FEDERAL COURT OF AUSTRALIA

ACCC v CLA Trading Pty Ltd [2016] FCA 377

File number:	WAD 330 of 2014
Judge:	**GILMOUR J**
Date of judgment:	19 April 2016
Catchwords:	**CONSUMER LAW** – unfair contract terms – misleading conduct – false or misleading representations – factors affecting pecuniary penalties under s 12GBA of the *ASIC Act*
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BA, 12BAA, 12BAB, 12BF, 12BG, 12BH(1), 12BI, 12BK, 12DA, 12DB, 12GA 12GBA, 12GLA, 12GLB, 12GND, 102 *Australian Securities and Investments Commission Regulations 2001* (Cth) r 28 *Competition and Consumer Act 2010* (Cth) ss 4, 131A, *Crimes Act 1914* (Cth) s 4AA *Federal Court of Australia Act 1976* (Cth) s 21, s 43(1) *Evidence Act 1995* (Cth) s 191 *Acts Interpretations Act 1901* (Cth) s 15AA *Fair Work Act 2009* (Cth) s 557(1) *Trade Practices Act 1975* (Cth) ss 51AF, 52,76E
Cases cited:	*Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412 *ACCC v AirAsia Berhad Company* [2012] FCA 1413 *ACCC v Alvaton Holdings Pty Ltd* [2010] FCA 760 *ACCC v CAN 117 372 915 Ltd (in liq)* [2015] FCA 368 *ACCC v Chopra* [2015] FCA 539 *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330 *ACCC v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665 *ACCC v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 *ACCC v Global One Entertainment Limited* [2011] FCA 393 *ACCC v Jones (No 5)* [2011] FCA 49 *ACCC v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301

ACCC v Marksun Australia Pty Ltd [2011] FCA 695

ACCC v McMahon Services Pty Ltd (2004) ATPR 42-031

ACCC v Navman Australia Pty Ltd [2007] FCA 2061

ACCC v Omniblend [2015] FCA 875

ACCC v Origin Energy Ltd [2015] FCA 55

ACCC v Real Estate Institute of Western Australia Inc (1999) 161 ALR 79

ACCC v Reebok Australia Pty Ltd [2015] FCA 83

ACCC v Safeway Stores Pty Ltd (1997) 145 ALR 36

ACCC v Singtel Optus Pty Ltd (No 4) (2011) 282 ALR 246

ACCC v Spreets Pty Ltd [2015] FCA 382

ACCC v TPG Internet Pty Ltd (2013) 250 CLR 640

ACCC v Virgin Mobile Australia Pty Ltd (No 2) [2002] FCA 1548

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564

Australian Securities and Investments Commission v Bank of Queensland Limited (2011) 86 ACSR 258

Australian Securities and Investments Commission v GE Capital Finance Australia [2014] FCA 701

Barbaro v The Queen; Zirilli v The Queen (2014) *253 CLR 58*

Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130

BMW Australia v ACCC (2004) 207 ALR 452

Campomar Sociedad Limitada v Nike International Limited (2000) 202 CLR 45

Cf. *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493

Comcare v Transpacific Industries Pty Ltd [2015] FCA 500

ConAgra Inc v McCain (Aust) Pty Ltd (1992) 33 FCR 302

Director-General of Fair Trading v First National Bank plc [2002] 1 AC 481

Director, Fair Work Building Industry Inspectorate v CFMEU (2015) 229 FCR 331

Doolan v Waltons Ltd (1981) 39 ALR 408

Ducret v Chaudhary's Oriental Carpet Palace Pty Ltd (1987) 16 FCR 562

Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd (1987) 78 ALR 193

Enterprise Finance Solutions Pty Ltd v Austec Pty Ltd [2013] FCA 491

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

Global One Mobile Entertainment Pty Ltd v Australian

Competition and Consumer Commission [2012] FCAFC 134

Given v CV Holland (Holdings) Pty Ltd (1977) 29 FLR 212

Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82

Hili v R (2010) 242 CLR 520

IOOF Australia Trustees Pty Ltd v Tantipech (1998) 156 ALR 470

Hadgkiss v Aldin [2007] 169 IR 76

Jetstar Airways Pty Ltd v Free [2008] VSC 539

Markarian v R (2005) 228 CLR 357

Markarian v The Queen (2005) 228 CLR 357

McWilliams Wines v McDonalds (1980) 33 ALR 394

Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Ltd (In Liq) (2013) 209 FCR 368

Secretary, Department of Health & Aging v Pegasa Australia Pty Ltd [2008] FCA 1545

Singtel Optus Pty Ltd v ACCC (2012) 287 ALR 249

SWF Hoists Industrial Equipment Pty Ltd v State Government Insurance Commission (1990) ATPR 41-045

Technology Leasing Ltd v Lenmar Pty Ltd (2012) FCA 709

Thomson Australian Holdings Pty Ltd v TPC (1981) 148 CLR 150

Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union (1979) 42 FLR 331

Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2) (1993) 41 FCR 89

TPC v CSR Ltd (1991) ATPR 41-076

Trade Practices Commission v CSR Ltd [1991] ATPR 52,135

Trade Practices Commission v TNT Australia Pty Ltd (1995) ATPR 41-375

Woolworths Ltd v Kelly (1991) 22 NSWLR 189

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ORDERS

WAD 330 of 2014

BETWEEN:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** First Applicant
	RAYNE DE GRUCHY Second Applicant
AND:	**CLA TRADING PTY LTD (ACN 082 220 399)** Respondent

JUDGE: **GILMOUR J**

DATE OF ORDER: **19 APRIL 2016**

THE COURT DECLARES THAT:

Unfair Contract Terms

1. Pursuant to section 12GND of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), clauses 3.5(a), 3.7, 4.1, 4.3, 4.4, 4.8(a), 4.9(a) to (c), 9.1(b), 10.1(a) and 10.2(a) to (c) in the respondent's Terms and Conditions of Rental effective 1 November 2013, and the first sentence in clause 1 of the respondent's Rental Agreement, are unfair terms within the meaning of section 12BG of the ASIC Act, and are therefore void pursuant to section 12BF(1) of the ASIC Act.

Misleading Conduct and False or Misleading Representations

2. The respondent through the publication of the Europcar Website from 16 December 2013 to 3 July 2014 represented that the maximum amount that a consumer would have to pay in the event of damage to or theft of the vehicle or third party loss was:

   (a) a Damage Liability Fee (DLF) of $3650 (DLF Representation); or

   (b) where the consumer purchased:

      (i) cover products offered by the respondent known as GoZen or SPOM, a DLF of nil in all circumstances; or

      (ii) cover products offered by the respondent known as Super Collision Damage Waiver or Collision Damage Waiver were purchased, the

DLF shown in the Rental Agreement in all circumstances save for damage to the vehicle's windscreen, headlights, wheels or tyres;

(**Cover Products Representation**);

when in fact, under any Car Rental Contract the customer's liability was not limited to the applicable DLF in cases of:

(c) breach of the Car Rental Contract by the customer;

(d) overhead damage;

(e) underbody damage;

(f) damage caused to a Commercial Vehicle while driving in reverse;

(g) water damage; and

(h) unless the cover products offered by the Respondent known as GoZen or SPOM were purchased, damage to the Vehicle's windscreen, headlights, wheels or tyres.

3. By reason of the matters referred to in paragraph 2 of these orders, the respondent in trade or commerce:

(a) engaged in conduct in relation to financial services that was misleading or deceptive or likely to mislead or deceive in contravention of section 12DA of the ASIC Act; and

(b) made false or misleading representations in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

(i) that a service, being the limitation of liability conferred by reason of the applicable DLF under each Car Rental Contract, was of a particular quality, in contravention of section 12DB(1)(a) of the ASIC Act;

(ii) (that the service had benefits it did not have, in contravention of section 12DB(1)(e) of the ASIC Act; and

(iii) concerning the existence, exclusion or effect of any condition or right, in contravention of section 12DB(I)(i) of the ASIC Act.

AND THE COURT ORDERS THAT:

Pecuniary penalty

4. The respondent pays to the Commonwealth of Australia a pecuniary penalty in the sum of $100,000.

Publication order

5. The respondent, at its own expense within 21 days of the date of this order, publishes a corrective advertisement, in the form of Annexure A to this Order, in The Australian newspaper in each State or Territory in which the respondent has an outlet, and ensures that each advertisement:

   (a) occupies a one eighth of a page of the newspaper;

   (i) is in a text which is Arial font and which is:

   (j) for the headline, no less than 10-point and bolded; and

   (k) for the remaining text, not less than 9-point;.

   (l) is placed within the first 10 pages of each of the newspapers.

Other orders

6 The respondent within 30 days of the date of this order pay the applicants' costs of the proceedings fixed in the sum of $65,000.

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

Annexure A

CORRECTIVE NOTICE

Corrective Notice ordered by the Federal Court of Australia

Misleading conduct and misleading representations regarding Europcar's limitation of customer liability

Following action by the Australian Competition and Consumer Commission, the Federal Court recently declared by consent that CLA Trading Pty Ltd, trading as Europcar, engaged in misleading or deceptive conduct and made false or misleading representations on its website (www.europcar.com. au) from December 2013 until 3 July 2014 regarding the limitation of customer liability under its standard car rental contract.

The Court found that during this period Europcar represented that under its standard car rental contract a customer's liability for loss or damage to the rental vehicle or damage to third party property would be limited to the applicable "Damage Liability Fee".

The Court found that Europcar's conduct was misleading because, apart from breach of the car rental contract, customers would also be fully liable for loss or damage, in an unlimited amount, in circumstances including damage caused by driving a commercial vehicle in reverse, overhead damage, underbody damage and water damage to the rental vehicle.

The Court held that Europcar contravened the consumer protection provisions of the Australian Securities and Investments Commission Act 2001 in the period December 2013 to 3 July 2014 and has ordered Europcar to publish this corrective notice and pay pecuniary penalties.

Europcar fully co-operated with the ACCC during its investigations and made changes to its website when the conduct was brought to its attention.

This Corrective Notice has been paid for by Europcar pursuant to the Court's orders.

REASONS FOR JUDGMENT

GILMOUR J:

1 This application by the Australian Competition and Consumer Commissioner (ACCC) and its delegate, the second applicant, seeks declaratory relief and the imposition of pecuniary penalties as well as publication orders against the respondent, CLA Trading Pty Ltd (Europcar) in respect of various breaches of the ASIC Act. The hearing proceeded upon a statement of agreed facts and admissions. Europcar also put on some written evidence, going to the issue of any penalties, which is not challenged.

Background

2 Europcar, during the period from 1 November 2013 until 27 January 2015 (Relevant Period), carried on a business whereby it required its customers, before they took possession of any of its vehicles, to enter into a contract (Car Rental Contract) which:

(a) included a document signed by the customer headed "Rental Agreement" and given a unique number and reservation number in the heading (Rental Agreement); and

(b) incorporated the terms set out in a document entitled "Terms and Conditions of Rental Effective 1 November 2013" (2013 Terms and Conditions).

3 With effect from 1 February 2015 the 2013 Terms and Conditions were amended. These proceedings concern only the 2013 Terms and Conditions as employed by Europcar up to that date.

4 From 16 December 2013 until 3 July 2014 (Website Period), Europcar advertised and promoted, and continues to advertise and promote, the rental of motor vehicles and ancillary goods and services by publishing the website www.europcar.com.au (Europcar Website). The Europcar Website was relevantly amended on 3 July 2014.

5 For the purposes of these proceedings the parties have agreed that certain of the terms in the Rental Agreement and 2013 Terms and Conditions were unfair contract terms of the sort that, since 1 July 2010, have been void by operation of s 12BF of the ASIC Act.

6 The parties have also agreed for the purposes of these proceedings that during the Website Period and via the Europcar Website Europcar made certain representations:

(a) that amounted to misleading or deceptive conduct in trade or commerce; and

(b) were false or misleading representations made in trade or commerce in connection with the supply or possible supply of financial services or goods or services, or in connection with the promotion by any means of the supply or use of financial services or goods or services.

Relief sought

7 The ACCC and Europcar ask the Court:

(a) to order payment by Europcar of a pecuniary penalty pursuant to s 12GBA of the ASIC Act; and

(b) in the form set out in a joint minute of proposed orders (Proposed Orders):

(i) to make declarations pursuant to s 12GND of the ASIC Act and s 21 of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act);

(ii) to order that Europcar pay the ACCC's costs of this proceeding in the sum of $65,000, pursuant to s 43(1) of the Federal Court Act; and

(iii) to make publication orders pursuant to ss 12GLA and 12GLB of the ASIC Act.

Agreed facts

8 Whilst Europcar had filed a defence to the claims brought by the ACCC, it now substantially admits the allegations made against it. Against that background the parties have tendered a statement of Agreed Facts and Admissions. The Agreed Facts were tendered as evidence in support of the Proposed Orders pursuant to s 191 of the *Evidence Act 1995* (Cth). They have also filed a comprehensive joint written outline of submissions as to the relevant legislation and applicable principles of law directed to those agreed facts and admissions. Accordingly, the Court is not called upon to adjudicate upon controversies of fact and law. As between the parties there no longer are any such controversies.

9 I have to some extent adopted the joint submissions as my own reasons where, after due consideration of these, I have concluded that they reflect the correct position at law. However, I have not attributed my reasons to those submissions at every point.

10 Despite the agreement reached between the parties I must be satisfied that I have the power to make the declarations and orders and that they are appropriate: *ACCC v Real Estate Institute*

of Western Australia Inc (1999) 161 ALR 79, 86 [1]; *ACCC v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548, [1]: *Thomson Australian Holdings Pty Ltd v TPC* (1981) 148 CLR 150, 163 [3]; see also *ACCC v Alvaton Holdings Pty Ltd* [2010] FCA 760, [23-26].

11 In *ACCC v REIWA Inc* at [18] the Court noted:

> 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.

Applicable legislation

12 A question was raised by the parties as to whether it is the Australian Consumer Law (ACL) that applies to any unfair contract terms such as to render them void and applies to the misleading conduct in which Europcar engaged, or whether it is the equivalent provisions in the ASIC Act that apply instead.

13 The parties' primary submission is that the ASIC Act applies. The parties jointly made the submissions which follow.

14 Under s 1(a) of the ACL, the ACL applies only to the extent provided by Part XI of the *Competition and Consumer Act* 2010 (CCA). Section 131A(1) of the CCA, which is in Part XI, provides that the ACL does not apply (other than with an immaterial exception) to the supply, or possible supply, of services that are financial services, or of financial products.

15 Concerning unfair contract terms, s 131A(2)(b) specifically provides that Part 2-3 of the ACL (the part dealing with unfair contract terms) does not apply to, or in relation to, contracts that are financial products or contracts for the supply, or possible supply, of financial services.

16 The result is that if the Europcar rental contract is a financial product, the unfair contract term provisions of the ACL will not apply. Part 2 Div 2 Subdiv BA of the ASIC Act will apply instead.

17 The Europcar rental contract is a financial product for the following reasons:

(a) Under s 2 of the ACL, "financial product" has the meaning given by s 12BAA of the ASIC Act.

(b) One class of contract that is specified to be a financial product in s 12BAA is a credit facility within the meaning of the *Australian Securities and Investments Commission Regulations 2001* (Cth) (ASIC Regulations): s 12BAA(7)(k)).

(c) Under r 2B(1)(a) of the ASIC Regulations, a credit facility includes the provision of credit. "Credit" is then defined in r 2B(3) to include:

> "a contract, arrangement or understanding for the hire, lease or rental of goods or services, other than a contract, arrangement or understanding under which:
>
> (A) full payment is made before or when the goods or services are provided; and
>
> (B) for the hire, lease or rental of goods—an amount at least equal to the value of the goods is paid as a deposit in relation to the return of the goods…."

(d) It is common ground that the Car Rental Contracts here meet that definition of "credit": Agreed Facts [12].

18 Each Car Rental Contract was therefore a "financial product" for the purposes of s 12BAA of the ASIC Act so under s 131A(2) of the CCA, Part 2-3 of the ACL regarding unfair contract terms does not apply to it. By reason of s 12BF(1)(c)(i) of the ASIC Act it is, rather, Subdiv BA of that legislation that applies to regulate unfair contract terms in the Car Rental Contracts.

19 I accept these submissions. Although it did not consider the applicability of provisions in the ACL the same path of reasoning was employed by the Full Court in relation to contracts for the leasing out of telecommunications equipment, which were held to be credit facilities and therefore financial products within the meaning of s 12BAA(7)(k) of the ASIC Act: *Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Ltd (In Liq)* (2013) 209 FCR 368 at [117]-[125].

20 I accept these submissions. Accordingly, it is ASIC which is authorised to make any application under s 12GND to have a term in the Car Rental Contract declared to be unfair. The ACCC has to that end obtained a formal delegation of ASIC's powers under s 102 of the ASIC Act to the second applicant: Agreed Facts [2].

21 A similar question arises as to which legislation applies to the misleading or deceptive conduct and false or misleading representations. The parties submitted and I accept, for the following reasons, that, again, it is the ASIC Act which is engaged.

22 The misleading conduct that occurred here was engaged in the course of the possible supply of a financial product, namely the Car Rental Contracts. This means that under s 131A of the CCA, the ACL does not apply.

23 However the ASIC Act equivalents of ACL ss 18 and 29, namely ss 12DA and 12DB, apply only in relation to *financial services*. That is not necessarily the same thing as supply of a financial product. It is therefore necessary to consider whether the impugned conduct here relevantly involves "conduct in relation to financial services".

24 The definition of "financial service" is found in s 12BAB of the ASIC Act: see ASIC Act s 12BA. There are several categories of financial service that can be discounted immediately for present purposes. What is left as potentially relevant in s 12BAB(1) is that:

> "a person provides a financial service if they:
>
> …
>
> (b) deal in a financial product (see subsection (7)); or
>
> …
>
> (g) provide a service (not being the operation of a derivative trade repository) that is otherwise supplied in relation to a financial product (other than an Australian carbon credit unit or an eligible international emissions unit)….

25 "Dealing" is defined in s 12BAB(7) to include issuing, acquiring or disposing of a financial product. Since the Car Rental Contract is a financial product, in providing it Europcar is issuing a financial product, and thereby providing financial services: *Quikfund* at [126].

26 However, the definition of "services" in ASIC Act s 12BA specifically excludes "the supply of goods within the meaning of the [CCA]". Section 4 of the CCA Act defines "goods" to include vehicles, and provides that:

> "supply, when used as a verb, includes:
>
> (a) in relation to goods, supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase …."

27 Renting a car out to a person is a supply of goods within the meaning of the CCA, and so cannot be a "service" within the meaning of Part 2 Div 2 of the ASIC Act.

28 Accordingly, in *providing cars* Europcar is not providing a financial service, even if by making the Car Rental Contract it is dealing in a financial product.

29 However, I find that, in limiting the customer's liability for damage to the vehicle, which is the specific aspect of the contract that is of concern here, Europcar is still providing a service that is supplied in relation to a financial product, as that particular service is not a supply of goods.

30 It follows that where the relevant conduct concerns aspects of the car rental that are not the supply of goods, but are the supply of services, then the ACL does not apply and the ASIC Act applies instead.

31 Accordingly, different conduct arising in the context of the same contract may, depending upon the constituent facts, attract the jurisdiction conferred under the ASIC Act or it may not as the remit of the exclusionary provisions of s 12BA.

32 Nicholas J in *Enterprise Finance Solutions Pty Ltd v Austec Pty Ltd* [2013] FCA 491 at [70]-[76] came to a conclusion to similar effect concerning the *Trade Practices Act 1975* (Cth) (TPA) ss 52(1) and the exclusionary provision in s 51AF. This excludes the operation of Pt V of the TPA in cases involving contraventions of any of its provisions, only in so far as such conduct related to financial services, but not where the conduct related to something other than financial services. Where it did relate to financial services then s 12DA of the ASIC Act applied. Thus different legislation may apply to different aspects of the same transaction: It will, as his Honour found, depend on the facts.

33 His Honour, in so finding, adopted with approval the reasoning of Foster J on the same point in *Australian Securities and Investments Commission v Bank of Queensland Limited* (2011) 86 ACSR 258. His Honour's reasoning was also followed by Cowdroy J concerning similar agreements in *Technology Leasing Ltd v Lenmar Pty Ltd* [2012] FCA 709. That case and *ASIC v Bank of Queensland* were referred to by the Full Court in *Quikfund* with apparent approval.

34 The misleading conduct in this case concerns the characteristics of that right or benefit which limits the customer's liability for damage to the car not the characteristics of the goods that are supplied, namely the vehicle.

35 It is, as I have stated, the ASIC Act, not the ACL, which applies in respect of this misleading conduct.

Unfair contract terms

36 The ACCC seeks declarations to the effect that standard form consumer contracts offered and entered into by Europcar contain terms that are unfair within the meaning of s 12BG of the ASIC Act.

37 The terms, impugned by the ACCC in this proceeding, purport to allow Europcar to impose, in a way which is unfair, no fault liability on the customer and to make the customer's liability unlimited in cases of breach of contract, no matter how trivial or removed from the loss suffered by Europcar. It is important to understand, as counsel for Europcar made clear, that it was not the mere fact that the terms imposed no fault liability but rather the way those terms operated in this particular case which rendered them unfair (T.11-12). Indeed, clauses 3.3(b) and (c), which are not impugned, are no fault terms but they do not operate unfairly.

Statutory framework

38 Subdivision BA of the ASIC Act confers jurisdiction in the Court to assess the substantive fairness of certain contractual terms in some standard form consumer contracts.

39 Section 12BF of the ASIC Act provides that any such term which is unfair within the meaning of the statute is void, but the contract will otherwise continue to bind the parties to the extent that it is capable of operating without the unfair term.

40 Section 12GND empowers the Court, on the application of a party to a consumer contract or ASIC, to declare that a term of such a contract is an unfair term. Here ASIC has delegated its authority to the second applicant.

41 Subsection 12BG(1) of the ASIC Act provides that a term of a consumer contract is unfair if:

> (e) it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
>
> (f) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
>
> (g) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

42 Subsection 12BG(4) provides that, for the purposes of ss 12BG(1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

43 Subsection 12BG(2) provides that, in determining whether a term of a consumer contract is unfair under s 12BG(1), a court may take into account such matters as it thinks relevant, but must take into account the extent to which the term is transparent and the contract as a whole. Section 12BG(3) provides guidance on the meaning of "transparent" in this context.

44 Section 12BH(1) provides a non-exhaustive list of examples of the kinds of terms of a consumer contract that may be unfair, including:

> (h) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
>
> (i) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract.

45 Subdivision BA of Pt 2 Div 2 of the ASIC Act is a relatively recent enactment, which has been the subject of limited judicial consideration in this Court and other superior courts.

46 It is instructive in these circumstances to have regard to the purpose or object of the statutory provisions: s 15AA of the *Acts Interpretations Act 1901* (Cth).

47 The common law will not invalidate contractual terms merely because they are unfair: see e.g. *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 132-3 per Kirby P; *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 at 193-4; Elizabeth V Lanyon *"Equity and the Doctrine of Penalties"* (1996) 9 Journal of Contract Law 234 at 250.

48 Section 12BF of the ASIC Act, like Part 2-3 of the ACL, is a statutory exception to the freedom of contract approach of the Common Law, but applicable only to standard form consumer contracts. The terms of standard form contracts are not negotiated between the parties. Terms of such contracts are generally presented on a "take it or leave it basis", with the consumer facing the alternatives of either accepting the terms without negotiation or not contracting at all. The latter in many cases will, ordinarily, not be a realistic alternative, given the prevalence of standard form contracts in the modern Australian commercial environment.

49 That objective of regulating such contracts is evident in the definition of "consumer contract" in s 12BF(3), and in the guidelines set out in s 12BK that must be taken into account in determining whether a contract is a "standard form contract". The definition in s 12BF(3) restricts the application of the legislation to:

> a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.

50 As to whether a contract is a 'standard form contract' s 12BK provides that:

> [i]n determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:
>
> (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
>
> (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
>
> (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in subsection 12BI(1)) in the form in which they were presented;
>
> (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in subsection 12BI(1);
>
> (e) whether the terms of the contract (other than the terms referred to in subsection 12BI(1)) take into account the specific characteristics of another party or the particular transaction;

51 These elements of potential unfairness, individually or in some combination, point to the concern of the Parliament to regulate "take it or leave it" consumer contracts.

52 A further indication of that objective appears from ss 12BI(1)(a) and 12BI(1)(b) of the ASIC Act, which exempt from the operation of the legislation terms that define the main subject matter of the contract and terms that set the upfront price payable under the contract. Consumers are taken to be able to make choices on the basis of the goods and services being offered as well as price. However, it is the ability of suppliers to impose other terms on consumers that are unfair which is the object of regulation.

Relevant case law

53 Some assistance may be gained from cases which have considered the unfair contracts terms regimes in Victoria and the United Kingdom.

54 There are some differences between these regimes. Nonetheless, some of the principles found in those cases are of assistance in the interpretation and application of Pt 2, Div 2, Subdiv BA of the ASIC Act:

(a) the underlying policy of unfair contract terms legislation respects true freedom of contract and seeks to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated: *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [112];

(b) the requirement of a "significant imbalance" directs attention to the substantive unfairness of the contract: *Director-General of Fair Trading v First National Bank plc* [2002] 1 AC 481 at [37];

(c) it is useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it: *Director-General of Fair Trading v First National Bank plc* at [54];

(d) the "significant imbalance" requirement is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in its favour – this may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty: *Director-General of Fair Trading v First National Bank* at 494 [17] per Lord Bingham, applied in *ACCC v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368 at [950];

(e) significant in this context means "significant in magnitude", or "sufficiently large to be important", "being a meaning not too distant from substantial": *Jetstar Airways Pty Ltd v Free* at [104]-[105] per Cavanough J: Cf. *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 at [32]-[33];

(f) the legislation proceeds on the assumption that some terms in consumer contracts, especially in standard form consumer contracts, may be inherently unfair, regardless of how comprehensively they might be drawn to the consumer's attention: *Jetstar Airways Pty Ltd v Free* at [115]; and

(g) in considering "the contract as a whole", not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question: *Jetstar Airways Pty Ltd v Free* at [128].

The facts

55 The following facts are drawn from the Agreed Facts (each fact is referable to the Relevant Period):

(a) Europcar carried on a business whereby it:

(i) provided motor vehicles for rental; and

(ii) supplied to the consumers who rent the motor vehicles services that are ancillary to the rental of the vehicles.

(b) Europcar's practice was to require its customers, before they took possession of any of its vehicles, to enter into a Car Rental Contract which:

(i) included a document called a "Rental Agreement"; and

(ii) incorporated the 2013 Terms and Conditions.

(c) Customers who rented vehicles from Europcar pursuant to Car Rental Contracts have included individuals whose hiring of vehicles and acquisition of the ancillary services have been wholly or predominantly for personal use (Consumers).

(d) The Car Rental Contracts included terms to the effect set out below:

(i) The customer must return the Vehicle to Europcar at the end of the Rental Period in the same condition as it was in at the Start of Rental.

(ii) At the end of the Rental Period the customer must pay Europcar all reasonable costs to return the Vehicle to the same condition it was in at the Start of Rental.

(iii) If the customer breaches the Car Rental Contract there is no cover and the customer is liable for Damage, theft of the vehicle or Third Party Loss even if such breach does not cause the loss or damage to the Vehicle.

(iv) "Damage" is defined to include loss of or damage to the Vehicle and a daily fee as shown in the Rental Agreement for Europcar's loss of use of the vehicle if it is waiting for the vehicle to be repaired or replaced.

(v) "Third Party Loss" means any loss or damage to third party property, including other motor vehicles, and any third party claim for loss of income or consequential loss.

(vi) If there is Damage or Third Party Loss or the Vehicle has been stolen, the customer must pay Europcar the Damage Liability Fee (DLF and, if applicable, a Single Vehicle Accident Liability Fee (SVALF)) for each separate event, whether or not the customer is at fault.

(vii) The DLF was $3,650, unless the customer has purchased a Cover Product. If the customer had purchased a Cover Product and there is Damage or Third Party Loss or the Vehicle has been stolen, the customer's DLF was reduced to a specified amount which, in the case of the Cover Product known as "GoZen" or "Super Peace of Mind (SPOM)", could have been zero.

(viii) If the customer has purchased a Cover Product and there is Damage or Third Party Loss or the Vehicle has been stolen, the customer's DLF payable pursuant to the term set out in sub-para (vi) above is reduced to an amount specified in the Rental Agreement in respect of the particular Cover Product.

(ix) If the DLF is payable pursuant to the term set out in sub-para (vi) above but there is no Third Party Loss then:

(A) upon return of the Vehicle to the rental station Europcar may make an estimate of Damage and charge the customer's account the estimated amount up to but not exceeding the DLF shown in the Rental Agreement; and

(B) once Damage has been assessed Europcar will:

(a) debit the customer's account with the difference up to a total amount not exceeding the DLF shown in the Rental Agreement; or

(b) credit the customer's account with the difference, and forward to the customer a tax invoice for the assessed amount.

(x) If the customer has not paid the DLF or the SVALF as required, the customer has no cover and is liable for Damage, loss of the Vehicle as a result of theft, and Third Party Loss.

(xi) Europcar may terminate the Car Rental Contract and take immediate possession of the Vehicle if the customer breaches the Car Rental Contract, upon which the customer must pay Europcar for Damage, loss of the Vehicle as a result of theft and Third Party loss.

(xii) The customer must always pay, and even if the customer has purchased a Cover Product there is no cover for:

(A) Overhead Damage or Underbody Damage and any Damage linked to that Underbody Damage caused by contact between the underside of the Vehicle and any part of the road way or any objection or obstruction;

(B) Damage or Third Party Loss that occurs whilst a Commercial Vehicle (defined in Clause 1.4 as a van, utility, truck or bus that is constructed and used for the carriage of goods or property or for the transport of more than 12 persons including the driver) is being driven in reverse; and

(C) Damage caused by total or partial inundation or immersion of the Vehicle in water or exposure of the Vehicle to salt water, including that which occurs whilst the Vehicle is being transported.

(xiii) There is no cover for Damage to the Vehicle's windscreen, headlights, wheels or tyres unless the customer has purchased GoZen or SPOM.

(xiv) Europcar is only responsible for any direct loss that the customer suffers as a result of Europcar’s breach of the Car Rental Contract and is not responsible for missed flights, disrupted travel or holiday plans, loss of enjoyment or opportunity or indirect or consequential loss.

(e) The Car Rental Contracts were standard form contracts, noting that under s 12BK(1) of the ASIC Act, if a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

Unfairness of the relevant terms

56 The first criterion under s 12BG(1) of the ASIC Act to be assessed is whether the relevant terms caused a significant imbalance in the respective rights and obligations of Europcar and the customer that arise under the contract.

57 This merely requires the Court to compare Europcar's rights and liabilities as a result of the impugned term, with the rights and liabilities of the consumer as a result of that term, to see whether there is a significant imbalance between the two. That needs to be considered in the context of the contract as a whole. The question of whether there is a reasonable justification for the disparity is the subject of the second criterion.

58 The terms which the parties have agreed are unfair fall into two categories. The first category comprises terms that imposed a liability on the consumer to make a payment to Europcar, up to the DLF, in respect of damage to or loss or theft of the vehicle, or loss suffered by third parties, regardless of whether the consumer was at fault, or of the extent to which any fault of the consumer contributed to the damage or loss. The second category comprises terms that removed the limitation of liability inherent in the DLF if the customer breached the Car Rental Contract, regardless of how trivial the breach was, and regardless of the extent to which the breach contributed to the relevant loss or damage.

No fault terms – significant imbalance

59 Clause 4.4, a no fault term, is perhaps the clearest example of the first category. It is in terms:

> The DLF and SVALF shown in the Rental Agreement are payable for each separate event and whether You (the consumer) are at fault or not.

60 The first sentence of the first paragraph of the covering Rental Agreement also provided that irrespective of fault, the customer was liable to pay up to the DLF if there was damage or third party loss.

61 The following additional clauses of the 2013 Terms and Conditions do not expressly state that they operate regardless of fault but it is agreed by the parties, correctly in my view, that in the context of the contract as a whole they had that effect:

(a) cll 3.3(b) and 3.3(c), which provided that the customer must pay all reasonable costs to return the Vehicle to the same condition it was in at the Start of

Rental, including but not limited to extra cleaning, and certain other charges; and

(b) cll 3.5(a) and 4.1, which each provided that if there was damage to the vehicle that is rented, or theft of the vehicle, or loss or damage to third party property, the customer must pay the DLF;

(c) cl 4.3, which provided that if Cover Products are purchased, a reduced DLF must be paid;

(d) cl 4.8(a), which provided that the customer was always required to pay and there was no cover for the DLF shown in the Rental Agreement if there was damage, theft of the vehicle or third party loss; and

(e) cl 9.1(b), which required the customer to return the vehicle in the same condition that it was in at the start of the rental.

62 The 2013 Terms and Conditions contained no qualification to these provisions to indicate that they only applied when the customer was at fault.

63 The DLF was a maximum, so that it was open to Europcar to levy less than the DLF if the damage or other loss was relatively minor. That was made explicit in cl. 3.6, which in effect only allowed Europcar to retain an amount equal to the Damage that was actually assessed (plus relevant fees). But cl 3.6 did not apply in the case of Third Party Loss.

64 The parties accept (para 23 of the Agreed Facts) that if certain nominated terms are declared void, then cll 3.3(b) and 3.3(c) of the 2013 Terms and Conditions by themselves would not cause a significant imbalance, and would be reasonably necessary to protect the legitimate interests of Europcar. Those clauses require the customer to pay all reasonable costs to return the vehicle to the same condition it was at the start of the rental.

65 Nonetheless, in context, the effect of the terms listed in [62] above, taken together, is that if damage occurs to the vehicle during the rental period, or if it is lost due to theft, or if a third party makes a claim arising out of damage caused by the vehicle during the rental period, the customer must pay Europcar an amount up to the DLF regardless of whether the customer was at fault. The amount of the DLF depended on whether the customer purchased any Cover Product, but it could have been up to $3,650. Europcar was correspondingly relieved of an equivalent risk.

66 Upon the question whether there is "significant imbalance" as was observed in *Director-General of Fair Trading v First National Bank plc* I agree that it is useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract including that term and the effect it would have without it. Without the "no fault" liability here, the customer would be liable only if he or she was at fault under ordinary principles of negligence. Europcar would be responsible for damage to its car caused in any other way. With the "no fault" liability, all the risk up to $3,650 is allocated to the customer. It arguably applies even if the damage is Europcar's fault. In the context of a consumer contract, that is a significant imbalance.

67 Accordingly, the parties have agreed, correctly in my view, that these terms caused a significant imbalance in the parties' rights and obligations arising under the Car Rental Contracts because each had the effect that any Consumer who had not purchased "GoZen" or SPOM was liable to Europcar, up to the amount of the DLF, in respect of loss or damage irrespective of:

(a) whether there was fault in relation to the driving and custody of the vehicle on the part of the Consumer or any person authorised by the Consumer to drive or have custody of the vehicle;

(b) the extent to which, if the Consumer was at fault, that fault caused or contributed to the loss or damage;

(c) the extent to which any fault on the part of Europcar caused or contributed to the loss or damage; and

(d) the extent to which any fault on the part of a third party caused or contributed to the loss or damage.

Breach terms – significant imbalance

68 The other category of terms in the 2013 Terms and Conditions which the ACCC alleges were unfair are those that removed the DLF cap entirely and made the customer liable for the total amount of any loss of or damage to the vehicle, regardless of fault.

69 Clauses 4.9(a) to 4.9(c) provided that:

> If You breach the Rental Contract there is no cover and You are liable for:
>
> (a) Damage;
>
> (b) loss of the Vehicle as a result of theft;

(c) Third Party Loss….

70 Thus, unlimited liability was imposed on the customer in any case of breach, however trivial or unrelated to the loss suffered by Europcar. There is no comparable term which imposes such liability on Europcar for breach. This, I find, is a significant imbalance in the parties' rights and obligations arising under the contract.

71 Clause 3.7 is a specific case of the application of cl 4.9. It provided that clause 4.9 applies if the customer has not paid the DLF (or SVALF) as required by clauses 3.5 and 3.6.

72 Clauses 10.1(a) and 10.2(a) to (c) of the 2013 Terms and Conditions also led to the same result as cl 4.9. They provided that:

> 10.1 We [Europcar] may terminate the Rental Contract and take immediate possession of the Vehicle if:
>
> (a) You breach the Rental Contract….
>
> 10.2 If the Rental Contract is terminated by Us You must pay for:
>
> (a) Damage;
>
> (b) loss of the Vehicle as a result of theft;
>
> (c) Third Party Loss….

73 Thus, as a consequence of a breach of any sort it is open to Europcar not only to terminate the contract but also to impose unlimited liability for loss or damage on the customer, regardless of fault. The customer had no similar contractual ability to impose such liability on Europcar or to terminate the contract for any breach by Europcar no matter how trivial. This too, I find, is a significant imbalance in the parties' rights and obligations arising under the contract. Indeed it is the kind of unfair term exampled under s 12BH(1)(b) because as it permits one party, but not the other party, to terminate the contract.

74 Clauses 4.9 and 10 are also the sort of term listed in s 12BH(1)(c), in that they have the effect of penalising, one party, but not another party, for a breach or termination of the contract.

75 The parties have thus agreed, correctly in my opinion, that each of these "breach" terms caused a significant imbalance in the parties' rights and obligations arising under the Car Rental Contracts because each of the terms had the effect that if a consumer breached the Car Rental Contract he or she would be liable to Europcar in respect of:

> the full amount of damage during the period of rental to the vehicle that the

Consumer has rented or, if the vehicle was lost, the full amount of the loss, including in all applicable cases loss of use of the vehicle; or

(a) any claim against Europcar by a third party arising out of the use of the rented vehicle during the period of rental

irrespective of:

(b) how trivial the breach may have been;
(c) the extent to which the breach caused or contributed to the relevant damage or loss;
(d) whether the breach has been remedied; or
(e) whether the Consumer has purchased and paid for any Cover Product.

Reasonably necessary to protect legitimate interests

76 The second criterion under s 12BG(1), is whether the term is reasonably necessary in order to protect the legitimate interests of Europcar.

77 Under s 12BG(4), each of the terms dealt with above is presumed not to be reasonably necessary in order to protect the legitimate interests of Europcar, unless Europcar proves otherwise.

78 Nothing in the Agreed Facts displaces that presumption. Rather, the Agreed Facts record that none of the terms referred to in the preceding paragraph is reasonably necessary in order to protect the legitimate interests of Europcar, as the party who would be advantaged by them if they were applied. This, for the reasons I have expressed, is self-evidently the case.

79 Accordingly, for the purposes of these proceedings I find that the relevant terms were not reasonably necessary in order to protect the legitimate interests of Europcar.

Detriment

80 Terms that permit Europcar to charge money to a consumer who would not otherwise be liable to Europcar (because he or she is not at fault), and terms that would allow Europcar to charge the customer for damage because the customer has committed a breach of the contract that did not cause or contribute to the damage, would cause detriment to the consumer. The parties agree, as do I, that each of the terms referred to above would advantage Europcar and cause detriment to a Consumer if it were to be applied or relied on.

Declaration

81 The parties therefore agree that the terms referred to above are unfair contract terms and are therefore void pursuant to s 12BF of the ASIC Act and consent to a declaration to that effect under s 12GND(1) of that Act.

Misleading conduct and misrepresentations

82 The parties agree that Europcar's conduct, as disclosed in the Agreed Facts, contravened the following provisions in the ASIC Act:

(a) s 12DB(1)(a) (misleading representations that services are of a particular quality);

(b) s 12DB(1)(e) (misleading representations that services had a particular benefit that they did not have); and

(c) s 12DB(1)(i) (misleading representations concerning the existence, exclusion or effect of any condition or right associated with the services).

ASIC Act s 12DA: misleading or deceptive conduct

83 Whether or not conduct is misleading or deceptive is a question of fact to be determined objectively, with the relevant conduct being viewed as a whole and in its full context: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199 per Gibbs CJ.

84 Conduct is misleading or deceptive, or likely to mislead or deceive, if it has a tendency to lead into error. There must be a sufficient causal link between the conduct and error on the part of persons exposed to it: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 651 [39] per French CJ, Crennan, Bell And Keane JJ, citing *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193, 241 per Gummow J.

85 When the conduct in question has been addressed to the public at large or a section of the public, one must assess the effect of the conduct on ordinary or reasonable members of the class, provided that the conduct does not affect an insignificant number of such people: *Campomar Sociedad Limitada v Nike International Limited* (2000) 202 CLR 45 at [105]; *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (1992) 33 FCR 302 at 380 and 381; *Global One Mobile Entertainment Pty Ltd v Australian Competition and Consumer Commission* [2012]

FCAFC 134 at [108]. That inquiry should exclude assumptions by persons whose reactions are extreme or fanciful. The question is whether the misconceptions, or deceptions, alleged to arise or to be likely to arise are properly to be attributed to the ordinary and reasonable members of the classes of prospective purchasers: *Campomar Sociedad Limitada* at [105].

86 Whether conduct conveys an alleged representation is a question of fact to be determined, having regard to all of the contextual circumstances within which something was said or done.

87 Conduct will be likely to mislead or deceive if there is a "real or not remote chance or possibility" of misleading or deceiving regardless of whether it is less or more than 50 per cent: *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 87 per Bowen CJ, Lockhart and Fitzgerald JJ citing *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331, 346, per Deane J.

88 It is not necessary to establish that persons in the relevant class have actually been misled: *McWilliams Wines v McDonalds* (1980) 33 ALR 394, 399 [35] per Smithers J.

89 Where the conduct is directed at the public, and conveyed a misleading representation to a significant number of persons amongst the target audience, the conduct may be misleading, even if some people would not have been misled. Therefore, attempting to determine a single true meaning of the impugned words and images is not the correct approach: *IOOF Australia Trustees Pty Ltd v Tantipech* (1998) 156 ALR 470, 476 per Lee, Nicholson & Sundberg JJ. The inquiry is not concerned with a search for one meaning, which would be conveyed to all. If, in a particular case, particular words would be likely to convey to a significant number of potential purchasers a particular erroneous belief, a contravention of ss 18 and 29 of the ACL (and ss 12DA or 12DB of the ASIC Act) may be established: *Re Siddons Pty Ltd v the Stanley Works Pty Ltd* (1991) 29 FCR 14, at [20] per Willcox & Heerey JJ.

90 A contravention of s 12DA of the ASIC Act may occur, not only when a contract has been concluded under the influence of a misleading communication, but also at the point where members of the target audience have been enticed into "the marketing web" by an erroneous belief engendered by a communication, even if the consumer may come to appreciate the true position before a transaction is concluded: *TPG Internet* at [51].

91 No disclaimer or piece of qualifying information, in itself, affords absolution from committing a contravention of ss 12DA or 12DB of the ASIC Act. Each must be considered

in the context of the conduct as a whole, which in a case such as this that means considering any disclaimer in the context of the website as a whole: *Australian Competition and Consumer Commission v Jones (No 5)* [2011] FCA 49 at [45].

92 I am satisfied, having regard to the Agreed Facts that Europcar engaged in misleading or deceptive conduct, as the ACCC alleged and as Europcar admits.

93 The DLF Representation was a representation that in all circumstances the maximum amount a consumer would have to pay if there was damage to or theft of the rental vehicle, or third party loss caused by the vehicle, would be $3,650. The website content that conveyed the DLF Representation is set out at para 26 of the Agreed Facts.

94 The Cover Products Representation was a representation that the maximum amount a consumer would have to pay if there was damage to or theft of the rental vehicle, or third party loss caused by the vehicle, would be:

(a) where GoZen or SPOM was purchased, a DLF of nil in all circumstances; or

(b) where Super Collision Damage Waiver or Collision Damage Waiver was purchased, the DLF shown in the Rental Agreement in all circumstances save damage to the Vehicle's windscreen, headlights, wheels or tyres.

95 The parties have agreed, and I find, that the relevant materials conveyed the DLF Representation and the Cover Products Representation, and that each of the representations was misleading. That is because, in fact, the Car Rental Contract provided that in certain circumstances the customer may have to pay more than the DLF, even if Cover Products were purchased. Those circumstances were a breach of the Car Rental Contract by the customer, overhead damage, underbody damage, damage to a Commercial Vehicle while driving in reverse, and water damage. The DLF Representation was also misleading because, except when GoZen or SPOM was purchased, the DLF would not apply in respect of damage to a vehicle's windscreen, headlights, wheels or tyres.

ASIC Act s 12DB(1)(a): misleading representations that a service was of a particular quality

96 Section 12DB(1)(a) of the ASIC Act provides that a person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services, make a false or misleading representation that services are of a particular standard, quality, value or grade,

97 Section 12BA defines "services" to include any rights (including rights in relation to personal property), benefits, privileges or facilities that are provided, granted or conferred in trade or commerce. Thus the DLF and Cover Products, being contractual rights, were each a service for the purposes of s 12DB.

98 "Quality" is not limited to the standard or degree of excellence that a thing has, but has a wider meaning that includes an attribute, property or special feature: *Given v CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212 at 216; *Doolan v Waltons Ltd* (1981) 39 ALR 408 at 411; *Ducret v Chaudhary's Oriental Carpet Palace Pty Ltd* (1987) 16 FCR 562 at 577.

99 Therefore, by conveying that the DLF and the covers provided under GoZen, Super Collision Damage Waiver and Collision Damage Waiver had the attribute or property that they were not subject to any exclusions, Europcar made representations as to the quality of its services that were misleading, and thereby contravened s 12DB(1)(a).

100 The parties have thus agreed, and I find, that each of the DLF Representation and the Cover Products Representation contravened s 12DB(1)(a) of the ASIC Act.

ASIC Act s 12DB(1)(e): misleading representations that a service had a particular benefit that it did not have

101 Section 12DB(1)(e) of the ASIC Act provides that a person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services, make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits.

102 The Europcar Website contravened s 12DB(1)(e) by representing that the DLF and Cover Products had benefits they did not have, namely the benefit of limiting the customer's liability in cases of overhead damage, underbody damage, damage to a Commercial Vehicle while driving in reverse, water damage and (except when GoZen or SPOM was purchased) damage to the Vehicle's windscreen, headlights, wheels or tyres.

103 The parties have therefore agreed, and I find, that each of the DLF Representation and the Cover Products Representation breached s 12DB(1)(e) of the ASIC Act.

ASIC Act s 12DB(1)(i): misleading representations concerning the existence, exclusion or effect of any condition or right associated with the services

104 Section 12DB(1)(i) of the ASIC Act provides that a person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services, make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

105 A statement about the scope of cover provided under the rental agreement is a statement about a right: *SWF Hoists & Industrial Equipment Pty Ltd v State Government Insurance Commission* (1990) ATPR 41-045.

106 The Europcar Website contravened s 12DB(1)(i) by making misleading representations about the rights connected with the DLF and Cover Products.

107 The parties have therefore agreed, and I find, that each of the DLF Representation and the Cover Products Representation contravened s 12DB(1)(i) of the ASIC Act.

Declaration – website conduct

108 The Court has a wide discretionary power to make declarations under s 21 of the *Federal Court Act*: see *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437-8 (Gibbs J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-2 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89, 99 (Sheppard J).

109 It is open to the Court to make declarations based on agreed facts and admissions, as distinct from evidence led in the usual manner. A statement of agreed facts may be relied upon as evidence in support of a proposed declaration: see, for example, *ACCC v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665, 680-1 [57]-[59], endorsed by the Full court in *ACCC v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513, [92]; *Hadgkiss v Aldin* [2007] 169 IR 76, 79 [10],[114]-[116]; *Secretary, Department of Health & Aging v Pegasa Australia Pty Ltd* [2008] FCA 1545 at [38]. (See also *Evidence Act* 1991 (Cth) s 191).

110 It has become the common practice of this Court to grant declaratory relief on the basis of agreed facts and admissions in areas of public interest.

111 In *Forster*, the High Court held that before making declarations three requirements should be satisfied:

(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.

112 Each of these requirements is satisfied in this case:

(a) The proposed declarations relate to conduct that contravenes the consumer protection provisions of the ASIC Act 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: see considerations and cases referred to in *ACCC v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730, at [7]. There is a significant legal controversy in this case, which is being resolved. The ACCC as the public regulator with delegated authority under the ASIC Act has a genuine interest in seeking the declaratory relief.

(c) Europcar is a proper contradictor because it initially opposed the declarations sought by the ACCC, having a true interest in the subject matter of the declarations. As to the existence of a proper contradictor where declarations are sought by consent of the parties, see *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378; [2012] FCAFC 56.

113 Nicholson J, in making declarations in *ACCC v CFMEU* at [6] explained the reasons for doing so. They are apt in the present case too because they serve to:

(a) record the Court's disapproval of the contravening conduct;

(b) vindicate the ACCC's claim that Europcar contravened the ASIC Act;

(c) assist the ACCC to carry out the duties conferred upon it by the CCA (which in this case concern the investigation and enforcement of consumer protection provisions of the ASIC Act);

(d) inform consumers of the respondent's contravening conduct; and

(e) deter other corporations from contravening the ASIC Act and the cognate provisions of the ACL.

114 The form of the declaration proposed by the parties achieves as they jointly submit an adequate balance between the detail required to inform as to the nature of the contravening conduct and the brevity needed to avoid the words becoming unwieldy and thereby diminishing the utility of the order.

115 Importantly, the declarations include:

(a) a description of the source of the representations (the Europcar Website);

(b) a description of the relevant representations that the website conveyed;

(c) a summary of the facts that contradicted the representations; and

(d) a description the period during which the website conveyed the representations.

116 As a result, the proposed declarations sufficiently disclose the basis on which the Europcar Website failed to comply with ss 12DA and 12DB of the ASIC Act: *BMW Australia v ACCC* (2004) 207 ALR 452 at [35].

117 I am, in these circumstances, prepared to make the declarations sought.

Publication orders

118 Section 12GA of the ASIC Act empowers the Court to make orders including an order requiring a person who has contravened provisions including ss 12DA and 12DB 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.

119 The publication of the corrective notice in newspapers will serve the purposes of dispelling false impressions created as a result of Europcar's conduct, alerting customers to the fact of the contraventions, and preventing the repetition of the contravening conduct by Europcar. It is therefore appropriate to make an order for publication in the form of the corrective notice annexed to the minute of proposed orders.

120 However, in light of the corrections to the Europcar Website referred to above, which have been in effect since 3 July 2014, there is no need for any publication order to be made in respect of the website.

Pecuniary penalty

121 The parties jointly submit that the Court should make orders imposing upon Europcar a pecuniary penalty, pursuant to section 12GBA of the ASIC Act, in respect of Europcar's admitted contraventions of the ASIC Act. However, it is ultimately a matter for the Court's discretion as to whether to impose a penalty and, if so, in what amount.

122 The parties made no submission as to the quantum of the appropriate civil pecuniary penalty in this matter in light of the decision of the Full Court of this Court in *Barbaro v The Queen* (Barbaro)*; Zirilli v The Queen* (2014) 253 CLR 58, concerning the applicability of or to civil penalty hearings. However, they permissibly made submissions as to the facts which should be found, applicable legal principles and comparative penalties: *CFMEU* at [125], [182] and [237]; see also *TPB v HP Kolya Pty Ltd* [2015] FCA 472 at [104].

123 Following the hearing, I gave the parties leave to make further submissions following the decision of the High Court in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 (Fair Work), which held that the principles in *Barbaro* do not apply to civil penalty proceedings, with the result that parties to civil penalty proceedings are in a position to make submissions on the appropriate range and quantum of penalty in agreed and contested matters.

124 The parties jointly withdrew reliance upon certain of their earlier submissions but made no submissions as to the quantum of any penalty.

Power to order penalty

125 Pursuant to s 12GBA of the ASIC Act (which is comparable to s 224 of the ACL), the Court may impose a pecuniary penalty on a person who has contravened, or has been knowingly concerned in or a party to a contravention of, a provision of Pt 2 Div 2 Subdiv D of the ASIC Act, other than s 12DA. That subdivision includes s 12DB. The Court may order the person to pay such pecuniary penalties in respect of "each act or omission" as the Court determines to be appropriate.

Maximum penalties and courses of conduct

126 The maximum penalty under Subdivision D of the ASIC Act for a body corporate applicable here to each case of the contravening conduct is $1.1 million: Item 2 of s 12GBA(3) of the ASIC Act and s 4AA of the *Crimes Act 1914* (Cth). (The legislation was amended with effect from 31 July 2015 to change a penalty unit from $1,100 to $1,800.) Having regard to

the maximum penalty is important for two reasons. First, it reflects the legislature's policy regarding the seriousness of the proscribed conduct. Second, it invites comparison between the worst possible case and the case presently before the Court, and thus provides a yardstick balanced with all of the other relevant factors: *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330 at [6]; *ACCC v Reebok Australia Pty Ltd* [2015] FCA 83 at [122].

127 The "course of conduct" principle, which has been recognised and applied in the context of the CCA and the ACL, see, for example, *ACCC v Marksun Australia Pty Ltd* [2011] FCA 695 at [71]-[81]; *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [52]-[55]; and *TPG* at [60]-[61] was explained by Middleton and Gordon JJ in *CFMEU v Cahill* (2010) 194 IR 461 at [39] as follows:

> The principle recognises that where there is an interrelationship between the *legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is "the same criminality" and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.

128 Each instance in which Europcar made a misleading representation on the Europcar Website constitutes a separate act in contravention of ss 12DB(1)(a), 12DB(1)(e), 12DB(1)(i) and 12DA of the ASIC Act.

129 Nonetheless the parties submit and I accept that the "course of conduct" or "one transaction" principle is apt to the assessment of a penalty in the present case. Accordingly I propose to treat Europcar's conduct as a single course of conduct on the basis that the representations arose from the same set of facts (the Europcar Website) during a specific period from 16 December 2013 until 3 July 2014.

130 However, the parties accept that approaching the question of penalty in this way does not operate to limit the maximum penalty to $1.1 million. Rather, as was accepted by Allsop CJ in *ACCC v Coles Supermarket Australia Pty Ltd* at [17], this approach serves to frame the analysis of the appropriate penalty.

131 Nonetheless, approaching the contraventions here as a single course of conduct I will fix one monetary penalty overall and in so doing I have taken into account the principal of totality.

The primary purpose of penalty: deterrence

132 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.

133 In relation to both specific and general deterrence, French J (as he then was) stated in *TPC v CSR Ltd* (1991) ATPR 41-076, 52,152.

> The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act.

134 This objective was restated in *ACCC v TPG* at 659 where French CJ, Crennan, Bell and Keane JJ stated:

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

135 The principles to be applied in assessing the appropriate penalty under s 224 of the ACL involve, in substance, the same considerations: *ACCC v Global One Mobile Entertainment Ltd* [2011] FCA 393. I accept the joint submission that there is no reason why the principles should be any different in respect of s 12GBA of the ASIC Act.

136 The case law emphasises that penalties of a sufficient quantum ought to be imposed to deter businesses from weighing up the risks of a penalty being ordered as a strategic business cost: *ACCC v McMahon Services Pty Ltd* (2004) *ACCC v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301 at 309 per Goldberg J. In *Singtel Optus Pty Ltd v ACCC* at [62], the Full Federal Court stated:

> There may be room for debate as to the proper place of deterrence in the punishment of some kinds of offences, such as crimes of passion; but in relation to offences of calculation by a corporation where the only punishment is a fine, the punishment must be fixed with a view to ensuring that the penalty is not such as to be regarded by that offender or others as an acceptable cost of doing business.

137 In considering the extent to which the penalty achieves deterrence, it is important for the Court to have regard to a company's size and profitability and while there is a real need for

pecuniary penalties to be high enough to achieve specific and general deterrence, they should not be so high as to be oppressive: *ACCC v Navman Australia Pty Ltd* [2007] FCA 2061 at [115].

138 The need for specific deterrence is, in this case, minimal. The parties are agreed that the conduct was not deliberate and the level of cooperation by Europcar has been of a very high order.

139 There is no element here of a "calculated contravention of legislation where commercial profit is the driver of the contravening conduct": *ACCC v TPG* at [65]. These were not contraventions deliberately engaged in by Europcar as "an acceptable cost of doing business": *Singtel Optus Pty Ltd v ACCC*.

Mandatory factors under s 12GBA of the ASIC Act

140 In determining the appropriate pecuniary penalty, s 12GBA(2) of the ASIC Act 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.

Other relevant factors

141 Given the similarities between section 12GBA of the ASIC Act, s 224(2) of the ACL and s 76E(2) of the TPA, the guiding principles developed for penalties under the TPA and ACL are also relevant to s 12GBA .

142 In *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 at 292, 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 where the court endorsed the approach of French J (as he then was) in *Trade Practices Commission v CSR Ltd* [1991] ATPR 52,135. 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 Pty Ltd v ACCC* at [37].

143 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.

144 Also relevant is the amount of loss or damage caused, including whether consumers suffered any loss: *ACCC v Global One Entertainment Limited* at [135].

145 The process of fixing the quantum of a penalty is not an exact science. The approach which should be adopted is one of "instinctive synthesis": *Markarian v R* (2005) 228 CLR 357. All of the circumstances must be weighed so as to mark the Court's view of the seriousness of the offence. Attention must be paid to the maximum penalty fixed by the CCA so as to compare the worst possible case with the one before the Court. The exercise is not a mathematical one, and there is no single correct penalty: *Australian Securities and Investments Commission v GE Capital Finance Australia* [2014] FCA 701 at [75], referring to *Markarian.*

Nature and extent of the act or omission

146 The nature of the contravening act here was to make representations about the benefits associated with certain terms of the Car Rental Contract without clearly indicating that those benefits would not apply in certain circumstances. The benefits concerned protection from liability for damage to or loss of a vehicle or for third party loss caused while the customer was renting a vehicle. The circumstances in which those benefits would *not* apply, and that were not adequately disclosed on the Europcar Website, included breach of the Car Rental

Contract by the customer, overhead damage, underbody damage, damage to a Commercial Vehicle while driving in reverse, and water damage. Further, unless the customer had purchased GoZen or SPOM, they would also be fully liable for any damage to the vehicle's windscreen, headlights, wheels and tyres.

147 These were matters likely to be material to customers considering whether to rent a vehicle from Europcar. In so far as they concerned Cover Products, they are also likely to have been material to a significant proportion of customers who were considering whether to pay an extra fee in order to "purchase" such "products".

148 The contravening conduct was engaged in by way of the Europcar Website, which was visited by a large number of consumers and businesses. During the Website Period, Europcar on average entered into approximately 290,300 Car Rental Contracts in Australia and:

(a) approximately 22.67% (65,819 Customers) of those Car Rental Contracts were entered into by Consumers who booked with Europcar via the Europcar Website; and

(b) approximately 12.68% (8,348) of the Consumers who booked through the Europcar Website purchased a cover product.

149 During the Website Period, information supplied by the Europcar Website was supplemented by documents routinely provided to customers and on display at branches of Europcar attended by those customers prior to entering a Car Rental Contract including the Rental Agreement, a brochure showing Cover Product options and exclusions and a copy of the 2013 Terms and Conditions. The Rental Agreement had a section headed 'Some Important Terms that may affect your liability'. Clause 2 of that section referred to exclusions from cover for underbody or overhead damage, use of the vehicle in prohibited areas and driving a Commercial Vehicle in reverse. That section of the Rental Agreement was positioned immediately above the customer's signature so that the customer was made aware of these exclusions and other special conditions before signing the Rental Agreement.

Size of the contravening company

150 Europcar has approximately 12.5% of the Consumer car rental market share in Australia.

151 Europcar has 66 outlets throughout Australia. In addition there are 14 franchises which are not controlled by Europcar and which operate from 56 outlets.

152 Capacity to pay any penalty imposed is a relevant factor for the Court to consider.

153 The competitors most likely to be affected by Europcar's contraventions are other car rental companies.

Loss and damage

154 The loss and damage suffered by consumers cannot be quantified. However it is possible that a not insignificant number of consumers paid for Cover Products which they may not have purchased had they been aware of the exclusions from cover which applied.

Previous contraventions and conduct

155 Europcar has not been found to have previously contravened the ACL or engaged in similar conduct previously.

Involvement of senior management

156 While the Europcar website was managed on a day to day basis by the Europcar marketing department, senior management takes responsibility for its content. Europcar acknowledges that it failed to identify the misleading aspects of its website until the misleading statements on the Europcar website were brought to Europcar's attention in the ACCC's letter of 25 June 2014, when senior management acted promptly and changes rectifying the inconsistencies and misleading statements were made with effect from 3 July 2014.

Culture of compliance

157 Europcar has had a compliance policy in relation to complying with the ACL and Part 2 Division 2 of the ASIC Act (Consumer Protection Law) since 24 August 2015. Pursuant to that policy, Mr Avdyl Kamberi, a director of Europcar, has been appointed as the Europcar compliance officer. This policy requires employees to report any breaches of the Consumer Protection Law to the Compliance Officer. In accordance with the policy, directors, officers, representatives and agents of Europcar have been given training in Consumer Protection Law.

Europcar's financial position

158 Europcar's annual revenue in the year ending 31 December 2014 was approximately AUD$172.4 million. In the year ended 31 December 2013, Europcar's annual revenue was approximately AUD$154.2 million.

The deliberateness of the contravention and the period over which it extended

159 The parties have agreed that in publishing the Europcar Website, Europcar did not consider whether in fact, the customer's liability under any Car Rental Contract could potentially exceed the DLF in cases of overhead damage, underbody damage, damage caused to a Commercial Vehicle while driving in reverse, water damage or, unless GoZen or SPOM was purchased, damage to the Vehicle's windscreen, headlights, wheels or tyres. Accordingly, the parties accept that Europcar did not intend to contravene the Consumer Protection Law.

160 The conduct occurred over a period of approximately 8 months from 16 December 2013 to 3 July 2014.

Whether the contravener has shown a disposition to cooperate with the ACCC in relation to the contravention

161 Europcar has co-operated with the ACCC and made admissions that supported and enabled the bringing of this application by the ACCC. Europcar made amendments to the Europcar Website when the ACCC drew Europcar's attention to its concerns.

162 Europcar is entitled to credit for admitting its wrongdoing and for cooperating with the ACCC to reach the agreement, saving the parties, the Court and the community substantial costs. It is of clear benefit to the ACCC's investigations that respondents are encouraged to cooperate in appropriate cases. For these reasons, Europcar is entitled to a discount on the penalty that otherwise would have been appropriate.

Assessing penalties including against the statutory maximum

163 The process to be applied in arriving at a particular penalty figure was considered in the context of criminal sentencing by the High Court in *Markarian*. That process is also applicable to the assessment of pecuniary penalties under s 224 of the ACL: *ACCC v Marksun Australia Pty Ltd* at [90]-[91] and, by extension, s 12GBA of the ASIC Act.

164 In *Markarian*, Gleeson CJ, Gummow, Hayne and Callinan JJ held:

(a) assessment of the appropriate penalty is a discretionary judgment based on all relevant factors (at [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 [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 [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 [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 [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 [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 [39]).

Parity principle

165 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 per Burchett and Kiefel JJ.

166 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: *NW Frozen Foods* at 295; *ACCC v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 at [68]. In *Singtel Optus Pty Ltd v ACCC* at 264 the Full Court observed that:

> …the Court is not assisted by…citations 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.

167 However, in *DFWBII v CFMEU*, the Full Court indicated that previous analogous or comparable penalty decisions have a role in the process of fixing penalties, stating at [252]:

> Despite the not infrequent suggestion, in pecuniary penalty cases, that earlier decisions are of little value, the criminal sentencing process makes substantial use of such decisions. In our view, the development of a consistent approach to the fixing of pecuniary penalties necessitates reference to prior decisions (Emphasis added).

168 In applying the decision in *DFWBII v CFMEU,* Middleton J in *ACCC v Chopra* [2015] FCA 539 confirmed (at [53]) that consistency in the imposition of penalties under the ACL is obviously desirable. Referring to the comments in CFMEU (at [253]), his Honour said that:

> If sufficient detail is given to the court as to the previous decisions…. the legal representatives are entitled to submit, based upon the relevant aspects of the previous decisions and the circumstances of the contravener's conduct, the range demonstrated by the relevant cases.

169 Similarly, in *ACCC v Omniblend* [2015] FCA 871 Beach J confirmed (at [9]) that he was:

> free to receive from the parties information concerning…the quantum of penalties imposed in other comparable cases.

170 Nevertheless, penalties which have been imposed in previous matters do not provide a basis for "formulating the outer bounds of the permissible discretion": *CFMEU* at [98]; *Barbaro* at [41] per French CJ, Hayne, Kiefel and Bell JJ. Further, there is no "'tariff' to be applied for particular types of contraventions": *Comcare v Transpacific Industries Pty Ltd* [2015] FCA 500 at [269]. The consistency the Court is seeking to achieve is "consistency in the application of the relevant legal principles, not numerical equivalence": *Hili v R* (2010) 242 CLR 520 at [48]-[49]; cited in *Barbaro* at [41] and referred to in *CFMEU* at [98].

171 The parties' researches have identified three previously decided cases which they submit may be of assistance to the Court although not every circumstance found in the cases arises in the same way in the present matter.

172 In *ACCC v AirAsia Berhad Company* [2012] FCA 1413 Tracey J ordered a penalty of $200,000 for a single course of conduct involving representations on AirAsia's website (from March 2011 to January 2012) as to the price for airfares on 13 routes which failed to specify, in a prominent way and as a single figure, the total price inclusive of all taxes, fees and other mandatory charges. The amount of the penalty was in contest between the parties.

173 Circumstances that were held to be material to the penalties included:

(a) the relevant conduct continued over many months and had the potential to influence thousands of bookings [31];

(b) the absence of evidence establishing that any consumer or competitor suffered any economic loss as a result of the contravention was a mitigating factor [38];

(c) AirAsia had been alerted to the requirements of s 48 of the ACL not long before the contravention occurred, and should have been exercising particular vigilance to ensure that it prominently displayed the single price for all its flights - while the conduct may have arisen out of inadvertence, it confirmed that AirAsia failed to put in place the necessary procedures to ensure that it complied with its statutory obligations [41];

(d) in any event inadvertence was not a mitigating factor [51];

(e) given the need for specific deterrence, AirAsia's size and market position were not to be ignored but were not accorded the same weight as the objective seriousness of the company's misconduct [44]-[47];

(f) there was no evidence of any wider cultural deficiencies within the company [54]; and

(g) AirAsia conceded liability, facilitated a speedy hearing of the proceeding and was entitled to contest the penalty amount sought by the ACCC [57].

174 In *ACCC v Origin Energy Ltd* [2015] FCA 55, White J ordered a total penalty of $125,000 for certain conduct engaged in on Origin's website. That was the figure agreed by the parties for that conduct. (There were also agreed penalties of $100,000 each ordered against two subsidiaries of Origin Energy Ltd for representations made in written "Confirmation Packs" sent out to customers.)

175 The web site conduct involved representations, made over a four month period, that residential customers would receive certain percentage discounts from Origin's usage charges for electricity and gas. In fact, the rates Origin used to calculate those charges were market rates, rather than the lower rates that were generally applicable to residential consumers.

176 Circumstances that were material to the penalty included:

(a) Origin's size and reputation were substantial [44];

(b) the representations were directed to residential consumers in South Australia and were directed to a diverse cross-section of the public [45];

(c) the prominence of the discounts in the representations was likely to have attracted consumers [46];

(d) the representations were made on a number of pages on the Origin website over a period of four months (although here the Court also took into account that the representations in the Confirmation Packs would have increased their reach) [47];

(e) while it was not possible to determine the number of consumers who were affected by the misleading representations, the number was not insignificant – however, not all consumers would have been misled [48]-[52].

(f) while Origin's contraventions were not in the most egregious class, their nature, duration, and potential effect on consumers meant they must be regarded seriously [52]; and

(g) Origin had no history of prior contraventions, no senior executives were involved in the contravening conduct, Origin co-operated with the ACCC in the proceedings and made a number of admissions which indicated contrition [53]-[54].

177 In *ACCC v Spreets Pty Ltd* [2015] FCA 382 the Court ordered that the respondent, a subsidiary of Yahoo!7 Pty Ltd, pay a penalty of $220,000 for misleading conduct engaged in via the internet, including emails to consumers and website advertising. The internet conduct was misleading because it represented that the consumers could purchase and redeem vouchers from Spreets without further cost, when in fact there were additional fees that had to be paid in order to redeem the vouchers.

178 In addition, the vouchers themselves displayed incorrect statements about the consumer's right to refunds, and Spreets had made misleading representations to voucher purchasers about aspects of the terms and conditions attaching to the vouchers and the ability to redeem them with certain merchants. This conduct was the subject of penalties separate to the penalty ordered in respect of the internet conduct.

179 Collier J took into account a number of matters including that:

(a) at the time of the contraventions Spreets was one of the largest online group buying companies in Australia [137];

(b) there was no suggestion that Spreets intentionally set out to mislead, deceive or cheat voucher purchasers [138];

(c) however it could not be said that the contravening conduct constituted isolated incidents – rather there was a systemic failure in the processes of Spreets in a core aspect of its business [139];

(d) senior management was involved in the contravening conduct [140];

(e) following the commencement of the ACCC's investigation, Spreets took steps to upgrade and improve its compliance program [144]; and

(f) Spreets had taken steps to cooperate with the ACCC to resolve the proceedings, avoiding the need for a contested hearing in the matter which would consume time and resources of the Court as well as the regulator [145].

180 In the present case it is not suggested that the misleading conduct was systemic within Europcar.

181 Europcar tendered affidavit evidence of its Finance Director, Mr Avdyl Kamberi in support of its submissions on the appropriate penalty and, to that end, puts in context and amplifies the agreed facts concerning Europcar's co-operation with the ACCC.

182 A brief chronology of the events informing and constituting that cooperation as disclosed by Mr Kamberi's affidavit is as follows (references below in square brackets are to the relevant page numbers appearing at the top of Mr Kamberi's affidavit and annexures):

Date	**Event**
10 Nov 2010	Initial meeting to discuss general issues concerning compliance in the rental car industry [p2]
19 Nov 2010	Letter ACCC to Europcar [p7] stating that "*the ACCC appreciates Europcar's proactive involvement*" [p7] in relation to compliance. (The letter otherwise focuses on unfair contract terms issues).
2 Dec 2010	Europcar's response on the unfair contract terms issues [p13]. The covering email [p11] confirms that Europcar "*remain ready to discuss with you any issues you may feel are unresolved*"
4 May 2011	Letter ACCC to Europcar [p17] noting that the ACCC "*appreciates the cooperation Europcar has so far provided to the ACCC*" and requests details of Europcar's cover products, including answers to a series of questions about Europcar's promotion and disclosure of its Cover Products [p18]
23 May 2011	Europcar responds in detail to each of the questions [p20] and provides a comprehensive package of extracts from the Europcar website [p23-36]
28 Mar 2013	Europcar heard nothing further from the ACCC until 28 March 2013, when it receives a further letter [p38]. This letter refers to the correspondence in late 2010 concerning unfair terms and develops the unfair terms issue. It also raises expressly the question of misleading and deceptive conduct and again seeks

	information and documents concerning Europcar's Cover Products [p41].
17 Apr 2013	Europcar responds in detail on all issues raised. On the misleading and deceptive conduct issue [p45], it confirms that it had provided information to the ACCC on Cover Products with its letter of 23 May 2011 and had since taken further steps to assist renters in their awareness of Cover Products. It is notable that these steps were taken, even though the 4 May 2011 letter from ACCC had not expressly raised any concerns with Europcar's Cover Product disclosures. The letter attached a comprehensive set of documents relevant to Europcar's Cover Product disclosures [p47-117].
4 Dec 2013	Letter from ACCC [p120-122]. The letter states that "*the purpose of this letter is to seek your cooperation in resolving the ACCC's remaining concerns about potential unfair contract terms*". The letter says nothing about Europcar's Cover Product disclosure or otherwise on the topic of misleading and deceptive conduct.
17 Dec 2013	Europcar provides a detailed response on the unfair contract terms and suggests a meeting early in 2014 to discuss any further concerns the ACCC may have [p126]
7 Mar 2014	Letter from the ACCC [p128] asking a series of further questions apparently relating only to the unfair contract terms issue.
1 Apr 2014	Europcar responds [p132], attaching insurance information [p133-155]
8 May 2014	ACCC writes with a follow up question on unfair terms [p157]
9 May 2015	Europcar responds [p161]
25 Jun 2014	Letter from ACCC [p163] maintaining position on unfair contract terms and stating that: "*The purpose of this letter, however, is to alert you to the ACCC's concerns that Europcar may have also engaged in misleading or deceptive conduct….*" [p163]. The letter states that the ACCC is "*seeking your comments in response to the issues raised, including any action you may consider necessary to address them*". It also refers to Europcar's letter of 17 April 2013 and requests a copy of "*the current counter brochure*" dealing with Cover Products supplied on point of sale [p164]
1 Jul 2014	Europcar responds rejecting the assertion of misleading and deceptive conduct, but nevertheless setting out the changes that Europcar proposed to make to its website from August 2014 [p168]. The changes were in fact implemented with effect from 3 July 2014 [p5]
31 Oct 2014	Letter from the ACCC [p175] confirming that the ACCC has "*resolved to institute civil proceedings against Europcar*" in relation to unfair contract terms and misleading and deceptive conduct. In relation to the latter, the letter states: "*Staff have previously raised concerns with Europcar in relation to these and similar issues in their letters to Europcar dated 28 March 2013 and 25 June 2014*".
3 Nov 2014	Europcar responds requesting an urgent meeting [p180] and noting that Europcar responded immediately to the ACCC letter of 25 June 2014 by making comprehensive amendments to its website
7 Nov 2014	Proceedings commenced
29 Jan 2015	Meeting held at Europcar's instigation to discuss options for a resolution [p5]

183 This chronology demonstrates generally Europcar's willingness to engage promptly and proactively with the ACCC concerning the particular allegations of misleading and deceptive conduct as well as the fact that Europcar:

(a) has been unhesitating in making full disclosure to the ACCC of the information provided by it to customers concerning its Cover Products, including website captures;

(b) took steps to improve the clarity of information provided to customers even before 28 March 2013, when the ACCC first raised expressly that the information may be misleading;

(c) was unaware that the ACCC may have had ongoing concerns about this issue after Europcar's letter of 17 April 2013, until 24 June 2014, when the ACCC first renewed its concerns about the Europcar website containing misleading statements; and

(d) thereafter promptly made further changes to its website in response to those concerns, with the result that the period in respect of which the claims of misleading and deceptive conduct are made, ends on 3 July 2014 (see the Statement of Agreed Facts at [26]), a mere five business days after the date of the ACCC letter.

184 Europcar accepts that it is responsible to ensure that its website does not contain misleading statements and makes no criticism of the ACCC in relation to the dealings of the parties as set out above. However, in the context of assessing penalty, Europcar submits that those dealings amply demonstrate that its cooperation goes beyond promptly reaching agreement on all issues in the proceedings, with the consequent saving of public resources.

185 There is no challenge by the ACCC to this characterisation of Europcar's dealings with it over a period of engagement between them extending a little over four years. I accept that it was, on the part of Europcar, an open and responsive engagement with the ACCC's concerns, from the moment they were first raised through to and including the ultimate resolution of these proceedings.

186 I have concluded, having regard to the considerations I have identified, that a penalty of $100,000 ought to be imposed upon Europcar.

I certify that the preceding one hundred and eighty-six (186) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour j.

Associate:

Dated: 19 April 2016