

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Social-Lites Pty Ltd [2017]

FCA 398

File number(s):	QUD 454 of 2016
Judge(s):	GILMOUR J
Date of judgment:	2 May 2017
Catchwords:	TRADE PRACTICES – misleading and deceptive conduct – false and misleading representations as to the health effects and benefits of e-cigarette products – imposition of pecuniary penalty – principles relevant to the imposition of a penalty pursuant to s 224 of the Australian Consumer Law – agreed penalty – consideration of whether agreed penalty is within the permissible range of penalties – declarations – compliance orders – injunctions – corrective notices
Legislation:	<i>Australian Consumer Law</i> Chapter 2, Chapter 3, Chapter 5, Part 2-1, Part 5-2, ss 18, 29, 29(1)(a), 33, 224, 224(1)(a)(ii), 224(1)(e), 224(2), 224(3), 224(4)(b), 232, 232(1)(a), 232(4)(a), 232(1)(e), 233, 246, 246(2)(b), 246(2)(d), 247(2)(b) <i>Competition and Consumer Act 2010</i> (Cth) Schedule 2 <i>Evidence Act 1995</i> (Cth) s 191 <i>Federal Court of Australia Act 1976</i> (Cth) ss 21, 43 <i>Trade Practices Act 1974</i> (Cth) s 76, 76E, 76E(2), 80, 86C

Cases cited:

Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd [2010] FCA 929

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (2015) 327 ALR 540

Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union [2007] ATPR 42-140

Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (2006) 236 ALR 665

Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (2007) 161 FCR 513

Australian Competition and Consumer Commission v Dell Computers Pty Ltd [2002] ATPR 41-878

Australian Competition and Consumer Commission v Humax Pty Ltd [2005] FCA 706

Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3) (2005) 215 ALR 301

Australian Competition and Consumer Commission v Marksun Australia Pty Ltd [2011] FCA 695

Australian Competition and Consumer Commission v MSY Technology Pty Ltd (No 2) (2011) 279 ALR 609

Australian Competition and Consumer Commission v MSY Technology Pty Ltd (2012) 201 FCR 378

Australian Competition and Consumer Commission v On Clinic Australia Pty Ltd (1996) 35 IPR 635

Australian Competition and Consumer Commission v Pepe's Ducks Ltd [2013] FCA 570

Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc (1999) 161 ALR 79

Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc (1999) 95 FCR 114

Australian Competition and Consumer Commission v Safeway Stores Pty Ltd (1991) 145 ALR 36

Australian Competition and Consumer Commission v Sampson [2011] FCA 1165

Australian Competition and Consumer Commission v Singtel Optus (No 3) (2010) 276 ALR 102

Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4) (2011) 282 ALR 246

Date of hearing:	22 March 2017
Registry:	Western Australia
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Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	109
Counsel for the Applicant:	Ms P Neskovcin
Solicitor for the Applicant:	Norton Rose Fulbright
Counsel for the Respondents:	The Respondents appeared in person via video-link from Brisbane

ORDERS

QUD 454 of 2016	
BETWEEN:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION Applicant
AND:	SOCIAL-LITES PTY LTD (ACN 155 429 753) First Respondent MR LEE O'HARE Second Respondent
JUDGE:	GILMOUR J
DATE OF ORDER:	2 MAY 2017

NOTICE

**TO: SOCIAL-LITES PTY LTD
LEE O'HARE**

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

- A. REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR**
- B. DISOBEY THIS ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,**

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

THE COURT DECLARES THAT:

1. From at least November 2013 to June 2016, the first respondent, Social-Lites Pty Ltd (Social-Lites), in trade or commerce:
 - (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law (ACL), being sch 2 to the *Competition and Consumer Act (No 2) 2010* (Cth) (CCA);
 - (b) in connection with the supply or possible supply of goods, and the promotion of the supply or use of goods, made false or misleading representations that the goods were of a particular composition, in contravention of s 29(1)(a) of the ACL; and
 - (c) engaged in conduct that is liable to mislead the public as to the nature or characteristics of goods, in contravention of s 33 of the ACL,
by representing to consumers that the e-cigarette products supplied by it did not contain carcinogens and toxic substances by publishing statements to that effect:
 - (d) from at least July 2015 to February 2016, on its website (Social-Lites Website); and
 - (e) from at least November 2013 to June 2016, in a video published on the website at www.youtube.com (YouTube),

when that was not the case.

2. From at least July 2015 to February 2016, Social-Lites, in trade or commerce:
 - (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL;
 - (b) in connection with the supply or possible supply of goods, and the promotion of the supply or use of goods, made false or misleading representations that the goods were of a particular composition, in contravention of s 29(1)(a) of the ACL; and
 - (c) engaged in conduct that is liable to mislead the public as to the nature or characteristics of goods, in contravention of s 33 of the ACL,

by representing to consumers that the e-cigarette products supplied by it did not contain any of the carcinogens and toxic substances found in traditional tobacco cigarettes by publishing statements to that effect on the Social-Lites Website, when that was not the case.

3. The second respondent, Mr Lee O'Hare, acting in his capacity as chief executive officer of Social-Lites, and being responsible for authorising all content of the Social-Lites Website, at all material times up to and including June 2016, and having knowledge of the essential elements of the contraventions of ss 18, 29(1)(a) and 33 of the ACL by Social-Lites referred to in paragraphs 1 and 2, was knowingly concerned in, or a party to, those contraventions, for the purposes of ss 224(1) and 232(1) of the ACL.

THE COURT ORDERS THAT:

Injunctions

4. Social-Lites be restrained for a period of 3 years from the date of this order, whether by itself, its servants, its agents or otherwise, in trade or commerce in connection with the supply or possible supply of e-cigarette products or the promotion of supply or use of e-cigarette products, from making any representation to the effect that:
 - (a) those products do not contain carcinogens and toxic substances; or

(b) those products do not contain any of the carcinogens and toxic substances found in traditional tobacco cigarettes,

when that is not the case.

5. Mr Lee O'Hare be restrained for a period of 3 years from the date of this order in trade or commerce in trade or commerce in connection with the supply or possible supply of e-cigarette products or the promotion of supply or use of e-cigarette products, from being knowingly concerned in or party to the making by a corporation of any representation to the effect that:

(a) those products do not contain carcinogens and toxic substances; or

(b) those products do not contain any of the carcinogens and toxic substances found in traditional tobacco cigarettes,

when that is not the case.

6. Social-Lites, within 7 days of the date of this order, take all reasonably practicable steps to remove from broadcast, publication, display or circulation any advertising or promotional material that conveys any of the representations referred to in the declarations at paragraphs 1 and 2 above.

Pecuniary penalties

7. Social-Lites and Mr Lee O'Hare pay to the Commonwealth of Australia pecuniary penalties in respect of the contraventions of ss 29(1)(a) and 33 of the ACL referred to in paragraphs 1 to 3 above, as follows:

(a) in respect of Social-Lites, a pecuniary penalty in the amount of \$50,000; and

(b) in respect of Mr Lee O'Hare, a pecuniary penalty in the amount of \$10,000.

8. The pecuniary penalties referred to in paragraph 7 above are to be paid in instalments as follows:

(a) in respect of Social-Lites, in equal monthly instalments over 3 years, in the amount of \$1,388.89 per month for each instalment; and

(b) in respect of Mr Lee O'Hare, in equal monthly instalments over 5 years, in the

amount of \$166.67 per month for each instalment.

9. In the event that there is a default by a Respondent in the making of any of the instalment payments referred to in paragraph 8 above, the whole of the outstanding amount of the pecuniary penalty specified in paragraph 7 above in respect of that Respondent is immediately due and payable by that Respondent.

Publication orders

10. Social-Lites publish, or cause to be published, at its own expense within 3 days of this order, a banner at the top of the homepage of the Social-Lites Website (whatever the URL/s of the website at the date of the order), which is maintained on the website for a period of 90 days from the date of this order and:
 - (a) is viewable immediately on a device's screen upon access to the homepage of the website;
 - (b) appears at the top of the screen, and comprises at least 20% of the height and the full width of the screen;
 - (c) contains text in at least size 20 font which prominently states: "Orders of the Federal Court of Australia regarding Social-Lites and Mr Lee O'Hare in proceeding by the Australian Competition and Consumer Commission - Click here for further details."; and
 - (d) when clicked, takes the user to a colour copy of a corrective notice in the form of Annexure A, which must be:
 - (i) crawlable (i.e. its contents may be indexed by a search engine); and
 - (ii) displayed prominently and of a size that takes up the entire screen.

Compliance orders

11. Mr Lee O'Hare, and each director of Social-Lites as at 16 June 2016, each at his or her own expense, is to:
 - (a) within 3 months of the date of this order, attend and undertake a training session on the responsibilities and obligations under ss 18, 29 and 33 of the ACL;

- (b) ensure that the training referred to in paragraph (a) is administered by a suitably qualified compliance professional or legal practitioner with expertise in the ACL; and
- (c) provide to the Applicant a written statement or certificate from the person conducting the training referred to in paragraph (a), within 14 days of completion of the training, verifying that such training has occurred.

Other orders

- 12. Social-Lites serve on the Applicant an affidavit verifying that it has carried out its obligations under paragraphs 6 and 10 above, to be served within 10 days of this order.
- 13. Social-Lites and Mr Lee O'Hare each pay a contribution to the Applicant's costs of, and incidental to, this proceeding, as follows:
 - (a) in respect of Social-Lites, in the amount of \$5,000; and
 - (b) in respect of Mr Lee O'Hare, in the amount of \$5,000.
- 14. The costs referred to in paragraph 13 above are to be paid as follows:
 - (a) in respect of Social-Lites, within 60 days of the date of this order; and
 - (b) in respect of Mr Lee O'Hare, in equal monthly instalments over 5 years, in the amount of \$83.33 per month for each instalment.
- 15. In the event that there is a default by Mr Lee O'Hare in the making of any of the instalment payments referred to in paragraph 14(b) above, the whole of the outstanding amount of the costs specified in paragraph 13(b) above is immediately due and payable by Mr Lee O'Hare.

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

REASONS FOR JUDGMENT

GILMOUR J:

1 I made declarations and imposed civil penalties and associated orders on 22 March 2017 in this matter. These are my reasons.

Introduction

2 The applicant (ACCC) applied for certain declarations, civil penalties and other orders against the respondents, Social-Lites Pty Ltd and Mr Lee O'Hare. The ACCC has provided extensive written submissions which, in my opinion, accurately set out the principles generally applicable in such cases as well as setting out the relevant facts. The respondents raised no issue in either respect. I have drawn substantially from those submissions in these reasons.

3 By a Concise Statement dated by a Concise Statement dated 16 June 2016 (Concise Statement), the ACCC alleged that the respondents, Social-Lites Pty Ltd and Mr Lee O'Hare, engaged in conduct that contravened ss 18, 29(1)(a) and 33 of the Australian *Consumer Law* (ACL), being sch 2 of the *Competition and Consumer Act 2010* (Cth) (CCA).

4 The conduct occurred between the period of at least November 2013 to June 2016, and involved the promotion and sale of e-cigarette products to consumers in Australia, including to consumers via Social-Lites' website (Social-Lites Website) and a video published on the YouTube website (YouTube Video).

5 In particular, the ACCC alleged that:

- (a) Social-Lites, in trade or commerce:
 - (i) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL;
 - (ii) in connection with the supply or possible supply of goods, and the promotion of the supply or use of goods, made false or misleading representations that the goods were of a particular composition, in

contravention of s 29(1)(a) of the ACL; and

- (iii) engaged in conduct that was liable to mislead the public as to the nature or characteristics of goods, in contravention of s 33 of the ACL,

by representing to consumers that the e-cigarette products supplied by it did not contain carcinogens and toxic substances by publishing statements to that effect, namely the representations at paragraphs 5 and 6 of the Concise Statement (Representations).

- (b) Mr O'Hare had knowledge of Social-Lites' conduct, and was, directly or indirectly, knowingly concerned in or a party to the contraventions by Social-Lites referred to at [5](a) above, within the meaning of ss 224(1)(e) and 232(1)(e) of the ACL.

6 Social-Lites and Mr O'Hare admitted these allegations. The admissions are confirmed in the Statement of Agreed Facts dated 30 January 2017 (SOAF). I admitted the SOAF into evidence pursuant to s 191 of the *Evidence Act 1995* (Cth).

7 While recognising that the question of relief remains at the discretion of the Court, the parties seek by consent the orders set out in the minutes of the proposed order signed by the parties on 21 September 2016 (the Proposed Consent Order), namely:

- (a) declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act), in the form set out in paragraphs 1 to 3 of the Proposed Consent Order;
- (b) injunctions pursuant to s 232 of the ACL, in the form set out in paragraphs 4 to 6 of the Proposed Consent Order;
- (c) payment by Social-Lites of a pecuniary penalty in the amount of \$50,000 pursuant to s 224 of the ACL, in the form set out in paragraph 7(a) of the Proposed Consent Order, and a further order that the pecuniary penalty be paid in instalments in the form set out in paragraph 8(a) of the Proposed Consent Order;
- (d) payment by Mr O'Hare of a pecuniary penalty in the amount of \$10,000

pursuant to s 224 of the ACL, in the form set out in paragraph 7(b) of the Proposed Consent Order, and a further order that the pecuniary penalty be paid in instalments in the form set out in paragraph 8(b) of the Proposed Consent Order;

- (e) a publication order to be made in the form set out in paragraph 10 of the Proposed Consent Order;
- (f) a non-punitive order pursuant to s 246 of the ACL requiring Mr O'Hare, and each director of Social-Lites to undertake training, in the form set out in paragraph 11 of the Proposed Consent Order;
- (g) payment by Social-Lites of a contribution to the ACCC's costs pursuant to s 43 of the *Federal Court Act*, in the form set out in paragraph 13(a) and 14(a) of the Proposed Consent Order; and
- (h) payment by Mr O'Hare of a contribution to the ACCC's costs pursuant to s 43 of the *Federal Court Act*, in the form set out in paragraph 13(b) of the Proposed Consent Order, which is also proposed to be paid in instalments as set out in paragraph 14(b) of the Proposed Consent Order.

8 The ACCC and the respondents have agreed the factual basis for the orders sought, which is set out in the SOAF and materials referred to in the SOAF.

Orders by consent: Principles

9 In *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors* (2015) 326 ALR 476, the High Court, while confirming the role of the court in determining the appropriate penalty, affirmed without alteration the long-standing practices of this Court when receiving and considering submissions on the amount of civil penalties: see *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41–993.

10 The High Court confirmed that joint or separate submissions as to quantum of pecuniary penalty can be received and, if appropriate, accepted in contested civil penalty proceedings: *Fair Work Building Industry Inspectorate* at [1] per the plurality (with whom

Gageler and Keane JJ agreed on this point at [68] and [79] respectively). The plurality held:

- (a) at [60] that it is to be expected that the regulator will be in a position to offer informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance;
- (b) at [61] that the submissions of a regulator will be considered on their merits in the same way as the submissions of a respondent and subject to being supported by findings of fact based upon evidence, agreement or concession; and
- (c) at [64] that it is consistent with the purposes of civil penalty regimes, and the public interest, that the regulator take an active role in attempting to achieve the penalty it considers appropriate and thus that the regulator's submissions as to the terms and quantum of a civil penalty be treated as a relevant consideration.

11 There is a well-recognised public interest in the settlement of cases under the *Trade Practices Act 1974* (Cth) (TPA), and by extension, the CCA. As was stated by Burchett and Kiefel JJ in *NW Frozen Foods* at 291:

There is an important public policy involved. When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the ACCC to turn to other areas of the economy that await their attention.

12 Further, in *ACCC v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79, French J (as his Honour then was) noted at 86 [18] that:

The court has a responsibility to be satisfied that what is proposed is not contrary to the public interest and is at least consistent with it...Consideration of the public interest, however, must also weigh the desirability of non-litigious resolution of enforcement proceedings.

13 In deciding whether to make consent orders proposed by the parties, the Court must be satisfied that it has the power to make the orders proposed and the orders are appropriate: *ACCC v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548 at [1]; *ACCC v Real Estate Institute of Western Australia Inc* (1999) 95 FCR 114 at 116.

14 Once the Court is satisfied of these matters, it has been recognised that the Court should exercise judicial restraint in scrutinising proposed settlements. As Lee J stated in *ACCC v Target Australia Pty Ltd* (2001) ATPR 41–840 at [24]:

It is the Court's duty in receiving consent orders in any matter to scrutinise such orders as to their appropriateness. However, after being satisfied as to the appropriateness of the orders, the Court should be slow to impede final settlement of such matters, particularly those involving public interest considerations. Moreover, the public has an interest in the mutual settlement of litigation, and subject to the foregoing the Court should be careful not to refuse to make orders simply because the orders may have been different had it been the Court's task to formulate them.

Contraventions

15 The contraventions by Social-Lites are admitted and set out in the Proposed Consent Order at paragraphs 1 and 2 and in the SOAF in paragraph 23.

16 The involvement of Mr O'Hare in the contraventions by Social-Lites is also admitted and set out in the Proposed Consent Order at paragraph 3 and the SOAF in paragraph 24.

Declarations

17 By consent, the ACCC, Social-Lites and Mr O'Hare seek the declarations in paragraphs 1 to 3 of the Proposed Consent Order. The Court has a wide discretionary power to make declarations under s 21 of the *Federal Court Act: Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437–8 per Gibbs J. There, Gibbs J held that the following three threshold requirements should be satisfied before a declaration will be made:

- (a) the question must be a real and not a hypothetical or theoretical one;
- (b) the applicant must have a real interest in raising it; and
- (c) there must be a proper contradictor.

18 Each of these requirements is satisfied in this case:

- (a) the proposed declarations relate to conduct that contravenes the ACL and the matters in issue have been identified and particularised by the parties with precision;

- (b) it is in the public interest for the ACCC to seek to have the declarations made and for the declarations to be made as:
 - (i) there is a significant legal controversy in this case, which is being resolved, and
 - (ii) the ACCC is the public regulator under the CCA and has a genuine interest in seeking the declaratory relief; and
- (c) the respondents are proper contradictors (notwithstanding their consent) because each is a person who contravened, or was involved in contraventions of, the ACL and is the subject of the declarations, therefore having a genuine interest in resisting the granting of the declarations: as to this last point see *ACCC v Sampson* [2011] FCA 1165 at [13]–[18].

19 The ACCC submitted that the declarations sought are appropriate because they serve to:

- (a) record the Court's disapproval of the contravening conduct;
- (b) vindicate the ACCC's claim that Social-Lites contravened, and Mr O'Hare was involved in Social-Lites' contraventions of, the ACL;
- (c) assist the ACCC in the future in carrying out the duties conferred on it by the CCA;
- (d) assist in clarifying the law; and
- (e) act as a deterrent to other persons and corporations from contravening the ACL: *ACCC v Construction, Forestry, Mining and Energy Union* [2007] ATPR 42-140 at [6].

20 The growing practice of this Court is to grant declaratory relief on the basis of admissions of the parties, or by consent, where declaratory relief is sought as an adjunct to an order imposing a pecuniary penalty or in matters of public interest: see for example, *ACCC v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665 at 680–681 [57]–[59] endorsed on appeal by the Full Court in *ACCC v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 at [92]. It is, in my opinion, appropriate for the Court to order the declaratory relief on the basis of the

admissions made by the respondents and materials referred to in the SOAF.

Injunctions

21 By consent, the parties seek injunctions restraining Social-Lites and Mr O'Hare from engaging in conduct, the terms of which are set out in paragraphs 4 to 6 of the Proposed Consent Order.

22 The ACCC submitted that it is appropriate for the Court to order the proposed injunctions.

23 Section 232(1)(a) of the ACL empowers the Court to grant an injunction, in such terms as it considers appropriate, if the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes, or would constitute, a contravention of a provision of Chapter 2 (which includes s 18) or Chapter 3 (which includes ss 29 and 33) of the ACL.

24 Pursuant to s 232(4)(a) of the ACL, the Court may grant an injunction whether or not there is a likelihood of the conduct being repeated.

25 The terms of s 232 are relevantly identical to those in s 80 of the TPA. The authorities on s 80 of the TPA therefore provide some guidance on the construction of s 232 of the ACL: *ACCC v Willesee Healthcare Pty Ltd* [2011] FCA 301 at [38].

26 In discussing s 80 of the TPA, Lockhart J, with whom French J (as he then was) agreed, said in *ICI Australia Operations v Trade Practices Commission* (1992) 38 FCR 248 at 256:

In my opinion, subss (4) and (5) are designed to ensure that once the condition precedent to the exercise of injunctive relief has been satisfied (ie contraventions or proposed contraventions of Pt IV or V of the Act), the court should be given the widest possible injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly.

27 This was endorsed in *Foster v ACCC* (2006) 149 FCR 135 at 147–148 at [30]–[31]. French J noted in *OD Transport Pty Ltd v WA Government Railways Commission* (1987) 13

FCR 500 at 508, that the Court's discretion in formulating the terms in which an injunction may be granted under s 80 of the TPA "is as wide as the phrase 'as the court determines to be appropriate'".

28 The Court's power under s 80 is, however, subject to at least three limitations: *ACCC v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197 at 203–4, a view adopted in later cases *Foster v ACCC* at [38], *ACCC v Marksun Australia Pty Ltd* [2011] FCA 695 at [59], and *ACCC v SMS Global Pty Ltd* [2011] ATPR 42-364 [59]. The limitations are as follows:

- (a) the relief should be designed to prevent a repetition of the contravening conduct;
- (b) there must be a sufficient nexus or relationship between the contravention and the injunction; and
- (c) the injunction must relate to the case or controversy.

29 I accept the parties' submission that the injunctive relief sought in this proceeding is within the Court's power and is appropriate because the relief:

- (a) is designed to prevent:
 - (i) Social-Lites from making false or misleading representations similar to those that are the subject of the proceeding; and
 - (ii) Mr O'Hare from having any further involvement in the making of such false or misleading representations;
- (b) is expressed in terms that are closely tied to the terms in which the respondents has admitted their respective contraventions of the ACL; and
- (c) arises in the circumstances of this proceeding, which has been appropriately issued in this Court.

30 It is submitted that the proposed injunctions, which are intended to have application for a period of three years, are appropriate to deter repetition of the contravening conduct.

31 An injunction must be specifically and clearly expressed, so that it is capable of being

readily obeyed and does not require Court supervision: *ACCC v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79 at 88–89 [26]. It is submitted that the terms of the proposed injunctions are framed in accordance with the admitted facts, and are appropriate to be made in these circumstances.

32 In addition, the respondents have consented to the injunctions in the form proposed. The consent of the parties to the injunctions is an alternative basis on which the injunctions may be granted, under s 233 of the ACL, which empowers the Court, if it considers that it is appropriate to do so, to grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied as required by s 232(1). The parties submit that in the event that the Court is not satisfied as required by s 232(1), it would be appropriate for the Court to grant the injunctions sought by consent in this proceeding under s 233.

Publication Order

33 By consent, the parties seek a publication order requiring Social-Lites to publish a corrective notice in the form set out in paragraph 10 of the Proposed Consent Order.

34 Section 246(2)(d) of the ACL empowers the Court to make an order, in relation to a person who has engaged in conduct that contravenes a provision of, amongst others, Chapter 2 (which includes s 18) and Chapter 3 (which includes ss 29 and 33) of the ACL, requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

35 The proposed publication of the corrective notice will:

- (a) protect the public interest by dispelling incorrect or false impressions which may have been created as a result of the respondents' misleading or deceptive conduct and false or misleading representations: *ACCC v On Clinic Australia Pty Ltd* (1996) 35 IPR 635 at 640.
- (b) alert affected consumers to the fact of the contraventions;
- (c) bring the outcome of the proceeding to the attention of consumers and the

industry, and educate them as to the requirements of the ACL and raise public awareness of the type of conduct that breaches the ACL; *ACCC v REIWA* (1999) 95 FCR 114 at 133; *MBF v Cassidy* (2003) 135 FCR 1 at 21, [50]; and

- (d) support the primary orders and serve to prevent repetition by the respondents: *ACCC v REIWA* (1999) 95 FCR 114 at 133; *MBF v Cassidy* (2003) 135 FCR 1 at 21, [51].

36 The proposed publication orders are particularly appropriate because of the widespread advertising over a period of two years and seven months: *ACCC v Dell Computers Pty Ltd* [2002] ATPR 41–878 at [46]. This especially applies for the representations made in the YouTube Video.

37 As was the case in *ACCC v Target Australia Pty Ltd* (2001) ATPR 41-840 at [21], corrective advertising may be a particularly appropriate remedy where the conduct in question consisted of media advertisements. Matters to be considered in the present case were that the advertisements were broadcast nationally, and repetitively, to a large number of consumers. The nature and prominence of the advertisements presents the inference that a number of people may have been misled or deceived, such people being unaware the conduct was misleading or deceptive and being unaware of their right to a remedy: see *Annand & Thompson Pty Ltd v Trade Practices Commission* (1979) 40 FLR 165 at 190 per Fisher J.

38 Online corrective notices or advertisements, in conjunction with orders for publication of notices in newspapers or other formats, have been previously ordered by the court in a number of cases pursuant to s 86C of the TPA and s 246(2)(d) of the ACL: see, for example, *ACCC v Singtel Optus (No 3)* (2010) 276 ALR 102 at 110–111 [29] and *ACCC v Pepe's Ducks Ltd* [2013] FCA 570 at [50]–[52].

39 The proposed publication orders are intended to be corrective and non-punitive in nature. However, if the Court considers that part or all of the publication orders sought are punitive in nature, then, to that extent, in the alternative the ACCC submits that having regard to the nature of the contraventions by Social-Lites of s 18, 29 and 33 of the ACL it would be appropriate for the Court to make the orders set out in paragraph 10 of the Proposed Consent

Order pursuant to s 247(2)(b) of the ACL.

Training

40 By consent, the parties seek a non-punitive order requiring Mr O'Hare and each director of Social-Lites to undertake training as set out in paragraph 11 of the Proposed Consent Order.

41 Section 246(2)(b) of the ACL empowers the Court to make such an order.

42 The minimum requirements for the training are set out in the Proposed Consent Order. It is therefore clear to Mr O'Hare and each director of Social-Lites what they must do to comply with the order.

43 The ACCC submits that it is appropriate for the Court to make the non-punitive order in the circumstances of this case.

Pecuniary Penalties - Applicable Principles

Section 224 of the ACL

44 Pursuant to s 224(1)(a)(ii) of the ACL, if the Court is satisfied that a person has contravened a provision of Part 3-1 of the ACL (which includes ss 29 and 33), the Court may order the person to pay such pecuniary penalty, in respect of each act or omission by the person to which it applies, as the Court determines to be appropriate.

45 The ACL does not empower the Court to impose a pecuniary penalty for a contravention of s 18 in Part 2-1 of the ACL.

46 Under s 224(3) of the ACL, the maximum penalty in respect of a contravention of a provision of Part 3-1 of the ACL:

- (a) for a body corporate is \$1.1 million; and
- (b) for a natural person is \$220,000.

47 A person is not liable to more than one pecuniary penalty in respect of the same conduct: s 224(4)(b).

48 In determining the appropriate pecuniary penalty, s 224(2) of the ACL requires the Court to have regard to all relevant matters, including:

- (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission;
- (b) the circumstances in which the act or omission took place; and
- (c) whether the person has previously been found by a Court in proceedings under Chapter 4 or Part 5-2 of the ACL to have engaged in any similar conduct.

49 Each of these factors is addressed later in these reasons.

Additional considerations

50 Section 224 of the ACL was preceded by, and is in substantially identical terms to, s 76E of the TPA. The Court has confirmed, with some exceptions, the application to s 76E of the TPA of the principles relevant to the imposition of a civil penalty under the former s 76 of the TPA (relating to restrictive trade practices): see eg *ACCC v MSY Technology Pty Ltd (No 2)* (2011) 279 ALR 609 at 624. Perram J's reasoning in this regard was not disturbed by the Full Court on appeal in *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378. Accordingly, given the similarities between s 224(2) of the ACL and s 76E(2) of the TPA, both of which require the penalty to be deemed "appropriate" by the Court, the guiding principles developed for s 76 of the TPA are also of relevance to the power contained in s 224 of the ACL: *Pepe's Ducks* at [16].

51 The principles applicable to agreed penalty submissions in civil penalty proceedings remain those in *NW Frozen Foods* and *Mobil Oil*. In *NW Frozen Foods*, Burchett and Kiefel JJ outlined a checklist of matters that judges have regarded as of assistance in the assessment of a pecuniary penalty under s 76 of the TPA. In considering the imposition of a penalty under s 76E of the TPA, Perram J in *ACCC v Singtel Optus Pty Ltd (No 4)* (2011) 282 ALR 246 at [11] set out an updated checklist of relevant considerations, which was referred to

without demur on appeal: *Singtel Optus v ACCC* (2012) 287 ALR 249 at [37]. That checklist has been widely considered by this Court in ordering pecuniary penalties under s 224 of the ACL: see *Pepe's Ducks* at [17] and *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540 at 544 [8] where it was also noted at [9] that the factors did not exhaust relevant considerations.

52 The guiding considerations identified by Perram J were:

- (a) the size of the contravening company;
- (b) the deliberateness of the contravention and the period over which it extended;
- (c) whether the contravention arose out of the conduct of senior management of the contravener or at some lower level;
- (d) whether the contravener has a corporate culture conducive to compliance with the ACL, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;
- (e) whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of the ACL in relation to the contravention;
- (f) whether the contravener has engaged in similar conduct in the past;
- (g) the financial position of the contravener; and
- (h) whether the contravening was systematic, deliberate or covert.

53 Each of these considerations is addressed below.

Purpose of deterrence

54 The principal object of a pecuniary penalty is deterrence, both the need to deter repetition of the contravening conduct by the contravener (specific deterrence) and to deter others who might be tempted to engage in similar contraventions (general deterrence). This informs the assessment of the appropriate penalty where commercial profit is what drove the contravening conduct: *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 [65].

55 The role of deterrence in the present case is addressed below.

Where penalties sought by consent

56 Litigation to establish contraventions of the ACL can be complex, time consuming and costly. It is in the public interest for litigation under the ACL (as with other litigation) to be concluded in the shortest time frame that is consistent with justice being done between the parties, freeing the Court and the ACCC as regulator to deal with other matters. To that end, this Court has looked favourably upon negotiated settlements, while noting that the ultimate responsibility for the terms and making of the orders that resolve the proceedings lies with the Court: *NW Frozen Foods* at 290–291.

57 Provided that the Court is satisfied that the terms of the orders are appropriate, it is submitted that it is in the public interest for the Court to make orders on the terms that have been agreed between the parties so as to encourage parties to assist the ACCC in its investigations and achieve negotiated settlements. The Court has recognised that, in addition to savings in time and costs, there is a public benefit in imposing agreed pecuniary penalties where appropriate as parties would not be disposed to reach such agreements were there unpredictable risks involved: *NW Frozen Foods* at 291.

58 In *NW Frozen Foods* at 291, the Full Federal Court held that the key question for the Court in relation to proposed agreed penalties is whether the amount proposed is "within the permissible range" in all the circumstances. In some other recent cases, it has been held that the phrase "permissible range" refers to that range that would be permitted by the Court, which is neither manifestly inadequate nor manifestly excessive: *Ponzio v B&P Caelli Constructions Pty Ltd* [2007] 158 FCR 543 at [129]; *Pepe's Ducks* at [25].

59 The decision of the Full Federal Court in *NW Frozen Foods* was considered by the Full Federal Court in *Mobil Oil*. The Full Federal Court in *Mobil Oil* held that the decision in *NW Frozen Foods* disclosed no error of principle. The Full Federal Court further held, at [54], that determining whether the amount proposed is within the permissible range may be approached by the Court either by considering first the proposed penalty and then whether it falls within the permissible range, or by considering first the appropriate range and then

determining whether the proposed penalty falls within that range.

60 In *NW Frozen Foods*, the Full Federal Court held at 298–299 that:

We agree with the statement made in several of the cases cited that it is not actually useful to investigate whether, unaided by the agreement of the parties, we would have arrived at the very figure they propose. The question is not that; it is simply whether, in the performance of the Court's duty under section 76, this particular penalty proposed with the consent of the corporation involved and of the Commission, is one that the Court should determine to be appropriate.

61 In *Mobil Oil*, the Court noted at [51] that the following propositions emerged from the reasoning on this issue in *NW Frozen Foods*:

- (a) it is the Court's responsibility to determine the appropriate penalty ...;
- (b) determining the quantum of a penalty is not an exact science ...;
- (c) there is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy ...;
- (d) the view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty ...;
- (e) in determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case ...;
- (f) [w]here the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so ...;
- (g) 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, and in answering that question:
 - (i) the Court will not reject the agreed figure simply because it would have been disposed to select some other figure; and
 - (ii) the agreed penalty will be appropriate if within the "permissible range".

Determining penalty figure

62 In *Markarian v R* (2005) 228 CLR 357, the High Court at 384 affirmed that the process of arriving at an appropriate sentence for a criminal offence involves an intuitive or instinctive synthesis of all the relevant factors. That process is also applicable to the assessment of pecuniary penalties under s 224 of the ACL: *ACCC v Marksun Australia Pty Ltd* [2011] FCA 695 at [90]–[91] and *ACCC v Coles Supermarkets* at 543 [6].

63 In *Markarian v R*, Gleeson CJ, Gummow, Hayne and Callinan JJ held:

- (a) assessment of the appropriate penalty is a discretionary judgment based on all relevant factors (at 371 [27]);
- (b) "...careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick" (at 372 [31]);
- (c) it will rarely be appropriate for a Court to start with the maximum penalty and proceed by making a proportional deduction from that maximum (at 372 [31]);
- (d) the Court should not adopt a mathematical approach of increments or decrements from a predetermined range, or assign specific numerical or proportionate value to the various relevant factors (at 373 [37]);
- (e) it is not appropriate to determine an 'objective' sentence and then adjust it by some mathematical value given to one or more factors such as a plea of guilty or assistance to authorities (at 374 [37]);
- (f) the Court "may not add and subtract item by item from some apparently subliminally derived figure" to determine the penalty to be imposed (at 375 [39]); and
- (g) since the law strongly favours transparency, accessible reasoning is necessary in the interests of all, and, while there may be occasions where some indulgence in an arithmetic process will better serve the end, it does not apply

where there are numerous and complex considerations that must be weighed (at 375 [39]).

Pecuniary Penalties - Application

64 By consent, the parties seek orders imposing pecuniary penalties pursuant to s 224 of the ACL on:

- (a) Social-Lites, in the amount of \$50,000; and
- (b) Mr O'Hare, in the amount of \$10,000.

65 The facts and admissions establishing the particular conduct which Social-Lites admits constitute contraventions of the ACL, and which Mr O'Hare admits gave rise to his involvement in the contraventions by Social-Lites, are set out in the SOAF, together with other matters relevant to penalties.

66 Each of the s 224 factors and considerations set out by Perram J in *ACCC v Singtel Optus Pty Ltd (No 4)* at [11] regarding the imposition of pecuniary penalties is considered below.

Nature, extent and duration of conduct, and circumstances in which it took place

67 Social-Lites made the Representations, which were false or misleading in contravention of s 29(1)(a) and 33 of the ACL. The Representations were made on the Social-Lites Website and through the YouTube video, both of which were accessible to the general public. The Representations purported to consumers that Social-Lites' e-cigarette products:

- (a) did not contain carcinogens and toxic substances; and
- (b) did not contain any of the carcinogens and toxic substances found in tobacco cigarette smoke.

68 Social-Lites did not have scientific or other evidence to support the Representations.

69 The conduct occurred:

- (a) from at least July 2015 to February 2016, in respect of the representations made on the Social-Lites website; and
- (b) from at least November 2013 to June 2016, in respect of the representations made in the YouTube video.

70 As set out at paragraph 5 of the SOAF, Mr O'Hare was personally responsible for authorising the content of the Social-Lites Website and the YouTube Video.

71 The contraventions are serious. The conduct was in respect of serious matters concerning public health. The conduct was directed to the general public and the medium of communication was the internet, which is far-reaching. The ACCC did not allege and did not attempt to demonstrate the degree of carcinogenicity of the chemicals in e-cigarettes. Accordingly they did not allege or seek to prove just how harmful exposure to these chemicals was.

72 The Representations had the potential to mislead a wide range of consumers about the health effects of non-nicotine e-cigarettes. Consumers were not in a position to ascertain the falsity of the Representations. The misrepresentations deprived consumers of the opportunity to make properly informed decisions.

73 Consumers of Social-Lites' e-cigarette products were misled, or were likely to have been misled, into believing that the use of those products would not expose them to carcinogens or toxic substances, like those contained in conventional tobacco cigarette smoke. The exposure to those carcinogens and toxic chemicals may have caused harm to the health of those consumers who, if they had been informed of the presence of these chemicals in the e-cigarettes, may have chosen not to purchase and use them.

Amount of profit gained and loss caused

74 The ACCC is unable to ascertain the number of consumers who relied upon the Representations. It is therefore unable to quantify the amount of profit gained by Social-Lites

by the contraventions of ss 29(1)(a) and 33 of the ACL.

75 The ACCC is also unable to quantify the non-pecuniary loss to consumers caused by the contraventions. Consumers lost the opportunity to make a different choice and avoid potential adverse health consequences.

76 The ACCC notes that:

- (a) the contravening Representations were made:
 - (i) on the Social-Lites Website for a period of at least six months; and
 - (ii) in the YouTube Video for at least 2 years and 7 months; and
- (b) Social-Lites sold 46,667 units of e-cigarettes in the period from 1 July 2013 to 30 June 2016.

Size of contravener and financial position

77 The respondents have provided the ACCC with information regarding their respective personal and business financial positions which are set out at paragraphs 29 to 32 of the SOAF.

78 The ACCC notes in particular that:

- (a) Social-Lites has informed the ACCC that:
 - (i) during the financial years ending 30 June 2014 to 30 June 2016, it generated revenue in the sum of \$1,223,605, but incurred losses of \$53,771;
 - (ii) it has assets totalling \$17,577; and
 - (iii) it has liabilities of \$50,123.
- (b) Mr O'Hare has informed the ACCC that:
 - (i) during the financial year ending 30 June 2014 he did not receive any income, and in the financial years ending 30 June 2015 and 30 June

2016 he received income from Social-Lites totalling \$72,884.24;

- (ii) he has assets totalling \$1,000; and
- (iii) he has liabilities of approximately \$50,000.

79 While capacity to pay any pecuniary penalty is a relevant factor, the Court must ultimately ensure that the penalty provides sufficient general deterrence: see *ACCC v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301 at 319 [87], 321 [99] and [100].

Deliberateness of the contravening conduct

80 Social-Lites did not have scientific or other evidence to support the Absolute Representation or the Comparative Representation, and did not carry out or commission any testing of the e-cigarette products or make reasonable or adequate enquiries to substantiate the accuracy of the Representations. By failing to do so, it made the Representations recklessly and without reasonable grounds.

81 Social-Lites made the statement set out in paragraph 11(a) of the SOAF on the Social-Lites Website with the intention that consumers who were seeking to avoid exposure to the harmful chemicals found in conventional tobacco cigarette smoke would be induced to purchase its e-cigarette products.

82 Accordingly, the Representations contravening s 29(1)(a) and 33 of the ACL, were made recklessly, and for commercial reasons.

83 However, the respondents have expressed contrition over the contravening representations by accepting responsibility and expressed their regret over their error in the Concise Response.

Participation of senior management

84 Mr O'Hare was, at all relevant times, the chief executive officer of Social-Lites, the controlling mind of Social-Lites, and personally responsible for authorising the content of the Social-Lites website and the YouTube video.

85 Mr O'Hare has admitted his involvement gave rise to Social-Lites' contraventions of the ACL.

Culture in respect of compliance with ACL

86 At the time of the contravening conduct, Social-Lites did not have a culture of compliance with the ACL.

Disposition to cooperate

87 The respondents have cooperated with the ACCC in the conduct of this proceeding by agreeing to the SOAF and the Proposed Consent Order. They have done so at an early point in the proceeding. It is a significant factor that the respondents have each admitted liability in relation to their contraventions of the ACL without a contested hearing.

88 The respondents ceased making the Representations soon after the commencement of this proceeding.

89 As a result of the cooperation of the respondents, a trial in this proceeding has been avoided. A contested trial would have consumed a larger amount of the Court's time and the ACCC's time and resources.

Whether prior similar conduct

90 The respondents have not previously been found by a court to have contravened the ACL.

Deterrence

91 As stated at [55] in these reasons above, the principal objective of a pecuniary penalty is deterrence.

92 As Allsop CJ stated in *ACCC v Coles Supermarkets Australia* at 561 [95]:

It is important that sellers in the market recognise that consumers are entitled to reliable, truthful and accurate information. Confidence in such is a matter of importance for the Australian community and economy. It is an important factor in

market efficiency. General and specific deterrence are important in order to encourage the maintenance of a fair, reliable and efficient market. Consumers play a vital part in that market. They buy the goods and services that commercial entities proffer.

93 As the ACCC submitted, it is necessary for the penalty to be of a sufficient magnitude for general deterrence, so as to deter others who may be tempted to engage in similar contraventions, including in particular other online traders, or other businesses who trade in goods which may have an impact on the health of the public.

94 It is also necessary for the penalty to be of a sufficient magnitude to achieve specific deterrence, in that the penalty must be sufficiently high to deter the respondents from repeating the contravening conduct. The fact that the respondents have consented to injunctions does not detract from the need for specific deterrence. As Allsop CJ said in *Coles Supermarkets* at 558 [79], consent by a party to an injunction "does not speak to whether or not it needs to be deterred from future similar conduct. ... It cannot ... rightly be taken as some sign that the consenting party has seen the error of its ways and is unlikely to engage in similar conduct again".

Parity principle

95 The parity principle requires that when penalties are imposed, "there should not be such an inequality as would suggest that the treatment meted out has not been even handed": *NW Frozen Foods* at 295.

96 Similar contraventions should incur similar penalties. However, the Court has emphasised that caution needs to be exercised in comparing penalties imposed in different cases, as every case necessarily turns on its own facts. In *Singtel Optus Pty Ltd v ACCC*, the Full Court observed at 264 [60] that:

...the Court is not assisted by...citation[s] of penalties imposed in other cases, where the combination of circumstances were different from the present, as if that citation is apt to establish a "range" of penalties appropriate in this case.

97 The Full Court endorsed the following passage of Middleton J in *ACCC v Telstra Corporation Ltd* (2010) 188 FCR 238 at 275 [215]:

It is apparent that there are many difficulties in simply referring to penalties

previously imposed for contraventions of legislation in widely differing circumstances or in circumstances where some of the factors are similar but others dissimilar to those of the present proceeding. In each case, the court must take into account the deterrent effect of the penalty and the fact that the penalties "should reflect the will of Parliament that the commercial standards laid down in the Act must be observed but not be so high as to be oppressive": see *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* [1978] ATPR at 40–091 at 17,896.

98 I am informed by the parties that there are, at present, no cases of breach of the ACL involving similar circumstances with which to compare this case.

99 The mandatory and discretionary factors to which the Court is to have regard provide sufficient guidance as to the appropriateness of the proposed penalties. Further, the proposed penalties are significant enough to achieve general deterrence without being oppressive to the respondents.

Maximum penalties and courses of conduct

100 As noted above, the maximum penalty in respect of contraventions of a provision of Part 3-1 of the ACL:

- (a) for a body corporate, is \$1.1 million; and
- (b) for a natural person, is \$220,000.

101 A person is not liable to more than one pecuniary penalty in respect of the same conduct: s 224(4) of the ACL.

102 Although it may be possible to characterise each of the various instances of conduct subject of these proceedings and admitted by the respondents as separate contraventions of the ACL, the ACCC submits that, in the circumstances of this case, it is appropriate that a single penalty be imposed upon Social-Lites, and upon Mr O'Hare for his involvement in the contraventions of Social-Lites. In *Pepe's Ducks* at [39], the Court took such an approach stating that:

In this case the parties agreed on a global penalty for all contraventions without identifying the number of contraventions in respect of which the penalty ought be imposed. I did not think it necessary to engage in the complex exercise of determining the precise number of contraventions.

Totality principle

103 In determining the appropriate penalty for multiple offences the "totality principle" must also be considered. This was applied in *Trade Practices Commission v TNT Australia Pty Ltd*: (1995) ATPR 41-375 at 40, 169, and subsequently endorsed in *ACCC v Baxter Healthcare Pty Ltd* [2010] FCA 929 at [22] where the Court held that the total penalty for each offence ought not to exceed what is proper for the entire contravening conduct involved. This approach was endorsed by Goldberg J in *ACCC v Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53, where his Honour said:

The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved... But that does not mean that a court should commence by determining an overall penalty and then dividing it among the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined.

...

[A] sentencer or penalty fixer must, as an initial step, impose a penalty appropriate for each contravention and then as a check, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct involved. [footnotes omitted]

104 The ACCC submitted that the penalties imposed in relation to the contravening conduct of Social-Lites, and Mr O'Hare's involvement in the contravening conduct of Social-Lites, are just and appropriate in all the circumstances of the case and appropriately take account of the entirety of each respondent's conduct.

Proposed penalties

105 The ACCC submitted that, in all the circumstances, the Court should make orders imposing pecuniary penalties pursuant to s 224 of the ACL on:

- (a) Social-Lites, in the amount of \$50,000; and
- (b) Mr O'Hare, in the amount of \$10,000.

106 The ACCC and the respondents have agreed that the pecuniary penalties ordered against Social-Lites and Mr O'Hare may be payable by instalments. The parties seek orders as set out in subparagraphs 8 to 9 of the Proposed Consent Orders. Under those proposed

instalment arrangements:

- (a) Social Lites will make equal monthly instalments over three years, in the amount of \$1,388.89 per month for each instalment; and
- (b) Mr O'Hare will make equal monthly instalments over five years, in the amount of \$166.67 per month for each instalment.

107 It is open to the Court to order payment of penalties by instalments where there is sufficient financial material before the court to justify the instalment arrangements: *ACCC v Humax Pty Ltd* [2005] FCA 706 at [12]. The ACCC submitted that it is appropriate for the Court to order the penalties imposed on Social-Lites and Mr O'Hare in this case be paid by instalments, and that the relatively longer period of five years for the instalment arrangements proposed in respect of Mr O'Hare is appropriate in light of his relatively weaker financial position. I am satisfied that it is, in this case, appropriate to impose the penalties sought and order that they be paid in instalments.

Costs

108 The respondents have each agreed to make a contribution of \$5,000 towards the ACCC's costs of the proceeding to be paid within 60 days of the date of the Court's order in the case of Social-Lites, and by monthly instalments over 5 years in the case of Mr O'Hare.

109 Although this amount does not reflect the ACCC's true costs in the matter, the ACCC was prepared to not fully pursue its costs in the interests of an early settlement: see *Pepe's Ducks* at [41]–[42]. I will make this order as to costs.

I certify that the preceding one hundred and nine (109) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

Associate:

Dated: 2 May 2017