FEDERAL COURT OF AUSTRALIA

Australian Energy Regulator v AGL Retail Energy Limited (Relief Hearing) [2024] FCA 1500

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| File number(s): | VID 749 of 2022 |
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| Judgment of: | **DOWNES J** |
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| Date of judgment: | 19 December 2024 |
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| Catchwords: | **CONSUMER LAW** – established contraventions of rule 31 of the *National Energy Retail Rules* and section 273 of the *National Energy Retail Law* – respondents contravened law over 16,000 times during four year period – respondents received, processed and retained amounts deducted from welfare payments after welfare recipients ceased to be customers, final bill had been issued and no money was payable to respondents – similar conduct had occurred in the past – no apology offered to customers – money repaid to customers without interest – dispute as to form of declaratory relief – dispute as to quantum of penalty to be imposed |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) s 44AAG  *National Energy Retail Law (South Australia) Act 2011* (SA) Sch (*National Energy Retail Law*) ss 273, 294, 296  *National Energy Retail Rules (Version 30)* r 31 |
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| Cases cited: | *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13  *Australian Communications and Media Authority v Clarity1 Pty Ltd (No 2)* (2006) 155 FCR 377; [2006] FCA 1399  *Australian Competition and Consumer Commission v ACM Group Ltd (No 3)* [2018] FCA 2059  *Australian Competition and Consumer Commission v BlueScope Steel Ltd (No 6)* [2023] FCA 1029  *Australian Competition and Consumer Commission v Employsure Pty Ltd* (2023) 164 ACSR 103; [2023] FCAFC 5  *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] ATPR 42-362; [2011] FCA 761  *Australian Energy Regulator v AGL Retail Energy Limited* [2024] FCA 969  *Australian Energy Regulator v AGL Sales Pty Limited* [2020] FCA 1623  *Australian Securities and Investments Commission v Westpac Securities Administration Limited* (2021) 156 ACSR 614; [2021] FCA 1008  *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20  *Trade Practices Commission v CSR**Ltd* [1991] ATPR 41‑076  *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24; [2021] FCAFC 49 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
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| Number of paragraphs: | 90 |
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| Date of hearing: | 11 December 2024 |
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| Counsel for the Applicant: | Mr J Arnott SC with Mr D Rowe |
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| Solicitor for the Applicant: | Baker McKenzie |
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| Counsel for the Respondents: | Mr N De Young KC with Ms C Dermody and Ms J Nikolic |
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| Solicitor for the Respondents: | King & Wood Mallesons |

ORDERS

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|  | | VID 749 of 2022 |
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| BETWEEN: | AUSTRALIAN ENERGY REGULATOR  Applicant | |
| AND: | AGL RETAIL ENERGY LIMITED (ACN 074 839 464)  First Respondent  AGL SALES PTY LTD (ACN 090 538 337)  Second Respondent  AGL SOUTH AUSTRALIA PTY LTD (ACN 091 105 092) (and another named in the Schedule)  Third Respondent | |

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| order made by: | DOWNES J |
| DATE OF ORDER: | 19 DECEMBER 2024 |

THE COURT DECLARES THAT:

1. Pursuant to s 44AAG(1) of the *Competition and Consumer Act 2010* **(**Cth**)** (**CCA**), the Court declares that by continuing to receive Centrepay deductions in respect of the customers identified in Schedule 1 to the Further Amended Statement of Claim filed 10 May 2024 and processing and retaining those deductions in circumstances where:

(a) the customer had ceased to be a customer of the relevant respondent and a final bill had been issued;

(b) the customer did not have any other active account with the relevant respondent; and

(c) the customer did not owe any amount to the relevant respondent in respect of their closed account,

such that the amount received exceeded the amount the relevant respondent was in fact entitled to charge the customer under any contract that that respondent had with that customer, and that respondent received and was in possession of sums of money that belonged to the customer and which that respondent did not have any contractual entitlement to retain, the respondents contravened rules 31(1), 31(2) and 31(3) of the *National Energy Retail Rules* (as in force during the periods of contravention identified below) (the **Retail Rules**), with the consequence that:

(d) AGL Retail Energy Limited, during the period from 3 September 2020 to 4 March 2021, engaged in:

(i) 14 contraventions of rule 31(1) of the Retail Rules by failing to notify a small customer on each of the 14 occasions on which that customer had been overcharged by an amount equal to or above $50 within 10 business days of becoming aware of each amount overcharged;

(ii) 14 contraventions of rule 31(2) of the Retail Rules by failing, on each of the 14 occasions on which that small customer had been overcharged by $50 or more, to use its best endeavours to refund the amounts overcharged within 10 business days; and

(iii) 7 contraventions of rule 31(3) of the Retail Rules by failing, on each of the 7 occasions on which a small customer was overcharged by less than $50, to use its best endeavours to refund the small customer the amount overcharged within 10 business days;

(e) AGL Sales Pty Ltd, during the period from 9 January 2017 to 28 October 2021, engaged in:

(i) 2,547 contraventions of rule 31(1) of the Retail Rules by failing to notify 126 small customers on each of the 2,547 occasions on which those customers had been overcharged by an amount equal to or above $50 within 10 business days of becoming aware of each amount overcharged;

(ii) 2,547 contraventions of rule 31(2) of the Retail Rules by failing, on each of the 2,547 occasions that the 126 small customers had been overcharged by $50 or more, to use its best endeavours to refund the amounts overcharged within 10 business days; and

(iii) 5,679 contraventions of rule 31(3) of the Retail Rules by failing, on each of the 5,679 occasions that 250 small customers had been overcharged by less than $50, to use its best endeavours to refund the small customers the amounts overcharged within 10 business days;

(f) AGL South Australia Pty Ltd, during the period from 11 April 2017 to 6 July 2021, engaged in:

(i) 931 contraventions of rule 31(1) of the Retail Rules by failing to notify 52 small customers on each of the 931 occasions on which those customers had been overcharged by an amount equal to or above $50 within 10 business days of becoming aware of each amount overcharged;

(ii) 931 contraventions of rule 31(2) of the Retail Rules by failing, on each of the 931 occasions that the 52 small customers had been overcharged by $50 or more, to use its best endeavours to refund the amounts overcharged within 10 business days; and

(iii) 3,106 contraventions of rule 31(3) of the Retail Rules by failing, on each of the 3,106 occasions that 120 small customers had been overcharged by less than $50, to use its best endeavours to refund the small customers the amounts overcharged within 10 business days;

(g) Powerdirect Pty Ltd, during the period from 28 May 2018 to 24 December 2020, engaged in:

(i) 39 contraventions of rule 31(1) of the Retail Rules by failing to notify 4 small customers on each of the 39 occasions on which those customers had been overcharged by an amount equal to or above $50 within 10 business days of becoming aware of each amount overcharged;

(ii) 39 contraventions of rule 31(2) of the Retail Rules by failing, on each of the 39 occasions that the 4 small customers had been overcharged by $50 or more, to use its best endeavours to refund the amounts overcharged within 10 business days; and

(iii) 302 contraventions of rule 31(3) of the Retail Rules by failing, on each of the 302 occasions that 12 small customers had been overcharged by less than $50, to use its best endeavours to refund the small customers the amounts overcharged within 10 business days.

2. Pursuant to s 44AAG(1) of the CCA, the Court declares that, during the period from 9 January 2017 to 28 October 2021, in the circumstances referred to in paragraph 1 above, the respondents contravened s 273(1) of the *National Energy Retail Law* contained in the Schedule to the *National Energy Retail Law (South Australia) Act 2011* (SA) insofar as they failed to implement policies, systems and processes to enable them to efficiently and effectively monitor their compliance with the requirements of rules 31(1), (2) and (3) of the Retail Rules including because their billing and accounting system was the subject of a deliberate methodological design choice that did not recognise the obligations that the respondents had under rule 31 of the Retail Rules.

THE COURT ORDERS THAT:

3. Pursuant to s 44AAG(2)(a) of the CCA, the respondents pay to the Commonwealth of Australia a pecuniary penalty in the amount of $25 million to be divided as follows:

(a) AGL Retail Energy Limited pay to the Commonwealth of Australia a pecuniary penalty in the sum of $54,160 in respect of the contraventions referred to in paragraph 1(d) above;

(b) AGL Sales Pty Ltd pay to the Commonwealth of Australia a pecuniary penalty in the sum of $16,670,277 in respect of the contraventions referred to in paragraph 1(e) above;

(c) AGL South Australia Pty Ltd pay to the Commonwealth of Australia a pecuniary penalty in the sum of $7,687,546 in respect of the contraventions referred to in paragraph 1(f) above; and

(d) Powerdirect Pty Ltd pay to the Commonwealth of Australia a pecuniary penalty in the sum of $588,017 in respect of the contraventions referred to in paragraph 1(g) above,

to be paid within 30 days of this order.

4. An order pursuant to s 44AAG(2)(c) of the CCA that the first, second and third respondents implement compliance systems and processes that automatically:

(a) detect the occurrence of an event where the first, second or third respondent receives an amount by way of a Centrepay deduction from a customer that:

(i) has ceased to be a customer of the first, second or third respondent and has been issued a final bill;

(ii) does not have any other active account with the first, second or third respondent; and

(iii) does not owe any amount to the first, second or third respondent in respect of the final billed account,

(an **Inactive Customer**); and

(b) raise, as soon as practicable, this detection to the attention of relevant employees of the first, second and third respondents in a form that identifies each Inactive Customer account which has received a Centrepay deduction and whether the deduction amount is equal to or above the overcharge threshold referred to in rule 31(1) of the Retail Rules in consequence of the occurrence of the event referred to in paragraph 4(a).

5. An order pursuant to ss 44AAG(2)(c) and (d) of the CCA that the first, second and third respondents:

(a) within 90 days of the date of this order, establish and implement a compliance program, which is specifically designed to:

(i) ensure an understanding and awareness by relevant employees of the first, second and third respondents’ responsibilities and obligations in relation to dealing with Inactive Customers, with respect to the requirements of rules 31(1), 31(2) and 31(3) of the Retail Rules; and

(ii) ensure that the relevant internal processes of its business comply with rules 31(1), 31(2) and 31(3) of the Retail Rules in relation to dealing with Inactive Customers;

(b) at their own expense, maintain and administer the compliance and training program referred to in paragraph 5(a) for a period of three years from the date of these orders;

(c) at their own expense, appoint a suitably qualified independent compliance professional (the **Reviewer**) with expertise in the national energy laws whose appointment has been approved by the applicant, to conduct a review of the implementation and effectiveness of the compliance and training program referred to in paragraph 5(a) above annually for two years, commencing 12 months after the date of this order and to prepare a written report to be provided to the first, second and third respondents within 60 days of the commencement of each review, with the report to address the following matters:

(i) identification of the processes which the relevant respondent has in place to comply with rule 31;

(ii) an assessment of the relevant respondent’s processes and their robustness to ensure compliance with rule 31;

(iii) an assessment of the operating effectiveness of the relevant respondent’s processes to comply with rule 31; and

(iv) any recommendations for any action to be taken by the relevant respondent having regard to the above assessments.

The appointed Reviewer may be replaced by the first, second and third respondents if necessary, with the prior approval of the applicant;

(d) provide the Reviewer with access to all sources of information within the possession, power or control of the first, second and third respondents and any related body corporate that is relevant to the review;

(e) within 30 days after receiving the Reviewer’s written report provide a copy of that report to the applicant;

(f) implement promptly and with due diligence any reasonable recommendations made by the Reviewer and advise the applicant in writing as to the recommendations that have been implemented and / or adopted and, where a recommendation has not been implemented and / or adopted, the reasons why;

(g) ensure that the Reviewer will be independent for the purposes of paragraph 5(c) by only appointing a Reviewer that:

(i) did not design or implement the compliance and training program referred to in paragraph 5(a);

(ii) is not a current employee, contractor or director of the first, second and third respondents or any related body corporate, and has not been an employee, contractor or director of the first, second and third respondents or any related body corporate in the five years preceding the date of these orders;

(iii) has not represented and does not represent the first, second and third respondents in any energy regulatory or consumer matters; and

(iv) has no significant shareholding or other interests in the first, second and third respondents or any related body corporate;

(h) within 90 days of the date of these orders, appoint a compliance officer to be responsible for ensuring that the processes implemented by the first, second and third respondents in relation to Inactive Customers comply with the requirements of this order, and ensure that a suitably qualified person carries out the role of compliance officer for the period of three years from the date of this order;

(i) ensure that the compliance officer reports annually to the Audit and Risk Management Committee (**ARMC**) of the first, second and third respondents on compliance with the matters set out in paragraphs 4 and 5 of this order and, within 30 days of that report being made to the ARMC, provide a copy of that report to the applicant;

(j) ensure that the compliance officer provides all requested assistance to the Reviewer appointed to conduct a review in accordance with paragraph 5(c); and

(k) ensure that the compliance officer promptly receives a copy of the Reviewer’s report each year and is responsible for overseeing the implementation of the recommendations in the report that have been adopted by the first, second and third respondents.

6. The respondents pay the applicant’s costs of the proceeding as agreed or, failing agreement, to be taxed.

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

REASONS FOR JUDGMENT

DOWNES J:

# SYNOPSIS

1 The relevant factual background appears in *Australian Energy Regulator v AGL Retail Energy Limited* [2024] FCA 969 (**liability judgment** or **LJ**). These reasons assume familiarity with the liability judgment, and I will adopt the defined terms used in that judgment.

2 By order dated 10 September 2024, the matter was listed for final hearing as to relief. The parties each filed a proposed draft form of order as to final relief.

3 By its draft order, the AER seeks (in essence):

(1) certain declarations;

(2) orders for the payment of pecuniary penalties by each AGL Entity commensurate to the number of contraventions attributable to that entity;

(3) an order that AGL take action to implement improved compliance systems and processes;

(4) an order that AGL establish, implement, maintain and administer a compliance and training program; and

(5) costs.

4 The parties reached agreement as to the form of orders 4 and 5 above, although AGL did not consent to them being made. Rather, AGL did not oppose these orders. There was also no dispute that costs should follow the event such that AGL pay the AER’s costs. As I consider that these orders are appropriate in light of the findings made in the liability judgment, I will make these orders.

5 The key areas of dispute which remain between the parties concern the form of the declaration and the quantum of the civil penalties.

6 The evidence adduced in the liability hearing was relied upon in the relief hearing. The AER further relied on the Supplementary Expert Report of Siobhan Hennessy dated 27 September 2024 (**Supplementary Hennessy Report**). Ms Hennessy was not required for cross‑examination and her calculations were not challenged by AGL. In turn, AGL relied on two additional affidavits, being those of Ms Josephine Egan (the Chief Customer Officer of AGL Energy Limited, which is the parent company of each of the AGL Entities) and Mr Glenn Waterson (General Manager of Retail Transformation at AGL Energy Limited), both dated 18 November 2024. Ms Egan and Mr Waterson were cross-examined at the relief hearing.

7 For the reasons that follow, I will make the orders sought by the AER except that the total penalty will be $25 million. I have also made minor changes to the draft order provided by the AER.

# DECLARATORY RELIEF

8 The AER seeks orders pursuant to s 44AAG of the *Competition and Consumer Act 2010* (Cth) (**CCA**). Section 44AAG(1) provides that the Court may make an order, on application by the AER on behalf of the Commonwealth, declaring that a person is in breach of, relevantly, the Retail Law and Retail Rules.

9 Although AGL accepts that declaratory relief is appropriate, it challenges the proposed wording of the declarations on two bases.

10 First, its version seeks to remove reference to s 44AAG of the CCA, and does not repeat, in respect of each individual AGL Entity, the description of the conduct comprising the contravention. It submits that its version has the advantage of brevity and simplicity. However, AGL’s version cuts across the proposition, which AGL accepts, that a declaration that a person has contravened a statutory provision should indicate the gist of the findings that identify the contravention and accurately reflect the contravening conduct in a concise way: see *Australian Competition and Consumer Commission v BlueScope Steel Ltd (No 6)* [2023] FCA 1029 at [18] (O’Bryan J).

11 Second*,* AGL’s version omits the additional text in the AER’s proposed declaration which refers to AGL having contravened s 273 of the Retail Law “*including* because their billing and accounting system was the subject of a deliberate methodological design choice that did not recognise the obligations that [AGL] had under r 31 of the Retail Rules” (emphasis added). While it is correct to say that the design of the system was not the sole cause of the failure that led to the contravention of s 273 (as can be seen from LJ [166]), the use of the word “including” in the proposed declaration makes that plain. Nor do I consider that the form of the declaration proposed by the AER attempts to encapsulate in summary form the relevant factual and legal detail of the primary reasons, as AGL submits. Rather, it highlights a critical finding at LJ [167]. The complaints by AGL about the form of the declaration are therefore without substance.

12 For these reasons, I am satisfied that it is appropriate to make the declarations in the form proposed by the AER, albeit with minor amendments.

# PECUNIARY PENALTIES

13 The AER seeks a penalty in the range of $40 million to $45 million. AGL does not submit that a penalty is not appropriate but contends that it should be $5 million.

## Relevant law

14 Section 44AAG(2)(a) of the CCA provides that if an order is made declaring that a person is (relevantly) in breach of the Retail Law or the Retail Rules, the order may include an order that the person “pay a civil penalty determined in accordance with the law”. This provision confers on this Court a discretion to impose a civil penalty.

15 Section 294 of the Retail Law sets out the matters to which a Court must have regard when determining the amount of a civil penalty. It provides that the amount must be determined having regard to “all relevant matters”, but specifically including:

(1) the nature and extent of the breach: s 294(a);

(2) the nature and extent of any loss or damage suffered as a result of the breach: s 294(b);

(3) the circumstances in which the breach took place: s 294(c);

(4) whether the person has engaged in any similar conduct and been found to be in breach of a provision of the Retail Law, the National Regulations or the Retail Rules in respect of that conduct: s 294(d);

(5) in the case of a regulated entity, whether the person has established, and has complied with, policies, systems and procedures under s 273: s 294(d); and

(6) (in relation to breaches occurring after 29 January 2021 only) the value of any benefit reasonably attributable to the breach that the person or, in the case of a body corporate, any related body corporate, has obtained, directly or indirectly: s 294(ba).

16 Section 296 of the Retail Law provides that if the breach consists of a failure to do something that is required to be done, the breach is to be regarded as continuing until the act is done despite the fact that any period within which, or time before which, the act is required to be done has expired or passed.

17 The scope of the power to impose civil pecuniary penalties was considered by the High Court in *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13. The following principles are derived from the reasons of the plurality:

(1) subject to the particular statutory scheme, “the purpose of a civil penalty is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the Act by the deterrence of further contraventions of the Act”: [9], [15];

(2) there is no place for a “notion of proportionality” in a civil penalty regime, being a notion drawn from the criminal law that a penalty must be proportionate to the seriousness of the conduct that constituted the contravention, and nor should the maximum penalty be reserved for only the most serious examples of the offending (subject to the terms of the statute). What is required is that there be “some reasonable relationship between the theoretical maximum and the final penalty imposed” which will be established where the maximum penalty does not exceed what is reasonably necessary to achieve the purpose of the provision, being the deterrence of future contraventions of a like kind by the contravenor and others: [10];

(3) civil penalties must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business: [17];

(4) the factors identified by French J (as his Honour then was) in *Trade Practices Commission v CSR**Ltd* [1991] ATPR 41-076 at 52,152–52,153 (as set out below) are possible relevant considerations which inform the assessment of a penalty of appropriate deterrent value. However, these should not be considered a “legal checklist” and the court’s task remains to determine what is an “appropriate” penalty in the circumstances of the particular case: [18]–[19], [54];

(5) another relevant factor is the maximum penalty which might be imposed, albeit it must be balanced with all other relevant factors: [52];

(6) the power to impose a penalty is to be exercised judicially, that is, fairly and reasonably having regard to the subject matter, scope and purpose of the legislation: [40];

(7) the penalty imposed should be “proportionate” in the sense that it strikes a reasonable balance between deterrence and oppressive severity: [41], [46];

(8) concepts such as totality, parity and course of conduct may assist in the assessment of what may be considered reasonably necessary to deter further contraventions of the Act: [45];

(9) a court which is empowered to impose an “appropriate” penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the legislation: [48] and [71];

(10) considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against future contraventions of a like kind: [50].

18 The factors identified by French J in *CSR* were:

1. The nature and extent of the contravening conduct.

2. The amount of loss or damage caused.

3. The circumstances in which the conduct took place.

4. The size of the contravening company.

5. The degree of power it has, as evidenced by its market share and ease of entry into the market.

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

7. Whether the contravention arose out of the conduct of senior management or at a lower level.

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

9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

19 These “French factors”have been held by this Court to be relevant to the determination of civil penalties under s 294 of the Retail Law: see, for example, *Australian Energy Regulator v AGL Sales Pty Limited* [2020] FCA 1623 at [59] (Anderson J). While the consideration of each of these factors is not mandatory, they each could fall within the scope of “all relevant matters” as required by s 294, depending on the facts of the case.

20 The totality principle operates as a final check prior to imposition of a penalty, whereby a court considers whether the aggregate penalty to be imposed is just and appropriate for the conduct when viewed as a whole: *Australian Competition and Consumer Commission v ACM Group Ltd (No 3)* [2018] FCA 2059 at [37] (Griffiths J). It has been described as an analytical tool which is applied to ensure that the overall penalty is not oppressive or disproportionate in the sense that it is greater than necessary to achieve the object of deterrence: see *Pattinson* at [45].

## General and specific deterrence

21 A substantial penalty is necessary to achieve general deterrence in this case. In this regard, the following matters are relevant.

22 First, each AGL Entity is a subsidiary of a large publicly listed company with significant financial resources. The penalty must send a clear signal to other companies in Australia (particularly other large companies) that contraventions of the Retail Rules are not tolerated, and that there are serious consequences for such contraventions.

23 Second, and relatedly, there is a need to ensure that the penalty is not seen by other large corporations as a mere cost of doing business. In other words, those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20 at [63] (Keane CJ, Finn and Gilmour JJ). Other large companies doing business in Australia will likely be aware of the penalty imposed on the AGL Entities in this case. In this context, it is essential that the penalty imposed is beyond an amount that might be seen as an acceptable cost of doing business for a company of AGL’s size and resources.

24 Third, the penalty must demonstrate that contraventions resulting from inadequate systems or processes have serious consequences, particularly where they involve large corporations and affect a large number of consumers.

25 A substantial penalty is also necessary to achieve specific deterrence. A greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather than to adhere to its preferred policy than will be necessary to persuade a poorly resourced contravenor that its unlawful policy preference is not sustainable: *Pattinson* at [60]; see also *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24; [2021] FCAFC 49 at [154] (Wigney, Beach and O’Bryan JJ). Having said that, the penalty should not be greater than is necessary to achieve the object of deterrence, and severity beyond that is oppression: see *Pattinson* at [40]. Further, retributive justice has no part to play in determining the appropriate civil penalty: see *Pattinson* at [39].

26 The AGL Entities form part of a group of companies which has a dominant position in the energy retailing sector with substantial market share and market power, as well as being vertically integrated into generation and trading markets. The AGL Entities have extensive levels of interaction with consumers, such that compliance with the Retail Rules should be a priority. AGL’s conduct affected a significant number of consumers over a period of (at least) four years. It is important that the penalty imposed is not capable of being perceived by the AGL Entities as an acceptable cost of failing to have adequate systems and processes in place. The size of the penalty must therefore be sufficient to act as an effective deterrent to the AGL Entities against future non-compliance with the Retail Rules. AGL’s size and financial position mean that a significant penalty is required to achieve such deterrence.

## The nature and extent of the breach: s 294(a)

27 By the liability judgment at [169] and [170], it was found that the AGL Entities had:

(1) committed 3,531 contraventions of r 31(1) of the Retail Rules;

(2) committed 3,531 contraventions of r 31(2) of the Retail Rules;

(3) committed 9,094 contraventions of r 31(3) of the Retail Rules; and

(4) contravened s 273(1) of the Retail Law.

28 Each of the 483 Affected Customers had contracted with one or more of the AGL Entities for the provision of electricity or gas. Each of the Affected Customers was also a recipient of welfare payments provided through Services Australia and had authorised deductions to be made directly to the AGL Entities from their welfare payments to pay their electricity and/or gas bills through the Centrepay system facilitated by Services Australia: LJ [24]–[26].

29 The AGL Entities’ use of the Centrepay system was governed by an agreement with Services Australia: LJ [3]–[4]. Among other things, that agreement:

(1) forbade the AGL Entities from collecting deductions from a person who was no longer an ongoing customer: LJ [35(4)];

(2) required the AGL Entities to cancel deductions within three business days if a customer ceased to receive the relevant electricity or gas service to which it related, and did not require AGL to obtain the customer’s consent to do so: LJ [35(3)]; and

(3) required the AGL Entities to take reasonable care and, later, to have processes to avoid receiving deductions exceeding what they should have received, and from 10 December 2018, the AGL Entities represented and warranted that they had adequate arrangements, processes, documentation and systems in place to support their agreements with customers and participation in Centrepay: LJ [35(5)] and [35(6)].

30 The AGL Entities’ use of the Centrepay system was managed through a set of online services. One of those online services delivered computer-readable deduction payment reports to the AGL Entities, the purpose of which was to allow the AGL Entities to reconcile the payments made by Services Australia into their bank accounts with the particular customer details to which the payments related. Deduction payment reports were provided each business day on which a deduction was made through the Centrepay arrangement: LJ [43]–[46].

31 The AGL Entities had developed their own script and batch processing program to automatically process deduction payment reports by identifying the relevant customer account in their own computer systems and recording the payment against that account: LJ [51]. Through these means, the AGL Entities accessed deduction payment reports from Services Australia and updated Affected Customer accounts in its own system accordingly each evening: LJ [49]. The AGL Entities intentionally designed its computer systems such that payments would be posted to a customer account even if it was inactive and in credit or with a zero balance: LJ [52]. Irrespective of the awareness of the obligations imposed by r 31, AGL should have ensured that the payments were returned to customers promptly, as Ms Egan accepted. Mr Waterson agreed that it was a “suboptimal process” and that the funds “should have been with the customer”.

32 During the relevant period (which was more than four years in length), each of the Affected Customers ceased to obtain electricity or gas from one of the AGL Entities. However, the relevant AGL Entity did not cancel their deduction from the Centrepay system as required by their agreement with Services Australia: LJ [28]. By operation of the computerised arrangements put in place by the AGL Entities, the AGL Entities continued to receive and process deductions from these customers’ welfare payments even though they were no longer being supplied the relevant electricity or gas and even after all their bills from the AGL Entities had been fully paid: LJ [29].

33 For the purposes of r 31 of the Retail Rules, the AGL Entities “became aware” of improper deductions in relation to a former customer when they applied a deduction recorded in a deduction payment report to the account of a customer whose account had been closed or become inactive and who did not owe any money for the electricity or gas they had consumed: LJ [31], [162].

34 This same issue had previously come to the attention of the AGL Entities on 14 June 2013, when Services Australia informed them that deductions had been made by AGL Sales Pty Ltd in relation to former customers. Services Australia indicated that it regarded this as a serious non-compliance which needed to be remedied and prevented in future: LJ [60]. From August 2013, the AGL Entities implemented a “short-term manual reporting solution” to identify Centrepay customers whose accounts had become inactive, had been issued a final bill and had a zero or credit balance: LJ [62]–[63]. On 25 October 2013, the AGL Entities told Services Australia that they had made changes to enable AGL to ensure future compliance: LJ [61]. However, the manual reporting process ceased in January 2016 for reasons which were not explained: LJ [65]. This is wholly unsatisfactory in light of my finding that AGL’s SAP system could readily identify the facts relating to each overcharge to a person who was employed within the payments team of AGL: LJ [159].

35 At the relief hearing, Ms Egan agreed that AGL is not able to provide an explanation. She expressed the view that the processes were not “embedded in [AGL’s] systems” or “formalised enough”, and agreed that AGL’s compliance function had failed to detect that suitable processes were not being used between January 2016 and the end of 2020. Notwithstanding these concessions, Ms Egan baulked at the self-evident proposition that this indicated weaknesses within AGL’s compliance and government structure.

36 In October 2019, as part of a broader program of remediating customers with high credit balances, the AGL Entities identified that Centrepay customers were among that cohort: LJ [68]. In these proceedings, the AGL Entities conceded that they became aware (for the purposes of the Retail Rules) of the contravening conduct in respect of a class of Affected Customers by 14 May 2020.

37 In an internal document dated 8 December 2020, Ms Egan’s predecessor (Ms Corbett) was identified as the “responsible officer” and Mr Waterson as the “issue owner”. That document stated the following:

As part of a program of work commissioned earlier this year to remediate excessive customer credit balances, AGL identified overpayments on 1,855 customer accounts, which included credits on Centrelink payments from Services Australia totalling $765,000.

AGL engaged Services Australia to return the residual credits which culminated in receiving the Remedy Notices in December 2020 to remediate AGL’s underlying processes in managing overpayments. The notices have been issued to AGL Retail Energy Ltd, AGL Sales Pty Ltd, AGL South Australia Pty Ltd and Powerdirect Pty Ltd.

To address the issue, AGL has implemented system fixes to cancel Services Australia’s deductions upon move-out and developed new processes to refund/reduce customer payments where appropriate. The remediation for the 1,855 customers is expected to be completed by February 2021. The completion dates for the remaining requirements are currently in discussion with Services Australia to ensure full compliance going forward.

A similar breach occurred in 2013 for failing to comply with obligations regarding overpayments and for failing to cancel customer’s Centrepay deductions when customers ceased to be an ongoing customer.

38 Notwithstanding these matters, the first customer was only remediated on 7 September 2020 and the last customer was remediated on 31 July 2022, nearly two years later. Some customers were no longer alive. No customer was paid any interest, or offered an explanation or an apology for what had occurred. To the contrary, a template of a sample letter which was sent to customers appeared to blame them for what had occurred, stating that “[w]e noticed that after you left us, you didn’t update your Centrepay arrangement”. Ms Egan accepted that she thought that the decision not to pay interest on the overcharged amounts was the “wrong decision”: T21.14.

39 Although AGL states that it accepts that its conduct was serious, it also seeks to downplay it. It submits that the contravening conduct was “not large scale”. It submits that the Affected Customers comprised approximately 1% of the total number of AGL’s customers that were using Centrepay during the relevant period, that AGL generally processes payments associated with approximately 25 million bills issued each year and that the total amount overcharged was approximately $468,000, which equates to around $37 for each instance of overcharging.

40 This is, however, looking at things in the wrong way. The correct perspective is that of each customer, who did not receive the benefit of his or her full welfare entitlements. This is considered in more detail below.

41 Further, the contraventions by AGL occurred over a prolonged period of more than *four years*, during which time AGL contravened the relevant law over *16,000 times*. AGL’s conduct had a direct and negative impact on 483 people who were individuals in receipt of welfare payments and therefore among the more economically and socially vulnerable of AGL’s customers. Such conduct was, on any view, “large scale”. It was *very* serious and it cannot be brushed aside because these customers constitute a small fraction of AGL’s total customer base or because, if one massages the numbers a certain way, they appear to be small in comparison to AGL’s total billings. For example, another way of looking at it is that, on average, each customer was deprived of nearly $1,000.

42 Further, Mr Waterson’s evidence was that over 40,000 customers, each of them welfare recipients, were using the Centrepay arrangement during each financial year within the relevant period, and each of these customers’ Centrepay deductions were processed using the same computer processing system. Thus, each of these customers was, in effect, exposed to the risk of overcharging as a consequence of AGL’s deliberately designed system, and would likely have been caused actual harm in the form of an overcharge in the event that they had decided to leave AGL and render their accounts inactive. The fact that such a large number of customers was exposed to the risk of harm increases the seriousness with which AGL’s conduct must be viewed: see *Australian Securities and Investments Commission v Westpac Securities Administration Limited* (2021) 156 ACSR 614; [2021] FCA 1008 at [66] (O’Bryan J).

43 For these reasons, I consider that the nature and extent of the contraventions weigh strongly in favour of a substantial penalty.

## The nature and extent of loss or damage suffered as a result of the breach: s 294(b)

44 The total amount “overcharged” was agreed to be $468,310 pursuant to the calculations in the Supplementary Hennessey Report. The Affected Customers were deprived of these amounts for periods of months or years. They were people in receipt of welfare payments, the receipt of which is indicative of strained personal financial circumstances or, at least, low incomes for many, if not all, of the Affected Customers.

45 The evidence does not disclose precisely which types of welfare support each of the Affected Customers was receiving during the relevant period. However, according to a publication by Services Australia entitled *A Guide to Australian Government Payments* (20 September 2021 to 31 December 2021), at the end of the relevant period:

(1) the fortnightly basic payment rate of the Age Pension for a single person was $882.20, with an additional Energy Supplement of $14.10 a fortnight;

(2) the fortnightly basic payment rate of JobSeeker for a single person with dependent children was $676.80, with an additional Energy Supplement of $9.50 a fortnight; and

(3) the fortnightly basic payment rate of Youth Allowance for a single 18–24 year old person living away from home with no dependent children was $512.50, with an additional Energy Supplement of $7.00 a fortnight.

46 Some examples of the deductions by AGL are as follows:

(1) 18 fortnightly payments of $120.00 were improperly deducted from Customer 375’s welfare payments, with a total of $2,160.00 overcharged;

(2) 53 fortnightly payments of $50.00 and one payment of $28.57 were improperly deducted from Customer 3’s welfare payments, with a total of $2,678.57 overcharged;

(3) 25 fortnightly payments of $91.00 and 23 fortnightly payments of $15.00 (mostly during the same time period) were improperly deducted from Customer 401’s welfare payments, with a total of $2,620.00 overcharged.

47 It follows that, as customers were improperly deprived of their welfare payments for months or years as a result of the contraventions by AGL, this caused them loss and damage, which is a factor that weighs in favour of a substantial penalty.

## The circumstances in which the breach took place: s 294(c)

48 The circumstances in which the contraventions took place have been addressed in the liability judgment (to which I have regard) and above in relation to consideration of the nature and extent of the breach as required by s 294(a).

49 The following are additional salient matters:

(1) although AGL submits that the conduct was not deliberate, its SAP system was the subject of a “deliberate methodological design choice that [has not] recognised the obligations” that AGL had under r 31 of the Retail Rules: LJ [167]. The design of the SAP system is described at LJ [47]–[59], and it (*inter alia*) enabled AGL to collect debts if a person had money owing: LJ [51], [56]. That the contravening conduct was systemic is a relevant factor: see *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] ATPR 42-362; [2011] FCA 761 at [11] (Perram J);

(2) Ms Egan accepted that the funds in question should have been returned to the customer promptly, irrespective of whether there was an internal misunderstanding about whether there had been an overcharge within the meaning of r 31 of the Retail Rules. This was a proper concession because AGL had *no* entitlement at law to those funds;

(3) the AGL Entities contravened their obligation under s 273 of the Retail Law by “failing to implement policies, systems and procedures to enable them to monitor their compliance with rule 31 of the Retail Rules”: LJ [168]. The conduct contravening r 31 arose from that failure, such that the AGL Entities did not have policies, systems and procedures to enable them to identify that customers using Centrepay had ceased obtaining services from the AGL Entities, to take steps to cease the deductions through the Centrepay service for those customers, to notify the customers of the credits on their accounts and to refund those sums;

(4) pursuant to cl 11.13 of the Centrepay Policy, the AGL Entities were under an obligation, if a recipient of Centrelink payments no longer received services from the AGL Entities, to cancel the deduction before the next scheduled payment if the recipient had not already done so. Thus, the AGL Entities were, or ought to have been, on notice of the potential for deductions to continue if not cancelled by the AGL Entities and were indeed under a contractual requirement to cancel the deductions so that overcharges did not occur;

(5) as early as 2019, staff at AGL had identified that there were customers using Centrepay with high credit balances, but these were not addressed until mid-2020: LJ [68]. According to Ms Nguyen, “it wasn’t something that was prioritised”;

(6) when asked about why the cessation in 2016 of the processes put in place in 2013 had not been detected until 2020, Ms Egan gave this evidence, which also referred to internal priorities within AGL:

Surely within that period of time, the processes like this should be examined by all levels within the compliance function?---Yes, but there’s an – an enormous number of processes within our business. We run an incredibly complex business with multiple processes across the enterprise, not just in customer markets but also in the integrated energy side of the business. So the audit team prioritises based on highest areas of risk, so I can understand why this particular payments process was not necessarily deemed the – a priority.

And the fact that it wasn’t deemed a priority has caused harm to a number of AGL customers, do you agree?--- I think the fact that we did not have the right systems and processes in place has caused harm to our customers, absolutely. We should have had the right systems and processes in place continually to ensure that this issue did not happen.

(7) the circumstances are such that the contraventions could have been avoided by AGL with relative ease and simplicity. Indeed, the evidence of Mr Waterson is that, through its Centrepay Enhancement Project, it has now implemented the automatic cancellation of Centrepay deductions upon accounts becoming inactive.

50 As the AER submits, these matters aggravate the seriousness of the conduct because they reveal a lack of concern within AGL as to the impact on customers of being improperly deprived of their welfare payments, and a causal connection between that lack of concern and the ongoing contravening conduct.

51 For these reasons, the circumstances in which the contravening conduct took place weigh in favour of a substantial penalty being imposed on AGL.

## Whether AGL has engaged in similar conduct: s 294(d)

52 AGL has not engaged in similar conduct which has been the subject of a finding of breach of any provision of the Retail Law or the Retail Rules.

53 However, the AGL Entities engaged in similar conduct in 2013 until it was detected by Services Australia and raised with them. After that occurred, the AGL Entities represented to Services Australia that they had put into place systems which would ensure compliance with the Centrepay framework in future. That did not occur or occurred in part but ceased. That AGL has engaged in similar conduct previously was recognised in its own internal document dated 8 December 2020. Further, Ms Egan accepted during cross-examination that the fact that similar conduct had happened in 2013 made the contravening conduct in this case “much more serious”: T17.45–18.1. I agree.

54 For these reasons, the fact that AGL has engaged in similar conduct previously, and attempted but failed to prevent its reoccurrence, is a relevant matter within the meaning of s 294 and supports a substantial penalty being imposed on AGL.

## Whether AGL has established and complied with policies, systems and procedures under s 273: s 294(e)

55 The AGL Entities contravened s 273 of the Retail Law because they failed to have in place policies, systems and procedures that would ensure compliance with r 31 of the Retail Rules: LJ [168]. This is a factor which aggravates the seriousness of the contravening conduct and supports a higher penalty being imposed.

## The value of the benefit reasonably attributable to the breach: s 294(ba)

56 Section 294(ba) of the Retail Law requires regard to be had to the value of any benefit reasonably attributable to the breach that the person or any related body corporate has obtained, directly or indirectly. This section applies as a mandatory consideration in relation to breaches occurring after 29 January 2021. However, I consider this to be a relevant matter within the meaning of s 294 for the period prior to 29 January 2021 and AGL did not submit otherwise.

57 The value of the benefit attributable to the r 31(2) contraventions is an aggregate amount of $238,881 and the value of the benefit attributable to the r 31(3) contraventions is an aggregate amount of $229,429, according to the unchallenged calculations contained in the Supplementary Hennessy Report. AGL submits that these funds were not treated as revenue by AGL. Yet, when pressed, senior counsel for AGL was unable to point to any evidence in support of this submission: T55.16–34.

58 In any event, AGL had the benefit of this money until it was disgorged, and did not pay interest on those sums when they were returned. Further, having regard to the chronology of events, those funds were not disgorged promptly. This is not acceptable, on any view.

59 While the value of the benefit arising from the contraventions might be inconsequential to companies of the size and scale of the AGL Entities, it was not inconsequential to the Affected Customers who are individual consumers of limited personal financial means.

60 On the other hand, AGL no longer holds any of the funds, and so has obtained no permanent benefit.

61 Overall, I consider that the value of the benefit which AGL obtained which is reasonably attributable to the breaches is a moderate factor in favour of a more substantial penalty being imposed.

## Additional relevant factors

### Size and market share of contravening company

62 As observed above, each of the AGL Entities forms part of a large corporate group which has a dominant position in the Australian energy retailing sector with substantial market share and market power. In its Annual Report, AGL Energy Limited reported revenue of $13.58 billion in the 2024 financial year, with profit after tax of $711 million.

63 AGL emphasised that while the size of a contravening company is a relevant factor to be considered when determining penalty, it cannot dominate the analysis. I agree. However, as addressed above, given the group’s size and financial position, a significant penalty is necessary to ensure specific deterrence by avoiding the possibility that AGL may perceive a civil penalty as an acceptable “cost of doing business”.

### Remedial action taken

64 AGL relies on the remedial action which it has taken, aspects of which are summarised below.

65 On its own case, AGL became aware (for the purposes of r 31(1) of the Retail Rules) of a class of Affected Customers by 14 May 2020. On 24 July 2020, the AGL Entities notified Services Australia that it held Centrepay deduction payments relating to former customers. On around 19 August 2020, the AGL Entities commenced a letter campaign notifying Affected Customers of the overcharging and their entitlement to a refund. On 5 October 2020, AGL sent Services Australia a list of customers who had not sought a refund following the letter campaign.

66 On 8 December 2020, Services Australia issued Notices to Remedy to each of the AGL Entities, requiring them to take a number of steps to ensure no further improper deductions occurred, to remediate customers already affected, and to prevent future improper deductions.

67 On around 23 December 2020, AGL sent SMS messages to Affected Customers requesting the customer contact AGL to discuss a refund (where mobile numbers were held). On around 15 February 2021, AGL made calls to Affected Customers who did not receive an SMS. Where customers responded to these communications, a refund was provided by AGL. Where these amounts could not be directly refunded to Affected Customers, AGL sought to return the amounts to Services Australia, to then be refunded by Services Australia to the Affected Customer. In February 2021, AGL sent a “Returns Database” to Services Australia which contained a list of customers with Centrepay credits on inactive accounts that AGL had been unable to refund. Services Australia confirmed that it would accept funds from AGL and process refunds to customers. The majority of these funds were accepted by Services Australia on 5 May 2021.

68 On 22 April 2022, AGL wrote to Services Australia indicating that it had completed all remedial action required by Services Australia. On 27 April 2022, Services Australia confirmed it was satisfied that AGL had appropriately addressed the issues arising from the review.

69 Where direct refunds were not possible and Services Australia did not accept the funds, AGL dealt with the funds in accordance with the unclaimed monies process that is governed by State and Territory legislation.

70 The fact that AGL has returned the funds to customers where possible only provides limited support for the imposition of a lower penalty than is sought by the AER. That is because:

(1) it has not been possible for the AGL Entities to refund all of the improper deductions;

(2) the AGL Entities were in a position to identify the overcharging earlier than they indicate that they in fact did. At least as early as October 2019, the AGL Entities were on notice that Centrepay customers were among those with high credit balances;

(3) to the extent that the AGL Entities have taken remedial steps consistent with the Notices to Remedy issued by Services Australia, they were discharging obligations under the Centrepay agreement to which they are party;

(4) the remedial action taken was not conducted in a timely manner; and

(5) no interest was paid to the customers who received a refund.

### Changes to systems and processes

71 In late 2020, AGL implemented changes to its systems to automate the monitoring and reporting of inactive accounts with ongoing Centrepay deductions, and to raise a request with Services Australia to cancel a Centrepay deduction in those circumstances. In June 2022, AGL implemented additional changes as part of the Centrepay Enhancement Project which were directed to ensuring compliance with the Retail Rules and included (*inter alia*) sending cancellation requests for Centrepay deductions immediately upon a customer terminating their contract with the AGL Entities, which was an automated process. Further, in October 2024, the AGL Entities engaged an auditor to conduct an independent review of their compliance with key obligations under the Centrepay agreement over the preceding year.

72 These changes support a lower penalty than is sought by the AER. However, as raised during the relief hearing, these changes need to be embedded into written policy documents (rather than relying on word of mouth) so as to avoid a repetition of the previous occasion on which changes were made and then fell away.

### Contrition

73 By its written submissions, AGL indicates that it is “genuinely remorseful”. Further, during cross-examination, Ms Egan gave evidence that AGL “got it wrong in this case”. She agreed that AGL had “no excuse” for failing to design systems and processes that returned overcharged amounts to customers as soon as practicable. When pressed by senior counsel for the AER, the following evidence was given by Ms Egan:

… we got it wrong in this case. I have apologised for that. I’m really disappointed that this occurred and we’ve deeply reflected on the whole situation to understand, you know, how we got this so wrong. The customers’ accounts should have been dealt with more promptly. However, I think that’s – that is a serious issue. It – we should have – we should not have got that so wrong. Unfortunately, though, the team did not – none of us understood that was a contravention of rule 31.

But do you understand my question? It doesn’t matter if it’s a contravention of rule 31 or not. Your staff should have known - - -?---I agree.

- - - that at all times that money had to be returned to customers promptly?---I completely agree with you.

That’s just consistent - - -?---I completely agree with you.

- - - with any rational form of commercial morality. Would you agree?---No, I completely agree with you, and we have acknowledged that from the start that our systems and processes failed in this case. You know, it’s incredibly unfortunate. It is not in line with my experience of AGL or how we operate. I’ve had that conversation with my team. It’s an incredible learning for us all, and I believe we’ve taken action now to prevent that ever happening again.

74 I accept that Ms Egan showed genuine remorse for what had occurred, and did so on behalf of AGL and not just in her own right (noting that she did not hold her present position during the relevant period).

75 However, an apology from AGL can only go so far in circumstances where it is given for the first time more than three years after the end of the relevant period and after the liability judgment has been handed down; it is made to the Court and not to the Affected Customers; and it is given in the context of a hearing as to the quantum of civil penalty.

76 On balance, I therefore consider that the contrition expressed by AGL is a neutral factor.

### Degree of involvement of senior management

77 Contrary to the submissions of the AER, the evidence does not support a finding that the contravention arose out of the conduct of senior management.

78 Notwithstanding that, a substantial penalty is necessary in order to seek to provoke some attention from those on AGL’s board and executive leadership team to focus more closely on these issues.

### Culture of compliance

79 AGL asserts that it has a “strong culture of compliance”. Ms Egan’s evidence, both in her affidavit and during cross-examination, was that AGL has a “strong compliance culture”.

80 However, such a proposition is at odds with the objective evidence, being that a serious issue of non-compliance was identified in 2013 by Services Australia, responded to by AGL but lapsed again from 2016 (without explanation), only for it to reappear.

81 In these circumstances, a substantial penalty is necessary in order to seek to effect necessary cultural change within AGL.

### Degree of co-operation

82 The AER submits that the AGL Entities are not entitled to a discount for co-operation in this case, noting that both liability and penalty have been disputed. However, AGL’s contentions were not unarguable and, given that r 31 of the Retail Rules has not been the subject of judicial interpretation previously, it was entitled to test those contentions before the Court: see *Australian Communications and Media Authority v Clarity1 Pty Ltd (No 2)* (2006) 155 FCR 377; [2006] FCA 1399 at [32]–[33] (Nicholson J). Further, the penalty sought by the AER at the relief hearing is excessive having regard to all relevant matters. Thus, the opposition by the AGL Entities at both the liability and penalty stages is a neutral factor.

### Maximum penalty

83 In considering the appropriate penalty, regard is ordinarily had to the maximum penalty because it provides, taken with all the other relevant factors, a yardstick: see *Australian Competition and Consumer Commission v Employsure Pty Ltd* (2023) 164 ACSR 103; [2023] FCAFC 5 at [44] (Rares, Stewart and Abraham JJ).

84 In this case, the maximum penalty changed throughout the relevant period. The Supplementary Hennessey Report set out the number of contraventions per entity, separated by reference to the date on which the maximum penalty changed. The table below, which is extracted from the AER’s written submissions, reproduces that data and uses it to illustrate the maximum penalties in respect of each of the AGL Entities (which calculations were not challenged by AGL):

| **AGL Entity** | **Rule 31(1)** | **Rule 31(2)** | **Rule 31(3)** | **Total contraventions** | **Maximum penalty\*\*** |
| --- | --- | --- | --- | --- | --- |
| *Contraventions prior to 29 January 2021*\* | | | | | |
| AGL Retail Energy Limited (A005) | 11 | 11 | 7 | 29 | $2,900,000 |
| AGL Sales Pty Ltd (A092) | 2,542 | 2,542 | 5,671 | 10,755 | $1,075,500,000 |
| AGL South Australia Pty Ltd (A072) | 929 | 929 | 3,105 | 4,963 | $496,300,000 |
| Powerdirect Pty Ltd (A121) | 39 | 39 | 302 | 380 | $38,000,000 |
| *Contraventions from 29 January 2021 onwards\** | | | | | |
| AGL Retail Energy Limited (A005) | 3 | 3 | 0 | 6 | $8,610,000 |
| AGL Sales Pty Ltd (A092) | 5 | 5 | 8 | 18 | $25,830,000 |
| AGL South Australia Pty Ltd (A072) | 2 | 2 | 1 | 5 | $7,175,000 |
| Powerdirect Pty Ltd (A121) | 0 | 0 | 0 | 0 | $0 |
| **Total maximum penalty (using simplifying assumption)** | | | | | **$1,654,315,000** |

85 It was common ground that the theoretical maximum penalty is extremely high and that it is not appropriate for it to operate as a yardstick on the facts of this case. However, as submitted by the AER, the maximum penalty reflects the legislative assessment that breaches of the Retail Rules and the Retail Law have significant consequences for energy consumers and that substantial penalties are necessary in order to provide the appropriate specific and general deterrence.

## Conclusion as to appropriate penalty

86 Having regard to the findings in the liability judgment, the facts and considerations set out above and the statements of legal principle in the authorities regarding the purpose of civil penalties, I consider that an appropriate pecuniary penalty in this case is the amount of $25 million.

87 For the reasons explained above, a penalty in this amount will be sufficient to deter repetition by AGL as well as contravention by others in the electricity and gas industry. It is one that goes beyond being a mere “cost of doing business” and it reflects the nature and extent of AGL’s contraventions.

88 Applying the totality principle as a final check, the amount of $25 million is just, appropriate and proportionate to the contraventions found in the liability judgment. Further, having regard to AGL’s size and financial position, a penalty in this amount is not oppressive.

89 As each of the AGL Entities share the internal resources of the AGL group, including people, data, processes and technology (LJ [61]), it is not appropriate that any particular AGL Entity pay a reduced penalty by reason of its relative size in the corporate group. Rather, as was common ground, it is appropriate that the overall penalty is shared *pro rata* between each of the AGL Entities commensurate to the number of contraventions associated with each entity.

# DISPOSITION

90 For these reasons, I will order that the AGL Entities pay a penalty to the Commonwealth of Australia in the amount of $25 million, to be divided *pro rata* between each of the AGL Entities relative to the number of contraventions in which each entity engaged. I will also order declaratory relief in the form proposed by the AER in their draft form of order, with minor modifications. Further, I will make orders 4 and 5 in the agreed form and order that costs follow the event such that AGL pay the AER’s costs to be agreed or, failing agreement, to be taxed (which order was also not challenged by AGL).

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| --- |
| I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes. |

Associate:

Dated: 19 December 2024

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | VID 749 of 2022 |
| Respondents |  |
| Fourth Respondent: | POWERDIRECT PTY LTD (ACN 067 609 803) |