CIVIL PENALTY PROCEEDINGS: A PRACTITIONER'S GUIDE

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A INTRODUCTORY MATTERS

A1 Structure and purpose of this paper

1. This paper provides a broad overview of the principles and practice relating to civil penalty proceedings. It is intended as a practical and helpful reference, to be used by barristers and solicitors that practise or wish to practise in this area of law.

2. The paper commences with an overview and summary of key concepts and principles.

3. **Part A** deals with introductory matters: the nature of civil penalty proceedings, an introduction to penalty privilege, and some comparisons to conventional civil and criminal proceedings.

4. **Part B** is a guide to the liability phase of civil penalty proceedings. It deals with pleadings, discovery, mediation, evidence, and trials on liability.

5. **Part C** is a guide to the penalty phase of civil penalty proceedings: that is, once liability for a contravention has been established, the process by which an appropriate penalty is determined. The penalty phase is effectively the civil equivalent of a criminal sentencing hearing.

A2 Overview and summary of civil penalty proceedings

6. Civil penalty proceedings are a very interesting subject matter. A common tool of modern regulation, civil penalty proceedings are a proceeding in a court, brought by a public authority (the regulator), for the imposition of a non-criminal penalty, where provided by legislation as a sanction for certain proscribed conduct.

7. They are a unique fusion, appearing on their face to be a hybrid of civil and criminal proceedings. However, they are principally civil in substance, with civil rules of evidence and civil onus of proof. They are prosecuted by statutory regulators which have extensive pre-trial powers of investigation. Civil penalty proceedings often commence after an extensive investigation, and the obtaining of voluminous documents. They give rise to interesting questions such as the privilege against self-incrimination (or self-exposure to a penalty) for natural persons who are respondents to such proceedings.

8. Although not criminal in nature, civil penalties are imposed by a court, upon a finding that a contravention has occurred. Their sole purpose is to act as a deterrent.[2] More will be explained on this later in the paper. Commonly, the legislation by which civil

[2] Affirmed most recently in *Australian Building and Construction Commissioner v Pattinson & Anor* (2022) 399 ALR 599 (***ABCC v Pattinson***).

penalties are enacted will specifically provide that the court must apply both the rules of evidence and procedure for civil matters.[3]

9. In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (***Agreed Penalties Case***), a majority of the High Court described civil penalty provisions as typically having the following context:

> In essence, civil penalty provisions are included as part of a statutory regime involving specialist industry or activity regulator or a department or Minister of State of the Commonwealth (the regulator) with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest. Typically, the legislation provides for a range of enforcement mechanisms, including injunctions, compensation orders, disqualification orders and civil penalties, with or… without criminal offences. That necessitates the regulator choosing the enforcement mechanism or mechanisms which the regulator considers to be most conducive to securing compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence. And, finally, it requires the regulator, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings.[4]

10. Although civil penalty provisions are now found in a wide range of legislation, those authorities most active in bringing civil penalty proceedings include the Australian Securities and Investments Commission (**ASIC**), the Australian Competition and Consumer Commission (**ACCC**), the Commissioner of Taxation, the Fair Work Ombudsman, the Australian Building and Construction Commissioner (**ABCC**), and increasingly, the Australian Energy Regulator (**AER**). Proceedings are often truncated with the use of concise statements, statements of agreed facts, limited discovery (if any) and affidavits standing as the evidence in chief. Issues of liability are often wholly or substantially agreed, particularly with corporate respondents – much like a criminal plea of guilt. In determining whether to admit liability, respondents may weigh up all of the risks of the litigation, including the prospects of successfully defending the proceeding and the reputational risks.

11. Although penalties are most commonly pecuniary in nature, this is not always the case. By way of example, a sanction involving some loss of status or entitlements (such as an order to disqualify a person as a director of companies) may also be considered a penalty.[5] Determining the appropriate penalty is the subject of well settled principles ranging from the "French factors" to the "Santow factors" (discussed further below),

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3 See eg *Corporations Act 2001* (Cth) s 1317L; *Taxation Administration Act 1953* (Cth) s 298-85; *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) s 65AG.

4 *Agreed Penalties Case* (2015) 258 CLR 482, at [24] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

5 *Rich v ASIC* (2004) 220 CLR 129, [37].

each of which have been replicated or supplemented in various statutes. However, all these factors are secondary to the focus on deterrence – both specific and general - as emphasised recently by the High Court in *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599 (***ABCC v Pattinson***).

A3 Statutory powers of investigation

12. Most regulators have extensive statutory powers of investigation including to compel the production of documents and information and to attend examinations to answer questions and/or to provide reasonable assistance. These must be responded to. A failure to respond without a lawful excuse (for example legal professional privilege) constitutes an offence. These powers are often exercised prior to civil penalty proceedings being commenced so that a substantial volume of documents is already obtained. The framing of statutory notices to corporate respondents to produce documents often gives a clear indication as to the form of likely civil penalty proceedings which will follow.

A4 Comparison to criminal and conventional civil proceedings.

13. Civil penalties are avowedly civil in nature although in some ways they resemble criminal prosecutions. This is why civil penalty proceedings are sometimes referred to as a "hybrid" proceeding; one that incorporates elements of both civil and criminal proceedings. However, they are typically created in order to stand apart from a criminal prosecution with civil penalty legislation "*emphatic in drawing a distinction*"[6] with criminal proceedings – whether by reason of the nature of the conduct in question (more regulatory than personal), the intended standard of proof (on the balance of probabilities rather than beyond reasonable doubt), the intended sanctions (monetary, rather than custodial), the likely respondents (commonly corporations), or their intended purpose (strictly deterrence).

14. Accordingly, the starting point for determining the applicable procedure in a civil penalty proceeding is to start with the conventional civil procedure rules, and the particular legislation under which the civil penalty proceeding may be commenced.[7] From that starting point, it is then a question of identifying any reasons why the conventional procedure should ***not*** be applied. Typically, if there is such a reason, it will relate either to:

    (a) the impact of penalty privilege, in relation to individual respondents –

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6 *ABCC v Pattinson,* [14]

7 *Morley v ASIC* (2010) 247 FLR 140, at [696] (Spigelman CJ, Beazley and Giles JJA); see also *Adler v ASIC* (2003) 179 FLR 1, at p678] (Giles JA, Mason P and Beazley JA agreeing).

particularly in relation to pleadings and disclosure; or

(b) the nature of the civil penalty proceeding itself – such as in relation to the structure of the trial, and the Court's discretion in relation to agreed penalties.

15. In comparison to conventional civil proceedings, civil penalty proceedings have the following distinguishing features:

(a) the regulator will owe obligations as a model litigant;

(b) individual respondents may be partially excused from the ordinary requirement to file a responsive defence, and will not be required to file any evidence, until the close of the applicant's case;

(c) individual respondents may be excused from discovery or any other production of documents;

(d) the trial will be split in two parts: initially a trial on liability, to be followed (if the applicant is successful) by a subsequent hearing on penalty – analogous to a criminal sentencing hearing;

(e) the relief sought is not compensatory, but in the nature of a penalty, imposed for the purposes of deterrence not punishment; and

(f) settlement (by way of an agreed penalty) is subject to approval by the Court, which will usually approve the settlement provided it is "within the range".

16. In comparison to conventional criminal proceedings:

(a) civil penalty proceedings are primarily governed by civil procedure and the civil rules of evidence;

(b) the obligations specific to a criminal prosecutor – such as the obligation to call all material witnesses – will not apply to the applicant;

(c) discovery (or disclosure) is in accordance with civil procedural rules – a corporate respondent may be ordered to make discovery, and discovery more generally is subject to the discretion of the Court – in many cases, there is no discovery at all;

(d) the parties may be required to attend a mediation;

(e) corporate respondents will typically be required to file their evidence before trial;

(f) the applicant's case must only be established on the civil standard of proof, albeit in accordance with the *Briginshaw* principles;

(g) if liability for a civil penalty is established, the applicant has a much greater

freedom to make submissions in relation to the appropriate penalty, and the parties may propose an agreed penalty, by way of compromise;

(h) more generally in relation to the quantum of penalty, it will be fixed based on principles of deterrence – other sentencing considerations, such as proportionality[8], punishment or rehabilitation, are not applicable.

17. Those issues are explored further below.

A5 What is the penalty privilege?

18. Where the respondents are individuals, the procedural aspects of civil penalty proceedings are likely to be significantly impacted by the privilege against self-exposure to a penalty, also known as **penalty privilege.**

19. Penalty privilege is related to, but not the same as, the privilege against self-incrimination. The general principle, in relation to judicial proceedings, is that a natural person is not bound to answer any questions (either pre-trial at an examination or at trial) or produce any documents if the answer or the document would have a tendency to expose that person to conviction for a crime or to the imposition of a civil penalty.[9] In conventional civil proceedings, the penalty privilege may only be relied upon where the person has a bona fide apprehension of self-exposure to a penalty on reasonable grounds.[10] Where the proceeding itself is for the purpose of imposing a civil penalty, the penalty privilege will be generally available.[11] The penalty privilege is not available to corporations.[12] Accordingly, a civil penalty proceeding against a corporate respondent will align much more closely with conventional civil procedure, than will a civil penalty proceeding against a natural person.

B THE LIABILITY PHASE

B1 Pleadings

(a) The Statement of Claim

20. Upon commencing a civil penalty proceeding – as with any other civil proceeding – the applicant's case must typically be set out in a statement of claim. The statement of claim must comply with the conventional requirements of civil procedure, as set out in the applicable rules of court.

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8 See *ABCC v Pattinson* at [38]

9 *Sorby v Commonwealth* (1983) 152 CLR 281; *R v Associated Northern Collieries* (1910) 11 CLR 738.

10 *Sorby v Commonwealth* (1983) 152 CLR 281.

11 *R v Associated Northern Collieries* (1910) 11 CLR 738.

12 *Trade Practices Commission v Abbco Ice Works Pty Ltd (1994*) 52 FCR 96

21. In the Federal Court, the statement of claim must:

(a) be divided into consecutively numbered paragraphs, each, as far as practicable, dealing with a separate matter;

(b) be as brief as the nature of the case permits;

(c) identify the issues that the applicant wants the court to determine;

(d) state the material facts on which the applicant relies that are necessary to give the respondent fair notice of the case to be made out against it at trial (but not the evidence by which those facts are sought to be proven);

(e) state the provisions of any statute relied upon; and

(f) state the specific relief sought or claimed – ie typically, a declaration that a civil penalty provision has been contravened, and an order that a corresponding penalty be imposed.[13]

22. Although the ordinary rules of civil procedure will apply, an applicant can expect that those rules might be applied with a greater degree of exactness where the proceeding is to impose a civil penalty. In *CFMEU v BHP Coal Pty Ltd* (2015) 230 FCR 298[14], the Full Court of the Federal Court said:

> Even [though civil procedure will apply], a civil suit for the recovery of a pecuniary penalty is a proceeding of a penal nature: …. In this class of case, it is especially important that those accused of a contravention know with some precision the case to be made against them. Procedural fairness demands no less.

23. In *Adler v ASIC* (2003) 46 ACSR 504, the Full Court of the Federal Court said that – in civil penalty proceedings, as in civil proceedings more generally – pleadings *'serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision.'*[15]

24. In relation to the contravention of civil penalty provisions, that should include, at least:

(a) which provision is said to have been contravened;

(b) by what facts or matters, and by reference to what legislative provisions (if any), is the contravention said to have occurred;

(c) how many contraventions are said to have occurred;

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13 *Federal Court Rules 2011* (Cth), r 16.02(1).

14 *CFMEU v BHP Coal Pty Ltd* (2015) 230 FCR 298, at [63].

15 *Adler v ASIC* (2003) 46 ACSR 504 (Full Court), at [138] (Giles JA, Mason P and Beazley JA agreeing), quoting *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286.

(d) whether the contravention is an ongoing contravention (and for what period), or is to be proven at a specific point in time; and

(e) if more than one is available, the applicable statutory maximum penalty, and any facts that are relevant to determining that penalty (see below).

25. **Pleading states of mind:** In civil penalty proceedings, although certain states of mind of the respondent (eg intention vs recklessness) may be regarded as relevant to the quantum of penalty, unless they are elements of the contravention itself, there is no need to plead the respondent's state of mind in this way. The mere bringing of a civil penalty proceeding is sufficient to give notice that the respondent's state of mind is in issue, at least in relation to the quantum of penalty. [16] Further, a respondent's contravention will not be assumed to be innocent (in the sense of ignorance or inadvertence), unless proven otherwise. Rather, if the contravention itself does not involve any state of mind, then it is for the party asserting any particular state of mind (ie by way of mitigation or aggravation) to prove its assertion.[17]

26. **Facts that are material to the statutory maximum penalty:** In modern civil penalty legislation, it is common that the available maximum penalty may be either a specified amount, or some amount that is calculated by reference to the actual contravention (eg benefits obtained or loss avoided) or some attribute of the contravener (eg annual turnover). Where there are facts that are material to determining the applicable maximum penalty, which if not pleaded may take the other party by surprise, they must be pleaded.[18]

(b) The Defence

27. Subject to an important qualification where the respondent is a natural person, a respondent to a civil penalty proceeding must file a defence, in accordance with conventional civil procedure, as set out in the rules of court.

28. In the Federal Court, a party pleading a defence to a statement of claim must specifically admit or deny every allegation of fact that is pleaded against them – or where relevant, state that they do not know, and therefore cannot admit or deny either way.[19] In a defence, a party must expressly plead any matter of fact, or point of law, that either:

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16 *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181, [121]-[124] (Full Court) (*Reckitt*).

17 *Reckitt*, [130]-[131].

18 *ACCC v Flight Centre (No 3)* (2014) 234 FCR 325, 327-337.

19 *Federal Court Rules 2011* (Cth), r 16.07.

(a) raises an issue not arising from the statement of claim;

(b) if not expressly pleaded, might take another party by surprise; or

(c) that party alleges makes the claim against that party not maintainable.[20]

29. Where the respondent is a natural person, the operation of penalty privilege will provide significant exceptions from the ordinary operation of the pleading rules, as set out above. The two most important decisions in this respect are those set out below.

30. In *ASIC v Mining Projects Group Pty Ltd & Ors* (2007) 164 FCR 32, Finkelstein J of the Federal Court considered a case brought by ASIC, against both corporate and individual respondents. The individual respondents had pleaded a positive case in their defence, of which ASIC sought further and better particulars. The respondents declined to provide them, relying on their penalty privilege. ASIC contended that the privilege had been waived, by the assertion of positive facts in the respondents' defence. Justice Finkelstein held that any waiver was limited to the facts as pleaded themselves, and there was no obligation to provide further particulars.[21] His Honour held further that the respondents must file a defence, but the pleading rules more generally must give way to their penalty privilege.[22]

31. In relation to the running of a positive defence, Finkelstein J stated:

> Ordinarily a positive case must be raised in the defence. Whether it must be raised in a defence in a civil action to recover a penalty is by no means clear. The view I favour is that there can be no such requirement as it would be inconsistent with the privilege. On the other hand, if a respondent who wishes to run a positive case is required to plead his case that can be accommodated while maintaining the privilege. What should occur is that the respondent should be entitled to rely on the privilege until the plaintiff's case is concluded. If at that point the respondent decides to run a positive case he can deliver an amended defence that will outline his case. In an exceptional case the judge may grant a short adjournment to allow the plaintiff time to prepare, if he is otherwise taken by surprise. In most cases that will not be necessary. …[23]

32. The day after Finkelstein J's judgment in *ASIC v Mining Projects*, the New South Wales Court of Appeal delivered a judgment dealing with substantially the same issue. In *Macdonald v ASIC* (2007) 73 NSWLR 612, the individual respondents had sought to be relieved of any obligation to plead facts that might otherwise take the applicant by surprise, or to provide adequate particulars, and to file a defence that was limited to bare admissions, non-admissions and denials, with liberty to amend after ASIC had

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20 *Federal Court Rules 2011* (Cth), r 16.08.
21 *ASIC v Mining Projects Group Pty Ltd* (2007) 164 FCR 32, at [24]-[25].
22 *ASIC v Mining Projects Group Pty Ltd* (2007) 164 FCR 32, at [12].
23 *ASIC v Mining Projects Group Pty Ltd* (2007) 164 FCR 32, at [13].

closed its case. A majority of Mason P and Giles JA were not willing to go quite this far. Rather, their Honours confirmed that the individual respondents should not be compelled to include in their defence *'any information that may have the tendency to expose* [them] *directly or indirectly to the penalties being sought'*.[24] This did not require that they be excused from any form of positive defence in its entirety. Rather, the conventional rules of pleading should be departed from no more than is necessary to give effect to the privilege. This required that the respondents *'invoke at the outset any relevant defence or statutory ground of dispensation; and… to identify any parts of ASIC's own allegation intended to be relied upon in that regard.'*[25]

33. As a practical example, Mason P suggested a pleading in the following form:

> "If, which is denied, the matters alleged in para X constitute a contravention of sY of the Corporations Law, the defendant says that the matters alleged by ASIC also establish that the claimant relied upon information or professional or expert advice (etc) / acted honestly (etc). The defendant reserves the right to advance in his case additional material in support of his defence, the details whereof will be disclosed by amending this paragraph after the close of ASIC's case."[26]

34. A similar approach to that taken in *Macdonald* was adopted by the Queensland Court of Appeal in *Anderson v* ASIC (2012) 2 Qd R 401.[27]

35. The reasoning in those cases has since regularly been followed. To the extent there is a difference between the two lines of authority (in that the Court of Appeal in *Macdonald* required at least some initial notice of a positive defence, while Finkelstein J in *Mining Projects* did not), the reasoning in *Macdonald* was subsequently adopted by the Full Court of the Federal Court in *Adams v Director of the Fair Work Building Industry Inspectorate* (2017) 258 FCR 257.[28] Both *Mining Projects* and *MacDonald* were endorsed by a majority of the Full Court in *Australian Building and Construction Commissioner v O'Halloran* [2021] FCAFC 185.[29] The "Macdonald" defence is now routinely deployed by individual defendants in civil penalty proceedings and sometimes in ordinary civil proceedings where the privilege against self-incrimination (or penalty privilege) is relevant and invoked.

36. In summary of the matters above, a corporate respondent must file a defence that meets the conventional requirements. In contrast, an individual respondent is entitled

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24 *Macdonald v ASIC* (2007) 73 NSWLR 612, [71] (Mason P, Giles JA agreeing).
25 *Macdonald v ASIC* (2007) 73 NSWLR 612, [74] (Mason P, Giles JA agreeing).
26 *Macdonald v ASIC* (2007) 73 NSWLR 612, [72] (Mason P, Giles JA agreeing).
27 *Anderson v ASIC* (2012) 2 Qd R 401.
28 *Adams v Director of the Fair Work Building Industry Inspectorate* (2017) 258 FCR 257, [102]-[105].
29 *Australian Building and Construction Commissioner v O'Halloran* [2021] FCAFC 185 (Kerr and Wigney JJ, Logan J dissenting).

to claim penalty privilege, and consequently:

(a) they are entitled to put the applicant to its proof, but must nonetheless file a defence;

(b) the rules of pleadings will be modified to accommodate the penalty privilege where necessary;

(c) the respondent is not obliged to make any admissions;

(d) the respondent must raise any relevant statutory defence, or ground of dispensation, at the outset, and identify any parts of the applicant's pleading that support those defences, but they need not initially plead any positive facts of their own; and

(e) if the respondent wishes to amend their pleadings at the close of the applicant's case, to raise any positive facts in their defence, they may do so.

(c) Notices to admit

37. Where an individual respondent is not obliged to make admission by way of pleadings, by reason of their penalty privilege, it has also been held that they may not be put to an admission (or a positive denial) by the service of a notice to admit.[30]

38. In relation to a corporate respondent, a notice to admit will operate in the ordinary way.

B2 Alternatives to pleadings: Federal Court Concise Statement procedure[31]

39. As a matter of current practice, and because they are most common in Commonwealth legislation, most civil penalty proceedings are presently commenced in the Federal Court of Australia – and a significant proportion of those in the Commercial and Corporations List. Since October 2016, parties commencing in that List have the option of commencing proceedings with a five-page "concise statement", instead of a conventional statement of claim.[32]

40. A concise statement must summarise:

(a) the important facts;

(b) the relief that is sought from the Court (and against whom);

(c) the primary legal grounds, or causes of action; and

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30 *Director, Fair Work Building Industry Inspectorate v Adams* [2015] FCA 420, [24]-[26] (Gilmour J).

31 This section borrows heavily from Matthew Peckham, 'Creating efficiencies: Federal Court procedure' [2022] 5 *Law Institute Journal* 30.

32 Commercial and Corporations Practice Note (C&C-1), issued 25 October 2016.

(d) the alleged harm, including wherever possible a conservative and realistic estimate of loss, which may be expressed as a range.[33]

41. The purpose of the concise statement procedure is to enable the applicant to bring to the attention of the respondent and the Court the key issues and key facts at the ehart of the dispute and the essential relief that is sought from the Court.[34] Critically, this avoids the need for lengthy or detailed pleadings prior to commencing proceedings, and their associated costs.[35]

42. At the first case management hearing (typically within two to three weeks of filing), the Court will consider whether the matter is better suited to concise statements or a more detailed statement of claim.[36] The Court may require a concise statement in response from the respondent, in order to proceed without pleadings, or to determine which procedure is most appropriate.[37]

43. Unlike conventional pleadings, concise statements are not intended to be exhaustive of the issues in dispute. Although they must set out the key facts and claims, they will then form a starting point for the issues to be further articulated through the case management process as a whole, by whatever means are most fitting.[38] The concise statement procedure is one that emphasises the modern approach to case management, and requires cooperation between the parties.[39]

44. In practice, regulatory enforcement and civil penalty proceedings are commonly commenced by way of concise statement. There is nothing inherent to such proceedings that requires the formality of pleadings – subject to the principle, already cited above, that a person accused of a contravention, or against whom a penalty is sought, deserves to know with some precision the case that is to be made against them. Arguably, that is a matter more relevant to the extent to which the applicant's case must be properly exposed, and not to the means by which that is achieved.

45. The question of whether a concise statement can be appropriate in a civil penalty case against a natural person is not yet settled although it may present more challenges.

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33 Practice Note C&C-1, [5.6].

34 Practice Note C&C-1, [5.4]; see also *Allianz Australia v Delor Vue Apartments CTS 39788* [2021] FCAFC 121; (2021) 153 ACSR 522 (***Allianz Australia v Delor Vue Apartments***), at [140] (McKerracher and Colvin JJ).

35 See eg Practice Note C&C-1, at [5.4]; *MLC Ltd v Crickitt (No 2)* [2017] FCA 937, at [4] (Allsop CJ); *ASIC v ANZ Banking Group* (2019) 139 ACSR 52 (***ASIC v ANZ***), at [8] (Allsop CJ)

36 Practice Note C&C-1, [6.7].

37 *Allianz Australia v Delor Vue Apartments*, at [143] (McKerracher and Colvin JJ).

38 *Allianz Australia v Delor Vue Apartments*, at [143], [144], [150], [151] (McKerracher and Colvin JJ); *ASIC v ANZ*, at [9] (Allsop CJ).

39 *Allianz Australia v Delor Vue Apartments*, at [146]-[147] (McKerracher and Colvin JJ).

46. On the one hand, a natural person's privilege against self-exposure to a penalty will necessarily conflict with the cooperative and proactive approach to case management that has so far been described as fundamental to proceeding by concise statements. In *ASIC v Bettles* [2020] FCA 1568,[40] a case against a natural person, Greenwood ACJ ordered that ASIC's concise statement be set aside and replaced by conventional pleadings. In doing so, Greenwood ACJ noted that the penalty was very serious, and that it was essential for ASIC to set out individually each of the material facts giving rise to the alleged contraventions.[41]

47. On the other hand, this may not rule out such proceedings altogether. By way of example, a case might be commenced by concise statement and then expanded by conventional pleadings, if the contraventions alleged are contested. In some penalty proceedings, the contravention itself will be admitted, and the real contest is solely about the quantum of penalty. In that case, a concise statement might be analogous to the procedure for a "plea brief" under ss 116 and 117 of the *Criminal Procedure Act 2009* (Vic). In criminal cases, those provisions allow for the service of a condensed version of the prosecution brief, which is served on the accused with their consent, typically as a prelude to a guilty plea.

48. Similarly, in civil penalty cases where the contravention is admitted, proceedings are regularly commenced by concise statement, and then followed by a statement of agreed facts. Together, these will form the basis for the Court to declare that a contravention has occurred, and the starting point for a subsequent hearing on penalty (whether by agreement or contested). This procedure applies just as well to individuals as it does to a corporate respondent, subject to the commentary above.

49. Ultimately, whether a concise statement method is appropriate for a particular civil penalty proceeding will be a matter for the docket judge.

B3 Is default judgment available?

50. Where the respondent is a natural person, there is a tension between the principle that the respondent must file a defence, and the principle (underlying the penalty privilege) that the facts on which a penalty is to be imposed on a natural person must be established by the person who is seeking to impose that penalty.

51. In conventional civil proceedings, when a respondent fails to file a defence, the applicant may apply for default judgment.[42] Further, when an allegation is not

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40 *ASIC v Bettles* [2020] FCA 1568 (Greenwood ACJ)
41 *ASIC v Bettles* [2020] FCA 1568, [82], [85] (Greenwood ACJ).
42 See eg *Federal Court Rules 2011* (Cth), r 5.23(2).

specifically denied (or made the subject of a non-admission), it is taken to be admitted.[43]

52. In the context of civil penalty proceedings, the issue arose in *ACCC v Dataline.Net.Au Pty Ltd (in liq) & Ors* (2006) 236 ALR 665 (Federal Court).[44] In that case, Kiefel J (as her Honour then was) granted declarations of contravention in a case where they were sought in default of a defence. The declarations were in terms that they were based on deemed admissions, so that there could be no misunderstanding.[45] In relation to the consequent imposing of penalties, Kiefel J said '*the question arises as to whether it is appropriate*'.[46] In that case, however, there was evidence on affidavit which was capable of supporting the contraventions in question, so Kiefel J proceeded to impose a penalty, albeit of a modest amount only.[47]

53. In *ASIC v Cash Store Pty Ltd (in liq)* [2014] FCA 926, the two corporate respondents each submitted that they would not appear, and would abide by the Court's decision.[48] The hearing to determine their liability was conducted unopposed, and findings were made on the evidence. Whether a default judgment was available was not in issue. A subsequent hearing to determine the quantum of penalty was also conducted unopposed.[49]

54. Since that time, however, there have now been a series of cases in which a declaration of contravention was granted, and a penalty imposed on a natural person, on the basis of deemed admissions – that is, by way of default judgment.

55. The most significant example is *Commonwealth v Harrison* [2019] FCA 937, Perry J granted declaratory relief by way of default judgment in respect of a natural person alleged to have breached civil penalty provisions, but expressly refrained from deciding whether any imposition of penalties would follow.[50] In the subsequent hearing on penalty, Perry J accepted the Commonwealth's submission that matters pleaded in the statement of claim could be taken to be admitted, and were not required to be proven.[51] The Commonwealth's additional evidence related to matters that were relevant to the quantum of penalty only. The penalty imposed was substantial – $571,000.

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43 See eg *Federal Court Rules 2011* (Cth), r 16.07(2), and see further *ACCC v Dataline.Net.Au Pty Ltd (in liq) & Ors* (2006) 236 ALR 665 at [45] (Kiefel J).
44 *ACCC v Dataline.Net.Au Pty Ltd (in liq) & Ors* (2006) 236 ALR 665 (Federal Court).
45 *ACCC v Dataline.Net.Au Pty Ltd (in liq) & Ors* (2006) 236 ALR 665 (Federal Court), [59]
46 *ACCC v Dataline.Net.Au Pty Ltd (in liq) & Ors* (2006) 236 ALR 665 (Federal Court), [109].
47 $5,000 for the individual respondent, and no penalty for the two corporations, which were by then in liquidation: [117]-[118].
48 *ASIC v Cash Store Pty Ltd (in liq)* [2014] FCA 926, at [2].
49 *ASIC v Cash Store Pty Ltd (in liq*) (No 2) [2015] FCA 93.
50 *Commonwealth v Harrison* [2019] FCA 937 at [4].
51 *Commonwealth v Harrison (No 2)* (2020) 145 ACSR 192 (Federal Court), [7].

56. Similar approaches were taken in *ACMA v Getaway Escapes Pty Ltd* [2016] FCA 795 and in *Secretary, Department of Health v Evolution Supplements Australia Pty Ltd* [2021] FCA 74; *Secretary, Dept of Health v Evolution Supplements Australia Pty Ltd (No 2)* [2021] FCA 872.

B4 Discovery and compulsory production

57. As a general principle, the discovery of documents in civil penalty proceedings will be in accordance with the rules of conventional civil procedure – subject, as always, to the application of penalty privilege for individual respondents.

58. In the Federal Court, a party may apply to the Court for an order that another party make discovery of documents.[52] It will not be ordered automatically. The application must state whether the party is seeking standard discovery, or otherwise state the proposed scope.[53] Standard discovery will entail the production of documents that are directly relevant to the issues in the proceeding, of which the party is aware after a reasonable search, and that are (or have been) in the party's control.[54] The test for direct relevance requires that the documents must be those on which the party intends to rely, those which adversely affect its case, those which either support or adversely affect another party's case.[55] A party must not apply for an order for discovery unless the making of an order would facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.[56]

(a) Production by respondents

59. An individual respondent to a civil penalty proceeding will not be required to make discovery.[57] This is a consequence of their penalty privilege. Similarly, they will not be required to produce documents in response to a subpoena (or similar), or by way of interrogatories.

60. By way of contrast, because the penalty privilege does not apply to corporations, they can be ordered to make discovery[58] and to respond to subpoenas[59], in the ordinary way.

61. In practice, discovery by a corporate respondent in civil penalty proceedings is less

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52 Federal Court Rules 2011 (Cth) r 20.13(1).
53 Federal Court Rules 2011 (Cth) r 20.13(2).
54 Federal Court Rules 2011 (Cth) r 20.14(1).
55 Federal Court Rules 2011 (Cth) r 20.14(2).
56 Federal Court Rules 2011 (Cth) r 20.11.
57 *Rich v ASIC* (2004) 220 CLR 129
58 *Trade Practices Commission v CC (NSW) Pty Ltd (No 4)* (1995) 58 FCR 426.
59 *Baulkham Hills Shire Council v Australian Kafarsghab (Lebanese) Assn Ltd* (1994) 83 LGERA 1.

common than in conventional litigation. As discussed above, most regulators have statutory investigative powers of their own, including to compel the production of documents and therefore discovery may not need to be sought from the respondent, where the applicant has already obtained all the documents that it practically needs for its case. In practice, it may be more commonly sought in relation to a positive defence that is raised by the respondent, rather than in relation to the applicant's own case.

62. In *Trade Practices Commission v CC (NSW) Pty Ltd (No 4)* (1995) 58 FCR 426, where discovery was ordered from a corporate respondent, Lindgren J said that it must not be used for a "fishing expedition". In other words, it must not be used for the purpose of ascertaining whether a case exists, but rather only for the purpose of compelling the production of documents where there was already some evidence to support the case in question.[60] This distinction might be particularly relevant if proceedings were brought by an applicant who did ***not*** have the power to compel the production of documents, independently of the court. In that way, it would presumably prevent the commencement of speculative proceedings, brought more for investigative purposes, than on the basis of an existing known case.

63. In *ACCC v Cornerstone Investment Aust Pty Ltd (No 2)* [2017] FCA 393, Gleeson J ordered that a corporate respondent provide both documentary discovery and answers to interrogatories.

(b) Production by the applicants

64. An applicant in civil penalty proceedings may be required to make discovery, in accordance with conventional civil procedure.[61] By comparison to conventional civil litigation – and especially to a criminal prosecution – discovery by the applicant is a less common feature, and will not be ordered in every case. Whether or not discovery is practically necessary (or is sought by the respondent) will depend on the nature of the case, and particularly the mode by which the matter was investigated.

65. If the applicant's investigation was conducted primarily by requiring the production of documents from the respondent, by use of some statutory investigative powers, then discovery by the applicant is likely to produce little of value. In contrast, if the investigation included enquiries with third parties, then discovery may be more productive – for example, in case any of those enquiries were more favourable to the respondent than the evidence which the applicant relies upon.

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60 *Trade Practices Commission v CC (NSW) Pty Ltd (No 4)* (1995) 58 FCR 426, 438.

61 *Visy Industries Holdings Pty Ltd v ACCC* (2007) 161 FCR 122 (Full Court), [112] (Lander J, Moore J agreeing).

66. More generally, the discovery obligations that are applicable to a prosecutor in a criminal trial do not apply.[62] There is no duty of prosecutorial fairness owed by regulators in civil penalty proceedings.[63]

B5 Mediation

67. In most conventional civil proceedings, the parties will participate in mediation, whether voluntarily or by referral from the court, before they reach trial. In the Federal Court, r 28.01 provides that the parties must, and the Court will, consider options for alternative dispute resolution, including mediation, as early as is reasonably practicable – and that if appropriate, the Court will implement those options.

68. In *ACCC v Lux Pty Ltd* [2001] FCA 600, the ACCC sought the setting aside of an order that the parties to a civil penalty proceeding attend mediation. Firstly, the ACCC said that mediation was inappropriate, where the contravention in question concerned conduct against a vulnerable person, being a person with an intellectual disability. Secondly, the ACCC said that its statutory functions were best achieved by a judicial determination. Thirdly, the ACCC said that – where the respondent had not admitted its liability – there was only a negligible prospect of a successful resolution.[64] Those arguments were rejected, and the parties ordered to mediate. Nicholson J said that mediation would assist in determining whether the respondent might admit liability, and whether any consequent relief could be agreed. Further, failing a complete resolution, the parties might agree on a narrowing of the issues for trial.[65]

69. Despite this endorsement of the utility of mediation in civil penalty proceedings, they do differ from conventional proceedings in certain other respects. For one thing, civil penalty proceedings are "excluded proceedings" for the purposes of s 15 of the *Civil Dispute Resolution Act 2011* (Cth) – and therefore excluded from the requirement that the parties file a "genuine steps statement" upon commencement in the Federal Court, in relation to their efforts to resolve the issues in dispute. The *Civil Procedure Act 2010* (Vic) contains a similar carveout from the obligation (in Victorian courts) that litigants must use reasonable endeavours to resolve their dispute, including, if appropriate, by alternative dispute resolution.[66] That obligation will not apply if it is not in the interests of justice to do so, or if the dispute is of such a nature that only judicial determination

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62 *Visy Industries Holdings Pty Ltd v ACCC* (2007) 161 FCR 122 (Full Court), [112] (Lander J, Moore J agreeing).

63 *Visy Industries Holdings Pty Ltd v ACCC* (2007) 161 FCR 122 (Full Court), [112] (Lander J, Moore J agreeing); *Adler v ASIC* (2003) 179 FLR 1, [678] (Giles JA, Mason P and Beazley JA agreeing).

64 *ACCC v Lux Pty Ltd* [2001] FCA 600, [13]-[15].

65 *ACCC v Lux Pty Ltd* [2001] FCA 600, [30]-[31].

66 *Civil Procedure Act 2010 (Vic)* s 22.

is appropriate. A note in the text of the Act suggests – but does not positively mandate – *'A proceeding where a civil penalty is sought may be of such a nature that only judicial determination is appropriate.'*

70. In the context of civil penalty proceedings, parties will often determine whether mediation is appropriate or not. Mediations are relatively less common compared with regular commercial proceedings. In proceedings where liability is not likely to be in contest, parties may decide to engage in without prejudice discussions on issues of liability and agreed facts without the need for a formal mediation. In other cases, a mediation may help facilitate agreement on liability on the basis of certain agreed facts, but not in relation to the quantum of penalty. At the broadest end of the scale, the parties may agree facts on which a contravention is admitted, and then jointly propose the quantum of the penalty that is said to be appropriate. Whether or not the alleged contravention and the proposed quantum of penalty are accepted by the Court are both matters for judicial discretion, dealt with further below.

B6 Witness statements and expert reports

71. It is common in conventional civil proceedings, particularly in complex litigation, that evidence-in-chief will be presented wholly or largely by way of either witness statements or affidavits, to be filed by each party prior to trial. The purpose of the filing of the evidence before trial is to increase the efficiency of trial, and to ensure that each party is on notice of the case put against it.

72. In civil penalty proceedings against a natural person, this practice will be impacted by their penalty privilege. The Full Court of the Federal Court held in *ACCC v FFE Building Services Pty Ltd* (2003) 130 FCR 37 that an individual respondent is entitled to wait until the close of the applicant's case, before electing whether to go into evidence. To the extent that the Victorian Court of Appeal held to the contrary, shortly beforehand in *Sidebottom v Commissioner of Taxation* (2003) 6 VR 302, that decision has not subsequently been followed, and was questioned by the Full Court in *FFE Building Services* (2003), and by the New South Wales Supreme Court in *ASIC v Rich (No 3)* (2003) 45 ACSR 305.[67] The principle extends both to the evidence of the respondent itself, and to other witnesses the respondent may call, including expert witnesses.[68]

73. Two key practical matters were then addressed by Kiefel J (as her Honour then was) in *ACCC v Eurong Beach Resort Pty Ltd* [2005] FCA 1134.

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67 *ASIC v Rich (No 3)* (2003) 45 ACSR 305, [68]-[69].
68 *ASIC v Plymin* (2002) 4 VR 168, [5], [10].

74. Firstly, what is the position where a penalty is sought against both corporate and individual respondents, where the latter are the officers of the former? Where the corporate respondents are ordered to file their evidence before trial, they will not be in breach of that requirement if they fail to file a statement from the individual respondent, who has personally claimed the privilege, and is therefore not obliged to file evidence of their own. However, the corporate respondent must then seek leave to adduce that further evidence, at the appropriate time.[69]

75. Secondly, where an individual respondent resists going into evidence until after the close of the applicant's case, they must then be in a position to proceed without delay.[70] As a matter of practice, any witness statements should have been previously prepared, so that they can promptly be served. This is intended to minimise the disruption to the trial.

B7 Trial

76. Although civil penalty proceedings are fundamentally civil in nature, the influence of criminal procedure is most heavily apparent at trial.

(a) A hearing on liability, then a hearing on penalty and other relief

77. Most significantly, civil courts are typically reluctant to conduct a split trial, where issues are determined in multiple stages.[71] In civil penalty proceedings, however, the conventional approach is for the trial to be heard in two parts. The first will be a hearing on liability (if there is a contest), to determine whether the alleged contraventions are made out. If that is established, the court will make orders for a hearing on penalty, to determine the appropriate quantum of penalty, and any other relief. For obvious reasons, that reflects the practice in criminal prosecutions, of a trial that is followed by a sentencing hearing. It is practically difficult, and would be a waste of resources, to lead evidence and make submissions in relation to the quantum of penalty, when no contraventions have yet been established. The conduct of the penalty hearing is dealt with in detail in Part C of this paper.

78. It has been increasingly common in civil penalty proceedings, particularly in proceedings involving ASIC and the ACCC, for questions of liability to be agreed and for there to be only a hearing on penalty, should the parties not agree on quantum of penalty.

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69 *ACCC v Eurong Beach Resort Pty Ltd* [2005] FCA 1134, [10], [12].
70 *ACCC v Eurong Beach Resort Pty Ltd* [2005] FCA 1134, [13].
71 See eg *Save the Ridge Inc v Commonwealth* (2005) 147 FCR 97, [15] (Black CJ and Moore J).

(b) Order of trial

79. The order of trial, although within the discretion of the court, is also more likely to be influenced by criminal procedure. In the Victorian State courts, the conventional approach that is provided by the rules is as follows (assuming both parties adduce evidence): [72]

(a) the applicant will make an opening address;

(b) the applicant will then adduce their evidence;

(c) the respondent will make an opening address;

(d) the respondent will then adduce their evidence;

(e) the respondent will make a closing address; and

(f) the applicant will make a closing address.

80. In civil penalty proceedings, it is more common for the applicant's closing address to come first, and then the respondent's, with the applicant then possibly making an address in reply (if necessary to do so). That approach is more typical of a criminal proceeding.[73]

(c) The role of the applicant

81. The applicant in a civil penalty proceeding will typically be a public authority, usually with functions that are predominantly regulatory in nature. They will typically be subject to legislative or policy guidelines that they must act as model litigants.[74] Even in the absence of such guidelines, the expectation that the Commonwealth and the States or their agencies will act as model litigants has long been recognised by the courts.[75]

82. That obligation does not prevent a public authority from acting firmly and properly to protect its interests, or the public interest more generally. However, the obligation to act as a model litigant may mean that a public authority:

(a) will be expected to comply conscientiously with procedures that are designed

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72 See *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 49.01(5). In the Federal Court Rules, the order of trial is not dealt with specifically.

73 In Victoria, see *Criminal Procedure Act 2009* (Vic), Part 5.7, Division 7 (Closing addresses and judge's directions to the jury).

74 See *Legal Services Directions 2017* (Cth), Appendix B (The Commonwealth's obligation to act as a model litigant); *Victorian Model Litigant Guidelines* (revised 2011), https://www.justice.vic.gov.au/justice-system/laws-and-regulation/victorian-model-litigant-guidelines.

75 See eg *Melbourne Steamship Ltd v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) SASR 268 at 273; *Yong Jun Qin v Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155; Scott v Handley [1999] FCA 404 at [44] (Spender, Finn and Weinberg JJ).

to minimise cost or delay;[76]

(b) must not take issue with purely technical points of practice and procedure, which do not advance the issues in substance;[77] and

(c) is expected to bear a higher burden in assisting the court to arrive at a proper and just result.[78]

83. However, the applicant is in other respects an ordinary civil litigant. It does not bear the special and higher burdens of a criminal prosecutor. As noted above, the prosecutor's duty of disclosure does not apply. Similarly, although it is a part of the function of a Crown prosecutor, in a criminal prosecution, to call all material witnesses,[79] there is not any equivalent duty for an applicant in civil penalty proceedings.[80]

(d) The role of the respondent

84. As has already been noted above, where an individual respondent has claimed the penalty privilege, they will generally be entitled to file a more limited "*Macdonald* defence", and may then seek to amend their pleadings mid-trial, after the close of the applicant's case. Similarly, they may also seek to file any evidence at that time.

85. In other respects, and for corporate respondents, their role is substantially governed by the conventional civil procedural rules.

(e) Burden of proof

86. In civil penalty proceedings, the civil standard of proof will apply: the facts which establish the contravention must be proven by the applicant on the balance of probabilities. As noted above, this is often provided expressly by the relevantly legislation.[81]

87. However, the standard of proof will be subject to the "*Briginshaw* principles":[82]

(a) When the law requires the proof of any fact, the court must feel an actual persuasion of its occurrence or existence before it can be found – it cannot be

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76 *Yong Jun Qin v Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155, at 166.
77 *Yong Jun Qin v Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155, at 166.
78 *P&C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 263 at 268.
79 *Whitehorn v The Queen* (1983) 152 CLR 657; *R v Apostolides* (1984) 154 CLR 563.
80 See *Adler v ASIC* (2003) 179 FLR 1 at [678]-[680] (Giles JA, Mason P and Beazley JA agreeing); *ASIC v Plymin* (2003) 175 FLR 124, [549]; *ASIC v Hellicar* (2012) 247 CLR 345, [147]-[155].
81 See eg *Corporations Act 2001* (Cth) s 1317L; *Taxation Administration Act 1953* (Cth) s 298-85; *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) s 65AG.
82 *Briginshaw v Briginshaw* (1938) 60 CLR 336; *CFMEU v BHP Coal Pty Ltd* (2015) 230 FCR 298, at [63]. Those principles are also reflected in s 140(2) of the Uniform Evidence Acts.

found as a result of a "*mere mechanical comparison of probabilities independently of any belief in its reality*".[83]

(b) It will be sufficient if the court is reasonably satisfied that the fact is proven. In arriving at a state of "reasonable satisfaction", the court must consider the nature and consequences of the facts to be proven – in particular, the seriousness of the allegation, any inherent unlikelihood as to what is alleged, and the gravity of the consequences. Accordingly, a court may be more readily satisfied of a fact that is ordinary and of limited consequence, than one which would involve some "*grave moral delinquency"*.[84]

(c) Where the consequence is exposure to a penalty, a finding of fact *"should not be produced by inexact proofs, indefinite testimony, or indirect inferences"*.[85]

88. Where a respondent to a civil penalty case is seeking to make out a positive legal defence – that is, a matter that is not merely aimed at denying an essential ingredient to the applicant's claim, but would separately exculpate or excuse the respondent's conduct – the burden of proving those facts will be on the respondent.[86]

(f) Reliance on admissions

89. An issue arises where many of the regulatory authorities conducting civil penalty proceedings will also have a wide suite of statutory investigative powers, including the power to conduct compulsory examinations. Although there are typically limits to how (or against whom) this evidence may be used, admissions that are obtained in examination are frequently relied upon in evidence in subsequent civil penalty proceedings. Admissions may also potentially be obtained from a corporate respondent's own records.

90. Where admissions are relied on, however, an applicant must exercise critical judgment. In *Australian Prudential Regulation Authority v Kelaher* (2019) 138 ACSR 459, Jagot J (then of the Federal Court) dismissed a case brought by the regulator that was founded entirely on alleged admissions against interest, set out in the respondent's own business records. Her Honour noted that it was for the applicant to prove its case by such evidence as it saw fit. However, by running a purely documentary case, "*it must take the documents as it finds them."* In that case, the documents were brought into existence for specific purposes, after the fact, mostly by

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83 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361.
84 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.
85 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.
86 *ACCC v Air New Zealand* (2014) 319 ALR 388, at [488]; *ASIC v Big Star Energy Ltd (No 3)* (2020) 148 ACSR 334, at [26].

authors whose qualifications or experience were unknown to the court, and whose opinions were expressed at a high level of generality. The documents included statements expressing views in relation to the respondent's systems, policies and procedures, but without any direct evidence of those matters being adduced, so as to enable that evidence to be properly assessed. That approach was unpersuasive.[87] To the extent that those statements involved a conclusion of law, they did not constitute admissions. Further – to the extent that they did constitute an admission – they had only limited probative value.[88]

(g) Reliance on inference where witness is not called

91. In a civil penalty case, the inferences available under the rule in *Jones v Dunkel* (1959) 101 CLR 298 may be applicable to either the applicant or the respondent.[89] It has been utilised successfully against respondents who are natural persons and who have elected not to give evidence at trial.[90]

92. Firstly, a court might infer that – where a relevant witness has not been called, and no explanation has been provided – the witness's evidence would not have assisted the party that might ordinarily have been expected to call them.

93. Secondly, a court may also have greater confidence in drawing any other inferences unfavourable to that party, if the witness appeared to have been able to shed light on whether the inference should be drawn.

94. The application of either such principles requires that:

(a) the missing witness would be expected to be called by one party, rather than another;

(b) their evidence would shed light on a particular matter; and

(c) their absence has not been explained.

B8 Declaring contraventions

95. Where a contravention has been made out in the initial hearing, the Court may (or under some legislation, must) declare that the contravention has occurred. The jurisdiction to grant declaratory relief is a wide one, and it is well recognised that it may

87 *Australian Prudential Regulation Authority v Kelaher* (2019) 138 ACSR 459, [4]-[5].

88 *Australian Prudential Regulation Authority v Kelaher* (2019) 138 ACSR 459, [136].

89 *Adler v ASIC* (2003) 46 ACSR 504, at [659]-[661] (Giles JA, Mason P and Beazley JA agreeing); *Adams v Director, Fair Work Building Industry* Inspectorate (2017) 258 FCR 257, at [147]; and other cases cited in *ASIC v Big Star Energy Ltd (No 3)* (2020) 148 ACSR 334 at [39]. The operation of that rule is explained in *ASIC v Big Star Energy Ltd (No 3)* at [33]-[34].

90 See eg *Adler v ASIC* (2003) 179 FLR 1 at 659-661 (Giles JA, Mason P and Beazley JA agreeing).

serve an important law enforcement purpose. The purpose of a declaration includes to:

(a) properly identify the contravening conduct;

(b) record the court's disapproval of that conduct;

(c) vindicate the concerns on which the legislation is based;

(d) assist the regulator in carrying out the duties conferred by the legislation;

(e) assist in clarifying the law; and

(f) to communicate clearly to other potential wrongdoers that the conduct in question is unlawful. [91]

96. In order to properly identify the contravening conduct, the declaration must be sufficiently specific.[92]

97. A declaration of contravention may be made by consent, provided there are sufficient agreed facts or admissions for the court to determine that the declaration is appropriate, and has a sound factual basis.[93] In practical terms, they will typically be supported by a statement of agreed facts, and joint submissions from the parties. In *ASIC v Westpac Banking Corporation* (2018) 132 ACSR 230, Perram J refused to grant the parties' proposed declarations, where they did not appropriately specify the contravening conduct. In that case, it was apparent that the parties did not agree sufficiently on the underlying facts, or the construction of the relevant legislation.[94]

98. Where the contraventions are agreed, there may also be a joint submission on penalty or relief, or those issues may be separately contested – dealt with further in Part C.

C THE PENALTY PHASE

C1 The purpose of civil penalties: deterrence

99. When a court has declared that a respondent has contravened a civil penalty provision, the next question that typically follows is determining the amount of the penalty. As in a criminal proceeding, this will typically be the subject of a separate hearing.

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91 See eg *ASIC v Axis International Management Pty Ltd* (2009) 73 ACSR 207, [32]-[43], and cases there referred to.

92 *ASIC v Westpac Banking Corporation* (2018) 132 ACSR 230 (FCA), at [30] (Perram J) and the cases there cited.

93 See eg *ASIC v NSG Services Pty Ltd* [2017] FCA 345, at [8] (Moshinsky J); *ASIC v Newcrest Mining Ltd* (2014) 101 ACSR 46, at [10] (Middleton J).

94 *ASIC v Westpac Banking Corporation* (2018) 132 ACSR 230 (FCA), at [21]-[29] (Perram J).

100. Although a hearing to determine a civil penalty and a criminal sentencing hearing may bear strong resemblances on the surface, they are conducted with fundamentally different objectives in mind, and the role of an applicant regulator should not be mistaken for that of a criminal prosecutor.

101. In a ***criminal prosecution*** in Victoria, the purposes of sentencing are defined in legislation as follows:

(a) **punishment –** to punish the offender to an extent and in a manner which is just in all of the circumstances;

(b) **deterrence** – to deter the offender or other persons from committing offences of the same or a similar character;

(c) **rehabilitation –** to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated;

(d) **denunciation** – to manifest the denunciation by the court of the type of conduct in which the offender is engaged; and

(e) **protection** – to protect the community from the offender.[95]

102. By way of contrast, the focus of ***civil penalties*** is solely on deterrence – both specific deterrence (ie that directed at the wrongdoer themselves) and general deterrence (ie that directed to the public at large). To the extent that any of the other matters listed above may be considered at all, it is only for the purpose of securing that central objective. The penalty should be no greater than is necessary to achieve the objective of deterrence.[96] Conversely, it should be of a quantum that is sufficient to do so.[97]

103. In an early and influential decision, *Trade Practices Commission v CSR Ltd* [1990] FCA 521[98], French J said as follows:

> Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act] … The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt 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.

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95 *Sentencing Act 1991* (Vic), s 5.
96 *ASIC v Adler* (2002) 42 ACSR 80 (NSWSC), at [125]-[126] (Santow J).
97 See *ABCC v Pattinson*, discussed below.
98 *Trade Practices Commission v CSR Ltd* [1990] FCA 521 at [40].

104. That statement has been consistently endorsed, including by the High Court.[99]

105. Most recently, the High Court reiterated the primacy of deterrence in *ABCC v Pattinson*. In that case, the trial judge had imposed the maximum penalty of $63,000 against the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), a respondent union. While, taken in isolation, the contravention was not at the worst end of the scale, and had been admitted by the respondents, the trial judge had held that the CFMMEU was notoriously a serial offender, had acted historically in disregard of the law, and appeared to treat the imposition of civil penalties as "*little more than the cost of its preferred business model*". Where that penalty was initially reduced on first appeal, it was then reinstated by a 6-judge majority in the High Court.

106. The majority noted that, in criminal sentencing, the principle of proportionality required that the sentence imposed for an offence must not be disproportionate to the seriousness of the offending. In other words, it acted to constrain the sentencing discretion, by requiring that the punishment fit the crime, and be no greater retribution than the offender deserves. However, the notion of proportionality was so closely connected to the central role of punishment in criminal sentencing that it could not be translated coherently into the context of civil penalties.[100]

107. Rather, the majority held that the power to determine an appropriate penalty must be exercised fairly and reasonably, having regard to the subject matter, scope and purpose of the legislation. If the term "proportionality" is to be used at all, it is merely to strike a balance between the purpose of deterrence, and oppressive severity.[101] In that case, by initially reducing the penalty on appeal, the Full Court of the Federal Court had failed to have a proper regard for deterrence. The majority concluded that the repeated and historic contraventions of the relevant legislation were a compelling indication that the penalties imposed on the CFMMEU previously had not been sufficient, but rather were regarded as an "*acceptable cost of doing business*."[102]

108. *ABCC v Pattinson* has reaffirmed that deterrence – both specific and general – is the sole objective of civil penalties.

C2 General approach and the role of the maximum penalty

109. In a practical sense, the role of a judge in a penalty hearing is to reduce down a

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99 *Agreed Penalties Case* (2015) 258 CLR 482 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *ABCC v Pattinson* at [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

100 *ABCC v Pattinson* at [38]-[39] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

101 *ABCC v Pattinson* at [40]-[41] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

102 *ABCC v Pattinson* at [43] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

complex set of facts, circumstances and principles, to a single number – the penalty for the contravention in question. That number must be reached by a reasoned process, but the reasoning should not – or should not necessarily – be mathematical in nature. The process (like that of criminal sentencing) is described as an "*instinctive synthesis"*, in which the judge must consider and reconcile a wide range of relevant factors, some of which may be conflicting and contradictory.[103]

110. The first and most obvious of those factors is the maximum penalty that has been fixed for the provision in question. In *Markarian v R* (2005) 228 CLR 357, in a criminal sentencing context, it was observed that careful attention to maximum penalties will almost always be required:

(a) first, because the legislature has legislated for them;

(b) secondly, because they invite comparison between the worst possible case and the case before the court at the time; and

(c) thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.[104]

111. In *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25, the Full Court of the Federal Court confirmed those principles as applying to civil penalties, but noted that they must not be mechanically applied. A contravention that was objectively in the top or bottom range of seriousness need not necessarily attract a penalty in the top or the bottom of the range commensurately. However, there must be a reasonable relationship between the theoretical maximum and the final penalty imposed.[105]

112. By way of example, where the maximum penalty was imposed in *ABCC v Pattinson* (above), although that contravention was not in the top range of seriousness, the context of repeated historic contraventions was regarded as requiring the maximum penalty available, in order to establish a deterrent. *Pattionson* shows that the apparent level of seriousness of contravening conduct cannot trump deterrence in determining the appropriate penalty.

C3 Role of the applicant

113. The role of the applicant in a penalty hearing is substantially different from that of a criminal prosecutor.

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103 *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25, at [44], [175] (Full Court of the Federal Court).

104 *Markarian v R* (2005) 228 CLR 357, at [31].

105 *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25, [154]-[156] (Full Court of the Federal Court).

114. In relation to the criminal process, the High Court held in *Barbaro v R* (2014) 253 CLR 58 that a prosecutor may not nominate any specific sentence to the judge, or even an appropriate range. An applicant in a civil penalty proceeding is not restricted in this way, and may nominate a particular penalty (or range of penalties) as appropriate to the circumstances of the case. This may arise both in a contested hearing, or where a particular proposed penalty has been agreed with the respondent.[106]

115. In the *Agreed Penalties Case* (2015) 258 CLR 482, a majority of the High Court distinguished the decision in *Barbaro v R,* and emphasised that there are basic differences between a criminal prosecution, and a civil penalty proceeding. The purpose of civil penalties is not punishment but deterrence. Unlike a criminal prosecutor, a regulator in a civil penalty proceeding is an avowedly interested party – their statutory functions will typically include promoting appropriate standards of conduct. It is to be expected that they will fashion penalty submissions with an eye to achieving that objective. Further, it is to be expected that a regulator will be able to offer informed submissions as to the effects of contravention on the industry broadly, in aid of general deterrence, and the level of penalty necessary to achieve compliance.[107] That is of particular assistance, in regulating what may often be a highly technical or specialised field of activity.

C4 The French and Santow factors

116. In some legislation, there is an express provision as to what factors must be considered when determining an appropriate penalty.[108] In the absence of express provision, or to supplement such provisions, there are also several factors that are widely accepted on general principles of construction, and routinely applied.

117. In an early and influential decision, *Trade Practices Commission v CSR Ltd* [1990] FCA 521, French J (as his Honour then was, in the Federal Court) listed factors that were relevant to determining the quantum of penalty. Now commonly known as the "**the French factors**", they are as follows:

(a) the nature and extent of the contravening conduct;

(b) the amount of loss or damage caused;

(c) the circumstances in which the conduct took place;

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106 *Agreed Penalties Case* (2015) 258 CLR 482.

107 *Agreed Penalties Case* (2015) 258 CLR 482, at [51], [59], [60] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

108 See eg, *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) s 65AC.

(d) the size of the contravening company;

(e) the degree of power it has, as evidenced by its market share and ease of entry into the market;

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

(g) whether the contravention arose out of the conduct of senior management, or at a lower level;

(h) whether the company has a corporate culture conducive to compliance with the regime in question, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;

(i) whether the company has shown a disposition to cooperate with the relevant regulatory authority, in relation to the contravention in question.[109]

118. Another influential decision is that of Santow J, in *ASIC v Adler* (2002) 42 ACSR 80, which concerned disqualification orders under s 206C of the *Corporations Act 2001* (Cth). Where Santow J set out a summary of principles applicable to such orders, extracted from the case law, they may also apply by analogy where the penalty is pecuniary in nature. Among these principles (commonly known as "**the Santow factors"**) were the following:

(a) Disqualification orders are intended to protect the public. They are deterrent in nature;

(b) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company;

(c) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature, such as those involving dishonesty;

(d) It is relevant to consider the seriousness of the contravention, the likelihood of further contraventions and the propensity for harm to the public;

(e) Any personal hardship to the respondent must be balanced against the public interest and the need for protection and deterrence;

(f) If a person is likely to reform their future conduct, that will be a mitigating factor;

(g) It is necessary to assess the character of the offenders, the nature of the breaches, the structure of the companies and the nature of their business, the

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109 *Trade Practices Commission v CSR Ltd* [1990] FCA 521 at [42].

interests shareholders, creditors and employees, the risk to others, the honesty and competence of the offenders, the hardship to the offenders and their personal and commercial interests, and the offenders' appreciation that future breaches could result in future proceedings;

(h) Factors which led to the longest periods of disqualification (25 years or more) were: large financial losses, a high likelihood of future contravening, activities undertaken in fields with potential for great financial damage, lack of contrition or remorse, previous offending, disregard for law and compliance, and dishonesty or fraudulent intent;

(i) Factors that led to medium-term disqualifications (7 to 12 years) included: serious incompetence and irresponsibility, substantial loss, misconduct that was deliberate but a lesser degree of dishonesty, knowing and willful contraventions of the law, and a lack of contrition where there was nonetheless a prospect that the individual might reform;

(j) Factors that led to the shortest disqualifications (up to 3 years) included that: the respondents had attempted to compensate those they had wronged, the respondents had no future intention to manage companies, and where the the respondent had expressed remorse and contrition, had acted on the advice of professionals, and had not contested the proceedings.[110]

119. In view of *ABCC v Pattinson*, the above factors must be seen solely through the lens of deterrence.

C5 Multiple contravenors and the principle of parity

120. Where there are multiple respondents, they typically cannot be penalised jointly and severally – rather, an individual penalty must be identified for each.[111] That is a question of legislative construction, so it may not apply in all cases.

121. Further, where there are multiple contravenors, there ought to be parity in the penalties applied to each. All other things being equal, there should not be a marked disparity between them, that would give rise to a justifiable sense of grievance.[112]

122. If a penalty is to be imposed on multiple respondents for substantially the same or similar conduct, the Court must take care to identify the relevant points of similarity and

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110 *ASIC v Adler* (2002) 42 ACSR 80, [56] (Santow J).

111 *ACCC v Cement Australia Pty Ltd* (2017) 258 FCR 312, [376] (Middleton, Beach and Moshinsky JJ).

112 *ASIC v Vines* (2006) 58 ACSR 298, [45] (Austin J), citing *Postiglione v R* (1997) 189 CLR 295.

difference. If identical penalties are to be imposed, the Court must consider whether that equal treatment is warranted by the circumstances. If one respondent will be penalised more than another, the relevant circumstances explaining that differential treatment should be identified.[113]

123. In contrast to the principle of parity between respondents to the same conduct, comparisons between individual cases will rarely be useful.[114] What is sought is not numerical consistency, but the consistent application of principle.[115]

C6 The respondent's financial resources

124. The respondent's financial resources will be a relevant consideration, from the perspective of both general and specific deterrence.

125. Firstly, a penalty must be sufficient to meet the purpose of ***specific*** deterrence, in respect of the respondent in question. In that respect, *"the penalty should not be greater than is necessary to achieve the object of deterrence; severity beyond that would be oppression".*[116] A respondent's financial resources are relevant to that question, including the extent to which it can pay (and not be crushed by) an appropriate penalty.[117]

126. In some cases, the fact that a respondent has substantial financial resources might be a factor requiring a larger penalty. In *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, Allsop CJ said that the respondent's resources alone did not justify a higher penalty than might otherwise be imposed. However, they were *"clearly relevant"* to determining what penalty was required for specific deterrence.[118]

127. Secondly, the penalty must be sufficient to establish ***general*** deterrence. The respondent's financial resources may have an impact on how any penalty is perceived, from that perspective. Where the public might regard a particular penalty as onerous and significant when imposed on a person of ordinary means, thus serving the purpose of general deterrence, the same penalty might be regarded as insufficient if imposed on a large corporation, or a very wealthy individual. In *ACCC v Coles Supermarkets*, Coles' resources were equally relevant to determining a sum that – in the eyes of the

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113 *Gilfillan v ASIC* [2012] NSWCA 370 at [195] (Sackville J, Beazley and Barrett JJA agreeing).
114 *Flight Centre Ltd v ACCC (No 2)* (2018) 260 FCR 68, [69]; *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249, [60].
115 *McDonald v Australian Building and Construction Commissioner* (2011) 2020 IR 467, [23]-[25],
116 *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285, at 293 (Burchett and Kiefel JJ); cited in
117 *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, [92] (Allsop CJ).
118 *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, [92] (Allsop CJ).

public – would be regarded as significant, for the purposes of general deterrence.[119]

128. On the other hand, general deterrence might require that the penalty be higher than would otherwise be imposed, if the Court were to consider the specific respondent alone. In *ACCC v High Adventure Pty Ltd* [2005] FCAFC 247, the Full Court of the Federal Court said:

> as deterrence (especially general deterrence) is the primary purpose lying behind the penalty regime, there inevitably will be cases where the penalty that must be imposed will be higher, perhaps even considerably higher, than the penalty that would otherwise be imposed on a particular offender if one were to have regard only to the circumstances of that offender. In some cases the penalty may be so high that the offender will become insolvent. That possibility must not prevent the Court from doing its duty for otherwise the important object of general deterrence will be undermined.[120]

129. Relevantly, penalties have been imposed against companies in liquidation,[121] bankrupt or impecunious individuals,[122] and wrongdoers who are otherwise unable to pay the penalty imposed.[123] Unlike an ordinary commercial debt, a civil penalty is not discharged or provable in bankruptcy or corporate liquidation.[124]

130. In contrast to the wide range of options available in the criminal sentencing process, civil penalties are primarily financial in nature, with few other forms of deterrence. Further, they are typically a blunt instrument, being imposed as a simple lump sum. This can lead to difficult categories of cases, such as those where the maximum penalty might not be sufficient deterrent for a large or determined wrongdoer, or those where an impecunious individual might face disproportionate hardship from a penalty that is sufficiently large for the purpose of general deterrence.

131. In *Commissioner of Taxation v Pavihi* [2019] FCA 2056, a substantial agreed penalty was imposed on an impecunious respondent in difficult personal circumstances, for

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119 *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, [92] (Allsop CJ).

120 *ACCC v High Adventure Pty Ltd* [2005] FCAFC 247, [11] (Heerey, Finkelstein and Allsop JJ).

121 See *ACCC v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996 at [19]-[25]; *ACCC v Sensaslim Australia Pty Ltd (in liq) (No 7)* [2016] FCA 484 at [20]-[29]; *Secretary, Dept of Health and Ageing v Prime Nature Prize Pty Ltd (in liq)* [2010] FCA 597 at [22]-[23] and [58]; *ACCC v SIP Australia Pty Ltd* [2003] FCA 336 at [59]; *ACCC v Leahy Petroleum Pty Ltd (No 2)* (2005) 215 ALR 281 at [9]-[11] and [32]-[42]; *ACCC v Dataline.Net.Au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513 at [20]; *ACCC v The Vale Wine Co Pty Ltd* [1996] ATPR 41-528 at 42-777; *ACCC v GIA Pty Ltd* (2002) ATPR 41-902 at [21] and *ACCC v Chaste Corporation Pty Ltd (in liquidation)* [2005] FCA 1212 at [171]-[179].

122 *Registrar v Matcham* (2014) 97 ACSR 412 at [250]-[254]; *ASIC v Idyllic Solutions Pty Ltd* [2013] NSWSC 106 at [448]; *Sensaslim* at [30], [145]-[149]; *Secretary v PNP* at [59]; *ASIC v Loiterton* (2004) 50 ACSR 693 at [47]-[54], [67]-[73].

123 *Leahy Petroleum* at [44]-[47], [57]-[58]; *ACCC v Fila Sport Oceania Pty Ltd (Administrators Appointed) (2004)* ATPR 41-983 at [20]-[25] and *ACMA v Clarity1 Pty Ltd* (2006) 155 FCR 377 at [40]-[41].

124 See *Commissioner of Taxation v Pavihi* [2019] FCA 2056, [28] (Wheelahan J); *Mathers v Commonwealth* [2004] FCA 217 (Heerey J).

reasons of general deterrence. In that case, the long-term impact on the respondent was mitigated by an undertaking from the applicant, described as follows:

> The effect of the undertaking is that before taking enforcement action after six years from the date of the order the applicant will be required to seek the leave of the Court in light of any changes to the respondent's financial circumstances which may arise or come to light. The undertaking would not prevent the applicant after a period of six years from seeking to enforce the penalties with leave of the Court in light of any significant change to the respondent's financial circumstances, such as a financial windfall, the discovery of any concealed assets, or a significant increase in earning capacity. Otherwise, within the period of six years from the making of the order for the payment of the penalty, the order will be enforceable in the normal way.[125]

C7 The proper approach to assessing multiple contraventions

132. Where there are numerous separate contraventions, arising from separate acts, the starting point is that each contravention should ordinarily attract a separate penalty, appropriate for that contravention.[126]

133. Where the relevant acts are related, the need to penalise each of the several contraventions must be balanced against the need to ensure that the total or aggregate penalty is not unjust or disproportionate, and that the offender is not being penalised twice for substantially the same conduct.[127]

134. The Court will therefore exercise its judgment as to what amount will fairly reflect the substance of the offending conduct so as to achieve the appropriate deterrent effect.[128] So, for example, in appropriate cases, the Court may:

(a) characterise the contraventions as a single multi-faceted contravention;[129]

(b) impose a penalty for only the most serious contravention;[130]

(c) characterise the contraventions as falling into one or more courses of conduct, imposing either separate penalties for each course, or an overall penalty by reference to the accumulated maximum;[131] or

(d) determine a suitable penalty for each contravention in question, and then reduce the sum of those amounts in order to determine an aggregate amount

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125 *Commissioner of Taxation v Pavihi* [2019] FCA 2056, [58] (Wheelahan J).

126 See *Registrar, Aboriginal and Torres Strait Islander Corporations v Matcham* (2014) 97 ACSR 412 at [197].

127 *Registrar v Matcham* (2014) 97 ACSR 412 at [198]-[199].

128 *Registrar v Matcham* (2014) 97 ACSR 412 at [200]-[201].

129 *Registrar v Matcham* (2014) 97 ACSR 412 at [197], [199].

130 *Registrar v Matcham* (2014) 97 ACSR 412 at [195].

131 See eg *ACCC v Apple Pty Ltd* [2012] FCA 646 at [42], [45].

that properly reflects the totality of the offending.[132]

135. Each of these approaches is a useful "tool of analysis" in the civil penalty process which can, but need not necessarily, be used in a particular case if the resulting penalty fails to reflect the seriousness of the contraventions.[133]

C8 Courses of conduct

136. In cases with numerous individual contraventions, the Court should consider whether the contraventions arise out of the same course of conduct, or a single transaction, to determine whether it is appropriate that a single penalty be imposed for the whole.[134] For example, in *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, where a supermarket had engaged in misleading conduct by using the expressions, "Baked Today, Sold Today", "Freshly Baked", "Baked Fresh" and "Freshly Baked In-Store" in advertising certain bread products, there were estimated to be over 85 million contraventions – that is, those misleading representations had been made in over 85 million instances. Where the maximum penalty for a single contravention was $1.1 million, the theoretical maximum for all contraventions was $93.5 ***trillion*** – an absurdly large figure, which did not supply a meaningful overall maximum.[135] In that case, the Court determined that the wrongdoing in substance involved four separate courses of conduct, being each of the four misleading expressions that were used. In its further analysis to determine the penalty, it considered a notional maximum of $4.4 million – the individual maximum, multiplied by four.[136]

137. The principle of penalising a "course of conduct", rather than each contravention on an individual basis, is a useful tool of analysis that can optionally be used in a particular case.[137] It does not convert multiple contraventions into a single one, and nor does it impose an artificial cap on the available maximum penalty, in cases of multiple contraventions. However, it may serve the object of ensuring that the penalties imposed are of appropriate deterrent value having regard to the actual substantive wrongdoing.[138] In that respect, the maximum penalty for a single contravention can appropriately operate as a guide against which to consider the whole of the overlapping

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132 See discussion in *Singtel v ACCC* (2012) 287 ALR 249 at [53].

133 *ACCC v Yazaki Corporation* (2018) 262 FCR 243 at [235] in respect of the course of conduct principle generally.

134 *ACCC v Yazaki Corporation* (2018) 262 FCR 243 at [234]; *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, at [139]-[145] (Jagot, Yates and Bromwich JJ).

135 See also *ACCC v Reckitt Benckiser* (2016) 340 ALR 25, at [157] (Jagot, Yates and Bromwich JJ).

136 *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, [83]-[84] (Allsop CJ).

137 *ACCC v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996, [66] (Perry J)

138 *ACCC v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996, [67] (Perry J).

wrongdoing in each course of conduct.[139] In that sense, the maximum penalty will serve as a guide to the degree of seriousness with which Parliament regards conduct of that kind.[140]

138. In cases where numerous contraventions have been committed, it is necessary to take an instinctive approach by reference to the multiplicity of breaches, a broad view of the course or courses of conduct, and an assessment of the overall extent and seriousness of the offending, while keeping the totality principle in mind.[141] As was done in *ACCC v Coles Supermarket*, the course of conduct principle may be used as a tool of analysis, in order to identify a suitable proxy for the notional maximum penalty, in light of the seriousness of the conduct and the factors that are identified above.

C9 Totality

139. Where there are multiple contraventions, with some degree of overlap, the Court must also use its discretion to ensure that the combined amount of any penalties is an appropriate sanction for the conduct as a whole, and does not result in double punishment.[142] This is known as the totality principle – it looks at both the penalties and the conduct in their totality.

140. In applying the totality principle, there are several different approaches. The Court may look at the multiple contraventions as a whole, consider the notional maximum, and apply one single penalty. In *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, where there were identified four courses of conduct, Allsop CJ imposed a single penalty of $2.5 million, out of the notional maximum of $4.4 ($1.1 million x 4 courses of conduct). That was on the basis that each of the courses of conduct had substantially formed part of a single marketing campaign, which was amenable to a single penalty.[143]

141. In other cases, the Court may impose a separate penalty for each contravention, and then add up the total. The question is then whether the overall penalty is appropriate in totality, or whether some discount should be made to each amount, in order to avoid double punishment. There is not any scientific or arithmetic formula for doing so, but the Court must take all of the relevant circumstances into account.[144]

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139 *ACCC v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996, [72] (Perry J); *Coles Supermarkets* at [82]-[84], [103] (Allsop CJ).
140 *AER v Snowy Hydro Ltd (No 2)* [2015] FCA 58, [119] (Beach J).
141 *ACCC v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996, at [58]-[60] (Perry J).
142 *Singtel Optus v ACCC* (2012) 287 ALR 249, at [53] (FCA, Full Court).
143 *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, [85] (Allsop CJz).
144 *Singtel Optus v ACCC* (2012) 287 ALR 249, at [54] (FCA, Full Court).

C10 Fixing an agreed penalty

142. There is a long-standing practice in civil penalty proceedings, in contrast to the criminal law, that the parties may come to an agreement on the quantum of penalty, and propose that amount to the Court by joint submissions.[145]

(a) Process for proposing an agreed penalty

143. Summarising an earlier decision in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285, in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 the Full Court of the Federal Court stated the following propositions:

(i) It is the responsibility of the Court to determine the appropriate penalty to be imposed [the legislation] in respect of a contravention of [the legislation].

(ii) Determining the quantum of a penalty is not an exact science. Within a permissible range, the courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another.

(iii) There is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy. Accordingly, when the regulator and contravenor have reached agreement, they may present to the Court a statement of facts and opinions as to the effect of those facts, together with joint submissions as to the appropriate penalty to be imposed.

(iv) The view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty. In particular, the views of the regulator on matters within its expertise (such as the ACCC's views as to the deterrent effect of a proposed penalty in a given market) will usually be given greater weight than its views on more "subjective" matters.

(v) In determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case. Where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so.

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145 See *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; *Agreed Penalties Case* (2015) 258 CLR 482.

(vi) Where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure is, in the Court's view, appropriate in the circumstances of the case. In answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if within the permissible range.[146]

144. The Full Court in *Mobil Oil* then made five further points:

(a) Firstly, the making of joint submissions saves resources for the regulator and the court, so that the regulator can use its resources more efficiently to investigate other matters, and bring them before the courts.

(b) Secondly, the Court need not commence its reasoning with the proposed penalty, and limit itself to considering whether that penalty is in the permissible range. It may take that approach, or it may first make an independent assessment of the appropriate range, and then determine whether the proposed penalty is appropriate by comparison.

(c) Thirdly, the penalty was imposed on the basis of clear submissions and a detailed statement of agreed facts.

(d) Fourth, the regulator should also explain to the Court the process of reasoning which is said to justify a discounted penalty.

(e) Fifth, if the Court considers that the evidence or information before it is inadequate, it may request that the parties provide further evidence or information – and if they do not do so, the Court may be not be satisfied that the proposed penalty is in range. Similarly, in the absence of a contradictor, the Court may seek the assistance of an *amicus curiae* or intervenor. Finally, if the Court is not disposed to impose the penalty that it sought by the parties, it may be appropriate, depending on the circumstances, for each of them to be given the opportunity to withdraw consent to the proposed orders and for the matter to proceed as a contested hearing.[147]

145. That procedure was endorsed by the High Court in the *Agreed Penalties Case* (2015)

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146 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72, [53].

147 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72, [54]-[60].

258 CLR 482. Among other things, the majority observed that agreed penalties serve the important public policy goal of 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. This in turn encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and the associated use of resources.[148]

146. Further, the majority observed that:

> Civil penalty proceedings are civil proceedings and therefore an adversarial contest in which the issue and scope of possible relief are largely framed and limited as the parties may choose, the standard of proof is upon the balance of probabilities and the respondent is denied most of the procedural protections of an accused in criminal proceedings.[149]

147. Accordingly, they observed that it was:

> entirely consistent with the nature of civil proceedings for a court to make orders by consent and to approve a compromise of proceedings on terms proposed by the parties, provided the court is persuaded that what is proposed is appropriate. [150]

(b) The Court's discretion in respect of agreed penalties

148. The Court's discretion in respect of agreed penalties is a significant factor to be considered. Accordingly, the penalty must always be properly justified by the parties, and there is always a risk that the penalty ultimately imposed may be different to what is expected. That risk is typically a slight one – although it does happen, it is most unusual for a trial judge to find that the agreed penalty is manifestly inadequate or alternatively excessive and instead impose another penalty. Most proceedings involving an agreed penalty are accepted as "within the range" by the trial judge and approved.

149. As noted above, in *ASIC v Westpac Banking Corporation* (2018) 132 ACSR 230, the Court refused to grant the parties' proposed declarations of contravention, where they were not sufficiently specific. That case was later the subject of a contested trial.

150. In *Volkswagen v ACCC* [2021] FCAFC 49, the Full Court considered a case where the proposed penalties were too low. The trial judge had received proposed agreed penalty submissions for an amount of $75 million. The judge found the proposed penalty to be manifestly inadequate, and instead imposed a penalty of $125 million.

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148 *Agreed Penalties Case* (2015) 258 CLR 482, [46].
149 *Agreed Penalties Case* (2015) 258 CLR 482, [53].
150 *Agreed Penalties Case* (2015) 258 CLR 482, [57].

That higher penalty was upheld on appeal.

151. In that case, the trial judge had observed that the $75 million agreed penalty was manifestly inadequate for either specific or general deterrence. The conduct in question was described as an "*egregious*" and "*calculated*" consumer fraud, it was perpetrated by senior management, it involved very serious deception of Australian regulators and significant harm to both consumers and the natural environment, Volkwagen had shown no contrition, and the litigation was fiercely contested and settled only at the last minute. Further – and perhaps most critically – the proposed penalty was not supported by any reasoning or justification, other than that it was a compromise between the parties. This approach was regarded as *"overly pragmatic*", and the penalty as not falling within an appropriate range.[151]

152. Conversely, in cases such as *ACCC v Australian Abalone Pty Ltd* [2007] FCA 1834[152] and *ACCC v Admiral Mechanical Services Pty Ltd* [2007] FCA 1085[153], the penalties were reduced by the Court on the basis that they were too high, and exceeded the appropriate range.

153. As the above cases show, although the interest in certainty of outcomes and the settlement of litigation is well recognised, and appropriate proposed penalties are routinely considered and accepted, the Court's independent discretion is nonetheless a real factor in the settlement of civil penalty proceedings.

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151 *Volkswagen v ACCC* [2021] FCAFC 49, [82]-[83].
152 *ACCC v Australian Abalone Pty Ltd* [2007] FCA 1834, [150].
153 *ACCC v Admiral Mechanical Services Pty Ltd* [2007] FCA 1085, [376].