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No. VID685/2023

Federal Court of Australia
District Registry: Victoria
Division: General

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Applicant

QANTAS AIRWAYS LIMITED (ACN 009 661 901)
Respondent

JOINT SUBMISSIONS ON CONTRAVENTIONS AND RELIEF

A INTRODUCTION

1. These submissions are made jointly by the applicant, the Australian Competition and Consumer Commission (**ACCC**), and the respondent, Qantas Airways Limited (**Qantas**), in support of final orders in the proceeding as set out in the proposed orders annexed to these submissions (**Proposed Orders**) seeking:

   a. declaratory relief under s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**);

   b. an order that Qantas pay a total pecuniary penalty of $100 million under s 224(1) of the Australian Consumer Law (**ACL**), being Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) in respect of conduct which contravened ss 29(1)(b), 29(1)(g) and 34 of the ACL; and

   c. costs under s 43(1) of the FCA Act.

2. Qantas admits that, between 21 May 2021 and 26 August 2023 (**Relevant Period**), it:

   a. engaged in misleading or deceptive conduct, made false or misleading representations, and engaged in conduct liable to mislead the public in contravention of sections 18, 29(1)(b), 29(1)(g) and 34 of the ACL, by offering for sale, and selling, tickets for flights for 2 or more days after Qantas had already decided to cancel those flights; and

   b. engaged in misleading or deceptive conduct and made false or misleading representations in contravention of sections 18, 29(1)(b) and 29(1)(g) of the ACL, by continuing to display flight information on the "Manage Booking" page to consumers who purchased tickets or made bookings for certain flights for 2 or more days after Qantas had decided to cancel those flights, with no indication that Qantas had already decided to cancel those flights.

3. Facts agreed between the parties, and the formal admissions of contraventions by Qantas of ss 18, 29(1)(b), 29(1)(g) and 34 of the ACL, are set out in a statement of agreed facts and admissions dated 25 September 2024 for the purposes of s 191 of the *Evidence Act 1995* (Cth) (**SAFA**).

4. The parties jointly seek the declarations and orders set out in the Proposed Orders. The parties recognise that the grant of such relief remains at the discretion of the Court. As these submissions explain, the proposed total penalty is appropriate to reflect the seriousness of the contravening conduct, and to achieve the central objective of deterrence. It also reflects the fact that Qantas has cooperated with the ACCC to resolve the proceeding. Further, the proposed declarations reflect the contraventions admitted by Qantas and established by the facts agreed in the SAFA, and the requirements for the making of declarations are met.

5. Qantas has also given an undertaking pursuant to s 87B of the CCA (**Undertaking**) in connection with the admitted contraventions, which was accepted by the ACCC on 5 May 2024. [1] The Undertaking includes commitments to provide a remediation program up to a total amount of approximately $20 million to consumers affected by the Continued Sale Conduct (as defined in paragraph 15 of these Submissions) (**Remediation Program**) and to implement changes to its systems and processes applicable to the Australian based Qantas Group entities to ensure the contravening conduct does not occur in the future.[2]

B THE CONTRAVENING CONDUCT

B.1 Misleading or deceptive conduct and false or misleading representations

6. Section 18 of the ACL states:

> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

7. Section 29 of the ACL relevantly states:

> (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
>
> …
>
> (b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

[1] The Undertaking is Annexure A to the Statement of Agreed Facts and Admissions (**SAFA**).
[2] SAFA at [83] and [84]; See Annexure A to the SAFA.

…

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; …

8. Section 34 of the ACL states:

> A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

9. The principles applicable to determining whether conduct contravenes s 18 of the ACL are well-known.[3] There are broad similarities between the type of inquiry required by s 18 and that required by ss 29 and 34.[4]

10. Conduct is misleading or deceptive if it has a tendency to lead into error.[5] Whether conduct in relation to a particular class of consumers is misleading or deceptive is a question of fact to be resolved by a consideration of the whole of the impugned conduct in the circumstances and context in which it occurred.[6]

11. The purpose underlying provisions such as ss 18, 29 and 34 of the ACL is remedial.[7] Accordingly, these sections should be interpreted broadly "so as to give the fullest relief which the fair meaning of its language will allow".[8]

12. There is no significant difference between the words and phrases "misleading or deceptive" and "mislead or deceive" in s 18, "misleading" in s 29(1) and "mislead" in s 34.[9] However, a distinction may be drawn between "likely to mislead or deceive" (s 18) and "liable to mislead" (s 34); the latter may apply to a narrower range of conduct.[10]

B.2 The admitted contraventions

13. During the Relevant Period, Qantas offered for sale, and sold, tickets for flights to consumers through direct channels (such as its website (**Qantas Website**)) and mobile app (**Qantas App**)) and indirect channels (such as travel agents and third-party websites) by reference to:[11]

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[3] *Australian Competition and Consumer Commission v Australian Private Networks Pty Ltd (trading as Activ8me)* [2019] FCA 384 (***Activ8me***) at [13] (Middleton J).
[4] *Activ8me* at [13].
[5] *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 (***TPG***) at [39] (French CJ, Crennan, Bell and Keane JJ).
[6] *Australian Competition and Consumer Commission v Coles Supermarkets* [2014] FCA 1405 (***Coles***) at [41].
[7] *Activ8me* at [15].
[8] *Activ8me* at [15].
[9] *Activ8me* at [16].
[9] *Activ8me* at [16].
[10] *Activ8me* at [16].
[11] SAFA at [12] to [15].

a. a flight number;

b. a scheduled departure date and time;

c. a scheduled arrival date and time;

d. a scheduled departure and arrival airport;

e. cabin class of travel; and

f. a particular fare type within the selected cabin class of travel.

14. After a customer booked a flight with Qantas, the customer could view details of the booking on the "Manage Booking" page of the Qantas Website or on the Qantas App (the **Manage Booking Page**).[12]

15. Qantas admits that, during the Relevant Period, it offered to the public tickets for sale on 70,543 flights[13] for 2 or more days after Qantas had decided to cancel the flight, and 86,597 consumers made bookings on, or were re-accommodated to, some of those flights after Qantas had decided to cancel the relevant flight (**Continued Sale Conduct**).[14] In respect of bookings that were ticketed, the total amount paid by consumers in relation to those tickets was $17.9 million.[15]

16. By engaging in the Continued Sale Conduct, in trade or commerce, Qantas admits that it represented to consumers that:

a. the relevant flights with the corresponding stated flight number and scheduled date and time were still available (**Scheduled Flight Representations**);[16] and

b. it would use reasonable endeavours to operate the relevant flights at the scheduled date and time (**Reasonable Endeavours Representations**).[17]

17. Qantas admits that:

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[12] SAFA at [40].
[13] Comprising 69,237 domestic/trans-Tasman and 1,306 international flights. See Annexure C to the SAFA (**Continued Sale Conduct Flights**).
[14] SAFA at [34] and [39].
[15] SAFA at [39(c)]. This figure includes bookings that were ticketed and paid for by: any form of cash; a combination of cash and points ("Points plus Pay"); and redeeming a flight credit. The figure does not include tickets paid for by redeeming points for a "classic reward" ticket, although does include any fees or taxes paid in cash for such tickets.
[16] The Scheduled Flight Representation was partly express and partly implied. To the extent it was express, it was made in writing on the Qantas Website, Qantas App and through Qantas' systems to third-party travel agents in each case by stating the flight number, and scheduled date and time of the particular flight. To the extent it was implied, it was implied by reason of the flight being offered for sale.
[17] The Reasonable Endeavours Representation was partly express and partly implied. To the extent it was express, it was made in writing on the Qantas Website, Qantas App and through Qantas' systems to third-party travel agents, in each case by stating the flight number, scheduled date and time of the particular flight, and in clauses 5.2 and 9.1(a) of Qantas' Conditions of Carriage. To the extent it was implied, it was implied by reason of the flight being offered for sale subject to Qantas' Conditions of Carriage.

a. the Scheduled Flight Representations were false and misleading in respect of each of the Continued Sale Conduct Flights because, at the time those representations were made, there was no longer a flight with the stated flight number and scheduled date and time as Qantas had already decided to cancel it;[18] and

b. the Reasonable Endeavours Representations were false and misleading in respect of each of the Continued Sale Conduct Flights because Qantas did not have reasonable grounds for making the representations as Qantas had already decided to cancel the flight.[19]

18. Qantas admits that by making the Scheduled Flight Representations and the Reasonable Endeavours Representations, it contravened sections 18(1), 29(1)(b), 29(1)(g) and 34 of the ACL.[20]

19. Further, Qantas admits that, during the Relevant Period, it continued to display flight details for 60,297 flights[21] on the Manage Booking Page of up to 883,977 consumers, who had purchased tickets or made bookings for those flights, for 2 or more days after Qantas had decided to cancel the flight, with no indication that the flight had been cancelled (**Delayed Notification Conduct**).[22] In respect of bookings that were ticketed, the total amount paid by consumers in relation to those tickets was $170.9 million.[23]

20. By engaging in the Delayed Notification Conduct, in trade or commerce, Qantas admits that it represented to consumers that:[24]

a. the relevant flight with the stated flight number and scheduled date and time displayed on the Manage Booking Page was unchanged (**Flight Unchanged Representations**);[25] and

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[18] SAFA at [36].
[19] SAFA at [37].
[20] SAFA at [38].
[21] Set out in Annexure D to the SAFA (**Delayed Notification Conduct Flights**).
[22] SAFA at [48] and [53].
[23] SAFA at [53(b)]. This figure includes bookings that were ticketed and paid for by: any form of cash; a combination of cash and points ("Points plus Pay"); and redeeming a flight credit. The figure does not include tickets paid for by redeeming points for a "classic reward" ticket, although does include any fees or taxes paid in cash for such tickets.
[24] SAFA at [49].
[25] The Flight Unchanged Representation was partly express and partly implied. To the extent it was express, it was made in writing on the "Manage Booking" page in each case by stating:
(a) the flight number, scheduled date and time on the "Manage Booking" page; and
(b) the words "Here's where you can manage your flight booking from [departure airport] to [arrival airport] departing on [scheduled date] at [scheduled time]" on the "Manage Booking" page.
To the extent it was implied, it was implied by reason of the matters in paragraphs (a) to (b) above, the word "confirmed" appearing after "status" on the "Manage Booking" page, and the absence of any statement or indication that the flight had been cancelled on the "Manage Booking" page.

b. it would use reasonable endeavours to operate the flight displayed on the Manage Booking Page at the scheduled date and time (**Manage Booking Representations**). [26]

21. Qantas admits that:

a. the Flight Unchanged Representations were false and misleading in respect of each of the Delayed Notification Conduct Flights because, at the time the Representations were made, there was no longer a flight with the stated flight number and scheduled date and time as Qantas had already decided to cancel it;[27] and

b. the Manage Booking Representations were false and misleading in respect of each of the Delayed Notification Conduct Flights because Qantas did not have reasonable grounds for making the representations as Qantas had already decided to cancel the flight.[28]

22. Qantas admits that by making the Flight Unchanged Representations and the Manage Booking Representations, it contravened sections 18(1), 29(1)(b) and 29(1)(g) of the ACL.[29]

C PROPOSED ORDERS BY AGREEMENT

23. In deciding whether agreed orders conform with legal principle, the court is entitled to treat the consent of Qantas as an admission of all facts necessary or appropriate to the granting of the relief sought against it.[30]

24. The proper approach to be taken when civil regulatory orders are sought on an agreed basis, and the public interest in doing so, was explained by the High Court in *Commonwealth v Director, Fair Work Building Industry Inspectorate*[31] (***Fair Work***). The High Court there reaffirmed the practice of acting upon agreed penalty submissions, as explained in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer*

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[26] The Manage Booking Representation was partly express and partly implied. To the extent it was express, it was made in writing in clauses 5.2 and 9.1(a) of Qantas' Conditions of Carriage and on the "Manage Booking" page in each case by stating:

(a) the flight number, scheduled date and time on the "Manage Booking" page; and
(b) the words "Here's where you can manage your flight booking from [departure airport] to [arrival airport] departing on [scheduled date] at [scheduled time]" on the "Manage Booking" page.

To the extent it was implied, it was implied by reason of the matters in paragraphs (a) to (b) above, the word "confirmed" appearing after "status" on the "Manage Booking" page, the flight being sold subject to Qantas' Conditions of Carriage, and the absence of any statement or indication that the flight had been cancelled on the "Manage Booking" page.

[27] SAFA at [50].
[28] SAFA at [51].
[29] SAFA at [52].
[30] *Coles* at [73].
[31] *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (***Fair Work***).

Commission[32] (***NW Frozen Foods***) and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd*.[33] The principles were summarised by the Full Court in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (***Volkswagen***).[34]

25. In *Fair Work*, the High Court confirmed that, subject to the Court being sufficiently persuaded of the accuracy of the parties' agreement as to the facts and their consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances, it is consistent with principle and highly desirable in practice for the Court to accept the parties' proposal and impose the proposed penalty.[35]

26. As the plurality observed:[36]

> … there is an important public policy involved in promoting predictability of outcome in civil penalty proceedings … the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers. As was recognised in *Allied Mills* and authoritatively determined in *NW Frozen Foods*, such predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention.

27. The High Court also noted the propriety of receiving joint submissions – and imposing the proposed penalty (and other relief proposed) if appropriate – where those submissions are advanced by the relevant regulator which, by reason of its functions, is in a position to provide "informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance."[37]

28. Because fixing the quantum of a civil penalty is not an exact science, there is a permissible range in which courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another.[38] Accordingly, the question for the Court is whether the agreed figure proposed by the parties is *an* appropriate penalty in the circumstances of the case,[39] rather than *the* appropriate penalty. The permissible range is determined by all the relevant facts and consequences of the contravention and the contravenor's circumstances.[40]

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[32] *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (***NW Frozen Foods***).
[33] *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41,993.
[34] *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24; [2021] FCAFC 49 at [124]-[129] (Wigney, Beach and O'Bryan JJ) (***Volkswagen***).
[35] *Fair Work* at [58] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). *Volkswagen* at [126].
[36] *Fair Work* at [46] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Volkswagen* at [126].
[37] *Fair Work* at [60] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).
[38] *Fair Work* at [47] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).
[39] *Fair Work* at [48] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).
[40] *Volkswagen* at [127].

29. If the proposed penalty is within the permissible range "the public policy consideration of predictability of outcome would generally provide a compelling reason for the Court to accept the proposed penalty in those circumstances."[41]

30. Once the Court is satisfied that orders are "within power and appropriate" it should "exercise a degree of restraint" when scrutinising the proposed settlement terms.[42] The Court will not depart from an agreed penalty figure that is within the permissible range "merely because it might otherwise have been disposed to select some other figure".[43]

31. The desirability of giving effect to the agreement of the parties is reinforced where, as here, they are sophisticated, legally represented and, in turn, well able to understand and evaluate the desirability of the settlement.[44]

32. While the overriding statutory directive is for the Court to impose a penalty which is determined to be appropriate having regard to all relevant matters,[45] the fact that the regulator and the contravenor have agreed and jointly propose a penalty is a relevant and important matter which the Court must have regard to in determining an appropriate penalty.[46] In considering whether the proposed agreed penalty is an appropriate penalty, the Court should generally recognise that the agreed penalty is most likely to reflect, amongst other things, the regulator's considered estimation of the penalty necessary to achieve deterrence and the risks and expense of the litigation had it not been settled.[47]

D PECUNIARY PENALTY

33. The Court has power to order the payment of a pecuniary penalty pursuant to s 224(1)(a)(ii) of the ACL. Section 224(1)(a)(ii) provides that if the Court is satisfied that a person has contravened a provision of Part 3-1 of the ACL (which includes ss 29 and 34), the Court may order the person to pay such pecuniary penalty as the Court determines to be appropriate for each act or omission by the person to which s 224 applies.

34. The appropriateness of the total penalty that the parties propose be imposed in this matter is addressed below, having regard to:

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[41] *Volkswagen* at [131].
[42] *Coles* at [72].
[43] *Fair Work* at [47].
[44] *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* [2016] FCA 676 at [27] per Jagot J.
[45] *Volkswagen* at [131].
[46] *Volkswagen* at [131].
[47] *Fair Work* at [109] (Keane J); *Volkswagen* at [125].

a. the central purpose of imposing penalties, namely the need to ensure specific and general deterrence;

b. the statutory maximum and principles relevant to multiple contraventions;

c. factors relevant to the appropriate penalty; and

d. the appropriate penalty amounts.

D.1 The primary purpose – deterrence

D.1.1 Requirement for a penalty of appropriate deterrent value

35. The primary purpose of imposing a civil penalty is deterrence.[48] This has been emphasised by the High Court on multiple occasions. In *Fair Work*, the High Court stated that, unlike criminal sentences, a civil penalty is "primarily if not wholly protective in promoting the public interests in compliance".[49] In *Australian Building and Construction Commissioner v Pattinson (**Pattinson**)*,[50] the High Court reiterated that deterrence is the primary, if not sole, objective for the imposition of civil penalties.[51]

36. In considering an appropriate penalty, it is necessary to endeavour to "put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."[52]

37. In *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* (***CFMEU***),[53] the plurality of the High Court described that price as the "sting or burden" of the penalty; the greater the sting or burden, the more likely it will be that the contravenor will seek to avoid the risk of subjection to further penalties, the more potent the example for would-be contravenors, and the greater the penalty's specific and general deterrent effect. Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect.[54]

38. The Full Court has explained the need to ensure that the penalty "is not such as to be regarded by that offender or others as an acceptable cost of doing business" and will deter them "from the cynical calculation involved in weighing up the risk of penalty

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[48] *Fair Work* at [55]; *Pattinson* at [15]. In the context of the ACL, see *TPG* at [65]-[66] (French CJ, Crennan, Bell and Keane JJ); and see *Viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 at [129] (Yates, Abraham and Cheeseman JJ); see also *Australian Competition and Consumer Commission v Employsure Pty Ltd* (2023) 407 ALR 302; [2023] FCAFC (***Employsure***) at [49] (Rares, Stewart and Abraham JJ).
[49] *Fair Work* at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).
[50] A*ustralian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 *(**Pattinson**)*.
[51] *Pattinson* at [15], [40]–[41] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
[52] *Volkswagen* at [147].
[53] (2018) 262 CLR 157; [2018] HCA 3 at [116] (Keane, Nettle and Gordon JJ) (***CFMEU***).
[54] *CFMEU* at [116]; *Australian Competition and Consumer Commission v Medibank Private Ltd* (2020) 146 ACSR 181; [2020] FCA 1030 at [46] (Anderson J).

against the profits to be made from contravention."[55] These observations were cited with approval by the High Court in *TPG.*

39. Similarly, in *NW Frozen Foods* the Full Court referenced the need to "impose penalties sufficient to ensure the deterrence, not only of the parties actually before it, but also of others who might be tempted to think that contravention would pay, and detection lead merely to a compliance programme for the future".[56]

40. The Full Court has emphasised that the "critical importance of effective deterrence must inform the assessment of the appropriate penalty".[57] The Court explained that:[58]

> the greater the risk of consumers being misled and the greater the prospect of gain to the contravener, the greater the sanction required, so as to make the risk/benefit equation less palatable to a potential wrongdoer and the deterrence sufficiently effective in achieving voluntary compliance. Tipping the balance of the risk/benefit equation in this way is even more important when the benefit in contemplation is profit or other material gain. It is especially important if there are disadvantages, including increased costs or lesser sales or profits, in complying with legal obligations for those who "decide" to be law-abiding.

41. The plurality in *Pattinson* observed that the court is required "to ensure that the penalty it imposes is "proportionate", where that term is understood to refer to a penalty that strikes a reasonable balance between deterrence and oppressive severity."[59] Their Honours also referred to the statement by the Full Court in *Reckitt Benckiser* that:[60]

> If it costs more to obey the law than to breach it, a failure to sanction contraventions adequately de facto punishes all who do the right thing. It is therefore important that those who do comply see that those who do not are dealt with appropriately. This is, in a sense, the other side of deterrence, being a dimension of the general deterrence equation. This is not to give licence to impose a disproportionate or oppressive penalty, which cannot be done, but rather to recognise that proportionality of penalty is measured in the wider context of the demands of effective deterrence and encouraging the corresponding virtue of voluntary compliance.

D.1.2 General deterrence considerations

42. A substantial penalty is necessary to achieve general deterrence in this case. In this regard, the following matters can be noted:

    a. *First*, Qantas' status as a large, publicly listed company, with significant financial resources, and its market position in the airline industry, means that the penalty must send a clear signal to other companies in Australia (particularly other large

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[55] *Singtel Optus v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 (***Singtel Optus***) at [62]-[63], cited with approval in *TPG* at [66] and *Pattinson* at [17].
[56] *NW Frozen Foods* at [204].
[57] *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 (***Reckitt Benckiser***) at [153].
[58] *Reckitt Benckiser* at [151]; see also at [57], [148]–[153], [164] and [176].
[59] *Pattinson* at [41].
[60] *Reckitt Benckiser* at [152]; referred to in *Pattinson* at [41].

companies) that contraventions of the ACL will not be tolerated and that there are serious consequences for contravening the ACL.

b. *Second*, and relatedly, there is a need to ensure that the penalty is not seen by other large corporations, as a mere cost of doing business. It is likely that any penalty imposed on Qantas will attract significant public attention. Other large companies doing business in Australia will likely be aware of the penalty imposed on Qantas in this case. In this context, it is essential that the penalty imposed is beyond an amount that might be seen as an acceptable cost of doing business for a company of Qantas' size and resources.

c. *Third*, the penalty must demonstrate that contraventions resulting from inadequate systems or processes have serious consequences, particularly where they involve large corporations and affect a large number of consumers. The systems, operations and processes for a company the size of, and with the resources of, Qantas must be compliant with the ACL.

D.1.3 Specific deterrence considerations

43. A substantial penalty is also necessary to achieve specific deterrence.

44. Qantas is the largest domestic airline in Australia,[61] accounting for 38% of the domestic airline passenger market.[62] Qantas carries millions of passengers each year and has extensive levels of interaction with consumers, such that compliance with the ACL should be a priority for Qantas.

45. Qantas' conduct affected a significant number of consumers. The Manage Booking Pages of up to 883,977 consumers were subject to the Delayed Notification Conduct.[63] The total number of consumers exposed to the representations arising from the Continued Sale Conduct during that period cannot be quantified but at least included the 86,597 consumers who made bookings on or were re-accommodated to flights that Qantas had already decided to cancel.[64]

46. It is important that the penalty imposed has the necessary "sting" and is not capable of being perceived by Qantas as an acceptable cost of failing to have adequate systems and processes in place. The size of the penalty must therefore be sufficient to act as an effective deterrent to Qantas against future non-compliance with the ACL. Qantas'

[61] SAFA at [6].
[62] SAFA at [8].
[63] SAFA at [53].
[64] SAFA at [39].

size and financial position mean that a significant penalty is required to achieve such deterrence.

D.1.4 Statutory maximum

47. In *Pattinson*, the plurality of the High Court stated 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; and thirdly, taken and balanced with all other relevant factors, the maximum penalty provides a numerical guide.[65] The plurality in *Pattinson* confirmed that the prescribed maximum penalty is "but one yardstick that ordinarily must be applied" and must be treated "as one of a number of relevant factors."[66]

48. During the Relevant Period, the maximum pecuniary penalty payable by a body corporate in respect of a contravention of ss 29 or 34 of the ACL was:

    a. from the beginning of the Relevant Period (May 2021) up to 9 November 2022, the greater of:

        i. $10 million;

        ii. three times the value of the benefit obtained from the contravention, if that benefit can be determined; or,

        iii. if the benefit cannot be determined, 10% of the contravenor's annual turnover during the 12 month period ending at the end of the month in which the act or omission first occurred; and

    b. from 10 November 2022[67] until the end of the Relevant Period (26 August 2023), the greater of:

        i. $50 million;

        ii. three times the value of the benefit obtained from the contravention, if that benefit can be determined; or,

        iii. if the benefit cannot be determined, 30% of the contravenor's adjusted turnover during the breach turnover period for the act or omission.

49. As discussed below, the value of any benefit obtained by Qantas that could be reasonably attributable to the contraventions cannot be quantified. Based on the

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[65] *Pattinson* at [52], citing *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [31].
[66] *Pattinson* at [53]-[54].
[67] Amended by the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth).

matters set out in the SAFA in relation to Qantas' financial position and the applicable maximum penalty for the contraventions admitted by Qantas,[68] the maximum penalty for *each* contravention would be: [69]

a. for contraventions that occurred from the beginning of the Relevant Period up to 9 November 2022, from between $537.3 million to $1.48 billion[70]; and

b. for contraventions that occurred from 10 November 2022 until the end of the Relevant Period, from between $4.45 billion to approximately $6.1 billion[71].

50. A separate contravention occurred each time that Qantas made each of the representations that arose from the Continued Sale Conduct and Delayed Notification Conduct to a consumer. [72] In circumstances where the precise number of contraventions is unknown but would give rise to a theoretical maximum vastly in excess of the $100 million that the ACCC and Qantas submit is appropriate to achieve deterrence, this is not a case where seeking to calculate an aggregate penalty by reference to the total theoretical maximum is meaningful or useful.[73] Where the number of contraventions is such that the total maximum penalty is no longer meaningful, the assessment of whether the proposed total penalty is appropriate is best undertaken by reference to other factors.[74] The parties submit that is the case here.

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[68] SAFA at [9] and [11].
[69] As set out in paragraphs [69] to [71] of the SAFA, the parties agree that Qantas obtained benefits that are reasonably attributable to Qantas' contravening conduct, but the value of those benefits cannot be determined. In those circumstances, the maximum penalty is to be calculated by reference to s 224(3A)(c) of the ACL.
[70] For the period from 1 September 2018 to 9 November 2022 (inclusive), the maximum penalty calculated in accordance with s224(3A)(c) was, relevant to the admitted contraventions, 10% of the company's annual turnover in the 12 months ending in the month of each relevant contravention. By way of example, for contraventions that occurred at the start of the Relevant Period (in May 2021), the maximum penalty is to be calculated by reference to 10% of Qantas' turnover from 1 June 2020 to 31 May 2021, being $537.3 million. For contraventions that occurred later in the period, in November 2022 (pre-9 November 2022), the maximum penalty is to be calculated by reference to 10% of Qantas' turnover from 1 December 2021 to 30 November 2022, being $1.48 billion. Accordingly for this period, the maximum penalty ranged between $537.3 million to $1.48 billion depending on when the contravention occurred.
[71] For the period on and from 10 November 2022, the maximum penalty calculated in accordance with s 224(3A)(c) is, relevant to the admitted contraventions, 30% of the company's adjusted turnover during the breach turnover period for each relevant contravention. By way of example, for contraventions that occurred early in this period, i.e. November 2022 (post- 10 November 2022), the maximum penalty is to be calculated by reference to 30% of Qantas' adjusted turnover from 1 December 2021 to 30 November 2022, being $4.45 billion. For contraventions that occurred at the end of the Relevant Period, in August 2023, the maximum penalty is to be calculated by reference to 30% of Qantas' adjusted turnover from 1 September 2022 to 31 August 2023, being $6.1 billion. Accordingly for this period, the maximum penalty ranged between $4.5 billion to $6.1 billion depending on when the contravention occurred.
[72] *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (t/as Bet365) (No 2)* [2016] FCA 698 at [12] (Beach J) (***Hillside***); *Australian Competition and Consumer Commission v Uber B.V.* [2022] FCA 1466 at [75] (O'Bryan J).
[73] See *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 (***Coles 2***) at [18] and [82] (Allsop CJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68; [2017] FCAFC 113 at [143] (Dowsett, Greenwood and Wigney JJ) (***CFMEU 2***); *Australian Competition and Consumer Commission v Trivago NV (No 2) (2022) 159 ACSR 353* (***Trivago***) at [66].
[74] *Reckitt Benckiser* at [157].

D.1.5 Multiple contraventions

51. There are three principles which are relevant to dealing with the issue of penalty in the context of multiple contraventions.

Same conduct

52. Section 224(4) of the ACL provides that a contravenor cannot be penalised twice for the same conduct even if the conduct constituted a contravention of two or more provisions. Accordingly, if the Court were minded to impose a penalty for conduct constituting a contravention of, for example, s 34 of the ACL, it should not impose any additional penalty in respect of the same conduct simply because the conduct also constituted a contravention of ss 29(1)(g) and/or 29(1)(b) of the ACL.

53. Section 224(4) applies to conduct which is truly 'the same', not merely similar or repeated, and can therefore be differentiated from the 'course of conduct' principle discussed below.[75]

54. In this case:

    a. each time Qantas made the Scheduled Flight Representations and the Reasonable Endeavours Representations (being the Representations that resulted from the Continued Sale Conduct) it contravened ss 29(1)(b), 29(1)(g) and 34 of the ACL. Each contravention of these three provisions resulted from the 'same conduct'; and

    b. each time Qantas made the Flight Unchanged Representations and the Manage Booking Representations (being the Representations that resulted from the Delayed Notification Conduct) Qantas contravened both s 29(1)(b) and 29(1)(g). Each contravention of these two provisions resulted from the 'same conduct'.

Course of conduct principle

55. Ordinarily, separate contraventions arising from separate acts should attract separate penalties.[76] However, where separate acts give rise to separate contraventions that are inextricably interrelated, they may be regarded as a "course of conduct" for penalty purposes so as to avoid double punishment for those parts of the legally distinct contraventions that involve overlap in wrongdoing.[77] Whether the contraventions

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[75] *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243; [2018] FCAFC 73 (***Yazaki***) at [217]-[224] (Allsop CJ, Middleton and Robertson JJ); *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd (No 2)* [2017] FCA 205 at [13]-[17] (Foster J).
[76] *Employsure* at [51].
[77] *Employsure* at [51], citing *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1; [2010] FCAFC 39 (***Cahill***) at [39] and [41].

should be treated as a single course of conduct is fact specific having regard to all of the circumstances of the case.[78]

56. The course of conduct principle is a useful "tool of analysis" in the determination of appropriate civil penalties which can, but need not, be used in any given case.[79] It is critical, however, that the penalties ultimately imposed are of appropriate deterrent value having regard to the actual, substantive wrongdoing.[80]

57. In the present case, it is appropriate to analyse the contraventions as two courses of conduct, referable to the two categories of conduct that gave rise to the contraventions – the Continued Sale Conduct and the Delayed Notification Conduct. This analysis is consistent with Qantas engaging in the two distinct patterns of conduct during the Relevant Period.

58. However, analysing the many contraventions by reference to two courses of conduct is not to downplay the wrongdoing: the analysis does not convert the many separate contraventions into only two contraventions, nor does it limit the available maximum penalty.[81]

Totality

59. The principle of totality requires the Court to make a "final check" of the penalties to be imposed on a wrongdoer, considered as a whole, to ensure that the total penalty does not exceed what is proper for the entire contravening conduct.[82] It will not necessarily result in a reduction.[83] However, in cases where the Court believes that the cumulative total of the penalties to be imposed would be too high, the Court should alter the final penalties to ensure that they are "just and appropriate".[84]

60. In this case, the parties submit that the proposed total penalties are just and appropriate, and do not exceed what is proper for Qantas' contravening conduct. Accordingly, no further adjustment for totality is required.

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[78] *Employsure* at [51].
[79] *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312 (***Cement Australia***) at [424]; *Trivago* at [67].
[80] *Reckitt Benckiser* at [139]-[145]; *Cement Australia* at [425] –[428].
[81] *Yazaki* at [227]-[235] and authorities discussed therein; *Coles 2* at [82] –[85]; *Reckitt Benckiser* at [139]-[145]; *Hillside* at [24]–[25]; *Australian Competition and Consumer Commission v Google LLC (No 4)* [2022] FCA 942 (Google) at [33] (Thawley J).
[82] *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238; 145 ALR 36 (***Safeway***) at 53, citing *Mill v R* (1988) 166 CLR 59; 83 ALR 1; *Employsure* at [52].
[83] *Trivago* at [70].
[84] *Trivago* at [70], referring to *Safeway* at 53 and *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* (2014) 234 FCR 343 at [101]-[102] per Middleton J.

D.2 Factors informing the appropriate penalties

61. Section 224(2) of the ACL provides that, in determining the appropriate penalty, the Court must have regard to "all relevant matters". Those matters expressly include (but are not limited to) the following mandatory matters:

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

    b. the circumstances in which the act or omission took place; and

    c. whether the person has previously been found by a court to have engaged in any similar conduct.

62. In addition to those factors, the Court must have regard to all other matters relevant to the assessment of penalty. Such matters often include those stated by French J in *Trade Practices Commission v CSR Ltd*[85] in the context of contraventions of provisions of Pt IV of the *Trade Practices Act 1974* (Cth). Those factors, which have been referred to often in the assessment of civil penalties and have become known as the "French factors", are as follows:

    a. the size of the contravening company;

    b. the deliberateness of the contravention and the period over which it extended;

    c. whether the contravention arose out of the conduct of senior management or at a lower level;

    d. whether the company has a corporate culture conducive to compliance with the Act as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;

    e. whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention;

    f. whether the contravenor has engaged in similar conduct in the past; and

    g. the financial position of the contravenor.

63. The French factors are not exhaustive of the matters that may be relevant in a particular case.[86] They have "a degree of overlap" with the mandatory considerations in s 224(2)

[85] [1991] ATPR 41-076; [1990] FCA 521 at 52,152-52,153.
[86] *CFMEU 2* at [101] (Dowsett, Greenwood and Wigney JJ).

of the ACL, but "do not necessarily exhaust potentially relevant considerations" or "regiment the discretionary sentencing function".[87]

64. The various French factors are applied to Qantas and the admitted contraventions below. When considering those various factors, it is necessary to keep in mind the primary purpose for the imposition of a penalty – deterrence (both specific and general). Moreover, as the High Court stated in *Pattinson*:[88]

> It may readily be seen that this list of factors includes matters pertaining both to the character of the contravening conduct (such as factors 1 to 3) and to the character of the contravenor (such as factors 4, 5, 8 and 9). It is important, however, not to regard the list of possible relevant considerations as a "rigid catalogue of matters for attention" as if it were a legal checklist. The court's task remains to determine what is an "appropriate" penalty in the circumstances of the particular case.

65. The penalty is determined by an "intuitive" or "instinctive" synthesis of all relevant factors.[89] Instinctive synthesis is the method by which the Court identifies all the factors that are relevant to the penalty and, after weighing all of those factors, reaches a conclusion that a particular penalty is the one that should be imposed.[90]

D.2.1 Size and financial position of Qantas

66. Qantas' size and market position is a critical matter in considering the appropriate penalty in the present case.

67. Qantas is a large, publicly listed company incorporated in Australia. It is Australia's largest domestic and international airline – as at June 2024, Qantas held 38% of Australia's domestic airline passenger market and together with its subsidiary Jetstar, held 63% of the market.[91]

68. During the Relevant Period, Qantas carried many millions of passengers (over 45 million in FY2022/23),[92] reported over $19 billion in annual revenue and held over $20 billion in total assets.[93] In FY2022/23, it reported a record profit of $2.5 billion, and in FY2023/24, reported a profit of $2.08 billion.[94]

69. The size of a contravening corporation is particularly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent.[95] In *Pattinson*, the

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[87] *Coles 2* at [9].
[88] *Pattinson* at [19].
[89] *Employsure* at [43], [53] (Rares, Stewart and Abraham JJ).
[90] *Employsure* at [43] (Rares, Stewart and Abraham JJ).
[91] SAFA at [8].
[92] SAFA at [10].
[93] SAFA at [9].
[94] SAFA at [9].
[95] *Volkswagen* at [154]; *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2021] FCA 502 (***Telstra***) at [62]; *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538 at [25].

plurality stated that in some cases, the circumstances of the contravenor may be more significant in terms of what is required to achieve deterrence than the circumstances of the contravention.[96]

70. In terms of specific deterrence, the sum required to achieve that object will generally be larger where the company is well resourced.[97] It follows that it may be appropriate to impose a higher penalty on a large and well-resourced corporation than would be the case if the corporation was small and had limited resources.[98] The proposed total penalty reflects Qantas' substantial size, significant resources and market position.

71. Similarly, in order to achieve general deterrence, a higher penalty will be required in cases involving large companies, in order to deter other large companies who may be tempted to engage in similar contravening conduct.[99] The proposed total penalty accounts for this fact – Qantas' prominence is such that any penalty imposed on it will likely attract significant attention. It is essential that the penalties are beyond an amount that might be considered to be an acceptable cost of doing business for a company of Qantas' size and resources.

72. A contravenor's size and financial position are also relevant to the court's satisfaction that the proposed penalty is not oppressive.[100] The proposed penalty is not oppressive having regard to Qantas' size and financial position.

D.2.2 Nature and extent of the contravening conduct

73. The contraventions were serious, occurred over an extended period of time (a period of approximately two years and two months) and affected a very large number of consumers.[101] The contraventions affected a service that is critical to the Australian economy and to consumers.[102] Air travel plays a crucial role in connecting communities, with aviation accounting for a significant proportion of travel undertaken by Australians annually.[103] Due to Australia's large land mass, dispersed population and relative geographical isolation, consumers rely heavily on aviation, and airlines.[104] These matters warrant the imposition of a substantial total penalty.

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[96] *Pattinson* at [60].
[97] *Volkswagen* at [154]; *Pattinson* at [60].
[98] *Volkswagen* at [154].
[99] *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* [2016] FCA 1516 at [146]; *Google* at [53]; *Chief Executive Officer of the AUSTRAC v Crown Melbourne Limited* [2023] FCA 782 at [185] and [198].
[100] See, for example, *Google* at [53].
[101] SAFA at [39] and [53].
[102] SAFA at [64].
[103] SAFA at [64].
[104] SAFA at [64].

Continued Sale Conduct

74. As described above, the Continued Sale Conduct involved Qantas offering for sale, and selling, flights for two or more days after it made a decision to cancel the flight. Those flights were sold by reference to a flight number and scheduled departure and arrival date and time. In almost all cases, cancellation decisions made in respect of flights the subject of the Continued Sale Conduct were made five or more days prior to the scheduled flight departure date.[105]

75. The price of tickets on flights from the same origin to the same destination on the same day may vary depending on a number of factors including the time of departure, the demand and availability of seats and proximity to departure date.[106] Consumers select fares on flights based on their particular needs, which may include a preference for particular departure or arrival times.[107]

76. Qantas engaged in the Continued Sale Conduct from 21 May 2021 until 26 August 2023 in respect of flights scheduled to depart between 1 May 2022 and 10 May 2024. During that period:

    a. 70,543 flights (69,237 domestic/trans-Tasman and 1,306 international) were affected by the Continued Sale Conduct;[108]

    b. whilst the total number of consumers exposed to the representations arising from the Continued Sale Conduct cannot be quantified, it at least included all consumers who made bookings on, or were re-accommodated to, a flight that Qantas had already decided to cancel;

    c. 86,597 consumers made bookings on, or were re-accommodated to, a flight that Qantas had already decided to cancel (81,238 of those consumer bookings related to a domestic/trans-Tasman flight and 5,359 related to an international flight). In respect of bookings that were ticketed, the total amount paid by consumers in relation to those tickets was $17.9 million;[109] and

[105] SAFA at [29].
[106] SAFA at [17].
[107] SAFA at [18].
[108] SAFA at [39].
[109] SAFA at [39]. This figure includes bookings that were ticketed and paid for by: any form of cash; a combination of cash and points ("Points plus Pay"); and redeeming a flight credit. The figure does not include tickets paid for by redeeming points for a "classic reward" ticket, although does include any fees or taxes paid in cash for such tickets.

d. on average, tickets on affected flights[110] were offered for sale for approximately 11 days after Qantas had decided to cancel the flight, and in some cases, for up to 62 days after Qantas had decided to cancel the flight.[111]

Delayed Notification Conduct

77. As described above, Qantas continued to display flight details for 60,297 flights on the Manage Booking Page of consumers who had purchased tickets or made bookings for those flights for 2 or more days after Qantas had made a decision to cancel the flight with no indication that the flight had been cancelled.[112] In almost all cases, cancellation decisions made in respect of flights the subject of the Delayed Notification Conduct were made five or more days prior to the scheduled flight departure date.[113]

78. Qantas engaged in the Delayed Notification Conduct from 21 May 2021 until 26 August 2023 in respect of flights scheduled to depart between 1 May 2022 and 1 May 2024. During that period:

a. 60,297 flights (57,274 domestic/trans-Tasman and 3,023 international) were affected by the Delayed Notification Conduct;[114]

b. the Manage Booking Pages of up to 883,977 consumers were subject to the Delayed Notification Conduct (806,406 of those consumers held bookings on a domestic/trans-Tasman flight and 77,571 held bookings on an international flight). In respect of bookings that were ticketed, the total amount paid by consumers in relation to those tickets was $170.9 million;[115] and

c. on average, it took approximately 11 days for consumers who had made bookings on these flights to be notified that a cancellation decision had been made regarding their flight, and in some cases, up to 67 days after a cancellation decision had been made.[116]

D.2.3 Circumstances in which the contraventions occurred

79. The contraventions occurred over an extended period of time.

80. The contraventions occurred in circumstances where Qantas' scheduling systems and operational processes did not always ensure that cancelled flights were promptly

[110] SAFA, Annexure C.
[111] SAFA at [39].
[112] SAFA at [53].
[113] SAFA at [29].
[114] SAFA at [53].
[115] SAFA at [53]. This figure includes bookings that were ticketed and paid for by: any form of cash; a combination of cash and points ("Points plus Pay"); and redeeming a flight credit. The figure does not include tickets paid for by redeeming points for a "classic reward" ticket, although does include any fees or taxes paid in cash for such tickets.
[116] SAFA at [53].

removed from sale, or that consumers were notified of the cancellation of their flight promptly (and at least within 2 days of a cancellation decision).[117] Those deficiencies in Qantas' systems and operational processes resulted in the contravening conduct.

81. Qantas' scheduling systems and operational processes necessary to cancel a flight were utilised in response to planned and unforeseen events that could arise from time to time.[118] For part of the Relevant Period, Qantas' operations were also impacted by matters arising from the COVID-19 pandemic.[119]

82. During the Relevant Period, the time it took Qantas to manually review and process re-accommodation arrangements of passengers onto alternative flights following a cancellation decision were impacted by various factors including, among other things, resourcing constraints within Qantas' Customer Contact Centre, in particular during the COVID-19 pandemic (Qantas at times deferred communications to customers), volume constraints within the IT system and the time taken to identify and develop re-accommodation options.[120]

83. Senior managers responsible for different aspects of Qantas' systems and operations knew that: cancelled flights were not immediately removed from sale; some consumers could and did make bookings on flights after those flights were cancelled; consumers who had made bookings on flights were not immediately notified of the decision to cancel their flights; and, Manage Booking pages did not promptly reflect cancellation decisions.[121] Although, no single person knew all these matters.[122] Accordingly, Qantas was aware that there were deficiencies in its scheduling systems and operational processes.

84. Despite this awareness, the system and process deficiencies subsisted over an extended period of time and affected a significant number of consumers.

85. Further, although Qantas had the ability to immediately remove a flight from sale during the Relevant Period (by implementing a manual 'stop sell'[123]), Qantas did not do so in respect of any of the flights the subject of the Continued Sale Conduct.[124]

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[117] SAFA at [54].
[118] SAFA at [23]-[26].
[119] SAFA at [27].
[120] SAFA at [31]
[121] SAFA at [55].
[122] SAFA at [55].
[123] SAFA at [32].
[124] SAFA at [33]. It is noted that a manual 'stop sell' was implemented by Qantas during the Relevant Period where it considered there were (or were reasonably likely to be) insufficient re-accommodation options available to enable Qantas to follow its normal flight cancellation and re-accommodation process. As outlined at paragraph 85, Qantas did not implement a manual 'stop sell' in respect of any of the flights the subject of the Continued Sale Conduct.

86. It was not until after the commencement of this proceeding that Qantas took steps to address the deficiencies with its systems and operations that resulted in the contravening conduct.[125]

87. Following commencement of this proceeding, Qantas made changes to its systems so that it can now promptly remove cancelled flights from sale and notify existing ticketholders following cancellation of a flight.[126] As addressed above, Qantas is a substantial and very well-resourced company. Qantas could, and should, have introduced these changes earlier. Had these measures been introduced earlier, the contravening conduct would not have occurred.[127]

D.2.4 Nature and extent of loss or damage

88. As set out in paragraph 45 above, Qantas' contravening conduct affected a significant number of consumers over an extended period. Consumers suffered harm as a result of Qantas' contravening conduct. The harm that may be considered by the Court when considering the nature and extent of loss or damage includes harm of a non-pecuniary or non-economic nature, such as the lost opportunity to make different purchasing choices with accurate information.[128]

89. Qantas' Continued Sale Conduct caused some consumers to make decisions to purchase tickets on flights that had been cancelled, based on false and misleading information.[129] Some of those consumers may have lost the opportunity to choose a different flight, including at a lower cost, either with Qantas or a different carrier. For example, some consumers may have paid a higher fare to fly at a particular chosen time, and may not have done so, or may have sought to travel at a different time or date or with an alternative airline, if they had been aware that Qantas had already made a decision to cancel the flight they were paying for.

90. Further, some consumers may have suffered loss as a result of making travel or other arrangements based upon expected flight schedules. For example, consumers may have paid for travel arrangements which were not flexible or refundable, or which became non-refundable in the period between the date on which the consumer booked the relevant flight and the date on which Qantas notified the consumer that the flight had been cancelled.[130]

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[125] SAFA at [57].
[126] SAFA at [57] to [63].
[127] SAFA at [63].
[128] *Coles 2* at [52]; *Telstra* at [1], [55] and [56].
[129] SAFA at [66].
[130] SAFA at [66].

91. As a consequence of the Delayed Notification Conduct, consumers may have incurred greater costs in making alternate arrangements closer to their scheduled departure date, and had more limited alternative options available to them than if they had been promptly notified of the cancellation.[131]

92. Pursuant to the Remediation Program which forms part of the Undertaking, Qantas has taken steps to pay compensation to consumers who made a booking, or were re-accommodated onto, flights subject to the Continued Sale Conduct.[132] Remediation can be relevant both as evidence of contrition and because it attempts to redress, in the limited manner in which money can do it, the consequences of the contraventions.[133] Qantas has committed to remediating consumers up to the amount of approximately $20 million by providing remediation payments in the following amounts:

    a. for passengers on Australian domestic/trans-Tasman flights departing Australia, $225; or

    b. for passengers on international flights (excluding trans-Tasman flights) departing Australia, $450.[134]

93. These amounts are in addition to any refund or alternative flight already offered to those affected consumers.[135]

94. Further, in considering the nature and extent of consumer loss or damage arising from the contravening conduct, it is relevant that Qantas offered re-accommodation options to consumers, many of which were for an alternative flight which was close to the departure time of the consumer's original flight. While such offers may have limited or ameliorated the harm suffered by some consumers, it did not reduce the harm for others where the offered re-accommodation option may have been inconvenient or unsuitable, for example because it involved travel by an indirect route and/or an arrival time inconsistent with the purpose of the travel. Further, the offer of re-accommodation options for some consumers did not address the harm associated with a consumer's loss of opportunity.

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[131] SAFA at [67].
[132] See Annexure A to the SAFA at Schedule 3.
[133] *Australian Competition and Consumer Commission v Woolworths Limited* (2016) ATPR 42-521; [2016] FCA 44 at [166]-[167] (Edelman J), citing *Australian Competition and Consumer Commission v ACL Pty Ltd* (2015) 146 AID 385; [2015] FCA 399 at [35] (White J).
[134] See Annexure A to the SAFA at Schedule 3, paragraph 2.1(b).
[135] See cl 9.2 of the Conditions of Carriage at Annexure B to the SAFA.

D.2.5 Benefits to Qantas

95. Qantas benefitted from engaging in the contravening conduct, notwithstanding the fact that those benefits are not quantifiable.[136] Put shortly, those benefits included:

    a. obtaining and retaining revenue from consumers who may have chosen a different or less expensive flight with Qantas, or chosen to fly with a different carrier, had they been aware that their chosen flight had already been the subject of a cancellation decision;[137]

    b. retaining revenue from consumers who, having purchased a ticket from Qantas, were less likely to change carrier when they were ultimately notified their flight was cancelled;[138] and

    c. deferring the costs, including labour costs, associated with making the changes to its systems that it has now made, to avoid the contravening conduct from occurring.[139]

D.2.6 Compliance process

96. Qantas carries millions of passengers each year and Qantas' business involves significant interactions with consumers on a day-to-day basis.[140] Given these matters, and the extent of Qantas' resources, it is essential that consumer laws are front of mind and compliance is a priority.

97. During the Relevant Period Qantas had in place a Code of Conduct and Ethics which contained a brief section titled "Competition and Consumer Law Compliance Policy".[141] Personnel in contact with competitors, customers or suppliers were required pursuant to a "Competition Law Compliance Roadmap" to undertake certain online training, which contained a section on consumer law. [142]

98. As part of the Undertaking, Qantas has agreed to review and amend its Competition and Consumer Law Compliance Program, being amendments designed to minimise Qantas' risk of future breaches of the ACL, and to ensure its awareness of the responsibilities and obligations in relation to the requirements of the ACL.

99. Qantas' compliance policies and training failed to prevent the contravening conduct from occurring. Qantas is a company with significant levels of interaction with

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[136] SAFA at [69] to [71].
[137] SAFA at [69(a)-(b)].
[138] SAFA at [69(c)].
[139] SAFA at [69(d)].
[140] SAFA at [72].
[141] SAFA at [73(a)].
[142] SAFA at [73(b)(i)].

consumers, such that consumer laws should be front of mind and compliance should be a priority.

D.2.7 Prior conduct

100. Qantas has not previously been found by a court to have engaged in a breach of the ACL.[143] Qantas has given prior undertakings to the ACCC in respect of misleading or deceptive conduct and the making of false or misleading representations.[144] Further, its wholly owned subsidiary, Jetstar, has been ordered to pay penalties in respect of contraventions of s 29 of the ACL.[145]

101. The fact that Qantas Group companies have been found to have contravened the ACL and have agreed to provide s 87B undertakings in response to ACCC allegations of misconduct is relevant to the penalties required for specific deterrence in this case. This is not a matter of imposing punishment upon Qantas for past non-compliance with the law, but a case of recognising the context in which the circumstances of the present contraventions arose.

D.2.8 Cooperation

102. Cooperation with authorities in proceedings can reduce the penalty that would otherwise be imposed. The reduction reflects the fact that such cooperation increases the likelihood of cooperation in future cases in a way that furthers the object of the legislation, frees up the regulator's resources, thereby increasing the likelihood that other contravenors will be detected and brought to justice, and facilitates the administration of justice.

103. Qantas has cooperated with the ACCC to resolve the proceeding at an early stage, by making the admissions contained in the SAFA and agreeing to jointly propose the total penalty and other relief sought. By resolving the proceeding early, Qantas has saved the Court's time and resources including by obviating the need for contested hearings on liability and penalty.[146] The proposed total penalty reflects Qantas' cooperation in agreeing to resolve the proceeding.

104. Qantas has also given the Undertaking to the ACCC.

105. Without this cooperation, the total penalty sought by the ACCC would have been significantly higher.

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[143] SAFA at [76].
[144] SAFA at [77]-[78].
[145] SAFA at [79]-[81].
[146] SAFA at [82].

D.3 Other decisions

106. The Full Federal Court has repeatedly emphasised that the differing circumstances of individual cases mean that a penalty in one case cannot dictate the penalty in a later case.[147] There is "little utility" in referring to the penalty imposed in "other cases decided at a different time, in different circumstances and with different facts".[148] That is particularly so in circumstances where the statutory maximum has been significantly increased in recent years on two occasions,[149] signalling Parliament's intention that penalties imposed must be higher than those previously awarded. The purpose of any comparison with other cases is consistent application of principle, not numerical uniformity.[150]

107. The total penalty proposed in this case is appropriate and in accordance with principle. It is not meaningfully informed by other cases, including due to differences in the conduct, context and extent of the contravening conduct, and the applicable maximum penalty per contravention.

D.4 Determining the penalty figure

108. The parties submit that total penalty of $100 million achieves the primary objectives of specific and general deterrence, informed by the mandatory and other relevant factors discussed above, and is within the appropriate range for the contraventions admitted by Qantas.

109. As set out at paragraph 57 above, it is appropriate that Qantas' conduct be analysed in term of two courses of conduct, by reference to the two categories of conduct that gave rise to the contraventions, being the Continued Sale Conduct and the Delayed Notification Conduct. In considering the appropriate penalty to be imposed for each course of conduct the Court will be centrally guided by achieving deterrence taking into account all of the above penalty factors.

110. Given the need to deter wrongdoing of this kind, by major and well-resourced corporations, it is appropriate that each penalty be, and be seen to be, significant. It is

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[147] *Yazaki* at [237]; *Flight Centre Limited v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53 at [69] (Allsop CJ, Davies and Wigney JJ); *NW Frozen Foods* at 295-296; *Singtel Optus* at [60]. See also *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790 at [77] (Beach J).
[148] *Yazaki* at [237].
[149] When the ACL commenced, the maximum civil penalty for breach of most of the provisions to which s 224(1) applies was $1.1m for bodies corporate. In September 2018, the maximum was increased to the greater of $10m, three times the value of the benefit obtained from the contravention or 10% of annual turnover (see *Treasury Laws Amendment (2018) Measures (no 3) Act 2018* (Cth)). The maximum was increased again in November 2022, to the greater of $50m, three times the value of the benefit obtained from the contravention or 30% of adjusted turnover (see *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth)).
[150] *Employsure* at [58].

also appropriate that the penalty amounts reflect relevant differences in the contraventions across the two courses of conduct, including by reference to the nature of the course of conduct, the harms the course of conduct caused to consumers and the benefits obtained by Qantas as a result of the conduct.

111. Adopting this approach, proposed amounts for each course of conduct which would be seen as appropriately significant, and which would reasonably reflect relevant differences between the courses of conduct, are as follows:

    a. ***Continued Sale Course of Conduct***: These are the most serious of the contraventions. Although fewer consumers were impacted by the Continued Sale Conduct than the Delayed Notification Course of Conduct, the conduct nevertheless affected over 85,000 consumers, over a period of more than two years. Further, the nature of the conduct was serious in that it directly distorted consumers' ability to make purchasing decisions based on accurate information. As a consequence, these contraventions were also likely to have caused the greatest harm, including due to consumers paying more to fly at a particular time in circumstances where Qantas had decided to cancel the relevant flight 2 or more days earlier, and consumers choosing to fly with Qantas over a different carrier based on the stated flight time and date. Equally, the contraventions resulting from the Continued Sale Conduct resulted in benefits to Qantas including by obtaining and retaining revenue from those consumers who may have chosen a different or less expensive flight with Qantas, or chosen to fly with a different carrier, had they been aware that Qantas had decided to cancel their chosen flight 2 or more days earlier, and by delaying the costs associated with making the changes to its system to avoid the contravening conduct at an earlier point in time. Making allowance for cooperation, an appropriate total penalty for this course of conduct is **$70 million**.

    b. ***Delayed Notification Course of Conduct***: These contraventions affected a very significant number of consumers (up to 883,977) over a more than two-year period. The contraventions resulted in harm to consumers, including incurring greater costs in making alternate arrangements closer to their scheduled departure date as a result of delayed notification of cancellation. The contraventions resulting from the Delayed Notification Conduct also resulted in benefits to Qantas, such as retaining revenue from consumers who, having purchased a ticket from Qantas, were less likely to change carrier when they were ultimately notified their flight was cancelled, and delaying the costs associated with making the changes to its system to avoid the contravening conduct at an earlier point in time. Making allowance for

cooperation, an appropriate total penalty for this course of conduct is **$30 million**. A lower penalty is proposed in respect of this course of conduct to reflect the more limited harm stemming from these contraventions (as compared with the harm stemming from the contraventions which resulted from the Continued Sale Conduct), as well as to take into account the substantial overlap between the flights, and consumers, impacted by both courses of conduct.

112. In addition to the factors identified in respect of each course of conduct above, many of the penalty factors apply equally to both courses of conduct and further confirm that the proposed penalties are appropriate. Those factors are as follows.

    a. *First*, as addressed at 66 to 68 above, Qantas is a large, publicly listed company with significant resources, and has a significant share of the airline industry in Australia.

    b. *Second,* as addressed at 73 above, each course of conduct occurred over an extended period of time, comprising approximately two years and two months.

    c. *Third*, as addressed at 83 to 84 above, Qantas' senior management responsible for different aspects of Qantas' systems and operations, between them, were aware of certain matters concerning Qantas' systems and operations which resulted in the contravening conduct.

    d. *Fourth*, as addressed at 86 above, despite the significant resources available to Qantas, and the combined awareness of its senior managers referred to above, Qantas failed to take steps to address the deficiencies in its systems and operations prior to the commencement of the proceeding. Following the commencement of the proceeding, Qantas has changed its systems to avoid the contravening conduct. Qantas could have introduced these changes earlier. Had these measures been introduced earlier, the contravening conduct would not have occurred.

    e. *Fifth*, as addressed at 99 above, despite Qantas' extensive interaction with consumers and the extent of its resources, Qantas failed to implement adequate compliance processes to prevent the contravening conduct from occurring.

113. In the circumstances of this case, for the reasons above, the proposed total penalty of $100 million is appropriate and necessary. A total penalty of this size is just and appropriate and does not require an adjustment for totality.

E DECLARATIONS OF CONTRAVENTION

114. The contraventions admitted by Qantas are established by the facts and admissions in the SAFA. The parties jointly seek declarations from the Court that Qantas contravened ss 18, 29(1)(b), 29(1)(g) and 34 of the ACL, in the form set out at paragraph 1 of the Proposed Orders.

115. The Court has a wide discretionary power to make declarations under s 21 of the FCA Act. In *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union*, (***CFMEU 2***)[151] the Full Court stated:

> Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions…

116. Before making declarations, three requirements should be satisfied:[152]

    a. the question the subject of the declaration must be a real and not hypothetical one;

    b. the applicant must have a real interest in raising it; and

    c. there must be a proper contradictor, in the sense of someone with a true interest in opposing the declaration sought.

117. The above requirements are satisfied in this case as follows:

    a. First, prior to the admissions made by Qantas, there was a direct and important question as to whether Qantas' had engaged in conduct contravening the ACL. Those contraventions are now established by the facts and admissions contained in the SAFA. The terms of the proposed declarations reflect the admitted contraventions.

    b. Secondly, the ACCC has a genuine interest, as the statutory regulator discharging its functions under the CCA in the public interest, in seeking declaratory relief.

    c. Thirdly, Qantas is a proper contradictor. Qantas is the entity alleged to have contravened the ACL. It is the subject of the proposed declarations and has an interest in opposing the declarations sought. This is the case even though it has made admissions and agreed facts set out in the SAFA.

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[151] (2017) 254 FCR 68; [2017] FCAFC 113 at [93] (Dowsett, Greenwood and Wigney JJ).
[152] *Forster v Jodolex Australia Pty Limited* (1972) 127 CLR 421; [1972] HCA 61 at 437-436 (Gibbs J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; [1992] HCA 10 at 581-582 (Mason CJ, Dawson, Toohey and Gaudron JJ).

118. That a party with an interest in the relief sought has chosen not to oppose a grant of particular declaratory relief is not an impediment to such relief being granted by a Court.[153]

119. The making of the declarations sought is desirable and appropriate in this case because it records the Court's disapproval of Qantas' conduct, vindicates the ACCC's claims that Qantas' conduct contravened ss 18, 29(1)(b), 29(1)(g) and 34 of the ACL, assists the ACCC to carry out the duties conferred upon it under the CCA, assists in clarifying the law, informs the public about Qantas' conduct and deters Qantas and other corporations from contravening the ACL.

F OTHER ORDERS

120. The Court has power to award costs pursuant to s 43 of the FCA Act. The parties have proposed that Qantas make a contribution to the ACCC's costs of and incidental to the proceeding fixed in the sum of $400,000 to be paid within 30 days of the date of the Court's order.

121. The parties jointly submit that the Court should make the Proposed Orders, including an order that the proceeding against Qantas otherwise be dismissed.

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T SPENCER BRUCE SC	R YEZERSKI SC
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	A BARRACLOUGH
Counsel for the ACCC	Counsel for Qantas

Date: 25 September 2024

[153] *Australian Competition and Consumer Commission v Meta Platforms Inc* [2023] FCA 842 at [24], citing *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378; [2012] FCAFC 56 at 14]-[30]-[33].