

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Burden [2017] FCA 399

File number(s):	WAD 267 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 4, Part 3-1, 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(1)(e), 232(4)(a), 246, 246(2)(b)(i) and (ii) <i>Companies Act 1993</i> (NZ) ss 248(1)(c)(i), 250 <i>Competition and Consumer Act 2010</i> (Cth) Schedule 2, ss 5(1)(g), 131(1) <i>Corporations Act 2001</i> (Cth) <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) ss 76 76E, 76E(2) <i>Insolvency (Cross-Border) Act 2006</i> (NZ) Schedule 1, art 5

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 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 Pepe's Ducks Ltd [2013] FCA 570

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

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

Australian Competition and Consumer Commission v Social-Lites Pty Ltd [2017] FCA 398

Australian Competition and Consumer Commission v Telstra Corporation Ltd (2010) 188 FCR 238, 275

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640

Australian Competition and Consumer Commission v Valve Corporation (No 3) (2016) 337 ALR 647

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421

Markarian v R (2005) 228 CLR 357

Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd (2004) ATPR 41-993

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285

Ponzio v B&P Caelli Constructions Pty Ltd [2007] 158 FCR 543

Rural Press Ltd v Australian Competition and Consumer Commission (2003) 216 CLR 53

Singtel Optus v Australian Competition and Consumer Commission (2012) 287 ALR 249

Date of hearing:	23 March 2017
Registry:	Western Australia
Division:	General Division
National Practice Area:	Commercial and Corporations
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Category:	Catchwords
Number of paragraphs:	104
Counsel for the Applicant:	Ms P Neskovcin
Solicitor for the Applicant:	Norton Rose Fulbright
Counsel for the Respondents:	The First Respondent appeared in person on behalf of the Respondents

ORDERS

WAD 267 of 2016	
BETWEEN:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION Applicant
AND:	MR JOHN BURDEN First Respondent ELUSION AUSTRALIA LIMITED (NZBN 942 903 115 8060) Second Respondent
JUDGE:	GILMOUR J
DATE OF ORDER:	2 May 2017

NOTICE

TO: JOHN DENNIS BURDEN

**ELUSION AUSTRALIA LIMITED (NZBN 942 903 115 8060) (IN LIQUIDATION)
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 August 2015 to June 2016, the second respondent, Elusion Australia Limited (NZBN 942 903 115 8060) (In Liquidation) (Elusion), 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 on its website (Elusion website) that the e-cigarette products supplied by it did not contain harmful chemicals, cancer-causing chemicals or carcinogens, when that was not the case.
2. From at least August 2015 to June 2016, Elusion, 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 on the Elusion website that the e-cigarette products supplied by it did not contain harmful chemicals, cancer-causing chemicals or carcinogens found in tobacco cigarettes, when that was not the case.

3. From at least August 2015 to June 2016, Elusion, 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 on the Elusion Website that the e-cigarette products supplied by it did not contain any of the chemicals found in tobacco cigarettes, when that was not the case.

4. The first respondent, John Dennis Burden (Mr Burden), acting in his capacity as director of Elusion, and being responsible for authorising all content of the Elusion 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 Elusion referred to in paragraphs 1 to 3 above, was knowingly concerned in, or a party to, those contraventions for the purposes of s 224(1) and 232(1) of the ACL.

THE COURT ORDERS THAT:

Injunctions

5. Elusion 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 harmful chemicals, cancer-causing chemicals or carcinogens;
 - (b) those products do not contain harmful chemicals, cancer-causing chemicals or carcinogens found in tobacco cigarettes; or
 - (c) those products do not contain any of the chemicals found in tobacco cigarettes, when that is not the case.

6. Mr Burden 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 did not contain harmful chemicals, cancer-causing chemicals or carcinogens;
 - (b) those products do not contain harmful chemicals, cancer-causing chemicals or carcinogens found in tobacco cigarettes; or
 - (c) those products do not contain any of the chemicals found in tobacco cigarettes, when that is not the case.

7. Elusion, 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 to 3 above.

Pecuniary penalties

8. Elusion and Mr Burden each 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 4 above, as follows:
 - (a) in respect of Elusion, a pecuniary penalty in the amount of \$40,000; and
 - (b) in respect of Mr Burden, a pecuniary penalty in the amount of \$15,000.
9. The pecuniary penalties referred to in paragraph 8 above are to be paid as follows:
 - (a) in respect of Elusion:
 - (i) \$5,000 within 30 days of the date of this order; and
 - (ii) the remaining \$35,000 to be paid in in equal monthly instalments over 18 months commencing 60 days after the date of this order, in the amount of \$1,944.44 per month for each instalment; and
 - (b) in respect of Mr Burden, \$15,000 within 30 days of the date of this order.
10. In the event that there is a default by Elusion in the making of any of the instalment payments referred to in paragraph 9(a) above, the whole of the outstanding amount of the pecuniary penalty specified in paragraph 8(a) above is immediately due and payable by Elusion.

Publication orders

11. Elusion 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 Elusion website, 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 Elusion and Mr Burden 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

12. Mr Burden at his 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

13. Elusion serve on the applicant an affidavit verifying that it has carried out its obligations under paragraphs 7 and 11 above, to be served within 10 days of this order.

14. Elusion and Mr Burden each pay a contribution to the applicant's costs of, and incidental to, this proceeding, as follows:

- (a) in respect of Elusion, in the amount of \$5,000; and
- (b) in respect of Mr Burden, in the amount of \$5,000.

15. The costs referred to in paragraph 14 above are to be paid as follows:

- (a) in respect of Elusion, \$5,000 within 30 days of the date of this order; and
- (b) in respect of Mr Burden, \$5,000 within 30 days of the date of this order.

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

REASONS FOR JUDGMENT

GILMOUR J:

1 The background to this matter which is set out below is substantially drawn from the written submissions of the applicant (ACCC). The respondents took no issue with the content.

2 By its Amended Concise Statement filed 22 December 2016 (Concise Statement), the ACCC alleges that the second respondent, Elusion Australia Limited, and first respondent, Mr John Burden, 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).

3 Elusion went into liquidation on 17 March 2017 just prior to the hearing of this matter. Elusion was incorporated in New Zealand but is not registered as a Company in Australia. Accordingly the *Corporations Act 2001* (Cth) has no application to it: see s 9 definition of company.

4 Under s 248(1)(c)(i) of the *Companies Act 1993* (NZ), which is the legislation applicable to Elusion, legal proceedings against a company cannot be continued once the company enters into liquidation unless the liquidator agrees or the Court orders otherwise.

5 In this instance, Mr John Gilbert of C & C Strategiz Ltd was appointed liquidator of Elusion on 17 March 2017. On 21 March 2017, in email correspondence to the solicitors for the ACCC, Mr Gilbert consented to the ACCC continuing its proceedings against Elusion. Article 5 of sch 1 of the *Insolvency (Cross-Border) Act 2006* (NZ) authorises a liquidator to act in a foreign state on behalf of a New Zealand insolvency proceeding like the present case.

6 I am satisfied therefore that no leave is required of this Court for this proceeding to continue to be prosecuted by the ACCC.

Jurisdiction

7 The third respondent (Elusion) is a company incorporated in New Zealand which at all relevant times carried on the business, in trade or commerce, of promoting and supplying e-cigarette products to consumers in Australia, including via its website (Elusion Website).

8 The ACL applies. I am satisfied that the Court has jurisdiction in relation to the impugned conduct because Elusion's conduct was "in Australia" and further, or in the alternative, Elusion was "carrying on business in Australia" at the relevant time.

9 Section 131(1) of the CCA provides that the ACL applies as a law of the Commonwealth to the conduct of corporations, and in relation to the contraventions of Chapter 2, 3 or 4 of Schedule 2 by corporations.

10 As the ACCC submits for the purpose of s 131(1), the relevant issue is whether Elusion's impugned conduct was conduct "in Australia" which contravened ss 18, 29(1)(a) and 33 of the ACL. The conduct involved representations made by Elusion on the Elusion Website: *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, 681 at [161].

11 The applicant refers to the following matters, any one of which I accept establishes that the conduct took place in Australia:

- (a) Elusion made the representations on the Elusion website, as noted in the SOAF at paragraphs 2, 5 and 7.
- (b) Elusion made the representations on the Elusion Website in connection with supply or possible supply of goods to consumers in Australia: *Valve Corporation* at 681 [163], 684, [178]–[179], by:
 - (i) stating on the website "*Welcome to Elusion Electronic Cigarettes. We ship e-cigarettes & accessories Australia-wide*": SOAF, Attachment 1;

- (ii) displaying prices for its e-cigarette products on the Elusion website in Australia dollars: SOAF, Attachment 1;
 - (iii) accepting payments from customers in Australian dollars: SOAF, Attachment 1.
 - (iv) directing enquiries to an Australian telephone number (1800 241 939): SOAF, Attachments 1 and 2.
- (c) Elusion accepted purchases of e-cigarette products by customers in Australia through the Elusion website: SOAF, paragraph 7. Accordingly by the time a customer in Australia had purchased a product, if not earlier, the customer had a relationship with Elusion and the representations were made in Australia: *Valve Corporation* at 684 [181].

12 Further or alternatively, the applicant relies on the extended application of the CCA to conduct outside Australia pursuant to s 5(1)(g) of the CCA.

13 Section 5(1)(g) provides that the ACL extends to the engaging in conduct outside Australia by “bodies corporate incorporated or carrying on business within Australia”.

14 The applicant relies on the following matters which I accept establish that Elusion was carrying on business within Australia: *Valve Corporation* at 687–688, [199]–[205].

- (a) Elusion did each of the matters referred to in 10(a) to (c) above;
- (b) Elusion marketed its e-cigarette products to consumers in Australia: SOAF, paragraphs 2 and 5 and Attachment 1.
- (c) Elusion supplied e-cigarette products through the Elusion website to customers in Australia: SOAF, paragraph 7.
- (d) Elusion derived revenue from customers in Australia: SOAF, paragraphs 5 to 7, and 24.

15 I am satisfied that a sufficient nexus is established based on the nature and extent of Elusion’s business in Australia so as to give the Court jurisdiction in relation to the impugned

conduct.

Background

16 The following background as well as relevant legal principles which I accept are correctly stated, is drawn from the written submissions of the ACCC. They are not controversial. The conduct occurred between the period of at least August 2015 to June 2016, and involved the promotion and sale of e-cigarette products to consumers in Australia, including to consumers via the Elusion website.

17 In particular, the ACCC alleged that:

- (a) Elusion, 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 harmful chemicals, cancer-causing chemicals or carcinogens by publishing statements to that effect, namely the representations at paragraph 5 of the Concise Statement (Representations).
- (b) Mr Burden had knowledge of Elusion's conduct, and was, directly or indirectly, knowingly concerned in or a party to the contraventions by Elusion referred to at [17](a) above, within the meaning of ss 224(1)(e) and 232(1)(e) of the ACL.

18 Elusion and Mr Burden have admitted these allegations in the SOAF dated 28 January

2017.

19 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 proposed final orders (the Proposed Final Orders) 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 4 of the Proposed Final Orders;
- (b) injunctions pursuant to s 232 of the ACL, in the form set out in paragraphs 5 to 7 of the Proposed Final Orders;
- (c) payment by Elusion of a pecuniary penalty in the amount of \$40,000 pursuant to s 224 of the ACL, in the form set out in paragraph 8(a) of the Proposed Final Orders, and a further order that the pecuniary penalty be paid in instalments in the form set out in paragraph 9(a) of the Proposed Final Orders;
- (d) payment by Mr Burden of a pecuniary penalty in the amount of \$15,000 pursuant to s 224 of the ACL, in the form set out in paragraph 8(b) of the Proposed Final Orders, to be paid within 30 days as set out in paragraph 9(b) of the Proposed Final Orders;
- (e) a publication order to be made in the form set out in paragraph 11 of the Proposed Final Orders;
- (f) a non-punitive order pursuant to s 246 of the ACL requiring Mr Burden to undertake training, in the form set out in paragraph 12 of the Proposed Final Orders;
- (g) payment by Elusion of a contribution to the ACCC's costs pursuant to s 43 of the Federal Court Act, in the form set out in paragraph 14(a) of the Proposed Final Orders, to be paid within 30 days as set out in paragraph 15(a) of the Proposed Final Orders; and
- (h) payment by Mr Burden of a contribution to the ACCC's costs pursuant to s 43 of the *Federal Court Act*, in the form set out in paragraph 14(b) of the

Proposed Final Orders, to be paid within 30 days as set out in paragraph 15(b) of the Proposed Final Orders.

20 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 which I have admitted under s 191 of the *Evidence Act 1995* (Cth). I also admitted additional evidence in the nature of expert evidence which underpins the technical facts admitted by the respondents.

21 The principles generally applicable in such matters where orders and declarations are sought by consent as well as those generally applicable to the determination of civil penalties are to be found in a recent decision in another e-cigarette proceeding almost on all fours with the present case: *ACCC v Social-Lites Pty Ltd* [2017] FCA 398. It is unnecessary to rehearse all of those principles here.

Contraventions

22 The contraventions by Elusion are admitted and set out in the Proposed Final Orders at paragraphs 1 to 3 and in the SOAF in paragraph 19.

23 The involvement of Mr Burden in the contraventions by Elusion is also admitted and set out in the Proposed Final Orders at paragraph 4 and the SOAF in paragraph 20.

Declarations

24 By consent, the ACCC, Elusion and Mr Burden seek the declarations in paragraphs 1 to 4 of the Proposed Final Orders. The Court has a wide discretionary power to make declarations under s 21 of the *Federal Court Act 1976* (Cth). In *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J held at 437–8 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.

25 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].

26 Nonetheless it remains a matter for the Court as to whether it has the power and whether it is, in all the circumstances, appropriate to make the declarations sought. I accept the submission made by the ACCC without demur on the part of the respondents 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 Elusion contravened, and Mr Burden was involved in Elusion's 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].

27 The proposed declarations contain sufficient indication of how and why the conduct complained of contravenes the ACL: *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 91.

Injunctions

28 By consent, the parties seek injunctions restraining Elusion and Mr Burden from engaging in conduct, the terms of which are set out in paragraphs 5 to 7 of the Proposed Final Orders.

29 The ACCC submits that it is appropriate for the Court to order the proposed injunctions. The respondents do not oppose this course. The liquidator of Elusion has been served with all of the papers in this matter and is thus aware of the injunctive relief sought.

30 In my view, whilst Elusion is in liquidation, injunctive relief ought to be ordered. Elusion may not always be in liquidation. Section 250 of the *Companies Act 1993* (NZ) permits the Court to terminate a liquidation on an application made by a liquidator or, among others, a director or shareholder of the company.

31 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.

32 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.

33 The injunctive relief sought in this proceeding is within the Court's power and I am satisfied is appropriate because, as the ACCC submits, the relief:

(a) is designed to prevent:

(i) Elusion from making false or misleading representations similar to

those that are the subject of the proceeding; and

- (ii) Mr Burden 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 have admitted their respective contraventions of the ACL; and
- (c) arises in the circumstances of this proceeding, which has been appropriately issued in this Court.

34 I am satisfied 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.

35 The terms of the proposed injunctions are framed in accordance with the admitted facts are clearly expressed and will not require any supervision by this Court.

Training

36 By consent, the parties seek a non-punitive order requiring Mr Burden to undertake training as set out in paragraph 12 of the Proposed Final Orders.

37 Sections 246(2)(b)(i) and (ii) of the ACL empowers the Court to make such a non-punitive training order.

38 The minimum requirements for the training are set out in the Proposed Final Orders. It is therefore clear to Mr Burden what he must do to comply with the order.

39 I am satisfied 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

40 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.

41 The ACL does not empower the Court to impose a pecuniary penalty for a contravention of s 18 of the ACL.

42 Under item 2 of 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.

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

44 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.

Additional considerations

45 As the ACCC submitted s 224 of the ACL was preceded by, and is in substantially identical terms to, s 76E of the *Trade Practices Act 1974* (Cth) (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): *ACCC v MSY Technology Pty Ltd (No 2)* (2011) 279 ALR 609 at 624. 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: *ACCC v Pepe's Ducks Ltd* [2013] FCA 570 at [16].

46 The principles applicable to agreed penalty submissions in civil penalty proceedings remain those in *NW Frozen Foods* (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41–993. 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 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.

47 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.

48 Each of these considerations is addressed below.

Purpose of deterrence

49 The principal object of a pecuniary penalty is deterrence, both specific and general. 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].

Where penalties sought by consent

50 The ACCC makes the following submissions which I accept.

51 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, the Court has looked favourably upon negotiated settlements, provided that their terms recognise that the ultimate responsibility for the terms and making of the orders that resolve the proceedings lies with the Court: *NW Frozen Foods* at 291.

52 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 involve: *NW Frozen Foods* at 291.

53 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: *NW Frozen Foods* at 291. 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: see *Ponzio v B&P Caelli Constructions Pty Ltd* [2007] 158 FCR 543 at [129] and *Pepe's Ducks* at [25].

Determining penalty figure

54 In *Markarian v R* (2005) 228 CLR 357, the High Court said 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].

Pecuniary Penalties - Application

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

- (a) Elusion, in the amount of \$40,000; and
- (b) Mr Burden, in the amount of \$15,000.

56 The facts and admissions establishing the particular conduct which Elusion admits constitute contraventions of the ACL, and which Mr Burden admits gave rise to his involvement in the contraventions by Elusion, are set out in the SOAF, together with other matters relevant to penalties.

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

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

58 Elusion made the Representations, which were false or misleading in contravention of ss 29(1)(a) and 33 of the ACL. The Representations were made on the Elusion Website, which was accessible to the general public. The Representations purported to consumers that Elusion's e-cigarette products:

- (a) did not contain harmful chemicals, cancer-causing chemicals or carcinogens;
- (b) did not contain harmful chemicals, cancer-causing chemicals or carcinogens found in tobacco cigarettes; and
- (c) did not contain any of the chemicals found in tobacco cigarettes.

59 Elusion did not have scientific or other evidence to support the Representations.

60 The conduct occurred from at least August 2015 to June 2016, in respect of the Representations made on the Elusion Website.

61 As set out at paragraph 3 of the SOAF, Mr Burden was personally responsible for authorising the content of the Elusion Website.

62 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.

63 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.

64 Consumers of Elusion's 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 harmful chemicals, cancer-causing chemicals or carcinogens, like those contained in conventional tobacco cigarette smoke. The exposure to those harmful chemicals, cancer-causing chemicals or carcinogens 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

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

66 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.

67 The ACCC notes that:

- (a) the contravening Representations were made on the Elusion Website for a period of at least nine months; and
- (b) Elusion sold approximately 17,000 units of e-cigarettes in the 2015/16 financial year.

Size of contravener and financial position

68 The respondents have provided the ACCC with information regarding their respective personal and business financial positions which are set out at paragraphs 23 to 31 of the SOAF.

69 The ACCC notes in particular that:

- (a) Elusion informed the ACCC that:
 - (i) during the financial years ending 30 June 2014 to 30 June 2016, it generated revenue in the sum of \$1,484,115, but incurred losses of \$230,099;
 - (ii) it has assets totalling \$774,667, of which approximately \$600,000 represents the goodwill of the business, which was an asset of the business at the time it was purchased by Mr Burden, with the balance of its assets being predominantly stock on hand; and
 - (iii) it has liabilities of \$421,805, inclusive of loans between related companies. If the loans between related companies are excluded, Elusion's total liabilities are significantly higher, in the amount of

\$1,488,176.

- (b) Mr Burden has informed the ACCC that:
- (i) during the financial years ending 30 June 2014 to 30 June 2016 he received income from Elusion and other sources totalling \$541,018;
 - (ii) he has assets totalling \$1,030,000;
 - (iii) he has liabilities of approximately \$400,000;
 - (iv) he is currently not earning any income, and that he does not expect to receive any income in the financial year ending 30 June 2017; and
 - (v) his personal asset position is the result of businesses that he operated prior to operating his e-cigarette businesses, and that he expects that his personal asset position will be reduced considerably in the near future as a result of divorce proceedings.

70 The asset position of Elusion, given its liquidation, is not known precisely but by one means or another it is insolvent.

71 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

72 Elusion did not have scientific or other evidence to support the Representations 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.

73 Elusion made the statement set out in paragraph 8(b) of the SOAF on the Elusion 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.

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

Participation of senior management

75 Mr Burden was, at all relevant times, a director of Elusion, the controlling mind of Elusion, and responsible for authorising the content of the Elusion website.

76 Mr Burden has admitted his involvement gave rise to Elusion's contraventions of the ACL.

77 However Mr Burden has said that the responsibility as to the final content of Elusions advertisements lay with his daughter and that she failed in this respect. I do not accept this attempt to entirely shift the responsibility for the conduct of the Company to his daughter. Mr Burden has admitted he knew of the content of the web-site advertisement and that no scientific support for these representations had been obtained.

78 As to the pressure of Acrolein, Acetaldehyde and Formaldehyde, Mr Burden made the following submissions:

Regarding each of the 3 chemicals, namely acrolein, acetaldehyde and formaldehyde, there is no known scientific or provable NOEL (No Observable Effect Limit) regarding their carcinogenicity.

No minimum concentration limits of these 3 chemicals have been pleaded that would make any of the 3 chemical carcinogenic per se. It cannot be argued then that, taken to the nth degree even a single atom or molecule of these chemicals is actually harmful or carcinogenic to a normal user of same which the applicant has not pleaded to, proved or in fact is ever capable of proving.

Mr. BURDEN admits that the e-vapor does in fact contain these chemicals, but it is not known to what extent and in what concentrations they are formed in the tested cigarettes. This is relevant for sentencing given that the extent of the concentration of the various chemicals are materially relevant to the causative processes (one would have thought) that lead to carcinogenesis. That consideration is, in turn, relevant to the question whether it had been established to the requisite degree that, Mr. BURDEN knew that his actions were likely to endanger life.

79 In fact, whatever be the precise position concerning the harmful effects of these chemicals in Elusion's e-cigarettes it was never submitted by the ACCC that they were life threatening. Indeed the ACCC did not attempt, in any qualitative sense, to establish just how

harmful those chemicals were. It is important to note, however, that the ACCC did not allege and did not attempt to demonstrate the degree of carcinogenicity of the chemicals in e-cigarettes. Accordingly the ACCC did not allege or seek to prove just how harmful exposure to the chemicals from smoking the e-cigarettes was.

80 Mr Burden also made submissions to the effect that his conduct had not been reckless. However the ACCC did not invite such a finding and I do not make one.

Culture in respect of compliance with ACL

81 At the time of the contravening conduct, Elusion did not have a culture of compliance with the ACL.

Disposition to cooperate

82 The respondents initially contested these proceedings and lodged a Concise Response filed 16 August 2016. The parties agreed to resolve the proceeding at mediation. The respondents have co-operated with the ACCC since the mediation in this matter on 19 October 2016, including by agreeing to the Proposed Final Orders and SOAF.

83 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

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

Deterrence

85 As I earlier mentioned in [49] of these reasons, the principal objective of a pecuniary penalty is deterrence.

86 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 that trade in goods which may have an impact on the health of the public.

87 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 *ACCC v Coles Supermarkets Australia*, 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

88 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.

89 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 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.

90 The Full Court endorsed the following passage of Middleton J in *Australian Competition and Consumer Commission v Telstra Corporation Ltd*:

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.

91 I am informed by senior counsel for the ACCC that there are, at present, no cases of breach of the ACL involving similar circumstances with which to compare this case.

92 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

93 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.

94 A person is not liable to more than one pecuniary penalty in respect of the same conduct.

95 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 Elusion, and upon Mr Burden for his involvement in the contraventions of Elusion. 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

96 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.

97 The totality principle operates as a "final check" to ensure that the penalties to be imposed on a wrongdoer, considered as a whole, are just and appropriate.

98 The ACCC submitted that the penalties imposed in relation to the contravening conduct of Elusion, and Mr Burden's involvement in the contravening conduct of Elusion, 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

99 The ACCC submitted that the Court should make orders imposing pecuniary penalties pursuant to s 224 of the ACL on:

- (a) Elusion, in the amount of \$40,000; and
- (b) Mr Burden, in the amount of \$15,000.

100 I accept this submission.

101 The ACCC and the respondents have agreed that the pecuniary penalty ordered against Elusion may be payable by instalments. The parties seek orders as set out in subparagraphs 8 to 9 of the Proposed Final Orders, which propose the following arrangements:

- (a) in respect of Elusion:
 - (i) \$5,000 to be paid within 30 days; and
 - (ii) the remaining \$35,000 to be paid in equal monthly instalments over 18 months commencing 60 days after the making of the proposed order, in the amount of \$1,944.44 per month for each instalment; and
- (b) in respect of Mr Burden, \$15,000 to be paid within 30 days.

102 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]. I am satisfied that it is appropriate for the Court to order the penalties imposed on Elusion in this case be paid by instalments.

Costs

103 The respondents have each agreed to make a contribution of \$5,000 towards the ACCC's costs of the proceeding to be paid within 30 days of the date of the Court's order.

104 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 four (104) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

Associate:

Dated: 2 May 2017