*Birubi (No 1)* at [128], [154] and 162]). I agree that the penalties should reflect this greater level of seriousness in the contraventions with respect to these products.
3. The contraventions were also serious in their extent and duration. In particular, the following matters are evident from the expert report of Mr Lytras (the **Lytras report**):
4. Some 244 retail outlets around Australia stocked at least one of the Products over the period 1 July 2010 to 14 November 2017 (Lytras report at [9.4] and Annexure 8). While, as the ACCC accepts, these figures include sales made before the relevant period, namely, 1 July 2015 to 14 November 2017, the figures also illustrate the reach and extent of Birubi’s distribution and, therefore, the reach of the misrepresentations as the ACCC also submits.
5. While only 352 bullroarers were sold during the relevant period, the volume of the Products sold over this time was otherwise significant. Specifically, Birubi sold 15,688 loose boomerangs, 7,167 boxed boomerangs, 19,472 didgeridoos, and 6,814 message stones (Lytras report at [7.6]).
6. Birubi charged $324,210 for sales of the Products in the relevant period (Lytras report at [11.5]).
7. While the duration of the wrongdoing varied, as the ACCC submits, it was in all cases substantial and systemic, ranging from 11 months for the Bullroarers to the whole of the 28 months of the relevant period for the loose and boxed boomerangs (Lytras Report at [8.1]-[8.5]). These were not isolated incidents.
8. Differences in the seriousness of the contraventions must also be taken into account in assessing the appropriate penalty for each course of conduct in recognition of the fact that the magnitude of the possible consequences of the wrongdoing is relevant to general deterrence: see *Flight Centre Limited v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; (2018) 356 ALR 389 (***Flight Centre***) at [72] (the Court).

Relevant circumstances including deliberateness and the role of management

1. Birubi has been a wholesaler in the souvenir industry since 2006 (affidavit of Mr Wooster sworn 30 May 2018 at [3]-[4]). Its products were sold in a range of outlets around Australia (the **Outlets**) to a broad range of consumers. In particular, I held in *Birubi (No 1)* at [72] that:

72. … The Outlets comprised souvenir shops, gift shops, museum gift shops, shops described as galleries, and convenience stores; each of which sell souvenirs, keepsakes and gifts. The Outlets, not surprisingly, tended to be located at places frequented by tourists including Sydney Airport and popular tourist destinations such as Bondi Beach, Kings Canyon, Mount Lofty, and Cairns. Furthermore, at least in the case of the Mason Gallery, the Products were also sold alongside what … Birubi described as “*more expensive, authentic artworks*”, as well as a variety of other souvenirs, gifts and mementos. As such, it was not in issue that the relevant class of purchasers and potential purchasers of the Products includes international tourists, interstate tourists, and those seeking to purchase a gift. Moreover, it is clear that the Products were not directed toward sophisticated consumers of Aboriginal art. As such, I agree with the ACCC that the potential class of consumers is a broad one and should be presumed to include “*the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, and men and women of various ages pursuing a variety of vocations”: Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd* (1980) 31 ALR 73at 93 (Lockhart J) (cited with approval by Deane and Fitzgerald JJ in *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (***Taco Bell***) at 202; see also *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2007] FCA 1904;(2007) 244 ALR 470 (***ACCC v Telstra***) at [17] (Gordon J).

1. It follows that the representations were directed to the general public and had the potential to mislead a broad range of customers including international tourists whose familiarity with Aboriginal art and cultural practices is likely to be limited (as I found in *Birubi (No 1)* at [75]). Further, Birubi stood to gain financially from prospective customers being misled, as the ACCC submitted (see further below).
2. As to the deliberateness of the conduct, the Full Court held in *Reckitt* at [129] that the deliberateness of conduct falls to be considered “*as a spectrum where, depending on the facts, the characterisation of kinds of conduct might involve more nuanced considerations than are capable of being conveyed by the limited concepts of knowing, reckless or innocent contraventions*.” In this regard, I expressly did not find in *Birubi (No 1)* that Birubi had any intention to mislead potential purchasers as the question of whether there was a contravention was an objective one (*Birubi (No 1)* at [14]). That said, however, I also found at [75] that the association between the objects and their designs on the one hand, and traditional Aboriginal art and cultural objects, on the other hand, was “***chosen*** *for emphasis on the labelling on the Products … as a feature rendering the Products more attractive to prospective purchasers. In this regard, Mr Wooster explained that Birubi* ‘*create[s] the packaging to highlight the product within the package*’” (emphasis added). Furthermore, Mr Wooster gave evidence that: he made the final decision as to the text on the packaging and labelling for the Trisha Mason products even though the supplier provided the packaging, prints and labelling (at [38]); he specified the Aboriginal style to be used for producing the bamboo didgeridoo product lines and approved the designs (at [43]); and he chose the symbols for the message stones from the internet (at [44]). It will be recalled that Mr Wooster was the sole director of Birubi. In this regard, it may be inferred that the presentation of the Products generally was, as the ACCC submits, the result of deliberate marketing choices by Mr Wooster as to the products, designs, labelling and packaging – being factors which were integral to the misleading impression conveyed by the Products.
3. In these circumstances, I agree with the ACCC’s submission that the absence of a positive intention to contravene the ACL is not a mitigating factor, but means no more than that the assessment of the penalty should be approached on the basis of the same neutral state of mind that was required for liability: *Reckitt* at [131] (the Court).
4. As to the involvement of senior management, as I have said, Mr Wooster was the sole director and had responsibility for the day-to-day operations of the company.

Loss or damage caused

1. The economic, social and cultural harms arising from Birubi’s conduct and the risks which future contraventions potentially pose have already been considered, and amply justify the imposition of a penalty which the ACCC submits should provide “*an emphatic general deterrent*” (ACCC’s penalty submissions at [46]).
2. In considering the loss and damage in fact caused by the wrongdoing, as opposed to the need to deter future harms, the ACCC submitted that the following matters are relevant:

47. *First*, as to the purchasing consumers, a precise or even global assessment of any loss to consumers or competitors is difficult, if not impossible: see e.g. *Coles Supermarkets*, [54]-[57]. The harm is better understood as the loss of an opportunity, if provided with accurate information about the goods, to make a different purchasing decision. For the reasons explained by Professor Altman (at [91]-[97]), it can properly be concluded that the misleading representations influenced some consumers to purchase Birubi’s products believing them to be “authentic” in ways that they were not. Given accurate information, at least some of the consumers can be expected to have preferred items that were made by Australian Aboriginal artists.

48. *Secondly*, while ultimately unquantifiable, Birubi’s conduct is likely to have contributed to the kinds of economic, social and cultural harms to participants in that sector which have been explained above. This is because the conduct is likely to have contributed to undermining benefits to Aboriginal people and communities in the Indigenous arts and souvenir sector and risked causing broader consumer uncertainty in relation to Aboriginal art: Altman Report, [71], [89]ff. Additionally, Birubi’s misrepresentations as to Indigenous authenticity and provenance are likely to have caused cultural harm and offence. They were made in relation to products that are considered by Dr Marika to have “misrepresented Indigenous culture and offended Indigenous lore and cultural values” (Dr Marika’s affidavit, [54]-[55]) and they are likely to cause pain and suffering associated with the unfair appropriation of cultural property: Altman Report, [71], [101]-[102].

1. I agree with these submissions. First, while it is not possible to make any meaningful assessment of loss to consumers or competitors, it is clear from Professor Altman’s evidence that the misleading representations may have enticed uninformed customers to prefer the inauthentic Products over the authentic art and products made by Australian Aboriginal artists and artisans. As such, the potential loss occasioned by consumers is properly understood as a loss of the opportunity to make a choice between the authentic and the inauthentic products based upon accurate information. Secondly, the sheer number of the Products sold and Outlets renders it likely that they contributed to the kinds of economic, social and cultural harms to Aboriginal artists and communities to which Dr Marika and Professor Altman testified. That said, it should also be acknowledged that, while the didgeridoos and message stones were produced without the involvement of an Indigenous artist, the designs used on the other products were created by the Aboriginal artist, Trisha Mason (*Birubi (No 1)* at [36]).
2. Decisions on penalties under other regulatory regimes demonstrate the relevance of harms of a non-economic nature to the determination of civil penalties. By way of example, in *Matcham*, in considering appropriate civil penalties for contraventions of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) Jacobson J took into account the potential impact of non-compliant behaviour upon the provision of essential services such as health and medical services to local communities by such corporations (*Matcham* at [238]-[244]). His Honour emphasised that this “*underscores the need for a robust message to be given to persons responsible for the management of such corporations that contraventions of the Act will be treated seriously*” (*Matcham* at [238]). As a further example, in *Reckitt* at [114], the Court took into account the loss, or at least serious distortion, of genuine consumer choice occasioned by the provision of misleading information about pain relieving products and the risk of harm by reason of additional or prolonged duration of pain. Furthermore, the Court took into the emotional costs inflicted on victims of tax exploitation schemes in *Commissioner of Taxation v International Indigenous Football Foundation Australia Pty Ltd* [2018] FCA 528; (2018) 107 ATR 769 at [61].
3. In short, I accept the need for robust penalties to strongly discourage conduct of the kind engaged in by Birubi which can give rise to such widespread economic, social and cultural harms, as well as to pain and suffering, and to ensure that it cannot be regarded by would-be offenders as merely a cost of doing business.

Prior similar conduct

1. The ACCC accepts that Birubi has not previously been found by a Court to have engaged in any similar conduct (ACCC’s penalty submissions at [51]).

Size, financial position and benefits

1. Mr Wooster was the sole director and shareholder of Birubi and the person responsible for Birubi’s day-to-day management: see [6] of the Questionnaire for Directors and Officers at Annexure HAR-3 to the affidavit of Holly Ritson affirmed on 7 June 2019. Birubi was a relatively small company with adjusted earnings before interest, tax, depreciation and amortisation in the 2017 and 2018 financial years of $223,976 and $165,646 respectively: Lytras report at [2.5].
2. Birubi ceased trading on 29 October 2018 shortly after the decision in *Birubi* *(No 1),* with a liquidator appointed on the same day (*Birubi (No 2)* at [2]). In his report to creditors, the liquidator reported that on 30 June 2018, Mr Wooster sold nearly all of the assets of the business to a related company, Gifts Mate Pty Ltd.
3. Birubi profited from its sale of the Products. Mr Lytras found that over the relevant period, 49,493 Products were sold, and Birubi paid a total price of $134,358 for the Products while charging a total price of $324,210 (Lytras report at [2.1]). I do not agree, however, as an unqualified proposition with the ACCC’s submission that at least a proportion of these sales resulted from customers being misled into choosing its products by the false impression given as to their cultural value. This is because Birubi did not sell directly to consumers but was a wholesaler. It was not any part of the ACCC’s case that Birubi had contravened the ACL by reason of misrepresentations made to retailers. As such, the proposition that Birubi benefited from the misrepresentations to consumers must refer to an indirect benefit in terms of its sales to retailers as a consequence, for example, of the retailers having successfully moved earlier Birubi stock, i.e., due to there being sufficient demand in terms of sales for retailers to purchase Birubi stock. In this sense, based upon the volume of sales and duration of the conduct it can be inferred that a proportion of Birubi’s sales resulted indirectly from sales to customers who were misled into choosing its products.
4. In any event, I agree with the ACCC’s submission that the nature of the harms which may be caused if other corporations are not deterred from engaging in similar contraventions carry far greater weight than the monetary benefits which Birubi may have received as a consequence of the contravening conduct.

Co-operation with the ACCC

1. Birubi responded to a voluntary request for information during the ACCC’s investigation and did not dispute certain aspects of the ACCC’s case which were unlikely to have been controversial in any event (*Birubi (No 1)* at [3]-[11]). As a consequence, the issues between the parties in the first stage of the trial (liability) largely reduced to the question of whether the implied representations were made. Beyond that, however, there is no evidence of any meaningful co-operation with the ACCC (save for that shown by the liquidator who has entered a submitting appearance including as to costs). As such, Birubi has demonstrated minimal co-operation and it cannot be said that Birubi’s level of co-operation has saved the ACCC from incurring substantial costs and conserved valuable court resources: cf e.g. *Jetstar (2019)* at [84]-[86] (Perry J). It follows that I agree with the ACCC that no discount in the civil penalty is warranted for co-operation.

###### Consideration of penalties to reflect the various factors

1. Applying these principles and factors, the question then arises as to the identification of penalties having the appropriate deterrent value for the five courses of conduct.
2. For the reasons earlier explained, I consider that it is appropriate and in line with authority to consider the statutory maximum of $1.1 million for a single contravention as a guide to an appropriate penalty for each course of conduct. In so doing, I emphasise that each course of conduct is comprised of multiple contraventions and that the course of conduct principle does not impose a cap upon the statutory maximum of $1.1 million.
3. While there is no specific evidence as to loss or damage suffered by particular individuals or communities, the evidence as to the potential for direct and indirect economic, social and cultural harm occasioned by conduct of this nature for Indigenous Australian artists and more broadly for Indigenous communities is powerful. Furthermore, given that the conduct had significant potential to mislead or deceive (and in the case of some products, overwhelmingly so), the duration of the conduct, the number of outlets across the country to which the products were supplied, and the number of products sold, it is clear that the objective seriousness of the conduct is considerable.
4. It is also appropriate that the penalties reflect some level of difference in the gravity of the different courses of conduct, as the ACCC submits, by reference to:
5. the duration of the wrongdoing;
6. the volume of sales involved; and
7. the specific findings of the Court as to the particular character of the misleading representations in each case.
8. In this regard, as the ACCC also submits, it is not the case that a breach of s 33 is by its nature more serious than a breach of s 29 given in particular that each provision carries the same maximum penalty. It is necessary to consider the findings with respect to each course of conduct in order to determine their objective seriousness.
9. Applying this approach so as to ensure that penalties are imposed in amounts likely to be seen as significant against a yardstick of $1.1 million and which would reflect such differences, I consider that the penalties should be imposed as follows.
10. ***Didgeridoos*:** I agree thatthe contraventions of s 33 by the misleading representations conveyed by the didgeridoos are the most serious of the contraventions established against Birubi. I found that the didgeridoos and their labelling conveyed a misleading impression of an “*overwhelming*” kind which was positively liable (in the sense of a greater than 50% probability) to mislead (*Birubi (No 1)* at [154]). Furthermore, these involved the highest volume of sales of any of the Products (19,472) which extended for a lengthy period (over two years). The ACCC submitted that a penalty of $600,000 to $700,000 was appropriate. Given these factors and the need to convey a strong message of general deterrence, I consider that a penalty of $700,000 is appropriate.
11. ***Boxed boomerangs***: Again I considered that the boxed boomerang, the plaque on its stand and its labelling and packaging conveyed the “*overwhelming impression*” that it was made in Australia and hand painted by an Australian Aboriginal person which was positively liable to mislead (*Birubi (No 1)* at [128]). Sales of these also extended for over two years. However, as they involved a considerably lower volume (7,167), I agree that a lower penalty than that imposed with respect to the didgeridoos is appropriate. The ACCC submitted that a range of $400,000 to $500,000 is appropriate. I consider that a penalty between these two figures of $475,000 is appropriate having regard to all of the relevant considerations.
12. ***Message stones***: Again, these misrepresentations were more likely than not to mislead (*Birubi (No 1)* at [162]) and extended for a lengthy period (19 months). The volume (6,814) is comparable to the boxed boomerangs and, as such, I agree with the ACCC that a comparable penalty is appropriate and therefore have reached the view that a penalty of $475,000 should be imposed.
13. ***Loose boomerangs:*** These misrepresentations created a real risk of misleading consumers as to the authenticity and provenance of the product, which was the dominant message conveyed (*Birubi (No 1)* at [115]-[117]) but were not found to be liable to mislead (*Birubi (No 1)* at [107]). Nonetheless the gravity is increased by the high volume (15,688) and lengthy period over which the misrepresentations were made (2 years, 4 months). The ACCC submitted that a penalty of $400,000 to $500,000 would reflect an appropriate balance between these factors. In my view overall a slightly lesser penalty should be imposed than for the boxed boomerangs and the message stones, and consider that the appropriate penalty is $450,000.
14. ***Bullroarers***: These misrepresentations created a real risk of misleading consumers as to the authenticity and provenance of the product, which was the dominant message conveyed (*Birubi (No 1)* at [144]) but were not found to be liable to mislead (*Birubi (No 1)* at [138]). They involved a low volume (only 352 bullroarers) and extended for less than a year. The ACCC contended that a penalty of $200,000 to $300,000 is appropriate. I agree that a lesser penalty is warranted for these reasons and consider that the appropriate balance is struck by a penalty in the sum of $200,000.
15. Finally, as I recently held in *Jetstar (2019)* with respect to the totality principle*:*

59. … the Court must consider all of the contravening conduct and determine whether the total penalty for each offence aggregated together exceeds that which is proper for the entire contravening conduct involved (the **totality principle**): *Mill v The Queen* (1988) 166 CLR 59 (***Mill***) at 63 (the Court) (by analogy). As such, the totality principle operates as a final check of the penalties to be imposed on the respondent, considered as a whole. As Goldberg J explained in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 (***Safeway Stores***)at 53:

The totality principle is designed to ensure that overall an appropriate sentence or penalty is [imposed] and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved.

60. The application of the totality principle will not necessarily result in a reduction in the penalty. Rather, as the parties submit, in cases where the Court considers that the cumulative total of the penalties to be imposed would be too high or too low, it should alter the final penalties to ensure that they are “*just and appropriate*”: *Safeway Stores* at 53 (quoting *Mill* at 63).

1. In the present case, the ACCC submits that the significant overlap in wrongdoing is properly accounted for by the course of conduct approach adopted and the cumulative total can be seen to be just and appropriate. As such the ACCC submits that no discount is required for totality reasons. I agree and consider that penalties in this range are just and appropriate.

##### CONCLUSION

1. For these reasons, I consider that penalties totalling $2,300,000.00 are appropriate and just for Birubi’s conduct.

|  |
| --- |
| I certify that the preceding one hundred and eight (108) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perry. |

Associate:

Dated: 26 June 2019