FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Limited (No 2) [2015] FCA 1090

Citation:	Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Limited (No 2) [2015] FCA 1090
Parties:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v HOMEOPATHY PLUS! AUSTRALIA PTY LIMITED and FRANCES MERCIA SHEFFIELD**
File number:	NSD 256 of 2013
Judge:	**PERRY J**
Date of judgment:	13 October 2015
Catchwords:	**CONSUMER LAW** – where representations made on respondent company's website that the whooping cough vaccine is ineffective and there is a reasonable basis in medical science for stating that homeopathy is an effective alternative – where representations misleading and deceptive contrary to ss 18 and 29, *Australian Consumer Law* – where grant of injunctive relief appropriate – where parties' submissions as to appropriate amount of any penalty disregarded as irrelevant (*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 59; (2015) 229 FCR 331) – whether to quantify penalty as separate contraventions or one or more courses of conduct – consideration of relevant factors in imposing pecuniary penalty under s 224, *Australian Consumer Law* – where significance of loss and damage is potential to divert customers from vaccinating themselves and those in their care posing grave risks of harm to them and the community – where little weight given to absence of proof of actual loss or harm – where contraventions extremely serious due to grave risks posed to public health – where general and specific deterrence primary consideration – whether imposition of pecuniary penalty would be crushing on individual contravener due to extenuating personal circumstances **COSTS** – where no reason to depart from general principle

that costs follow the event – where individual respondent submitted that the company should bear costs exclusively or predominantly – where no basis for differentiating between respondents in their conduct of the case – where ordinary course that an order for costs be joint and several between respondents followed

Legislation:

Australian Consumer Law (*Competition and Consumer Act 2010* (Cth), Schedule 2), ss 18, 29, 224, 232
Competition and Consumer Act 2010 (Cth), s 137H

Cases cited:

Australian Competition and Consumer Commission v ACN 135 183 372 (in liquidation) (formerly known as Energy Watch Pty Ltd) [2012] FCA 749
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36
Australian Competition and Consumer Commission v Breast Check Pty Ltd (No 2) [2014] FCA 1068
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited [2015] FCA 330
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 EnergyAustralia Pty Ltd [2015] FCA 274
Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Limited [2014] FCA 1412; (2014) 146 ALD 278
Australian Competition and Consumer Commission v MSY Technology Pt Ltd (No 2) [2011] FCA 382; (2011) 279 ALR 609
Australian Competition and Consumer Commission v Safe Breast Imaging Pty Ltd (No 2) [2014] FCA 998
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 TPG Internet Pty Ltd [2013] HCA 54; (2013) 250 CLR 640
Australian Competition and Consumer Commission v Visa Inc [2015] FCA 1020
Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd (1997) 78 FCR 197
Barbaro v The Queen [2014] HCA 2; (2014) 253 CLR 58
Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 59; (2015) 229 FCR 331
Dowdell v Knispel Fruit Juices Pty Ltd [2003] FCA 1276
Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd (1984) 2 FCR 82
Hughes v Western Australian Crick Association (Inc.)

(1986) ATPR 40-748
Jones v Sterling (1982) 63 FLR 216
Markarian v The Queen [2005] HCA 25; (2005) 228 CLR 357
Noone (Director of Consumer Affairs Victoria) v Operation Smile (Aust) Inc [2012] VSCA 91; (2012) 38 VR 569
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
Ruddock v Vadarlis (No 2) [2001] FCA 1865; (2001) 115 FCR 229
Scott v Secretary, Department of Social Security (No 2) [2000] FCA 1450
Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; (2012) 287 ALR 249
SZAFV v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1457
Tax Practitioners Board v Li [2015] FCA 233
TPG Internet Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 190; (2012) 210 FCR 227
Trade Practices Commission v Nicholas Enterprises Pty Ltd (1979) 28 ALR 201

Date of hearing:	22 April 2015
Date of last submissions:	25 May 2015
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	94
Counsel for the Applicant:	Ms R Higgins
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Counsel for the Respondents:	Mr M White
Solicitor for the Respondents:	Mackenzie and Vardanega Solicitors

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 256 of 2013**

BETWEEN:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** **Applicant**
AND:	**HOMEOPATHY PLUS! AUSTRALIA PTY LIMITED** **First Respondent**
	FRANCES MERCIA SHEFFIELD **Second Respondent**

JUDGE:	**PERRY J**
DATE OF ORDER:	**13 OCTOBER 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The First Respondent and the Second Respondent cease publishing and remove from the website www.homeopathyplus.com.au permanently:
   (a) the article entitled "Whooping Cough – Homeopathic Prevention and Treatment" published from 1 January 2011 until around 26 April 2012;
   (b) the article entitled "Whooping Cough – Homeopathic Prevention and Treatment" published from 11 January 2013 until around March 2013 and;
   (c) the article entitled "Government Data Shows Whooping Cough Vaccine a Failure" published from 3 February 2012 until around March 2013.
2. The First Respondent and Second Respondent be restrained, whether by themselves, their agents, servants or howsoever otherwise, for a period of five years from making any statements or representations, in trade or commerce, in connection with the supply or possible supply of homeopathic treatments or products (**Homeopathic Treatments**) or in connection with the promotion of the supply of Homeopathic Treatments, to the effect that the vaccine publicly available in Australia for whooping cough (**Vaccine**):
   (a) is short-lived in protecting against whooping cough;
   (b) is unreliable in protecting against whooping cough;

(c) is no longer effective in protecting against whooping cough;

(d) may not be the best solution for protecting against whooping cough;

(e) is of limited effect in protecting against whooping cough;

(f) is unreliable at best in protecting against whooping cough; and/or

(g) is largely ineffective in protecting against whooping cough,

for so long as the Vaccine is effective in protecting a significant majority of people who are exposed to the whooping cough infection from contracting whooping cough.

3. The First Respondent and Second Respondent be restrained, whether by themselves, their agents, servants or howsoever otherwise, for a period of five years from making any statements or representations, in trade or commerce, in connection with the supply or possible supply of Homeopathic Treatments or in connection with the promotion of the supply of Homeopathic Treatments, to the effect that Homeopathic Treatments are a safe and effective alternative to the Vaccine for the prevention of whooping cough, for so long as:

(a) there is no reasonable basis, in the sense of an adequate foundation, in medical science to enable the First Respondent and the Second Respondent to state that Homeopathic Treatments are safe and effective as an alternative to the Vaccine for the prevention of whooping cough; and

(b) the Vaccine is the only treatment approved for use by the Therapeutic Goods Administration for inclusion on the National Immunisation Program for the prevention of whooping cough.

4. Given Orders 2 and 3 above, the Respondents are released from the undertaking by their counsel given on 1 March 2013.

5. Pursuant to s 224 of the *Australian Consumer Law*, the First Respondent pay to the Commonwealth within 30 days of the making of this Order by the Court a pecuniary penalty of $115,000 in respect of the acts constituting its contraventions of s 29(1)(a), (b) and (g) of the *Australian Consumer Law*.

6. Pursuant to s 224 of the *Australian Consumer Law*, the Second Respondent pay to the Commonwealth within 90 days of the making of this Order by the Court a pecuniary penalty of $23,000 in respect of the acts constituting her contraventions of s 29(1)(a), (b) and (g) of the *Australian Consumer Law*.

7. A copy of the reasons for judgment given on 22 December 2014, with the seal of the Court thereon, be retained in the Court for the purposes of section 137H of the *Competition and Consumer Act 2010* (Cth).

8. The Respondents pay the Applicant's costs of the proceeding as agreed or assessed.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 256 of 2013**

BETWEEN:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** **Applicant**
AND:	**HOMEOPATHY PLUS! AUSTRALIA PTY LIMITED** **First Respondent**
	FRANCES MERCIA SHEFFIELD **Second Respondent**

JUDGE:	**PERRY J**
DATE:	**13 OCTOBER 2015**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1. INTRODUCTION

1 In reasons delivered on 22 December 2014, I concluded that the respondents, Homeopathy Plus! Australia Pty Limited (**Homeopathy Plus**) and Frances Mercia Sheffield had engaged in misleading and deceptive conduct in trade or commerce and thereby contravened ss 18 and 29 of the *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) (**ACL**): *Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Limited* [2014] FCA 1412; (2014) 146 ALD 278 (the **liability judgment**). Those contraventions arose from representations that the vaccine publicly available in

Australia for whooping cough (the **Vaccine**) was ineffective and that there was a reasonable basis in medical science for stating that homeopathic treatments are a safe and effective alternative to the Vaccine.

2 At the same time as I delivered my reasons, declarations were made giving effect to the conclusions reached in the liability judgment in the following terms:

> (1) The First Respondent and the Second Respondent have in trade and commerce:
>
> (a) engaged in conduct that was misleading and deceptive or was likely to mislead and deceive, in contravention of section 18 of the Australian Consumer Law ("**ACL**"); and
>
> (b) in connection with the supply or possible supply of homeopathic treatments or products ("**Homeopathic Treatments**"), and in connection with the promotion of the supply of Homeopathic Treatments, made false or misleading representations that the vaccine publicly available in Australia for whooping cough ("**Vaccine**") is of a particular standard or quality in contravention of sections 29(1)(a) and (b) of the ACL,
>
> by publishing, or causing to be published, on the website www.homeopathyplus.com.au ("**Website**"):
>
> (c) from 1 January 2011 until around 26 April 2012, an article entitled "Whooping Cough – Homeopathic Prevention and Treatment" (the "**First Whooping Cough Article**") in which a representation was made to the effect that the Vaccine is short-lived, unreliable and no longer effective in protecting against whooping cough;
>
> (d) from 11 January 2013 until around March 2013, an article entitled "Whooping Cough – Homeopathic Prevention and Treatment" (the "**Second Whooping Cough Article**") in which a representation was made to the effect that the Vaccine may not be the best solution for, is of limited effect, and is unreliable at best, in protecting against whooping cough; and
>
> (e) from 3 February 2012 until around March 2013 an article entitled "Government Data Shows Whooping Cough Vaccine a Failure" (the "**Government Article**") in which a representation was made to the effect that the Vaccine is largely ineffective in protecting against whooping cough;
>
> when, in fact, the Vaccine is effective in protecting a significant majority of people who are exposed to the whooping cough infection from contracting whooping cough.
>
> (2) The First Respondent and the Second Respondent have in trade or commerce:
>
> (a) engaged in conduct that was misleading and deceptive or was likely to mislead and deceive, in contravention of section 18 of the ACL;
>
> (b) in connection with the supply or possible supply of Homeopathic Treatments, and in connection with the promotion of the supply of Homeopathic Treatments, made false or misleading representations that the Homeopathic Treatments are of a particular standard or quality in contravention of section 29(1)(a) and (b) of the ACL; and
>
> (c) in connection with the supply or possible supply of Homeopathic Treatments, and in connection with the promotion of the supply of Homeopathic Treatments, made false or misleading representations that Homeopathic Treatments have a use or benefit in contravention

of section 29(1)(g) of the ACL,

by publishing, or causing to be published, on the Website:

(d) the First Whooping Cough Article;

(e) the Second Whooping Cough Article; and

(f) the Government Article in conjunction with the Second Whooping Cough Article,

in which representations were made to the effect that there was a reasonable basis, in the sense of an adequate foundation, in medical science to enable it or them (as the case may be) to state that Homeopathic Treatments are a safe and effective alternative to the Vaccine for the prevention of whooping cough when, in fact:

(g) there is no reasonable basis, in the sense of an adequate foundation, in medical science to enable the First Respondent and the Second Respondent to state that Homeopathic Treatments are safe and effective as an alternative to the Vaccine for the Prevention of Whooping Cough; and

(h) the Vaccine is the only treatment currently approved for use and accepted by medical practitioners in Australia for the prevention of whooping cough.

3 For convenience and consistently with the liability judgment, I will describe the representations as to the alleged lack of effectiveness of the Vaccine referred to in paragraph (1) of the declaration as the "**Vaccine Representations**" and the representations as to the alleged effectiveness of homeopathic treatments in prevention of whooping cough referred to in paragraph (2) as the "**Homeopathy Alternative Reasonable Basis Representations**".

4 Following delivery of the liability judgment, a hearing was held on penalty with further evidence being led. The terms of any injunctive relief and other final relief were also argued at that hearing. As I later explain, supplementary submissions were filed by the applicant by leave following delivery of judgment by the Full Court of the Federal Court in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 59; (2015) 229 FCR 331 (***FWBII v CFMEU***).

2. THE EVIDENCE

5 The applicant led evidence as to the existence of a webpage on the website of Homeopathy Plus (the **Website**) concerning homeoprophylaxis in April 2015. The evidence was led to support the applicant's submission as to the need for specific deterrence and was not objected to on that basis. Mrs Sheffield also gave evidence by affidavit sworn 16 March 2015. She was not cross-examined on that evidence.

3. INJUNCTIONS

6 The Court has power to grant an injunction under s 232 of the ACL in such terms as the Court considers appropriate on the application of the ACCC if satisfied that a person has

engaged or is proposing to engage in conduct that constitutes or would constitute, relevantly, a contravention of a provision of Chapter 2 or 3 in which ss 18 and 29(1)(a), (b) and (g) respectively appear. The power is a broad one, extending under subs (4) to the grant of an injunction irrespective of, for example, whether it appears to the Court that the person intends to engage again in the contravening conduct or whether there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind. The power is subject to at least three limitations (*Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197 at 202-4 (Merkel J)):

(1) it is confined by reference to the scope and purpose of the ACL, which would include injunctive relief designed to prevent a repetition of the conduct for which the relief is sought;

(2) as the Court must be satisfied that the injunction sought is "*appropriate*", there must be a sufficient nexus or relationship between the contraventions and the injunction sought; and

(3) the injunction must relate to the case or controversy the subject of the proceeding.

7 As finally formulated, the ACCC seeks orders that the respondents:

(1) be permanently restrained from publishing the First Whooping Cough Article, the Second Whooping Cough Article and the Government Article (the **Three Articles**);

(2) be restrained for a period of 5 years from making representations in trade or commerce, in connection with the supply, possible supply or promotion of homeopathic treatments or products, ***to the effect that***:

a) the whooping cough Vaccine is, among other things, short-lived, unreliable and no longer effective, for so long as the Vaccine is effective in protecting a significant majority of people who are exposed to the whooping cough infection from contracting whooping cough;

b) homeopathic treatments are a safe and effective alternative to the Vaccine for the prevention of whooping cough, for so long as there is no reasonable basis in medical science to enable the respondents to state so, and the Vaccine is the only treatment approved for use by the Therapeutic Goods Administration for inclusion on the National Immunisation Program for the prevention of whooping cough.

8 The respondents did not oppose the grant of an injunction in these terms. However, they submitted that in the reasons which accompany the decision on penalty and other relief, a number of matters should be noted, allegedly to clarify the scope of the injunctions, and that "*the logical, but narrow, import of the Federal Court's decision*" is that Mrs Sheffield "*may not re-publish these **specific** articles or say the **same** things as written in those articles within the commercial context*" (emphasis added).

9 With respect, the submission is misconceived. First the injunction is the operative order which is required to be obeyed and must embody in its own terms with precision the conduct which it restrains. As such, any narrowing of the scope of the injunction can be effected only by narrowing the terms of the injunction itself. Yet the respondents did not seek any such amendment.

10 Secondly, even if it were suggested that the injunction should be limited in this way, I do not consider that that would be appropriate. Different words could be used to convey representations to the same effect as the contravening representations and be equally misleading and deceptive.

11 Thirdly, I agree with the ACCC's concerns that the respondents may, absent injunctions in the terms proposed, engage in the offending conduct again in trade and commerce and in connection with the supply or possible supply of homeopathic treatments. In this regard, I note that the Second Whooping Cough Article was Mrs Sheffield's attempt to address the concerns raised by the ACCC with respect to the First Whooping Cough Article but was also found to be in breach of ss 18 and 29 of the ACL. Further, Mrs Sheffield admits that she is a passionate advocate of homeoprophylaxis and that this passion leads her to advocate against vaccination because she believes homeoprophylaxis is the better approach. This passion has been pursued in publishing the Three Articles in conjunction with promoting her online shop. Nor, as the ACCC submits, has Mrs Sheffield demonstrated any remorse either in her evidence at trial or in her affidavit on penalty, or promised not to engage in the impugned conduct again. As such, given that Mrs Sheffield is the sole director of Homeopathy Plus and is responsible for all of the content uploaded to the Website, I consider that there is a real, if not significant, risk that the respondents will engage in the contravening conduct again absent the injunction.

12 In the fourth place, the contravening representations posed a grave risk of serious harm to the health and safety of those consumers who may rely upon them and, in the case of parents, to

their infants and children, should they be persuaded not to vaccinate. Any future contravention along the same lines carries the same risks.

13 Furthermore, as in *Australian Competition and Consumer Commission v Breast Check Pty Ltd (No 2)* [2014] FCA 1068 (***Breast Check***) at [44] (Barker J), it is in the public interest to grant an injunction as it appropriately reinforces the understanding in the public mind, and to other would-be operators of such businesses, that considerable care needs to be taken to comply with consumer laws so as not to put the public interest and, more particularly, members of the public, at risk.

14 Finally, the injunctions do not forbid the respondents from holding or expressing opinions. They prevent the respondents from making representations to the effect of those found to be false and misleading in contravention of the ACL when made in trade and commerce in connection with the supply or possible supply of homeopathic treatments or products. As the ACCC submits, representations made by the respondents in trade and commerce must be held to standards of responsible accuracy. It is well established that matters of consumer protection and the prohibition of misleading and deceptive conduct in s 18 of the ACL are a justifiable limitation on the common law doctrine of freedom of speech: *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 86–87 (the Court); *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Aust) Inc* [2012] VSCA 91; (2012) 38 VR 569 at 610 [144]-[145] (Nettle JA).

15 In all of the circumstances, I am satisfied that it is appropriate to make the injunctions sought by the ACCC.

4. PENALTY

4.1 The decision in *Director, Fair Work Building Industry Inspectorate v CFMEU* delivered after judgment on penalty was reserved

16 After judgment on penalty and other final orders was reserved, the Full Court of the Federal Court delivered judgment in *FWBII v CFMEU*. In that decision, the Full Court held that the Court's task in proceedings for the imposition of a pecuniary penalty is to fix the appropriate penalty in the exercise of discretion. A submission made by the parties, agreed or otherwise, as to an appropriate penalty or range of penalties is an impermissible expression of an opinion, and is irrelevant and contrary to the process of instinctive synthesis which the exercise of discretion requires (*FWBII v CFMEU* at 335 [3], 376 [138]-[139], 388 [180], 391-392 [190]-[194] and 404-405 [239]-[241] (the Court)). In so holding, the Full Court held that

the decision of the High Court in *Barbaro v The Queen* [2014] HCA 2; (2014) 253 CLR 58 (***Barbaro***) concerning the exercise of the sentencing discretion in criminal trials was equally applicable to the exercise of discretion to set a pecuniary penalty in civil proceedings instituted by the regulator.

17 As a result, the parties were granted leave to provide further written submissions on the effect of that decision, together with copies of the transcript and the earlier submissions on penalty from which all submissions by the ACCC as to the suggested amount of penalty were redacted. The respondents accepted that the ACCC had redacted the appropriate references to penalty in the relevant documents. In the circumstances I have not had regard to the redacted paragraphs of the applicant's outline of submissions on relief, redacted penalty amounts in the applicant's proposed minutes of final orders, or redacted passages from the transcript.

18 The ACCC submitted, and I agree, that the Court may still however have regard to the remaining parts of its outline of submissions on relief which address the facts and evidence, the relevant principles including penalty factors, and comparable decisions to the extent that those decisions did not involve the Court's approval of agreed pecuniary penalties. As to the last of these points, however, as the applicant also pointed out, the Full Court considered in *FWBII v CFMEU* that decisions in which a penalty was imposed following the matter being resolved by consent may not be treated as helpful in future cases, save to the extent that they indicate a position by a regulator to which it should be held in later cases (at 404 [238]).

4.2 Penalty principles

19 The principles governing the imposition of a penalty were not in dispute. Under s 224 of the ACL, the Court is empowered to order a person to pay to, relevantly, 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*". That provision applies relevantly only to the contravention of s 29 of the ACL which is located within Part 3-1 of the ACL. Section 224 has no application to s 18.

20 Section 224(2) provides that in determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:

(1) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and

(2) the circumstances in which the act or omission took place; and

(3) whether the person has previously been found by a court in proceedings under Chapter 4 or Part 5-2 to have engaged in any similar conduct.

21 Otherwise, potentially relevant factors, as identified in *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761; (2011) 282 ALR 246 at 250-251 [11] (Perram J), include:

(1) the size of the contravening company;

(2) the deliberateness of the contravention and period over which it extended;

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

(4) whether the contravener has a corporate culture conducive to compliance with the ACL as evidenced by, for example, educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;

(5) whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of the ACL in relation to the contravention;

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

(7) the financial position of the contravener; and

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

22 The list is not exhaustive and should not be approached in a regimental formulaic way. As Wigney J recently pointed out in *Australian Competition and Consumer Commission v Visa Inc* [2015] FCA 1020 (***ACCC v Visa***) at [83], "*to do that would impermissibly constrain or formalise what is, at the end of the day, a broad evaluative judgment*."

23 The process of arriving at the appropriate sentence for a criminal offence involves an intuitive or instinctive synthesis of all of the relevant factors: *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 (***Markarian***) at 373-374 [35]-[37] (Gleeson CJ, Gummow, Hayne and Callinan JJ). The same approach has been held to apply to civil penalties under the ACL and its predecessor provision in the *Trade Practices Act 1974* (Cth): *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 190; (2012) 210 FCR 227 at 294 [145] (the Court); *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274 at [103] (Gordon J); *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2015] FCA 330 (***ACCC***

v Coles) at [6] (Allsop CJ). Instinctive synthesis was helpfully described by McHugh J in *Markarian* as meaning "*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 378 [51]). In short, as Gaudron, Gummow and Hayne JJ explained in *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at 611 [75] (in a passage approved in *Markarian* at 374 [37]), "*the task of the sentencer is to take account of* ***all*** *of the relevant factors and to arrive at a single result which takes due account of them all*" (emphasis in original).

24 Accordingly, as the High Court recently emphasised in *Barbaro* at 72 [34]-[35] (French CJ, Hayne, Kiefel and Bell JJ), sentencing (and by analogy, setting a pecuniary penalty) is not a mathematical exercise:

> Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts. As the plurality said in *Wong v The Queen* [(2001) 207 CLR 584 at 611 [75]], "[s]o long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform" (original emphasis).
>
> No less importantly, any determination of the bounds of an available range of sentences would have to depend upon first, what considerations are judged to bear upon the fixing of sentence and secondly, what effect is given to those considerations.

25 The deterrent effect of a pecuniary penalty is a particularly significant consideration to which regard must be had when determining an appropriate penalty for commercial and competition related contraventions, including s 29. As the Full Court said in the context of assessing a pecuniary penalty for a consumer protection contravention by a corporation in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 (***Singtel Optus***) at 265 [62], "*in relation to offences of calculation by a corporation where the only punishment is a fine, the punishment must be fixed with a view to ensuring that the penalty is not such as to be regarded by that offender or others as an acceptable cost of doing business.*" The High Court approved this statement in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 at 659 [66], explaining at 659 [65]:

> General and specific deterrence must play a primary role in assessing the appropriate penalty in cases of calculated contravention of legislation where commercial profit is

> the driver of the contravening conduct.

26 In considering the appropriate penalty to secure deterrence, some consideration must be given to the size and financial position of the contravener. The sum required to achieve the object of the deterrence will be larger where the company has vast resources than in the case of a small company: *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (***NW Frozen Foods***) at 293 (Bruchett and Kiefel JJ); *ACCC v Visa* at [96] (Wigney J).

27 In this process, careful attention to maximum penalties will always be required because the legislature has legislated for them, they invite comparison between the case before the court and the worst possible case, and they provide, taken and balanced with all of the other relevant factors, a yardstick: *Markarian* at 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ). However, even where the maximum penalty is high and the amount necessary to provide effective deterrence is large, the amount of the penalty cannot be so high as to be oppressive. As Burchett and Kiefel JJ explained in *NW Frozen Foods*, "*[p]lainly, if deterrence is the object, the penalty should not be greater than is necessary to achieve this object; severity beyond that would be oppression*" (at 293).

28 The Court may in some cases derive assistance from penalties imposed previously in comparable cases, particularly where those cases establish a pattern or range of penalties imposed for like contraventions. That assistance is subject to the caveat following the decision in *FWBII v CFMEU* explained at [18] above.

29 Finally, as the ACCC submits, the total penalty for related offenses ought not to exceed what is proper for the entire contravening conduct involved (the **totality principle**). The totality principle operates as a final check. As Goldberg J explained in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36:

> The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate 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.

30 Alternatively as I explain below in certain circumstances it may be appropriate for the Court to treat a number of contraventions as a course of conduct so as to warrant the imposition of only one penalty.

4.3 The respondents' position as to penalty

31 The respondents submit that in exercising its discretion the Court should not order a pecuniary penalty against Mrs Sheffield personally and should significantly temper the pecuniary penalty against Homeopathy Plus. I consider the respondents' specific submissions in support of their respective positions in the course of considering the relevant factors.

4.4 Consideration of relevant factors

4.4.1 Quantifying the contraventions – maximum penalty and course of conduct

32 As a corporate respondent, the maximum penalty that may be imposed on Homeopathy Plus for each contravention is $1.1 million, while in Mrs Sheffield's case, the maximum penalty that may be imposed for each contravention is $220,000 (s 224(3), item 2, ACL). A person is not liable to more than one pecuniary penalty in respect of the same conduct if the conduct constitutes a contravention of two or more penalty provisions (s 224(4), ACL). In this proceeding, the ACCC submitted that the maximum penalty that can be imposed against Homeopathy Plus is $6.6 million and against Mrs Sheffield, $1.32 million, comprising six acts or omissions for each respondent for the making of two offending representations in contravention of s 29 of the ACL in each of the Three Articles published on the Website.

33 However, as I have mentioned, where there are multiple contraventions, it is also within the Court's discretion to consider whether a number of contraventions should be treated as separate contraventions for penalty purposes, or as falling within one or more courses of conduct: *Australian Competition and Consumer Commission v MSY Technology Pt Ltd (No 2)* [2011] FCA 382; (2011) 279 ALR 609 at 630 [97] (Perram J); *Australian Competition and Consumer Commission v Safe Breast Imaging Pty Ltd (No 2)* [2014] FCA 998 (***Safe Breast Imaging***) at [31] (Barker J). Typically the purpose in so doing is "*to ensure the punishment fits the contravention and the penalty outcome is not artificially, and unjustly, inflated because of the sheer number of contraventions found*": *Safe Breast Imaging* at [31] (Barker J); see also *ACCC v Coles* at [17]-[18] (Allsop CJ).

34 Ultimately each case must be approached on its own facts. The Vaccine Representations and the Homeopathy Alternative Reasonable Basis Representations were made together in the First and Second Whooping Cough Articles in order relevantly to promote the online store. They were, in effect, "two sides of the same coin" and are not readily treated separately. In my view, the two representations in the case of each of these articles ought fairly to be

considered as part of the same contravention. To do otherwise would, in my view, produce an artificial and unjust outcome on penalty.

35 The position with the Government Article is more complex. The Government Article in its own terms contained the Vaccine Representation and I consider that constitutes a separate contravention. It was only in conjunction with the Second Whooping Cough Article that the Government Article made the Homeopathy Alternative Reasonable Basis Representation. That being so, in my view the Homeopathy Alternative Reasonable Basis Representation in the Government Article ought properly to be considered as part of the same course of conduct as the Second Whooping Cough Article for the purposes of setting a penalty.

36 In those circumstances, the starting approach to a pecuniary penalty assessment is that Homeopathy Plus is liable to a maximum pecuniary penalty of $3.3 million and Mrs Sheffield to a maximum pecuniary penalty of $660,000.

4.4.2 The nature and extent of the acts or omissions and any loss or damage suffered (s 224(2)(a))

37 The representations were made in the Three Articles published on the Website which hosts an online shop for the purchase of homeopathy treatments and products. As I have mentioned, Mrs Sheffield, the sole director of Homeopathy Plus, is the author of the Three Articles, was solely responsible for the content uploaded onto the Website and uploaded the Three Articles. Mrs Sheffield has promoted the prophylactic qualities of homeopathy through Homeopathy Plus for several years.

38 Mrs Sheffield's evidence fell well short of providing any credible basis for the impugned representations regarding the Vaccine. To the contrary, the evidence emphatically established that the Vaccine is effective. Conversely, there was no evidence of any support even among peak homeopathic associations for the use of homeopathy treatments as an alternative to the Vaccine, nor any published literature that supported the efficacy or effectiveness of homeopathic treatments as an alternative to the Vaccine.

39 The key issue here, in my view, in considering the significance of loss and damage, is not the question of the effect of the conduct on other "competitors", but the potential to divert consumers from immunising themselves and those in their care, with potential risks to their health and to the broader community (see by analogy e.g. *Breast Check* at [29] (Barker J)).

40 On this issue, the respondents stress in mitigation of penalty that no consumer was shown to have suffered loss or damage; nor was any evidence led of any consumer complaint. However, if even one consumer has been diverted from vaccinating to her or his detriment, or to the detriment of those in their care such as an infant, the potential consequences to their health may be very serious and at worst, fatal. These risks were increased by the informative style adopted in the articles including that the deficiencies in the Vaccine were presented as if they were established and accepted in orthodox medicine. This impression was only reinforced by the terms of the disclaimer that appeared before a visitor could access the Second Whooping Cough Article in the members' area of the Website.

41 Nor is this a case where the evidence suggests a narrow publication of the offending representations. The Three Articles were published on the internet and accessible to any member of the general public including for the period that the Second Whooping Cough Article was accessible only in the members' area of the Website.

42 In these circumstances, I do not consider that much weight can be given to the absence of proof of actual loss or damage. I am reinforced in this view by the fact that the number of persons who accessed the Website during the period when the Three Articles were published on the Website is likely to have been substantial. So much may be inferred from the fact that as at 28 June 2013, being some three or four months after the Second Whooping Cough Article and the Government Article were removed from the Website, there were 12,041 subscribers to the email newsletters. Added to this, the period for which the representations were made on the Website were lengthy, particularly in the case of the contravening representations made in the First Whooping Cough Article which was published from 1 January 2011 until 26 April 2012 and the Vaccine Representation in the Government Article which was published from 3 February 2012 to around March 2013. It should also be borne in mind that this is a case where the representations are such that actual loss or damage may not readily be proved such as in a case where children may have suffered injury as a result of misleading and deceptive representations to their parents about the safety or age appropriateness of a toy. It is also a case where injury consequential on heeding the representation, i.e. a consumer or child contracts the disease or suffers more severe symptoms, may not occur for some time. Moreover, at a general level, such representations risk serious harm to the Australian community in potentially reducing the capacity of communities to cocoon vulnerable infants and others, and to achieve herd immunity.

43 I therefore agree with the ACCC that the respondents' conduct in making the impugned representations in trade and commerce was extremely serious. This is so notwithstanding that there is no evidence of actual consumer loss or harm. I do not consider that the respondents intended such harm.

4.4.3 The circumstances in which the contraventions took place (s 224(2)(b))

44 Details as to the circumstances in which the contraventions took place are contained in the liability judgment and it is not necessary to repeat those at length here.

45 The First Whooping Cough Article was written at some time during 2009 and published on the Website from 1 January 2011 until 26 April 2012. The banner at the top of the page did not refer to the online shop. However, the article appeared on a page with a toolbar on which the click through button "*Shop*" appeared. Visitors to the Website could, by clicking through a series of two or three links commencing with the "*Shop*" button, reach a page where they could purchase Drosera which was referred to in the First Whooping Cough Article as a remedy for the prevention of whooping cough.

46 From 20 April 2012, the ACCC corresponded with Mrs Sheffield for the purpose of requesting that the First Whooping Cough Article be removed from the Website. That article was removed from the Website shortly thereafter on 26 April 2012 following a verbal undertaking given by Mrs Sheffield to the ACCC in a telephone conversation on the same day. In line with statements by Mrs Sheffield in the course of that conversation, she always intended to re-upload the First Whooping Cough Article when she had undertaken further research and decided whether any part of it needed to be changed on Mrs Sheffield's instructions.

47 The Second Whooping Cough Article was uploaded to the Website by Mrs Sheffield's son on 11 January 2013 where it remained until around March 2013. This article was a revised version of the First Whooping Cough Article. In the interim, Mrs Sheffield had read some further material. When the Second Whooping Cough Article was uploaded, Mrs Sheffield believed that it could not be accessed outside the members' area on the Website. Before accessing material within the members' area, a visitor was required to view a disclaimer stating that information on the Website "*is for general information and education purposes only*" and to accept a set of terms and conditions. The terms and conditions were exceedingly lengthy and it was highly unlikely that any visitor would trawl through them merely to access another part of the Website for free.

48 Subsequently, when Mrs Sheffield visited the Website on 15 January 2013 after receiving an email from the ACCC, she saw that the Second Whooping Cough Article was not only visible in the members' area, but also on the public area of the Website where it had been accessible for the previous four days. That day, Mrs Sheffield asked her son to remove the article from the public area of the Website so that it would be accessible only within the members' area after viewing the front disclaimer screen. Two days later on 17 January 2013, Mrs Sheffield spoke to an employee of the ACCC on the telephone and advised the ACCC that the Second Whooping Cough Article could now only be accessed in the members' area on signing an agreement. The ACCC did not at this time say that the Second Whooping Cough Article should be removed.

49 The Government Article was uploaded to the Website on 3 February 2012 where it remained until around March 2013. Mrs Sheffield's motives in uploading the Government Article were in part to advocate for a change in the government's approach. However, they were also to promote her online shop. This article was freely accessible to any member of the public who visited the Website without becoming a member of the Website. In contrast to the First and Second Whooping Cough Articles this article did not refer to any specific homeopathic products. Nonetheless it sought to promote homeopathic remedies in a partial and persuasive tone giving the impression, when read with the Second Whooping Cough Article, that homeopathy provides a safe and effective alternative to the Vaccine.

50 The potential class of consumers viewing the Website, including when the Second Whooping Cough Article was accessible only in the members' area, was unlimited. The breadth of persons accessing the Website has already been referred to and included men and women of various ages pursuing a variety of vocations, including the astute and the gullible, the intelligent and the not so intelligent, the well-educated and the poorly educated.

4.4.4 Whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of the ACL in relation to the contravention

51 In removing the First Whooping Cough Article and in responding immediately to the email from the ACCC with respect to the Second Whooping Cough Article by checking the website to see whether its publication was limited to the members' area, Mrs Sheffield and through her, Homeopathy Plus, have demonstrated a disposition to cooperate with the ACCC in relation to the contraventions.

52 Furthermore, in these proceedings Mrs Sheffield and Homeopathy Plus gave an undertaking on 1 March 2013 that, until the final determination of the proceedings, the respondents would cease publishing and remove from the Website the Second Whooping Cough Article and the Government Article, and would not make any statements or representations in trade or commerce to the effect that relying solely on homeopathic treatments without vaccination is a safe and effective alternative to the Vaccine for the prevention and/or treatment of whooping cough, and that the Vaccine:

(1) is short-lived in protecting against whooping cough;

(2) is unreliable in protecting against whooping cough;

(3) is no longer effective in protecting against whooping cough;

(4) may not be the best solution for protecting against whooping cough;

(5) is of limited effect in protecting against whooping cough;

(6) is unreliable at best in protecting against whooping cough; and/or

(7) is largely ineffective in protecting against whooping cough.

4.4.5 Whether the respondents have previously engaged in similar conduct (s 224(2)(c))

53 The respondents have not previously been found by a Court to have engaged in similar conduct.

4.4.6 The size and financial position of Homeopathy Plus and the financial position and other personal circumstances of Mrs Sheffield

54 Mrs Sheffield was diagnosed with a serious medical condition requiring medical intervention early this year which may incapacitate her for some time and affect her capacity to earn an income for an unknown period. Her husband is a paraplegic with significant and multiple health problems and I infer is financially dependent on Mrs Sheffield. Mrs Sheffield is currently his primary carer.

55 Mrs Sheffield gave evidence that any personal financial liability, whether by way of a pecuniary penalty or costs, would be "*financially ruinous*" for her and have "*significant consequences*" on her family. She also gave evidence that she anticipated that any fine or award of costs against the company would lead to its ultimate winding up and liquidation.

56 Mrs Sheffield's evidence that the proceeding has involved significant financial costs for her is not challenged, nor that part way through the proceeding she was unable to continue to pay

for her legal team who continued acting for her *pro bono* thereafter. While, as the ACCC point out, it was her election to defend the proceedings, no doubt the reality is that the decision to do so has adversely affected her financial situation. It may also be inferred from the serious medical conditions that afflict both Mrs Sheffield and her husband that they impact upon Mrs Sheffield's capacity to earn an income and that the costs of those medical conditions impose a financial burden. Mrs Sheffield, however, provided evidence of her financial position only by way of a brief and manifestly inadequate statement of personal assets and personal liabilities prepared by her which showed a personal net worth significantly in the red. The evidence of the financial position of Homeopathy Plus was equally inadequate with again a brief statement of business assets and liabilities prepared by Mrs Sheffield which again showed a business with no significant assets and significant liabilities when measured against those assets. No disclosure was made as to income received by Mrs Sheffield or Homeopathy Plus. No bank statements were provided or other documents created by independent third parties. No evidence was led from any past accountant or the current accountant recently engaged by Mrs Sheffield; nor, while the engagement of the new accountant was given as the reason for the inadequate financial disclosure, was any explanation given as to why she or he had been engaged only now. Mrs Sheffield's evidence as to difficulties in collating the material and recent engagement of a new accountant does not, in my view, adequately explain the complete failure to address the issue of income and alleged inability to pay any penalty in her case and a low penalty in the case of Homeopathy Plus.

57 Nonetheless, Mrs Sheffield gave evidence that she works five to six days a week in her practice as a homeopath, and leases one of the rooms in the Homeopathy Plus premises. It can also be inferred that income continues to be generated by sales from the online store. That income is apparently sufficient to employ her two adult children, together with two part-time employees, who draw a wage from the company. Moreover, Mrs Sheffield gave evidence that some of the proceeds received from the online shop have been donated to homeopathic and other charities, some of which receive regular monthly donations from the company. In addition, while Homeopathy Plus can be described as a small family company, it must not be overlooked that the newsletter had many thousands of subscribers and the Website had an unlimited audience.

58 It was accepted by the ACCC that the evidence was sufficient to establish that Mrs Sheffield and Homeopathy Plus were in difficult financial circumstances with limited capacity to pay a

pecuniary penalty and that this must be taken into account in ensuring that the penalty is not oppressive. I agree. I also consider that I should have regard to the fact that Mr Sheffield is financially dependent on Mrs Sheffield and not in a position to earn an income through his own labours. However, in the circumstances, I cannot find that the imposition of any penalty on Mrs Sheffield would be financially ruinous. There is clearly income being earned by Mrs Sheffield and her company Homeopathy Plus which she has chosen not to disclose.

59 In this regard, the decision in *Tax Practitioners Board v Li* [2015] FCA 233 on which Mrs Sheffield relies is distinguishable. In that case, the Court held that Mr Li should not be required to pay any penalty for recklessly making false or misleading statements in tax returns lodged on behalf of various taxpayers contrary to the *Tax Agent's Services Act 2009* (Cth). However, among other points of distinction, the evidence in that case "***demonstrated***" that the penalty sought would have a crushing impact on him and his wife and children who were financially dependent on him (at [98(2)]). Mr Li had also lost his livelihood and ability to work in his profession as he had lost his registration as a tax agent as a result of his actions (at [126]). Further, the offences came about as a consequence of Mr Li being deliberately and carefully targeted by the perpetrators of a sophisticated scam (at [98(7)]).

60 Furthermore, even if Homeopathy Plus were currently in liquidation, that would not of itself have been an immutable reason for not imposing a penalty on Homeopathy Plus: *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513 (***Dataline***) at 519 [19]-[21] (the Court). For example, the Court may wish clearly and unambiguously to signify to companies or traders in a discrete industry that a penalty of a particular magnitude was appropriate and might be imposed in the future: *Dataline* at [20]. In any case, the question remains what is the appropriate penalty in all of the circumstances: *Dataline* at [21].

4.4.7 Senior management in the conduct and whether Homeopathy Plus' corporate culture was conducive to compliance with the ACL

61 The contravening conduct was the result of Mrs Sheffield's actions. There was no evidence regarding the compliance culture of Homeopathy Plus although that is not unexpected for a company of its type and size, as the applicant submits.

4.4.8 The need for general deterrence

62 The respondents contend that general deterrence need not weigh so heavily in the Court's mind in its assessment as to whether to impose a pecuniary penalty or as to the amount of any such penalty for the following reasons:

> - the publicity this case has already received;
> - the characteristics of the Homeopathy Plus! Advocacy business and the Sheffield family are sufficiently unique that it would not be fair or just in the circumstances of this case to use them any further to communicate a broader message to the market;
> - to use the Sheffield family (with both parents suffering from significant health problems and facing financial ruin, possibly even if the Court makes no further monetary or costs orders against them) as a tool for general deterrence would be oppressive and crushing.

63 There was no evidence led as to the extent of publicity which the case had received although it was not in issue that the liability judgment had received some publicity and it may be accepted that this had some impact upon Mrs Sheffield and her family although no specific evidence again was led on this point.

64 Further, as the respondents also submit, the penalty must not be oppressive. I have referred already in particular to Mrs Sheffield's extenuating personal circumstances which are significant factors in mitigation.

65 As to the characteristics of the business of Homeopathy Plus, one of the main purposes of Homeopathy Plus was to advocate for homeopathy as was also the online shop. The First Whooping Cough Article was published in the "*Treatment Room*" of the Website which was intended in part to educate visitors. Nonetheless advertising also had a significant role in uploading the article, it was directed to the public at large, it was persuasive in tone, partial and not intended as a learned contribution to a scientific debate. The same features were present in the Second Whooping Cough Article and lead to the same conclusion. The Government Article similarly bore a trading and commercial character even though it was in part intended to advocate for a change in the government's approach to the epidemic. These matters point to the need to ensure that the penalty is not such as to be regarded by the respondents or others as an acceptable cost of doing business.

66 I also consider that particular emphasis should also be given to general deterrence as a factor where representations made in trade and commerce and held to be in breach of s 29 of the ACL relate to matters of medical science affecting the health and safety of individuals and of the community at large. The representations here, it must be emphasised, did not relate to an

ideological debate. Submissions at trial and on penalty which endeavoured to characterise the representations in this way misapprehend the tenor of the representations, the case put against the respondents by the ACCC, and the findings in the liability judgment embodied in the declaratory relief granted. Rather, the offending representations conveyed the existence of a reasonable basis ***in medical science*** for stating that a vaccine for a serious and potentially fatal disease was ineffective despite the evidence emphatically establishing that that was false and conveyed that homeopathy was a safe alternative means of preventing whooping cough despite there being no reasonable basis in medical science for the representation.

4.4.9 The deliberateness of the respondents' conduct

67 As the respondents submit, I did not find that Mrs Sheffield intended to mislead or deceive by making the impugned representations regarding the Vaccine. Rather, I accept that Mrs Sheffield genuinely believed that protection from the Vaccine is short-lived and unreliable, and that this is a relevant matter to take into account in mitigation in Mrs Sheffield's case. However, this must be balanced against the dangerousness of her conduct. She is avowedly a passionate advocate of homeoprophylaxis. This passion led her to advocate against vaccination including relevantly in the course of promoting her online store, and explained why she was consciously or subconsciously selective in her use of material which formed part of the basis of her thinking in writing the Three Articles. Furthermore, Mrs Sheffield lacked any relevant expertise in vaccines, medicine and science and was in a rush to get the First and Second Whooping Cough Articles out. However, the subject matter of the Vaccine Representations and Homeopathy Alternative Reasonable Basis Representations is a serious matter, and the publication of false representations about their effectiveness has potentially very serious and dangerous consequences for those who may follow that advice and their families. These matters call for great care before representations are made to the general public about such matters where the representations imply, as here, that there is an adequate basis for the representations in medical science - care which was plainly lacking in Mrs Sheffield's conduct in preparing the Three Articles and publishing them on the Website for the online shop.

4.4.10 Specific deterrence

68 Leaving aside those submissions made for which no evidence was led and which were conceded by the ACCC, the respondents contend that specific deterrence need not weigh so

heavily in the Court's mind in its assessment as to whether to fix a pecuniary penalty for a number of reasons:

> - the decision and its included declarations stand akin to a 'conviction' of the Respondents;
> - the Injunctions specifically deter the same conduct of the Respondents;
> …
> - the Court process to this point has been significantly draining and stressful on the Sheffield family…
> - the Costs of defending this proceeding have been relatively high for the Respondents…
> - if this was a criminal proceeding a very strong submission would be made that a person in Mrs Sheffield's position that suffer no further punishment than that already meted out (i.e. the published 'conviction' and the expense of defending the matter, previous 'good record' and personal financial and health problems).

69 It is wrong to say that the decision and declarations are akin to a conviction. The respondents have not been charged with any criminal offence. The proceedings are civil in character. The submission is misconceived. As to costs, while not necessarily irrelevant to the issue of financial hardship, they were nonetheless a potential consequence of the election to defend the litigation.

70 However, even allowing for the injunction and for the impact that the proceedings have had on Mrs Sheffield and her family, I consider that specific deterrence is a highly significant factor in this case.

71 First, it is evident from her affidavit that Mrs Sheffield continues to be a passionate advocate against the Vaccine and vaccination generally - advocacy which she has seen to pursue through the Three Articles in the context of, and relevantly for the purposes of, an online shop. This raises legitimate grounds for concern about whether her future conduct will comply with the ACL. The further evidence led by the ACCC on the penalty hearing reinforces those concerns, demonstrating that even after the liability judgment, Mrs Sheffield and Homeopathy Plus continue to advocate against vaccination and to promote homeopathy as an alternative with "*an excellent safety record in treating* ***and protecting against*** *epidemic disease*" (emphasis added) on the Website where the online shop is supported.

72 Secondly, Mrs Sheffield has shown no remorse for her conduct, a lack of comprehension of the gravity of the conduct found to contravene the ACL and indeed a lack of acceptance that she has done anything wrong. These matters are apparent from her evidence on penalty that she:

> …acted in good faith on documented homeopathic practice and knowledge regarding homeoprophylaxis… Unfortunately this information is not acknowledged or accepted by the current medical orthodoxy and so I have to pay a price for that.
>
> Throughout this entire dispute I have acted in conformity with the dictates of my conscience and the statements which the Court has ***deemed*** misleading were not calculated lies so as to achieve some personal financial benefit.
>
> (Emphasis added.)

73 In this regard, the findings by this Court embodied in the declarations do not "*deem*" the representations to be misleading, but make a finding that they are misleading and contravene s 29(1) of the ACL on the basis of an extensive body of evidence. The above statements also show a continuing failure by Mrs Sheffield to appreciate that the representations made in the Three Articles conveyed that they had a reasonable basis in medical science. The submissions made on her behalf on penalty similarly continued to seek to mischaracterise the representations as relating to matters of ideology or belief, and not of science.

74 It is not appropriate to consider whether these later representations referred to at [72] would contravene the ACL and they are broader in nature than those considered in the liability judgment. However, the continued publication of such material on the Homeopathy Plus Website with the online store heightens the need, in my view, for specific deterrence to be a primary consideration in assessing an appropriate penalty for both respondents.

4.4.11 The parity principle

75 As Burchett and Kiefel JJ observed in *NW Frozen Foods* at 295:

> A hallmark of justice is equality before the law, and, other things being equal, corporations guilty of similar contraventions should incur similar penalties… There should not be such an inequality as would suggest that the treatment meted out has not been even-handed…

76 Conversely, as the Full Court of the Federal Court cautioned in *Singtel Optus* at 264 [60], "*the court is not assisted by Optus's citation of penalties imposed in other cases, where the combination of circumstances were different from the present, as if that citation is apt to establish a "range" of penalties appropriate in this ca*se."

77 The ACCC identified the two potentially relevant decisions.

78 First *Breast Check* concerned deliberately false, misleading and deceptive representations over a period of seven months that breast imaging using certain devices as opposed to a mammography could provide an adequate scientific basis for determining whether a

consumer was at risk from breast cancer and the level of that risk. Breast Check was a small company through which the second respondent in those proceedings, its sole director and shareholder, operated his practice as a physiotherapist in Darwin. As here, his Honour accepted the risk to the relevant section of the public was that it had the potential to divert, and may have diverted, members of the class from using a medically recognised and more reliable means of breast imaging. However, as his Honour observed at [105] it was not a case where other more pervasive forms of advertising were used, such as internet advertising. The evidence did not there establish a wide circulation of the breast imaging pamphlet containing the representations (at [104]). His Honour considered in all the circumstances, including the seven-month period of the contravention involved and the relatively limited evidence going to the number of persons to whom publication was made and other factors, a pecuniary penalty in the sum of $75,000 was appropriate against the company having regard to the seriousness of the contravention and as against the individual respondent, $25,000.

79 Similar representations were made in *Safe Breast Imaging*. In that case, the respondent company, a small business owned and operated by the second respondent in those proceedings, made various representations found to be false, misleading and deceptive on its website, on YouTube and elsewhere on the internet, and in material distributed to the public and its customers over a period of approximately two years. The representations were that breast imaging using the MEM Device could provide an adequate scientific basis for assuring a customer that they do not have breast cancer, for assessing the risk of breast cancer, that it could be used as a substitute for mammography and that the service would be provided by a medical doctor. The second respondent, who was the controlling mind of the company, was held to be knowingly concerned in, or party to, the contraventions by the company. The service attracted many customers and the conduct had the potential to pose a grave risk of serious harm. The respondents saw a commercial advantage in their strategy even though it was based on their strong beliefs (at [56]). The contravention was deliberate with the second respondent knowing that the representations could not be supported, liability was contested and there were no expressions of regret or undertaking not to repeat the contraventions. In that case the corporate respondent was ordered to pay a penalty of $200,000 and the individual respondent, of $50,000.

80 These provide some limited assistance but ultimately all cases must be decided on their own facts. There were factors present in those cases which are not present here and *vice versa.*

4.4.12 The appropriate penalty

81 I have taken into account the matters in s 224(2) of the ACL and the other relevant factors set out above, including that the contraventions are extremely serious in light of the risk they pose to public health and the heightened importance generally in cases of this kind of general deterrence and here, also of specific deterrence. It is important to send a strong message that the kind of conduct undertaken in this case will attract a penalty which ensures that such contraventions are not regarded as merely an acceptable part of the price of doing business. Nor that a passionate belief is a matter that justifies conduct in trade and commerce that contravenes the ACL and creates serious risks to public health. These factors mean that I consider that a pecuniary penalty should be imposed upon both respondents.

82 In the case of Mrs Sheffield, I am entitled also to take into account her extenuating personal factors, including her health. Furthermore, notwithstanding the failure effectively to disclose her financial circumstances in support of her submissions, the ACCC accepted that Mrs Sheffield was in difficult financial circumstances. No doubt, her illness together with her husband's medical condition, will contribute to those difficulties. In the circumstances of this case, I consider that it would be crushing to impose on her a substantial pecuniary penalty although the penalty must still pay specific attention to general and specific deterrence. Having regard to all of these factors, I consider it is appropriate to order that a pecuniary penalty be imposed on Mrs Sheffield of $7,000 for the contravention by reason of the representations contained in the First Whooping Cough Article, $6,000 for the contravention by reason of the Vaccine Representation in the Government Article, and $10,000 for the contravention by reason of the representations in the Second Whooping Cough Article and the Homeopathy Alternative Reasonable Basis Representation in the Government Article in conjunction with the Second Whooping Cough Article. This gives a total penalty of $23,000 for all contraventions which in my view does not exceed what is proper for the entire contravening conduct.

83 I also consider it appropriate to order a more extended period in Mrs Sheffield's case for payment of the penalty and accordingly have allowed a 90 day period.

84 The position with respect to Homeopathy Plus is different. While it is a small family-run company, the Three Articles reached an unlimited and substantial audience. Furthermore, I can give little weight to the impact that any pecuniary penalty might have on its financial situation given the failure by Homeopathy Plus to provide any real disclosure of its financial

circumstances, although in considering specific and general deterrence I do take into account that the impact of a small fine on a small company may be proportional to the impact of a large fine on a large company. While I have taken into account all of the factors to which I have referred, general deterrence is a primary consideration, as is specific deterrence in this case. I consider in the circumstances that it is appropriate to order that a pecuniary penalty be imposed on Homeopathy Plus of $35,000 for the contravention by reason of the impugned representations contained in the First Whooping Cough Article, $30,000 for the contravention by reason of the Vaccine Representation in the Government Article, and $50,000 for the contravention by reason of the impugned representations in the Second Whooping Cough Article and the Homeopathy Alternative Reasonable Basis Representation in the Government Article in conjunction with the Second Whooping Cough Article. This gives a total penalty of $115,000 for all contraventions which again in my view does not exceed what is proper for the entire contravening conduct

5. ORDER FOR RETENTION OF SEALED REASONS FOR JUDGMENT

85 The ACCC seeks an order that a copy of the sealed reasons for judgment be retained by the Court for the purposes of s 137H of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The order is sought so that any persons affected by the respondents' conduct who wish to take further action will be able to use the findings of fact in this proceeding as *prima face* evidence of those facts in subsequent proceedings: *Jones v Sterling* (1982) 63 FLR 216 at 221–222 (Davies J). The order is not opposed and I consider it is appropriate for it to be made.

6. COSTS

86 While the question of costs is a matter for the Court's discretion, the general rule is that a successful party is entitled to its costs: *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; (2001) 115 FCR 229 at 234-235 [11] (Black CJ and French J); *Scott v Secretary, Department of Social Security (No 2)* [2000] FCA 1450 at [2] (Beaumont and French JJ). In *Hughes v Western Australian Crick Association (Inc.)* (1986) ATPR 40-748 at 48,136, Toohey J observed that the discretion must be exercised judicially and identified three principles as to the exercise of the discretion evident from the authorities:

> 1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order. *Ritter* v. *Godfrey* (1920) 2 K.B. 47.
> 2. Where a litigant has succeeded only upon a portion of his claim, the

> circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed. *Forster* v. *Farquhar* (1893) 1 Q.B. 564.
>
> 3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, "issue"' does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law. *Cretazzo* v. *Lombardi* (1975) 13 S.A.S.R. 4 at p. 12.

87 The ACCC was successful on all grounds and no conduct on its part is sought to be relied upon as a basis upon which it should be deprived of its costs.

88 The respondents, however, seek, in descending order of preference::

> - that the parties bear their own Costs of this 'public interest' litigation on a novel legal question (i.e. the basis for representations in trade and commerce for statements about vaccines and homeopathy); or
> - that the First Respondent pay the Applicant's costs; or
> - that the First Respondent pay 95% of the Applicant's costs and the Second Respondent pay 5% of the Applicant's costs on a standard party – party basis.

89 As to the first issue, the public interest involved in this litigation is the public interest in enforcing the ACL and obtaining appropriate relief. The interests of the respondents in defending the litigation, however, is personal and it was open to them at any time to elect to admit the contraventions and avoid the cost and expense of a trial. With respect to the latter, it is of some relevance that the evidence of one of the experts called by the respondent, Dr Donohoe, on the effectiveness of the Vaccine was largely consistent with that given by the experts called by the ACCC. Yet the decision was still made by the respondents to defend even these aspects of the claim by the ACCC.

90 The respondents also point to the fact that an award of costs is likely to be higher than the pecuniary penalties imposed. However, this submission ignores the fact that, an order for costs is compensatory only and not punitive, and further that even impecuniosity is not regarded as a sufficient reason for departing from the general rule: *SZAFV v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1457 at [15] (Hely J).

91 In support of their submission that Homeopathy Plus should bear the costs exclusively or predominantly, the respondents rely upon orders made in *Australian Competition and Consumer Commission v ACN 135 183 372 (in liquidation) (formerly known as Energy Watch Pty Ltd)* [2012] FCA 749 in which the Court made orders awarding 90% of the costs against the company and 10% against the individual notwithstanding his contravening conduct and that he was described as "*the public face of Energy Watch*" (at [23]). However,

that order was made by consent and does not therefore assist here. I afforded the respondents the opportunity to draw my attention after the hearing on penalty to any further authority which might support the respondents' second and third alternative positions, and none was forthcoming.

92 In the ordinary course an order for costs would be joint and several: *Trade Practices Commission v Nicholas Enterprises Pty Ltd* (1979) 28 ALR 201 at 210 (Fisher J). As Selway J explained in *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 1276 at [20], "*[o]ne of the reasons for this practice is for the greater protection of the successful party in the event that one or other of the respondents is unable to meet its share of the obligation to pay costs*". Nonetheless, as his Honour also said in that case, it is open to the court in the exercise of discretion to decline to follow the usual practice in this regard. The difficulty is that this is not a case where it is possible to differentiate between the respondents in their conduct of their defence to the proceedings. This is particularly so given that Mrs Sheffield is a sole director and was the directing mind of the company. The fact that the Three Articles did not disclose Mrs Sheffield as the author is irrelevant, contrary to the respondents' submissions.

93 For these reasons I consider that the ACCC is entitled to its costs for which the respondents should be jointly and severally liable.

7. CONCLUSIONS

94 For the reasons set out above, I consider that it is appropriate to grant injunctive relief in the terms sought by the ACCC, to impose pecuniary penalties on Homeopathy Plus cumulatively totalling $115,000 payable to the Commonwealth in 30 days, and to impose pecuniary penalties on Mrs Sheffield totalling $23,000 payable to the Commonwealth in 90 days. I also consider that the respondents should be jointly and severally liable for the ACCC's costs.

I certify that the preceding ninety-four (94) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perry.

Associate:

Dated: 13 October 2015