IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GENERAL LIST

Not Restricted

S ECI 2023 06104

BETWEEN:

ESSENTIAL SERVICES COMMISSION — Plaintiff

and

ORIGIN ENERGY ELECTRICITY LIMITED (ACN 071 052 287) — First Defendant

and

ORIGIN ENERGY (VIC) PTY LIMITED (ACN 086 013 283) — Second Defendant

and

ORIGIN ENERGY RETAIL LIMITED (ACN 078 868 425) — Third Defendant

S ECI 2024 00397

BETWEEN:

ESSENTIAL SERVICES COMMISSION — Plaintiff

and

ORIGIN ENERGY ELECTRICITY LIMITED (ACN 071 052 287) — First Defendant

and

ORIGIN ENERGY (VIC) PTY LIMITED (ACN 086 013 283) — Second Defendant

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JUDGE:	M Osborne J
WHERE HELD:	Melbourne
DATE OF HEARING:	16, 17 December 2024
DATE OF JUDGMENT:	21 March 2025
CASE MAY BE CITED AS:	Essential Services Commission v Origin Energy Electricity Limited & Ors
MEDIUM NEUTRAL CITATION:	[2025] VSC 130

ENERGY AND RESOURCES - Energy retailers supplying electricity and gas to retail customers – Number of admitted contraventions – Acknowledgement of liability - Contraventions in relation to life support and Payment Difficulty Framework obligations – Billing and disconnection related contraventions – Civil penalty provisions – Determination of appropriate penalty – Primary objective of deterrence – Mandatory statutory considerations – Course of conduct - The 'French' factors – Consistency – Totality – Whether adverse publicity orders should be made – Declarations of contraventions – Compliance program – *Essential Services Commission Act 2001* (Vic) ss 53, 54, 54A, 54F, 54G, 54O, 77 – *Electricity Industry Act 2000* (Vic) ss 1, 10, 40SE(1), 40SG(1),(3)&(4)(a), 40SL – *Gas Industry Act 2001* (Vic) ss 1, 18, 48DI – Energy Retail Code v 21 cls 82(2), 83(1), 81(6), 89, 111A – Energy Retail Code of Practice v 1 and 2 cls 65(1), 70, 70(2)(a), 71(1), 106(1)&(2), 107(1)&(2), 108(1), 108(2)(a)(ii), 108(2)(b), 110(1), 130(6), 131(2), 163(1)(a), 165(1)(a), 167(1)(b), 191(1).

APPEARANCES:	Counsel	Solicitors
For the Essential Services Commission	D Star KC with C van Proctor	Corrs Chambers Westgarth
For Origin Energy Electricity Limited, Origin Energy (Vic) Pty Limited and Origin Energy Retail Limited	N De Young KC with A Lord	Allens

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HIS HONOUR:

Introductory matters

1 The plaintiff ('Commission') is a body corporate established under the *Essential Services Commission Act 2001* (Vic) ('ESC Act'). Its responsibilities include, among other things, responsibility under the *Electricity Industry Act 2000* (Vic) ('EI Act') and the *Gas Industry Act 2001* (Vic) ('GI Act') (collectively 'the Acts') for licensing regulated entities in the electricity industry and the gas industry respectively.

2 The first defendant ('Origin Electricity') and the second defendant ('Origin Gas') are regulated entities under the EI Act and GI Act respectively. Both hold licences for the retail supply of electricity and gas respectively to customers in Victoria principally for personal household or domestic use. Along with the third defendant, Origin Energy Retail Limited ('Origin Mildura'), they form one of the largest group of energy retailers in Victoria (collectively 'Origin'[1]). At the end of the third quarter of the 2024 financial year, Origin supplied 18.70% and 17.30% of Victorian small electricity and gas customers respectively.

3 As a licensee, Origin is subject to codes of practice. The Energy Retail Code ('ERC') version (v) 12-21 applied in the period from 1 December 2021 to 28 February 2022 (inclusive) and the Energy Retail Code of Practice ('ERCOP') applied on and from 3 March 2022. Contraventions of the ERCOP are amenable to the making of contravention orders and hence the imposition of civil penalties. That is not the case with respect to contraventions of the ERC, notwithstanding that the content of the two codes is relevantly indistinguishable for present purposes.

The LS/PDF Proceeding

4 On 21 December 2023, the Commission commenced proceeding S ECI 2023 06104 ('the LS/PDF Proceeding') against Origin Electricity, Origin Gas and Origin Mildura. In the proceeding, the Commission seeks, among other things, contravention orders for contraventions of civil penalty requirements under s 53 of the ESC Act and associated

[1] Unless it is necessary to distinguish between the three defendant companies, these reasons refer to 'Origin', without differentiation.

orders including orders for pecuniary penalties totalling $10,875,000.

5 The contraventions in the LS/PDF Proceeding fall into two broad categories. The first involves contraventions of various obligations owed to customers whose health needs require the use of certain equipment that relies on the use of electricity or gas ('life support customers'). Energy retailers like Origin (and distributors) are required to provide such customers with additional support in cases of maintenance and planned or unplanned power service interruptions. The Acts require retailers within one business day after being advised by a relevant customer that a 'life support resident' resides or is intending to reside at the relevant customer's premises to record the 'life support customer details' in a life support register and to provide distributors with that information. In respect of four customers, an Origin agent mistakenly failed to correctly register the customers' accounts as requiring life support equipment. In the case of one further customer, an error in the SAP operating system ('SAP') unexpectedly prevented the customer's life support registration from being completed (together the 'failure to register contraventions'). The failure to register contraventions lasted seven days in the case of one customer, nine days in the case of the second customer, 193 days for the third customer, 86 days for the fourth customer and up to 177 days for the fifth customer.

6 In the case of a further five customers, Origin agents mistakenly failed to update the relevant customer's life support account status in the Origin system from 'registered – no medical confirmation' to 'registered – medical confirmation' upon receipt from the customer of a completed medical confirmation form ('MCF') (the 'failure to update contraventions').

7 Relatedly, Origin is required to report breaches of such obligations within two business days after identification and contravened those obligations by late reporting (the 'late reporting contraventions'). The failure to register, failure to update and failure to report contraventions in a timely manner are referred to collectively as the LS contraventions. The LS contraventions represent the first of the two broad

categories of contraventions the subject of the LS/PDF Proceeding.

8 The second group of contraventions involves Origin's breaches of certain provisions of the ERCOP regarding the provision of particular information to customers who were the subject of payment difficulty framework ('PDF') arrangements. Origin was required to contact those customers when the customers had failed to make a payment of their arrears, so as to discuss the variation of their existing payment plans, and to provide them with certain prescribed information (the 'PDF provision of information contraventions').

9 As is the case with the life support late reporting contraventions, Origin also was late in reporting breaches related to those obligations under the ERCOP. The late reporting contraventions are a subset of the PDF provision of information contraventions.

10 The pecuniary penalty sought by the Commission in the LS/PDF Proceeding is $10,875,000 (made up of $1,725,000 in respect of the LS contraventions and $9,150,000 in respect of the PDF provision of information contraventions). The penalty for the LS contraventions is made up of penalties of $90,000 for each of the failure to register contraventions, $240,000 for each of the failure to update contraventions and $75,000 for each of the late reporting contraventions.

11 Origin does not dispute that the contraventions occurred. It submits that the appropriate penalty in respect of the LS/PDF Proceeding is $3,500,000 (made up of $850,000 in respect of the LS contraventions and $2,650,000 in respect of the PDF provision of information contraventions). Origin agrees with $90,000 being appropriate for each of the failure to register contraventions and $75,000 for each of the late reporting contraventions, but argues that the penalty for each of the failure to update contraventions should be $60,000, rather than $240,000.

The BD Proceeding

12 On 1 February 2024, the Commission commenced proceeding S ECI 2024 00397 (the 'BD Proceeding') in which it sought like relief against Origin including pecuniary

penalties totalling $16,000,000. The contraventions the subject of the proceeding comprise one disconnection of a customer and a series of billing related contraventions.

13 In August 2022, Origin Electricity de-energised one customer's premises for approximately 26 hours. The disconnection arose following fraudulent activity on the customer's account by an unknown person which an Origin agent failed to properly identify.

14 The balance of the contraventions are all billing related. In the period from 26 April 2022 to 8 August 2022, Origin Electricity failed to advise 40 customers that they had been overcharged by an amount equal to or above the overcharge threshold of $50 within 10 business days after Origin became aware of the overcharging. Origin Gas engaged in contravening conduct of the same nature in relation to 38 customers in the period from 25 May 2022 to 8 August 2022 (the 'overcharging notification contraventions').

15 The ERC and later the ERCOP provide that where a small customer has been undercharged, retailers can only recover the amount undercharged for a limited period before the date the customer is notified of the undercharge (initially nine and then later four months). The back billing of undercharged amounts not limited to the four months before notification affected approximately 207 customers by Origin Electricity and 39 customers by Origin Gas over a five-month period in February to August 2022 (the 'undercharging contraventions').

16 Retailers are also required to carry out a 'deemed best offer check' for small customers and identify the relevant 'deemed best offer' for that customer. Between 3 March 2022 and 21 October 2022, Origin failed to have regard to a special offer made to a designated group of buyers (the 'buying group offer'), which was priced at 1% below an offer available to non-buying group members. When assessing the best offer, Origin failed to take into account the buying group offer and as a result erroneously advised 395,525 customers of Origin Electricity and 260,414 customers of Origin Gas

over a period of approximately eight months between March and October 2022 of a best offer that did not reflect the buying group offer, and as such was not the then best offer available (the 'best offer contraventions').

17 Retailers are also required to provide customers with the relevant customer's deemed best offer at least once every three months in the case of electricity customers, or at least every four months in the case of gas customers. The failure to provide a deemed best offer message to customers within the specified timeframes affected 1,103 customers of Origin Electricity and 466 customers of Origin Gas over a six-month period from March to September 2022 (the 'best offer frequency contraventions').

18 The ERC and the ERCOP oblige retailers to provide a pay-by date for a bill that is no earlier than 13 business days from the bill issue date. This obligation was not met by Origin in certain circumstances such that customers were sent bills with a pay-by date less than the required timeframe. These contraventions affected 17 Origin Electricity customers and 16 Origin Gas customers over a period of six months between March and September 2022 (the 'pay-by date contraventions').

19 Pursuant to the ERCOP, if certain benefit changes or price changes or fee and tariff changes are to take effect, retailers are obliged to provide customers with the relevant information using the customer's preferred method of communication. Between 18 June 2022 and 17 July 2022, Origin Electricity failed to provide 3,636 customers with information regarding a bill change alert using their nominated method of communication. Similarly, Origin Gas failed to deliver a feed-in tariff change alert to 267 customers using the customer's preferred method of communication during a one-month period between June and July 2022. Customers received the required information by email rather than by post or by post rather than by email (the 'preferred method of communication contraventions').

20 As noted above, the total penalty sought by the Commission in the BD Proceeding is $16,000,000. However, Origin submits that the appropriate penalty is $7,250,000. As is the case with the LS/PDF Proceeding, the parties' contentions as to the appropriate

penalty is based on the penalty that each submits is appropriate for the particular contravention. The parties' positions are summarised in the table below:

Contravention	**Commission**	**Origin**
Disconnection	$75,000	$75,000
Overcharging notification	$1,500,000	$500,000
Undercharging	$1,912,500	$700,000
Best Offer (frequency)	$1,650,000	$550,000
Best Offer (incorrect message)	$10,125,000	$5,050,000
Pay-by date	$375,000	$125,000
Preferred method of communication	$750,000	$250,000
TOTAL	**$16,387,500**	**$7,250,000**

The trial – evidence and areas of agreement

21 Origin cooperated fully with the Commission and acknowledged its liability at the earliest stage in respect of the allegations made in both proceedings.

22 Origin admitted the contravening conduct in its defence and has agreed for the most part to the orders sought by the Commission in both proceedings.

23 The parties are at odds in two areas only; first, the size of the pecuniary penalty and, secondly, whether the Court should make declarations of contravention for breaches of the ERC by Origin, where the statutory regime did not provide for the obtaining of contravention orders with respect to such breaches.

24 The Commission alleges breaches of the ERC by Origin prior to 28 February 2022 for similar conduct as that the subject of the contravention orders in both proceedings. Since the breaches of the ERC prior to 28 February 2022 do not give rise to the making of contravention orders, no question of pecuniary penalty arises. The relief sought by the Commission is limited to declaratory relief. Although Origin admits to the conduct the subject of the proposed declarations, it does not accept that it is appropriate for declarations to be made. Origin submits that the making of such declarations would be discordant with the then applicable legislative regime. There is no contest as to the form of the declarations, however, in the event that they are made.

25 The evidence in the LS/PDF Proceeding comprised:

(a) Amended Statement of Agreed Facts and Admissions ('LS/PDF SAFA');

(b) Affidavit of Caroline Leigh Morgan, Origin's Regional Operations Manager, affirmed 1 November 2024 ('Morgan Affidavit');

Ms Morgan has oversight of all Victorian and South Australian customers including oversight of Origin's management of life support requirements.

(c) Affidavit of Matthew Foster, Origin's Head of Customer Enablement, Origin Zero, affirmed 1 November 2024 ('Foster Affidavit');

Mr Foster was, at the relevant times, Origin's Credit Initiatives and Delivery Manager in the Retail Credit and Collections team. He led Origin's investigation into the circumstances which resulted in the PDF provision of information contraventions.

(d) Affidavit of Paul Magee, Group Manager - Technology of Origin Retail at Origin, sworn 1 November 2024 ('Magee Affidavit');

Mr Magee is responsible for Origin's retail technology platforms, technical design and decisions and software delivery.

(e) Affidavit of Jonathan David Briskin, Executive General Manager of Origin Retail at Origin, affirmed 1 November 2024 ('Briskin Affidavit').

Mr Briskin is responsible for Origin's residential and small to medium enterprise electricity, gas and broadband customers and ultimately for managing its compliance with regulatory obligations.

The deponents were not cross-examined.

26 The evidence in the BD Proceeding comprised:

(a) Amended Statement of Agreed Facts and Admissions ('Billing SAFA');

(b) Affidavit of Duncan Clive Permezel, Origin's General Manager, Consumer and Property, affirmed 1 November 2024 ('Permezel Affidavit');

Mr Permezel is responsible for Origin's consumer product portfolios including aspects of its best offer calculations and messaging.

(c) The Morgan Affidavit, the Magee Affidavit and the Briskin Affidavit.

The deponents were not cross-examined.

27 The proceedings were heard together, and as such, these reasons address both the LS/PDF Proceeding and the BD Proceeding.

LS/PDF Proceeding

Relevant matters – LS contraventions

Failure to register

28 On 12 May 2022, each of Origin Electricity and Origin Gas was advised by customer AD that a life support resident resided, or was intending to reside, at the customer's premises in Toorak and Benalla, Victoria. On that day, Origin's agent flagged AD as having life support requirements at the Toorak premises in its system, but mistakenly did not flag the points of delivery at the Benalla premises, as a result of which the system did not register AD as a life support customer at the Benalla premises. The customer was registered as a life support customer at the Toorak location, but not Benalla. On the same day, Origin's agent generated a 'work request' to give a life support registration pack to AD in respect of the customer's electricity account and gas account at the Benalla premises. On 19 May 2022, the Origin agent responding to that work request, identified the mistake and properly registered AD as a life support customer in respect of their electricity account and gas account at the Benalla premises.

29 On 2 November 2022, Origin Electricity was advised by customer JB that a life support resident resided at the customer's premises in Taylors Hill, Victoria. The Origin agent mistakenly did not flag JB as a life support customer or complete the registration in its

system.

30 On 11 November 2022, Origin Electricity was advised by customer JB that the life support paperwork had not been received in the mail. As a result of that call, the Origin agent identified the mistake and registered JB as a life support customer in respect of their electricity account.

31 On 9 June 2022, Origin Electricity was advised by customer JBA that a life support resident resided at JBA's premises in Kew, Victoria. Origin's agent mistakenly registered JBA as a life support customer in respect of the customer's gas account instead of the electricity account. Life support paperwork in respect of the customer's gas account was sent by Origin to the customer on 9 June 2022 and resent on 14 September 2022.

32 On 19 December 2022, Origin Electricity became aware of the mistake and registered JBA as a life support customer in respect of their electricity account. On that same day, Origin gave JBA the life support paperwork in respect of the customer's electricity account.

33 On 12 October 2022, Origin Electricity was advised by customer RL that a life support resident resided, or was intending to reside, at the customer's premises in Kew, Victoria. The Origin agent mistakenly registered RL as a life support customer in respect of the customer's gas account instead of their electricity account. As a result of the error, the life support paperwork sent to the customer by Origin related to the customer's gas account and not the electricity account.

34 On 6 January 2023, Origin received a completed MCF from RL for her electricity account. After receiving the completed MCF, Origin's agent became aware of the mistake and registered RL as a life support customer in respect of her electricity account.

35 On 27 June 2022, Origin Electricity was advised by customer PM that a life support resident resided, or was intending to reside, at PM's premises in Cobram, Victoria.

Origin's agent flagged PM as a life support customer, but SAP unexpectedly failed to populate all necessary life support registration fields causing the life support registration not to be completed. This system error resulted from the fact that the agent had flagged PM as a life support customer before PM had been connected to a supply point.

36 On 21 July 2022, PM was connected to and commenced receiving supply from the supply point.

37 On 21 December 2022, when migrating the customer to Origin's new software platform known as the Kraken system ('Kraken'), Origin became aware that PM's registration as a life support customer was not complete and completed the registration.

38 At all relevant times, each of the customers identified above remained protected from retailer-initiated disconnection.

39 However, for each of these five customers, Origin Electricity contravened the following obligations consequent upon being advised that a life support resident resided, or was intending to reside, at a customer's premises:

(a) Pursuant to s 40SG(1) of the EI Act, to register that customer 's details, within one business day of receiving life support advice;

(b) Pursuant to s 40SG(3) of the EI Act, to give the relevant customer the information specified by cl 163(1)(a) of the ERCOP (which relevantly is contained in Origin's welcome pack for life support customers and includes a MCF), within five business days of receiving life support advice; and

(c) Pursuant to s 40SG(4) of the EI Act, to notify the relevant distributor, within one business day of receiving life support advice.

In the case of AD who should have been registered for gas as well as electricity, Origin contravened equivalent provisions under s 48DI of the GI Act.

Failure to update

40 On 6 July 2022, Origin Electricity registered customer PG as a life support customer in respect of his electricity account at premises at Heywood, Victoria.

41 On 29 July 2022, Origin Electricity received a completed MCF signed on 20 July 2022 from PG for his electricity account. The agent who processed the form mistakenly did not update PG's life support account status in the system from 'registered – no medical confirmation' to 'registered – medical confirmation'.

42 On 1 September 2022, when responding to correspondence from PG, another Origin agent became aware of the mistake and updated PG's life support account status from 'registered – no medical conformation' to 'registered – medical confirmation'. Also on that day, Origin provided the customer's updated details (being the MCF) to the relevant electricity distributor. At all relevant times, PG was registered in Origin's system as a life support customer and received all the attendant protections for life support customers.

43 On 7 January 2022, Origin Electricity registered customer VH as a life support customer in respect of VH's electricity and gas accounts at her premises in Mount Waverley, Victoria.

44 On 15 September 2022, Origin received a MCF from VH for her electricity account. An agent advised VH that Origin had received the MCF, but that the account holder details were incorrect and as such the account could not be registered for life support.

45 On 16 September 2022, Origin received a completed MCF for the electricity account from VH. The Origin agent assigned to process the MCF could not locate the MCF and mistakenly believed the task had been assigned to her in error. As a result, the agent did not update the life support account status in the system from 'registered – no medical confirmation' to 'registered – medical confirmation'.

46 On 21 September 2022, another Origin agent performing daily reporting identified the mistake in relation to VH's life support account status and updated the customer's life

support account status from 'registered – no medical confirmation' to 'registered – medical confirmation.' Origin notified the customer's electricity distributor accordingly of the update. At all relevant times, VH was in fact registered as a life support customer and received all the attendant protections for life support customers.

47 On 26 July 2022, Origin registered customer FT as a life support customer in respect of his electricity account at premises in Herne Hill, Victoria. On or around 15 August 2022, Origin received a completed MCF for both FT's gas and electricity accounts. The MCFs were completed by FT and his doctor. Although FT had not selected the relevant field on each form, his respective electricity and gas account numbers were included.

48 On 16 August 2022, the Origin agent who processed the MCFs updated the life support account status for FT's gas account, but mistakenly failed to do so for the customer's electricity account.

49 As a result of the mistake, the agent did not update FT's status for his electricity account from 'registered – no medical confirmation' to 'registered – medical confirmation'.

50 On 4 October 2022, when performing medical confirmation follow-up processes, another Origin agent became aware of the mistake and updated the life support account status in the system for FT's electricity account from 'registered – no medical confirmation' to 'registered – medical confirmation.' Origin Electricity notified the customer's electricity distributor accordingly.

51 On 17 August 2022, Origin registered customer AM as a life support customer in respect of AM's electricity and gas accounts at premises in Carlton North, Victoria.

52 On 5 October 2022, Origin received a completed MCF for AM's electricity and gas accounts. The MCFs were completed by AM and his doctor and emailed to Origin. The MCF for the electricity account had 'gas' selected by AM as the required field, and the MCF for the gas account had 'electricity' selected as the required field for the life

support equipment.

53 On 6 October 2022, an Origin agent correctly processed the MCF for the electricity account and updated AM's life support account status, but mistakenly marked the gas MCF as a duplicate as the customer had selected 'electricity' on the MCF. As a result of the mistake, Origin did not update AM's life support account status for his gas account from 'registered – no medical confirmation' to 'registered – medical confirmation'.

54 On 3 November 2022, an Origin agent identified the mistake and in the course of undertaking quality assurance activity to review discrepancies between registered electricity and gas accounts, the agent updated the life support account status for AM's gas account from 'registered – no medical confirmation' to 'registered – medical confirmation'.

55 On 1 September 2022, Origin Electricity registered customer RK as a life support customer in respect of her electricity account.

56 On 9 September 2022, Origin Electricity received a completed MCF for RK's electricity account completed by the customer and her doctor. The MCF did not include an account number, but 'electricity' was selected as the required field.

57 On 10 September 2022, an Origin agent who processed the MCF erroneously updated the customer's life support account status for the gas account instead of her electricity account and did not update the life support account status for RK's electricity account.

58 On 4 November 2022, an agent of Origin Electricity identified the mistake in the course of undertaking quality assurance activity as part of Origin's detective controls and updated RK's life support account status from 'registered – no medical confirmation' to 'registered – medical confirmation'. On the same day, Origin notified RK's electricity distributor of the update to the customer's life support status from her MCF for her electricity account.

59 At all relevant times, RK was registered as a life support customer and received all the attendant protections for life support customers.

Proposed penalties – LS contraventions

60 In respect of the failure to register contraventions involving AD, JBA, PM, JB and RL, there is substantial agreement between the Commission and Origin as to the appropriate penalty. In the case of JBA, PM, JB and RL, the Commission proposes a pecuniary penalty of $90,000 in each case with which Origin agrees. In the case of AD, the failure to register affected both the customer's electricity and gas accounts and additionally involved a breach of the reporting requirements. The Commission proposes pecuniary penalties of $105,000 with respect to Origin Electricity and $60,000 with respect to Origin Gas (a total of $165,000). Origin proposes penalties of $95,000 for each of Origin Gas and Origin Electricity (a total of $190,000). In effect, Origin proposes a total penalty for the contravention involving AD which is $25,000 higher than that sought by the Commission.

61 In the case of the failure to update contraventions, Origin proposes a penalty in each case of $60,000.[2] The Commission, however, proposes penalties of $240,000 in each case.

62 In the result, the total penalties proposed by the Commission with respect to the LS contraventions is $1,725,000 split as between $1,425,000 for Origin Electricity and $300,000 for Origin Gas. Origin submits that the total penalty should be $850,000 split as between $695,000 payable by Origin Electricity and $155,000 payable by Origin Gas. Putting aside the position of customer AD, the critical difference between the two parties is whether the failure to update contraventions should attract a penalty of $60,000 as Origin contends or $240,000 as the Commission contends.

Relevant matters – PDF provision of information contraventions

63 From 1 January 2019 to 28 February 2022, each of Origin Electricity and Origin Gas

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[2] The updated connection with customer AM related to Origin Gas but otherwise Origin proposes that the penalties should be imposed on Origin Electricity.

offered a program known as the 'Power On Program' to customers in Victoria experiencing payment difficulties due to hardship with a range of assistance so that they could reduce their arrears and better manage their energy bills going forward.

64 The Power On Program was available to customers who were experiencing payment difficulties due to hardship such as death in the family, household illness, family violence or unemployment.

65 The assistance available under the Power On Program included:

(a) ensuring the customer was on a suitable energy plan and receiving appropriate discounts and eligible concession benefits;

(b) setting up a suitable payment arrangement (Power On payment plans); and

(c) providing details of other assistance including financial counselling, government assistance schemes and energy efficiency advice where relevant.

The Power On Program was intended by Origin to be consistent with and build on the statutory entitlements for tailored assistance under Division 3 of Part 3 of the ERC.

66 Relevantly, from 1 January 2019 to 20 March 2020, pursuant to cl 80(2) of the ERC, a 'residential customer' of a retailer who had not paid a bill by its 'pay-by date' and who had arrears of more than $55 (inclusive of GST) was required to be contacted by the retailer, within 21 'business days' after that 'pay-by date,' and given information about the assistance to which the 'customer' was entitled under Division 3 of Part 3 of the ERC and how to access it.

67 Relevantly, from 1 January 2019 to 28 February 2022, for a 'residential customer' whose repayment of arrears was not on hold, pursuant to cl 81(6) of the ERC, if the 'residential customer' receiving assistance under Division 3 of Part 3 of the ERC failed to make a payment by the date on which it was payable, the relevant retailer was required to contact the 'customer' to discuss their putting forward a revised proposal under cl 81.

68 Relevantly, from 1 January 2019 to 20 March 2020, for a 'residential customer' whose repayment of arrears was on hold, pursuant to cl 82(2) of the ERC, if the 'residential customer' failed to make a payment towards the cost of their on-going energy use by the date on which it was payable, retailers were required to contact the 'customer' to discuss varying the amount payable, or the frequency of those payments, or both, to give the 'customer' more time to lower their energy costs.

69 From 1 January 2019 to 8 November 2021, pursuant to cl 83(1) of the ERC, retailers were required to continue to provide assistance under Division 3 of Part 3 of the ERC to a 'residential customer' unless:

(a) after the retailer had complied with cl 81(6), the 'customer' had refused or failed to take reasonable action towards paying for their ongoing 'energy' use and repaying their arrears; or

(b) after the retailer had complied with cl 82(2), the 'customer' had refused or failed to take reasonable action towards making payments towards the cost of their ongoing 'energy' use; or

(c) the 'customer' was not facing payment difficulties.

70 From 1 January 2019 to 20 March 2020, pursuant to cl 89(1)(b) of the ERC, retailers were required at all times when relevant to do so, including on being contacted by a residential customer, to give the customer in a timely manner clear and unambiguous information about the assistance available under Part 3 of the ERC.

71 Relevantly, from 1 January 2019 to 25 January 2022, pursuant to cl 111A(1)(a) of the ERC, retailers were only permitted to arrange 'de-energisation' at premises of a 'residential customer' for not paying a bill if:

(a) the retailer had complied with all of its obligations to the customer under cl 89; and

(b) the retailer had, after issuing a disconnection warning notice, used its best

endeavours to contact the customer in relation to the matter and provide clear and unambiguous information about the assistance available under Part 3 of the ERC.

72 From 3 March 2022 to 5 May 2023, for a 'residential customer' whose repayment of arrears was not on hold, pursuant to s 130(6) of the ERCOP, if the 'residential customer' receiving assistance under Division 2 of Part 6 of the ERCOP failed to make a payment by the date on which it was payable, retailers were required to contact the 'customer' to discuss them putting forward a revised proposal under cl 130.

73 Relevantly, from 3 March 2022 to 5 May 2023, for a 'residential customer' whose repayment of arrears was on hold, pursuant to cl 131(2) of the ERCOP, if the 'residential customer' receiving assistance under Division 2 of Part 6 of the ERCOP failed to make a payment by the date on which it was payable, retailers were each required to contact the 'customer' to discuss varying the amount payable, or the frequency of those payments, or both, to give the customers more time to lower their energy costs.

74 During the period from 1 January 2019 to 28 February 2023, Origin used enterprise application software provided by SAP which was designed to send relevant correspondence to customers who missed a payment plan instalment in accordance with Origin's PDF.

75 In certain circumstances, Origin placed protected locks on customers' accounts in SAP, for the purpose of protecting the customers from collections activity in the event of the customer failing to pay amounts owing to Origin and, possible subsequent disconnection for non-payment. An unintended consequence of these locks (known as Dunning locks) was that they prevented SAP from sending required correspondence to the customer upon the customer missing a payment plan instalment. The required communication was prior to and separate to communications in any later collections process upon removal of the lock from the account.

76 Certain account activities in SAP also had the unintended consequence of preventing SAP from sending relevant correspondence upon the customer missing a payment plan instalment. Origin first identified these system errors in March 2023. It began investigations which continued for six months until September 2023. Its unwanted effect was reduced and eventually removed by the migration of customers to the alternative enterprise application software, 'Kraken', and the decommissioning of SAP in May 2023.

77 The PDF provision of information contraventions affected a total of 6,502 customers during the period for which civil penalties may be imposed.

78 Ultimately, it is Origin's case that the PDF provision of information contraventions, where the required correspondence was not sent to customers on payment plans, were caused by SAP errors which arose when other activities on the customer's account interfered with the triggering of the relevant correspondence. The activities were related and two-fold. The first involved Origin's use of protective Dunning locks on customers' accounts, to protect the customer from collections actions for unpaid bills (including associated communications) and possible disconnection for non-payment. The second involved various other SAP account activities, including SAP not recognising a missed payment when a customer's direct debit failed, until further unsuccessful attempts at processing the debit had been made, and when a new invoice was generated between the customer missing a payment and the issue of the required correspondence, leading to the system errors.

Proposed penalties – PDF provision of information contraventions

79 The Commission seeks total penalties arising with respect to the PDF provision of information contraventions of $9,150,000 apportioned as between Origin Electricity and Origin Gas as to $5,075,000 and $4,075,000. The breakup of penalties sought by the Commission is shown in the below table:

PDF provision of information contraventions	Origin Electricity	Origin Gas	Total

Clause 81(6) ERC / Clause 130(6) ERCOP	$3,000,000	$2,000,000	**$5,000,000**
Clause 82(2) ERC / Clause 131(2) ERCOP	$2,000,000	$2,000,000	**$4,000,000**
Failure to report breach	$75,000	$75,000	**$150,000**
Total for PDF provision of information contraventions	**$5,075,000**	**$4,075,000**	**$9,150,000**

80 Origin submits that the total penalties for the PDF provision of information contraventions should be $2,650,000 apportioned as between Origin Electricity as to $1,475,000 and Origin Gas as to $1,175,000. The breakup of penalties is shown in the below table:

PDF provision of information contraventions	Origin Electricity	Origin Gas	Total
Clause 81(6) ERC / Clause 130(6) ERCOP	$1,173,000	$878,000	**$2,051,000**
Clause 82(2) ERC / Clause 131(2) ERCOP	$227,000	$222,000	**$449,000**
Failure to report breach	$75,000	$75,000	**$150,000**
PDF provision of information contraventions	**$1,475,000**	**$1,175,000**	**$2,650,000**

The BD Proceeding

81 As noted above, the BD Proceeding involved the disconnection related contravention and a variety of billing related contraventions, which included the overcharging notification contraventions, the undercharging contraventions, the best offer contraventions, the best offer frequency contraventions, the pay-by date contraventions and the preferred method of communication contraventions.

The disconnection related contravention

82 On 8 June 2022, an unknown person contacted Origin, impersonating a customer. Origin's agent failed to follow all aspects of Origin's validation processes, and in so failing, permitted the unknown person to add a new email address and mobile number to the account. The unknown person subsequently accessed the account to process an online 'move out' request and in response to that request, Origin arranged for the customer's electricity supply to be disconnected, which was effected on

18 August 2022. When Origin Electricity was notified the next day of the disconnection, it reconnected energy, removed the email address and mobile phone number that had been added to the account and set up a password on the account for added security. On 9 September 2022, Origin Electricity made a wrongful disconnection payment to the customer of $467.01.

83 Origin Electricity admits that on 18 August 2022, in respect of one customer that had not in fact requested that Origin arrange disconnection of their premises, it contravened:

(a) clause 191(1) of the ERCOP v 1 by failing, if a relevant customer requests the retailer to arrange the disconnection of the relevant customer's premises, to use its best endeavours to arrange for disconnection in accordance with the relevant customer's request; and

(b) section 40SE(1) of the EI Act by arranging for the supply of electricity at the relevant customer's premises to be disconnected not in accordance with Subdivision 3, relevantly s 40SL in Subdivision 3, by arranging for the supply of electricity at the customer's premises to be disconnected without the customer's agreement or notice from the customer, in accordance with the supply and sale contract with it, that the customer wished to end the contract.

84 The contraventions took place because Origin acted on a fraudulent 'move out' request initiated by an unknown person who had gained access to a customer's account and de-energised their premises.

85 The Commission seeks a pecuniary penalty of $75,000 in respect of the disconnection related contravention. Origin does not dispute this penalty.

The overcharging notification contraventions

86 Throughout the period from 1 December 2021 to 21 October 2022, Origin utilised enterprise application software for the purpose of digitising and streamlining processes for the functions of:

(a) customer relationship management such as sales, marketing and campaign management, customer acquisition, customer attention and on-boarding;

(b) customer data management;

(c) billing and payment management;

(d) dunning and collection; and

(e) complaints and Ombudsman engagement.

87 Prior to 1 January 2022, Origin used the enterprise application software known as SAP to perform those functions.

88 Origin's standard practice, using SAP, was to bill customers based on estimated meter readings. Once the customer's meters were then read, and the bills adjusted, Origin was required to notify the customer of any overcharging within 10 business days after it became aware of the overcharging. The customer would be entitled to a credit against the next bill or, in some cases, could request a refund. In certain instances, Origin failed to notify the customers within the required 10-day period.

89 Between January 2022 and May 2023, Origin transferred its Victorian customers from SAP to Kraken ('migrated customers'). When a customer was transferred from SAP to Kraken, the preceding 12 months of their billing history was transferred from SAP to Kraken.

90 From January 2022, Origin had processes to address circumstances when it received updated meter data for migrated customers' accounts which related to the period prior to the transition to Origin's Kraken system which included:

(a) the creation of an amended bill for the migrated customers;

(b) directing amended bills for migrated customers to an 'amended bills' inbox to be actioned by Origin's agents; and

(c) manually processing any credits or debits for the migrated customers in an amended bill through Origin's Kraken system.

91 Due to human error by an Origin agent, the 'amended bills' inbox was not consistently monitored and the amended bills were not consistently actioned as they were received. This had the effect that certain customers were not contacted within the required 10 business days.

92 To address the risk of further similar issues arising, Origin instructed a specialist billing team to complete a daily review to check that amended bills were actioned within the required timeframe. Subsequently, from December 2023, Origin fully automated the process of issuing customer communications that accompany amended bills.

93 Origin Electricity admits that from 26 April 2022 to 8 August 2022, in respect of 40 small customers that had been overcharged by an amount equal to or above the overcharge threshold ($50), it contravened s 71(1) of the ERCOP v 1 by failing to inform those customers that they had been overcharged within 10 business days after it became aware of the overcharging.

94 Origin Gas admits that from 25 May 2022 to 8 August 2022, in respect of 38 small customers who had been overcharged by an amount equal to or above the overcharge threshold ($50) as a result of the error, it contravened s 71(1) of the ERCOP v 1 by failing to inform those customers that they had been overcharged within 10 business days after it became aware of the overcharging.

95 The contraventions arose due to Origin not sending amended bills to customers within the required 10 days of the updated meter read. The parties agree that the cause of the contraventions was not deliberate, but attributed to human error and Origin not consistently monitoring and actioning those amended bills.

96 Origin did have in place systems to prevent and detect human error in the application of those processes. Those systems identified the contraventions. However, Origin

accepts that the manual process it put in place was not sufficient to protect the human errors from occurring. The overcharging notification contraventions affected 40 customers of Origin Electricity over a period of approximately three months between April and August 2022, and 38 customers of Origin Gas over a period of approximately two and a half months between May and August 2022.

97 The Commission seeks pecuniary penalties totalling $1.5 million payable by Origin Electricity and Origin Gas in equal shares in respect of the overcharging notification contraventions.

98 Origin submits that the appropriate penalty for the overcharging notification contraventions is $500,000 in total, payable in equal shares by Origin Electricity and Origin Gas.

The undercharging contraventions

99 Origin's practice of billing customers by reference to estimated usage based on past billing, could also result in the customer being undercharged.

100 Undercharging could occur, for example, if a customer had previously been billed based on an estimated meter reading, but their meter data is subsequently updated, resulting in an amended bill that is higher than the original bill. Whilst Origin is permitted to recover undercharged amounts from those customers, it is required to limit the amount it proposes to recover to the amount undercharged in the four months before the date on which Origin advised the customer of the undercharging.[3] When recovering undercharged amounts in respect of some customers, Origin's systems did not limit the amount sought to be recovered to the amount undercharged in the previous four months as required by the relevant provisions of the ERC and the ERCOP v 1.

101 By reason of a system error with SAP, some bills were issued without review and adjustment to limit the back-billing of customers to the period prescribed by the ERC

3 Clause 30(2)(a) of the ERC v 18 to21 and cl 70(2)(a) of the ERCOP v 1.

or the ERCOP, whichever was applicable. The system error had the effect that Origin billed certain customers of undercharged amounts outside of the prescribed period. Upon identifying the issue, a project team was established to work with Origin's compliance team to investigate the issue. Origin fixed the system issue within four days of its identification. Origin engaged a team of 10 full-time agents who worked for seven weeks to identify and assess remediation for affected accounts.

102 Origin credited or refunded relevant amounts, and in some instances paid further compensation for affected accounts to a total of $626,000. Origin also updated the SAP screening logic to ensure the error did not reoccur. SAP has since been decommissioned.

103 Origin Electricity admits that from 2 February 2022 to 28 February 2022, in respect of at least 55 small customers who had been undercharged and from whom it proposed to recover the amount undercharged, it contravened cl 30(2)(a) of the ERC v 18 to 21, by not limiting the amount to be recovered to the amount that had been undercharged by it to the four months before the date on which the customers were notified of the undercharging, and in circumstances where the amount undercharged was not as a result of the customers' fault or unlawful act or omission. Origin Electricity otherwise admits that from 3 March 2022 to 2 August 2022, in respect of approximately 152 small customers who had been undercharged and from whom it proposed to recover the amount undercharged, it contravened cl 70(2)(a) of the ERCOP v 1, by not limiting the amount to be recovered to the amount that had been undercharged by it to the four months before the date on which the customers were notified of the undercharging, and in circumstances where the amount undercharged was not as a result of the customers' fault or unlawful act or omission.

104 Similarly, Origin Gas admits that from 2 February 2022 to 28 February 2022, in respect of at least 10 small customers who had been undercharged and from whom it proposed to recover the amount undercharged, it contravened cl 30(2)(a) of the ERC v 18 to 21, by not limiting the amount to be recovered to the amount that had been

undercharged by it to the four months before the date on which the customers were notified of the undercharging, and in circumstances where the amount undercharged was not as a result of the customers' fault or unlawful act or omission. Origin Gas additionally admits that from 3 March 2022 to 2 August 2022, in respect of approximately 29 small customers who had been undercharged and from whom it proposed to recover the amount undercharged, it contravened cl 70(2)(a) of the ERCOP v 1, by not limiting the amount to be recovered to the amount that had been undercharged by it to the four months before the date on which the customers were notified of the undercharging, and in circumstances where the amount undercharged was not as a result of the customers' fault or unlawful act or omission.

105 The undercharging contraventions affected approximately 207 customers of Origin Electricity and 39 customers of Origin Gas over a five-month period from February to August 2022.

106 Origin sought to recover amounts from customers outside the amounts it was permitted to recover under the regulatory scheme. The conduct was caused by a coding error in SAP that meant the system did not screen and detect some amended bills that needed adjustment to limit the recovery of undercharges to the required four-month period. The Commission submits that the system arose in SAP from a lack of proper investment by Origin in its processes or systems, or appropriate oversight of those systems.

107 The Commission seeks pecuniary penalties totalling $1,912,500 for the undercharging contraventions, payable by Origin Electricity as to $1,500,000 and Origin Gas as to $412,500. Origin submits that the appropriate penalty is $700,000, payable by Origin Electricity as to $550,000 and Origin Gas as to $150,000.

The best offer contraventions

108 Origin has obligations pursuant to Division 5 of Part 5 of the ERCOP to calculate, in accordance with a specified formula, 'deemed best offer checks', and to give customers information about the 'deemed best offer' on their bills at specified intervals and on

bill change alerts. The 'deemed best offer' includes Origin's lowest price generally available for that customer based on the customer's energy usage history. The formula required to be used to calculate a customer's deemed best offer takes into account the customer's annual usage history, the tariff, charges and discount rates of the customer's current plan and the deemed best offer, and specified discounts and rebates, concessions and relief schemes. In accordance with regulatory obligations, retailers are required to give customers deemed best offer messages at specified intervals (generally three months for electricity and four months for gas).

The best offer contraventions - incorrect messages

109 From 1 March 2022 to 21 October 2022, Origin had two generally available plans that were offered to consumers who were members of an assigned third party buying group. As mentioned earlier, the prices for the buying group offer for residential customers in Victoria were 1% below the lowest price generally available on a plan offered directly by Origin.

110 From 1 March 2022, the rules of the regulatory regime changed and retailers were required to include, for the first time in the best offer checks, offers which required customers to sign up to a third party membership group unless that membership or affiliation was paid.

111 In anticipation of that change, in late January 2022, Origin decided to set the buying group offer at the same price as the lowest priced generally available plan offered directly by Origin. The effect of the repricing would be such that the buying group offer was not the lowest price offer.

112 As a result of a human error, the price change was not implemented in Origin's system. This meant that by not including a buying group offer in its best offer calculations, Origin inadvertently sent customers incorrect information in their deemed best offer messages in contravention of cl 108(1) of the ERCOP v 1 and 2.

113 Origin Electricity admits that as a result of this error, from 3 March 2022 to 21 October

2022, in relation to approximately 395,525 small customers, it contravened cl 108(1) of the ERCOP v 1 and 2 by failing to identify the relevant 'deemed best offer' for those customers when required to carry out a 'deemed best offer check' for those customers in accordance with cl 108(2)(b) of the ERCOP v 1 and 2.

114 Origin Gas admits that as a result of the error, from 3 March 2022 to 21 October 2022, in relation to approximately 260,414 small customers, it contravened cl 108(1) of the ERCOP v 1 by failing to identify the relevant 'deemed best offer' for those customers when required to carry out a 'deemed best offer check' for those customers in accordance with cl 108(2)(b) of the ERCOP v 1 and 2.

115 The best offer contraventions affected a large number of customers (395,525 customers of Origin Electricity and 260,414 customers of Origin Gas) over a period of approximately eight months between March and October 2022.

116 Customers affected by the error received bills advising them that they were not currently on the deemed best offer and providing them with information about how to switch plans. The customers were advised that the best generally available plan was a plan which was priced 1% higher than the buying group plans.

117 Origin did have in place systems, processes and oversight mechanisms for best offer testing. However, although Origin conducted post-verification testing on best offer messages in accordance with its usual processes, those tests did not identify the error. This occurred because Origin assumed the repricing decision had been effected and did not expect to see the buying group offers being identified for customers as the best available plan offered by Origin in the best offer calculations.

118 The Commission proposes a total penalty with respect to the best offer contraventions of $10,125,000, payable as to $5,625,000 by Origin Electricity and $4,500,000 by Origin Gas.

119 Origin submits that the appropriate penalty is $5,050,000, payable by Origin Electricity as to $2,850,000 and Origin Gas as to $2,200,000.

The best offer contraventions – frequency

120 From July 2019 to 7 September 2022, Origin employed both automated and manual systems to conduct 'deemed best offer checks' and insert a 'deemed best offer message' on bills for customers.

121 It had an automatic system in place designed to detect potential inconsistencies in bills and refer those bills to a quality assurance process. An issue in SAP caused the best offer messages to not be printed on certain invoices.

122 Origin's quality assurance process automatically identified bills that could be issued without further review. Where those bills were released individually, the system updated the date the bill was issued ('bill issue date') and the date the bill was posted ('posting date') without the system issue occurring.

123 However, when the bills were released in bulk, the system updated the bill issue date but did not update the posting date such that if the quality assurance process took more than one day, the bill issue date was later than the posting date and the system incorrectly identified a bill as a re-issued or re-printed bill and did not perform a best offer check. In those cases, the affected customers did not receive the required 'deemed best offer message' on their bill with the frequency prescribed by the ERC or the ERCOP.

124 Once Origin identified the issue with SAP, it instructed its agents that all bills that could be issued without further review must be issued individually rather than released in bulk to prevent the system error occurring.

125 Origin Electricity admits that in respect of approximately 1,103 small customers as a result of the system error, from 3 March 2022 to 7 September 2022, it contravened cl 110(1) of the ERCOP v 1 by failing to provide a 'deemed best offer message' on a bill to those customers at least once every three months, or if the customer had agreed to a billing cycle with a regular recurrent period that differed from the usual recurrent period and that period was three months or longer, once in each billing cycle.

126 Origin Gas admits that in respect of approximately 466 small customers as a result of the system error in SAP described above, from 3 March 2022 to 7 September 2022, it contravened cl 110(1) of the ERCOP v 1 by failing to provide a 'deemed best offer message' on a bill to those customers at least once every four months. The effect of the system error was that the obligation imposed on Origin to give customers deemed best offer messages at specified intervals (three months for electricity and four months for gas) did not occur. Origin's systems did not send some customers the deemed best offer message at the required intervals as required by cl 110(1) of the ERCOP v 1.

127 The Commission submits that a total penalty appropriate for Origin's best offer frequency contraventions is $1,650,000, payable by Origin Electricity as to $900,000 and by Origin Gas as to $750,000.

128 Origin submits that the appropriate penalty for the best offer frequency contraventions is $550,000, payable by Origin Electricity as to $300,000 and by Origin Gas as to $250,000.

The pay-by date contraventions

129 The SAP error that caused the best offer frequency contraventions also caused bills to be released with an issue date later than the posting date.

130 In the result, Origin sent some customers on standard retail contracts bills with a pay-by date less than 13 business days from the bill issue date. In the majority of cases, the pay-by date was nevertheless at least six days from the bill issue date.

131 Origin Electricity admits that, from 3 March 2022 to 7 September 2022, in respect of 17 customers, it contravened cl 65(1) of the ERCOP v 1 by providing a 'pay-by date' for a bill that was earlier than 13 'business days' from the 'bill issue date'.

132 Origin Gas admits that from 3 March 2022 to 7 September 2022, in respect of 16 customers, it contravened cl 65(1) of the ERCOP v 1 by providing a 'pay-by date' for a bill that was earlier than 13 'business days' from the 'bill issue date'.

133 The pay-by date contraventions therefore affected a relatively small number of customers (17 Origin Electricity customers and 16 Origin Gas customers) over a period of six months between March and September 2022.

134 Although the contraventions involve a relatively small number of customers over a six-month period, the same conduct also occurred from as early as 22 August 2018, affecting 40 customers of Origin Electricity and 33 customers of Origin Gas.

135 The Commission seeks a penalty for the pay-by date contraventions of $375,000 apportioned as to $187,500 for Origin Electricity and $187,500 for Origin Gas. Origin submits that the appropriate penalty is $125,000, apportioned as to $62,500 for Origin Electricity and $62,500 for Origin Gas.

The preferred method of communication contraventions

136 From 18 June 2022 until 17 July 2022, cl 106(1) and (2) of the ERCOP v 1 obliged retailers, if a 'benefit change' or a 'price change' was to take effect, to provide 'small customers' who are party to their relevant 'customer retail contract' with a 'bill change alert' in writing using the 'small customer's preferred method of communication'.

137 On 19 June 2022 and 20 June 2022, cl 107(1) and (2) of the ERCOP v 1 obliged retailers, if a 'feed-in tariff change' was to take effect, to provide those same customers with a 'feed-in tariff alert' in writing using the small customer's preferred method of communication.

138 Bill change alerts and feed-in tariff change alerts informed the customer of the price or sub-tariffs subject to the customer's energy contract.

139 During the course of its transition from SAP to Kraken, the information technology logic applicable during the customer migration contained a flaw which resulted in some customers' preferred method of communication being incorrectly set in Kraken. As a result of the error, between 18 June 2022 and 17 July 2022, Origin Electricity sent 'bill change alerts' to the affected customers by means other than their preferred method of communication. For example, some customers may have received the

communications by post, when email was their preferred method of communication, or *vice versa*. As a result of the same error, on 19 June 2022 and 20 June 2022, Origin Electricity sent notices of a 'feed-in tariff change alert' to the affected customers by means other than their preferred method of communication.

140 Once the error was identified, Origin Electricity on or by 19 July 2022, updated the technology algorithm to prevent the error recurring and on or by 6 August 2022, updated affected customer accounts to set their communication preferences accordingly. In the case of those customers who were affected by the feed-in tariff change alert being notified by non-preferred means, Origin Electricity notified those same customers and re-issued the bill change alerts and tariff feed-in notices by their preferred method of communication and provided *ex gratia* credits to all affected customers who were disadvantaged by the difference between the old and new pricing prior to the re-issue of the bill change alerts and tariff feed-in notices. The practical effect of this was that any price increases did not commence for those customers until after Origin had notified them of the change via their preferred method of communication.

141 The preferred method of communication contraventions affected 3,636 customers of Origin Electricity who were sent bill change alerts by means other than their preferred method of communication. 267 customers of Origin Electricity were sent feed-in tariff change alerts by a means other than their preferred method of communication during the one-month period between June and July 2022. The Commission seeks a pecuniary penalty of $750,000 with respect to the preferred method of communication contraventions against Origin Electricity.

142 Origin submits that the appropriate penalty for the contraventions is $250,000.

The ESC Act – purposes and relief

Introduction

143 The ESC Act provides in s 1 that:

> The purpose of this Act is to enable the Essential Services Commission to perform the regulatory and advisory functions that are conferred on the Commission in a manner that provides incentives for dynamic, productive and allocative efficiency and promotes the long term interests of Victorian consumers.

144 Section 1 of the EI Act provides that 'the main purpose' of this Act is to regulate the electricity supply industry.

145 Section 10 of the EI Act provides that the objectives of the Commission under the EI Act are:

(a) to the extent that it is efficient and practicable to do so, to promote a consistent regulatory approach between the electricity industry and the gas industry; and

(b) to promote the development of full retail competition; and

(c) to promote protections for customers, including in relation to assisting customers who are facing payment difficulties.

146 Sections 1 and 18 of the GI Act are in substantially the same terms.

Contravention orders

147 Section 53(1) of the ESC Act provides that the Court may make an order, on application by the Commission, that a regulated entity has contravened a civil penalty requirement.

148 A 'civil penalty requirement', as defined in s 3 of the ESC Act, includes:

> (b) a condition, including a statutory condition, of a licence (other than a condition requiring compliance with a Code of Practice) issued to a regulated entity operating in a regulated industry that the Commission is responsible for licensing under relevant legislation;
>
> …
>
> (d) a provision of a Code of Practice that is: (i) prescribed as a civil penalty requirement; or (ii) specified in the Code of Practice as a civil penalty requirement…

149 During a transitional period from 1 December 2022 through to 31 December 2025,

certain clauses of the ERC v 21 are also 'civil penalty requirements' pursuant to s 77(2) and (3) of the ESC Act.The making of a contravention order is a statutory gateway for other relief under Part 7 of the ESC Act. If the Court makes a contravention order, it may also then make other orders pursuant to the ESC Act including (relevantly) a civil penalty order pursuant to s 54, an adverse publicity order pursuant to s 54F and orders requiring provision of services, education or other matters pursuant to s 54G.

Adverse publicity orders: s 54F

150 Section 54F(1) of the ESC Act provides that:

> If a court makes a contravention order against a regulated entity, the court may make an adverse publicity order against the regulated entity.

151 An 'adverse publicity order' is defined in s 54F(4) to mean an order that:

> (a) requires a regulated entity to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the regulated entity has possession of or access to; or
>
> (b) requires a regulated entity to publish, at the regulated entity's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

152 In making an adverse publicity order, the Court may:

(a) specify the period within which the order must be complied with; and

(b) impose any other requirement that the court considers necessary or expedient to make the order effective.[4]

153 The purpose of equivalent 'adverse' or 'punitive' publication provisions in other legislation is both punitive and protective, and this is well-recognised.[5]

Orders requiring provision of services, education, etc: s 54G

154 If a Court makes a contravention order under the ESC Act against a regulated entity, the Court may also make a preventative order under s 54G(2)(b), being an order for

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4 *Essential Services Commission Act 2001* (*Vic)* (*'ESC Act'*) s 54F(2).

5 See *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 20 [48]; *Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2)* [2021] FCA 966, [12]; *Australian Securities and Investments Commission v Aware Financial Services Australia Ltd* [2022] FCA 146, [35].

the purpose of ensuring that the regulated entity does not engage in the conduct, similar conduct or related conduct that constituted the contravention during the period of the order (which must not be longer than three years). This includes (i) a compliance program order, which is an order directing the regulated entity to establish a compliance program for employees or other persons involved in the regulated entity's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to such conduct and (ii) an education program order, which is an order directing the regulated entity to establish an education and training program for employees or other persons involved in the regulated entity's business, being a program designed to ensure the employees' or other persons' awareness of the responsibilities and obligations in relation to such conduct.

Agreed Components of Final Relief

155 The Commission seeks the following relief in both proceedings which is agreed to by Origin:

(a) contravention orders under s 53(1) of the ESC Act, although as noted above, the pecuniary penalty arising with respect to those contravention orders is disputed;

(b) adverse publicity orders under s 54F of the ESC Act;

(c) orders for the implementation of a quality assurance system and, in addition, a compliance, education and training program under s 54G of the ESC Act;

(d) costs orders.

Civil penalty orders

Statutory basis

156 Section 54(1) of the ESC Act provides that:

> If a court makes a contravention order against a person, the court may order the person to pay a civil penalty of an amount not exceeding –

(a) in the case of an energy licensee, the civil penalty amount in section 54A(1) in respect of that contravention ….

157 Section 54A(1) provides that for the purposes of s 54(1)(a) of the ESC Act, the civil penalty amount is, relevantly:

(a) an amount equal to 1200 penalty units or, if there is another amount provided for the contravention of that civil penalty requirement in accordance with section 54E, that other amount.

158 Section 77(5) of the ESC Act provides in respect of transitional civil penalty requirements in s 77(2) and (3) that if the Court makes a contravention order against a person in respect of such a requirement, the Court may order the person to pay a civil penalty under s 54(1) of an amount not exceeding an amount equal to 1200 penalty units.

Other matters

Maximum penalties

159 The maximum penalty, while important, is 'but one yardstick that ordinarily must be applied' and must be treated 'as one of a number of relevant factors to inform the assessment of a penalty'.[6] The maximum penalty 'does not constrain the exercise of the discretion' to fix a pecuniary penalty, beyond requiring 'some reasonable relationship between the theoretical maximum and the final penalty imposed'.[7] This relationship may be established by reference to 'the circumstances of the contravenor as well as by the circumstances of the conduct involved in the contravention'.[8]

160 In cases involving a very large number of contraventions, the maximum aggregate penalty may rise to such a number that it is no longer meaningful.[9] Where that situation applies, 'the focus should be on the conduct and on determining a penalty to

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6 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450, 472 [53]-[54] ('*Pattinson*'); *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia)* Pty Ltd (2016) 340 ALR 25; [2016] FCAFC 181, [155]-[156] ('*Reckitt*').

7 *Reckitt* (n 6) [154]-[155]; *Pattinson* (n 6) [53]-[55].

8 *Pattinson* (n 6) [55]; *Reckitt* (n 6) [156].

9 *Reckitt* (n 6) [157].

match the conduct'.[10]

161 The fundamental question for the Court is what penalty is reasonably necessary to create an effective deterrent. Accordingly, the maximum penalty is not reserved only for the worst possible cases, but rather for where it is necessary to achieve deterrence.[11]

Multiple contraventions

162 There are statutory provisions in the ESC Act, and course of conduct principles more generally, designed to avoid 'double punishment' of a contravenor for multiple contraventions for effectively the same or similar underlying conduct.

163 Section 54O(1) of the ESC Act provides that if a person contravenes two or more civil penalty requirements, a proceeding for a contravention order may be commenced against the person in relation to any one or more of those civil penalty requirements. However, a person is not liable to pay more than one civil penalty in relation to the same conduct.[12]

164 The Court may impose a single penalty for multiple contraventions if the contraventions are based on the same facts or form, or are part of, a series of contraventions of the same or similar nature.[13]

165 In addition, there is also the 'course of conduct' principle. Where there is an interrelationship between the factual and legal matters of two or more contraventions, the Court will consider whether it is appropriate to group them together as a 'course of conduct' to ensure that a person is not punished twice for the same conduct.[14]

166 The 'course of conduct principle' is a 'tool of analysis' which can be used to assist in

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10 *Australian Energy Regulator v Origin Energy Electricity Ltd* [2022] FCA 802, [42] ('*AER v Origin*'); *Australian Energy Regulator v Santos Direct Pty Ltd* [2024] FCA 579, [71].

11 *Pattinson* (n 6) [10], [14]-[15].

12 *ESC Act* ss 54O(1)-(2).

13 Ibid s 54P(1).

14 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249, [53] ('*Singtel Optus*'); *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243, [234] ('*Yazaki*'); *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540, [82]-[85] ('*Coles*').

determining an appropriate penalty in any given case.[15] It is frequently applied when the number of legally distinct breaches is extremely large.[16]

167 Further, there is the 'totality' principle. When imposing penalties in respect of multiple related contraventions, the Court is not bound to impose the cumulative, purely mathematical, total of those penalties. Rather, the totality principle requires the Court to make a 'final check' to ensure that penalties to be imposed on the wrongdoer, considered as a whole, are 'just and appropriate.'[17]

168 Together, the 'course of conduct' principle and the 'totality' principle overlap to ensure that the penalty imposed is not disproportionate to the contravening conduct.[18]

169 The application of the 'course of conduct' principle and the 'totality' principle does not convert multiple separate contraventions into a limited number of contraventions, nor does it constrain the available maximum penalty or otherwise displace the imposition of a significant penalty.[19] The critical question remains ensuring that the penalties imposed are of appropriate deterrent value having regard to the actual, substantive wrongdoing.[20]

Primary objective of civil penalties

170 The purpose of a civil penalty is primarily protective, in promoting the public interest in compliance by deterring further contravening conduct.[21] Deterrence is both general (deterring others from engaging in similar conduct) and specific (deterring the contravener from repeating the contravention). A penalty of appropriate deterrent

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15 *Yazaki* (n 14) [226]; *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312, [421]-[424]; *Singtel Optus* (n 14) [53].

16 See *Coles* (n 14) [82]-[85], [103]; *Reckitt* (n 6) [139]-[145], [157]; *Singtel Optus* (n 14) [51]-[55].

17 *Mornington Inn v Jordan* (2008) 168 FCR 383, [42]; *Australian Competition and Consumer Commission v BAJV* [2014] FCAFC 52, [23]; *CEO of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* (2020) 148 ACSR 247; [2020] FCA 1538, [69] ('*CEO AUSTRAC v Westpac Banking Corporation'*).

18 *Yazaki* (n 14) [236].

19 In relation to the course of conduct principle, see *Australian Energy Regulator v Snowy Hydro* [2015] FCA 58, [118] ('*AER v Snowy Hydro*'). See also *CEO AUSTRAC v Westpac Banking Corporation* (n 18) 148 ACSR 247, 258; [2020] FCA 1538, [67] (Beach J).

20 *Reckitt* (n 6) [139]-[145], [157] (FCAFC); *Australian Securities Investments Commission v AMP Financial Planning Pty Ltd* (2022) 164 ACSR 64, 86-7, 91; [2022] FCA 1115, [109]-[110], [122].

21 *Pattinson* (n 6) [15]-[16], [43], [45].

effect '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'[22] and must deter contraveners 'from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention'.[23]

171 An appropriate penalty is therefore one that is fashioned by reference to the facts of the particular case before the Court, in order to arrive at a penalty that is proportionate; in the sense that it strikes a reasonable balance between deterrence and oppressive severity.[24]

172 Arriving at an appropriate penalty involves an 'instinctive synthesis' of all relevant factors.[25] This involves a weighing together of all matters relevant to achieving deterrence by a reasoned and transparent process.[26]

Mandatory statutory considerations

173 Section 54(3) of the ESC Act provides a list of mandatory considerations to which the Court must have regard in determining civil penalty orders:

> Without limiting the matters to which the court may have regard in making an order under subsection (1), the court must have regard to the following -
>
> (a) the nature and extent of the contravention;
>
> (b) the circumstances in which the contravention took place;
>
> (c) whether previously the regulated entity has engaged in conduct that constitutes a contravention of a civil penalty requirement or similar conduct; or
>
> (d) any loss or damage experienced by any other person as a result of the contravention;
>
> (e) if the Commission served a compliance notice on the regulated entity in relation to a contravention, whether the regulated entity has complied or failed to comply with the notice.

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22 *Pattinson* (n 6) [17], citing *Singtel Optus* (n 14) [62].
23 See *Singtel Optus* (n 14) [62]-[63]; *Reckitt* (n 6) [57], [148]-[153], [164], [176]; *Pattinson* (n 6) [41].
24 *Pattinson* (n 6) [41], [46].
25 *Reckitt* (n 6) [175]; *Coles* (n 14) [6].
26 *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* (2019) 374 ALR 776, [79].

Other established factors for consideration

174 The mandatory factors specified in s 54(3) of the ESC Act are non-exhaustive. There are other well-established factors and principles the court may take into account.

The 'French factors'

175 The 'French factors', which apply to civil penalties more generally, provide a guide as to other relevant matters that a court may take into account.[27] These factors are:

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

(b) the amount of loss or damage caused;

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

(d) the size and financial position of the contravening company;

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

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

(g) whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time;

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

(i) whether the company (contravenor) 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; and

(j) whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the

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27 *Pattinson* (n 6) [18] where the plurality of the High Court affirmed the well-known statements of French J, as his Honour then was, in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR 41-076, [42].

contravention and taken steps to remediate;

(k) the extent of any profit or benefit derived as a result of the contravention.

Consistency

176 Although similar contraventions should incur similar penalties, the differing circumstances of individual cases mean that a penalty in one case cannot dictate the penalty in a later case. Comparisons with previous penalties will rarely be useful.[28] Insofar as any comparison with contravenors in other cases may be undertaken, what is sought is not numerical consistency, but the consistent application of principle.[29]

Factors taken into account in determining the appropriate civil penalty

Introduction

177 The parties made detailed submissions both in writing and orally as to the appropriate civil penalty. Some of the factors relate to the circumstances attending each contravention, whilst others relate to the circumstances of Origin more broadly. Insofar as the factors relate to the former category, it is necessary to consider the factors by reference to each of the categories of contravention. In the case of the latter category, the relevant considerations remain the same regardless of the particular contravention.

178 In the following section, I shall summarise briefly the parties' submissions with respect to the s 54(3) factors and then to various other relevant factors, using the French factors as a guide.

Mandatory Factors Under the ESC Act

Nature and extent of contraventions/circumstances in which the contravention took place/any loss and damage suffered as a result of the contravention

179 As there is overlap between these factors and each relate to the particular

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28 *Singtel Optus* (n 14) [60]; *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* (2018) 260 FCR 68, [69]; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, 295-6.

29 *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29; (2011) 202 IR 467, [23]-[25].

circumstances of each contravention, it is convenient to consider these factors together, but by reference to each group of contraventions and their context.

The LS contraventions

180 As noted above, the LS contraventions in fact comprise three groups of contraventions: the 'failure to register contraventions', the 'failure to update contraventions' and the 'late reporting contraventions'. The late reporting contraventions affect only one customer, AD, who was also the subject of a failure to register contravention occurring in May 2022, relating to both registration with Origin Electricity and Origin Gas. The Commission seeks a penalty of $165,000 in total, incorporating both the failure to register contraventions and the late reporting contraventions, although its submissions did not identify a separate penalty for the latter. Given that the Commission sought late reporting penalties of $75,000 each for the PDF late reporting contraventions, and $90,000 for each of the remaining failure to report contraventions, it seems probable that the Commission seeks a single penalty of $90,000 for the failure to register contravention affecting AD and $75,000 for the reporting contravention which gives rise to the total of $165,000.

181 In the case of the remaining failure to register contraventions affecting customers JBA, PM, JB and RL, the Commission submits that the appropriate penalty is $90,000 for each contravention. When the $165,000 for AD is added, the Commission's proposed penalty for the failure to register contraventions is $525,000.

182 In any event, given that Origin submits that the appropriate penalty for the contraventions affecting AD is $190,000, which is higher than the penalty proposed by the Commission, it is not necessary to get troubled by any opacity of the proposed penalty for the late reporting requirement.

183 The facts relating to the failure to register contraventions and the failure to update contraventions are set out in some detail above.[30]

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30 Paragraphs [35]-[165].

184 It is common ground that with the exception of the contraventions relating to the customer PM, the other contraventions were the product of inadvertent human error. It is also common ground that the five customers who were not registered within the required timeframe were exposed to a potential risk of a major unplanned outage that occurred in the period before the error was rectified, in the sense that distributors may have been unable to contact the customers in a reasonable timeframe after the unplanned outage to conduct a welfare check as usually required.

185 It is also common ground that despite being unregistered, the customers were protected from any retailer (Origin)-initiated outage.

186 No customer suffered any pecuniary loss or damage as a result of the failure to register contraventions. Origin notes that whilst the life support contraventions in respect of 10 customers were serious given their importance, the contraventions were not large scale in the context of Origin's population of 20,000 life support customers in Victoria (to give some context). Additionally, Origin emphasises that it had in place processes which were not followed by the relevant Origin agents.[31]

187 Origin's regional operations manager for Victoria and South Australia, Ms Morgan, gave evidence of Origin's extensive processes at the time of the errors. Her evidence described the processes in place for life support registration and updates following medical confirmation, as well as details as to the requirement on the part of all customer-facing agents to complete induction training before interacting with customers. Amongst other things, the induction training emphasised the importance of flagging customers for life support given the severe consequences of loss of energy supply for these customers.

188 Origin submits and the Commission accepts that the subject matter of the failure to register contraventions is more serious than that of the failure to update contraventions. According to Origin, there was a substantial difference between the

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31 There is no evidence that the internal processes or the relevant steps in Origin's training documents or modules were insufficient.

two types of contraventions. Once registered, the customer was registered as a life support customer and effectively protected from disconnection by the retailer (and assuming that the retailer passed on the relevant notification to the distributor, from disconnection by the distributor), but the registration had a provisional status requiring medical confirmation. This meant that the failure to update life support records would not detract from the fact that the registered customer could already receive the intended protections of the life support, and would continue to do so.

189 In the case of the failure to update contraventions, Origin had received medical confirmation from customers, but failed to update their account records accordingly. However, Origin's practice was to contact the customer in the event that medical confirmation was not provided before removing their protected status. In the ordinary course, Origin would therefore have contacted the customer telling them that medical confirmation had not been provided. In such event, the customer would presumably have informed Origin that the MCF had in fact been provided and the mistake would have been remedied. In the result, Origin rectified the omission before this stage had been reached. In such circumstances, the failure to update had no practical effect on the customer's protected status.

190 Relevantly, the failure to update contraventions occurred after 29 July 2022 by which time, the maximum penalty set by regulations made under the ESC Act had increased from 600 penalty units to 60,000 penalty units, thus increasing significantly the maximum penalty for the failure to update contraventions was much higher than the maximum penalty for the failure to register contraventions. The Commission relies on the fact of this increase and its consequential effect on the maximum penalty in support of its argument that a penalty of $240,000 should be imposed for the failure to update contraventions and $90,000 for the failure to register contraventions notwithstanding that the latter are more serious.

The PDF provision of information contraventions

191 The PDF provision of information contraventions affected a substantial number of

Origin customers (6,546) over the period from 21 December 2021 to 5 May 2022. The customers constituted a cohort of vulnerable consumers who had failed to make a payment by the due date under their payment plans and who were entitled to various protections against disconnection under the ERCOP in the event of their failing to pay amounts owing to Origin. The gist of the contraventions is that Origin was required to contact those customers who had failed to make a payment of arrears by the date on which it was payable, in circumstances where repayment of arrears was both on hold and those where they were not on hold, to discuss varying the amount payable, or the frequency of those payments, or both, so as to give the customer more time to lower their energy costs.

192 It is not in dispute that Origin's contraventions arose from a discrete number of technology systems errors with Origin's then applicable enterprise application software provided by SAP known as Retail 1 ('R1'). SAP was decommissioned in May 2023 following the completion by Origin of the migration of its retail customers from SAP to the new customer platform in Kraken. The system errors arose substantially from an incompatibility between the operation of SAP which was designed to trigger correspondence to customers about assistance available to them under the PDF when they failed to make a payment due under their payment plan and Origin's deployment of other processes designed to protect the vulnerable customer from collections activities for unpaid bills and possible disconnection for non-payment. In essence, Origin's placement of protective Dunning locks on customers' accounts which protected the customer from collections activities for unpaid bills, including associated communications and possible disconnection for non-payment, overrode the coding in SAP for sending the required PDF correspondence. The secondary cause of the PDF provision of information contraventions involved the various system failures in SAP to recognise a missed payment when a customer's direct debit payment failed due to insufficient funds until further unsuccessful attempts at processing the direct debit had been made, and when a new invoice was generated between a customer missing a payment and the issue of the required correspondence.

It is not in dispute that the errors which caused the PDF provision of information contraventions were system errors as a result of coding issues in SAP. Nor is it in dispute that SAP has been decommissioned and Origin's new Kraken enterprise management system is coded differently to prevent similar problems and that in relation to protective locks, a Dunning lock tag will not stop Kraken from sending the required customer PDF correspondence.

193 Origin emphasises that although the prescribed correspondence was not sent, the customer still received other communications from Origin about available PDF assistance during the period of operation of a subsisting payment plan. Origin's head of customer enablement, Mr Foster, gave evidence of other communications sent by Origin to affected customers on a payment plan at the time of establishment of the payment plan, which invited the customer to stay in touch with Origin about other payment assistance options in order to avoid the payment plan being cancelled and invited the customer to call Origin in the event that the customer anticipated that a payment would not be able to be made.

194 Origin also emphasised that customer invoices contained information about payment extensions, special payments, instalment plans and other assistance available to customers in the event that they were having trouble paying bills, including the details as to the Utility Relief Grant Scheme by which the customer would be able to seek to arrange a payment extension, special instalment, or instalment plan.

195 The Commission emphasises that the PDF provision of information contraventions were in relation to vulnerable customers who were experiencing payment difficulties due to hardship such as reasons of death in the family, household illness, family violence or unemployment. Whilst the Commission accepts that there is no ascertainable pecuniary loss to customers from the PDF provision of information contraventions, it emphasises that consumer harm is not limited to financial loss alone[32] and the impacted customers may have been more fully informed or could have

32 *ACCC v Energy Australia Pty Ltd* [2015] FCA 274, [100].

altered their arrangements to their benefit if Origin had complied with its information and engagement options. The Commission invites the Court to conclude that at least some of the customers were inconvenienced by the PDF provision of information contraventions.

196 Origin denies that that is so; it submits that it is not clear at all that the affected customers would have been more fully informed in any meaningful way or altered their arrangements to their benefit but for the failure to contact the customer. Origin submits that there is no evidentiary basis for the Commission's submission that the affected customers were inconvenienced.

197 In particular, Origin points to the correspondence that was sent to the affected customers which it submits is not materially different to that which was required to be sent under the PDF.

198 Whilst Origin accepts that a small number of affected customers who did not receive the required PDF correspondence after failing to make a payment by the due date were subsequently disconnected for non-payment of their energy bills, it emphasises that before disconnection occurred:

(a) Origin had directly contacted the customer in the 21 days prior to disconnection to discuss their overdue balance and their capacity to pay; or,

(b) Origin had made sufficient best endeavours to contact the customer, with the final contact attempt to have been made within the 21 days;

(c) the customer:

(i) had been offered and declined at least two payment plans;

(ii) had been offered and declined at least one payment plan and completed at least one payment plan; or

(iii) completed at least two payment plans;

(d) Origin had offered the customer the correct entitlements including government concessions;

(e) the Dunning cycle had been completed with the correct sequence of activities occurring in the right order and in accordance with stipulated timeframes (ie, the customer had received an invoice, reminder notices, best endeavours contact attempts and disconnection warning notices).

199 Although Origin submits that the contraventions did not result in the customer's disconnection, it asserts that it remediated all affected customers because they had not in fact received the required correspondence and in remediation paid a total of $234,145.35 to those customers.

The disconnection related contravention

200 The disconnection related contravention arose after an unknown person impersonated a customer when communicating with Origin on 8 June 2022. Origin's agent failed to follow all identity verification procedures required for the purpose of validating the person's identity and confirming that they were authorised on the account. The following day, Origin was notified of the disconnection and re-energised the premises.

201 The Commission submits and Origin accepts that the disconnection related contravention is a very serious contravention. However, Origin submits and the Commission accepts that the contravention is an isolated incident relating to one customer. The Commission submits that the incident reveals a deficiency with Origin's procedures and training and supervision of employees. This is disputed by Origin. Relevantly, Mr Magee, general manager of technology at Origin, gave evidence that at the time of the impersonation incident, Origin had in place identification verification processes which were not followed by the agent concerned, and in any case has now subsequently added an extra security measure so as to require any customers with a mobile device registered to their account to provide a one-time PIN or personal identification number ('OTP') which is then sent to their mobile

device when they call customer service. As such, a customer can now only update or change their account details if they provide an OTP or complete the full identification process. As stated above, Origin subsequently made a wrongful disconnection payment to the customer of $467.01.

The overcharging notification contraventions

202 The overcharging notification contraventions, affected 40 customers of Origin Electricity over a three-month period between April and August 2022 and 38 customers of Origin Gas over a two-and-a-half-month period between May and August 2022. The vice with Origin's conduct was not the use of estimated meter readings or the company's failure to recognise the overcharging, but rather the fact that the customers were not notified within the required 10-day period. The delayed notification arose due to human error on the part of an Origin agent in failing to monitor an inbox for amended bills, resulting in the bills not being consistently actioned as they were received. The need for a manual process was related to the migration of customer accounts from SAP to the Kraken system.

203 Once Origin became aware of the issue, Origin instructed a specialist billing team to complete a daily review to check amended bills were actioned within the required timeframe and subsequently, from December 2023, when the transfer to the Kraken system had been completed, Origin fully automated the process of issuing customers the relevant communications that accompany amended bills.

204 Origin accepts that the system in place at the time was not sufficient to prevent the error from occurring.

The undercharging contraventions

205 The use of estimated meter readings for billing purposes and their subsequent adjustment against actual meter readings also can result in customers being undercharged. As noted above, the ERC and the ERCOP (whichever was applicable), prevented Origin from recovering undercharges beyond the four-month period prior to the customer being notified of the undercharge, unless the amount undercharged

was the customer's fault or resulted from an unlawful act or omission. The effect of the undercharging contraventions was that when customers were back-billed, Origin did not limit recovery of the undercharged amounts to the four-month period prior to notification.

206 The undercharging contraventions affected approximately 207 customers of Origin Electricity and 39 customers of Origin Gas over a five-month period from February to August 2022. As the Commission emphasises, the underlying contravening conduct also took place prior to the relevant period for which penalties are sought, and over a very significant period of time (for more than four years[33]). The error arose from a coding issue in the now decommissioned SAP, which caused the system to fail to screen and detect certain bills that needed adjustment to limit the recovery of undercharges to the required period. The Commission accepts that the contraventions arose in Origin's legacy SAP system and that the relevant system issue has now been fixed. The Commission also accepts that once Origin became aware of the issue in 2022, it did take steps to fix the issue, but submits that there is no evidence from Origin explaining why this could not have occurred earlier.

207 Relevantly, since the undercharging contraventions meant that Origin received payments from customers to which it had no legal entitlement, Origin credited or refunded amounts, and in some cases paid compensation, for affected customers to a total of $626,000, of which $58,384.73 was paid to customers in relation to contraventions that were the subject of the Commission's claim for civil penalties. The remediation payments of $58,384.73 equates to approximately $237 per customer in the undercharged amounts that were erroneously invoiced to each customer.

The best offer contraventions

208 The best offer contraventions meant that 395,525 customers of Origin Electricity and 260,414 customers of Origin Gas did not receive details of the best available offer on their bills from Origin during the period from 3 March 2022 to 21 October 2022. As

33 The undercharging conduct also took place during the period where Origin was entitled to recover undercharges in the preceding 9 months.

noted above, this was due to the buying group offer price change not being implemented in Origin's system.

209 This was as a result of what Mr Permezel, Origin's general manager of consumer and property, describes as a 'human error.' This in turn meant that in Origin's internal systems, the buying group offer continued to be priced 1% lower than the plan that would have been the deemed best offer, but for the buying group offer. As such, SAP was not changed to take account of the buying group offer because it was anticipated that the buying group offer would no longer retain the 1% benefit. The effect of that error was that hundreds of thousands of customers received incorrect information as to the best alternative offer available to them. In effect, customers were advised that the best generally available plan was the plan known as Origin Go Variable which was 1% more expensive than the buying group plans. Mr Permezel gave evidence that the value of a 1% price difference would vary between customers, but for electricity customers based on standard usage profiles, would range from annual amounts of between $10.09 for customers with low energy usage, $13.74 for customers with medium energy usage and $16.67 for customers with high energy usage.

210 The Commission submits and Origin accepts that these customers were denied the opportunity of making fully-informed decisions about their choice of energy plan and as such were denied the opportunity of switching to the lowest alternative plan on offer.

211 Mr Permezel also gave evidence, however, that typically only a limited proportion of customers switch plans. An analysis of Origin's internal data which discerned customers' switching behaviour revealed that the volume of customer switching as a proportion of Origin's total Victorian account volumes during the financial year ending 2019 was 2.4%. This was before any requirement existed to include best offer messages. After the introduction of the requirement to include best offer messages, the switching percentage remained steady at 2% through to the 2022 financial year. According to Origin, this data suggests that the introduction of best offer message

requirements has had little to no effect on customers switching energy plans.

212 Accordingly, Origin argues that there is no basis to infer that affected customers would have switched plans but for the contraventions.

The best offer frequency contraventions

213 As noted above, the best offer frequency obligations require Origin to give customers deemed best offer messages every three months for electricity and every four months for gas.

214 These contraventions affected approximately 1,103 customers of Origin Electricity and 466 customers of Origin Gas in a six-month period from March to September 2022. The best offer frequency contraventions occurred due to an issue with Origin's legacy SAP, which caused a misalignment between the bill issue date and posting date, resulting in best offer messages not being printed on certain invoices.

215 Origin's Mr Magee gave evidence that the issue has now been addressed in Origin's new Kraken system through the automatic inclusion of best offer on bill ('BOB') messages in all bills. This new process was implemented from March 2024. The system error underpinning the best offer frequency contraventions effectively involved the issuance of bills without a best offer check where they were bulk-issued following a quality assurance process. In that case, SAP updated the bill issue date, but did not update the bill posting date, which meant that it mistakenly classified the bill as being re-issued or re-printed rather than issued for the first time, and as such did not perform a best offer check.

216 Origin has nevertheless reported two BOB breaches post the introduction of the revised approach in the Kraken system.

The pay-by date contraventions

217 The same legacy issue with SAP which caused the best offer messages to not be printed on certain invoices in respect of the best offer frequency contraventions also had the effect that from 22 August 2018 to 7 September 2022, some customers of Origin

received an invoice where the pay-by date was less than 13 days from the bill issue date. The Commission accepts that in the majority of cases, the pay-by date was at least six days from the bill issue date. In effect, the issue arose because due to the posting date not being updated, the pay-by date was also not updated. The Commission accepts that none of the customers affected by the contraventions were disconnected for non-payment following receipt of a communication containing an incorrect pay-by date and nor did Origin charge late payment fees as late payment fees are prohibited in Victoria. Nor did the incorrect specification of the pay-by date affect any entitlement to discounts, as Origin did not offer pay on time discounts during the relevant period. Accordingly, it is Origin's case that the pay-by date contraventions did not result in any loss or damage to customers.

Preferred method of communication contraventions

218 As noted above, during the period from 18 June 2022 until 17 July 2022 and from 19 June 2022 until 20 June 2022, 3,903 Origin Electricity customers received information either in respect of a bill change alert or a feed-in tariff change alert in a manner which was contrary to their preferred method of communication. It is accepted that this occurred during the course of the transition from SAP to Kraken and due to a flaw in the information technology logic. In effect, customers who had selected email as their preferred method of communication may have received the information by post and *vice versa*.

219 Origin's Mr Magee gave evidence that an error was made by a third-party developer responsible for building the migration tool that was used to export data from SAP to Kraken who did not follow the instructions provided by Origin. The system error was not contained within Kraken, but was rather a coding error that arose from the migration logic.

220 Origin emphasises that the migration of customers from SAP to Kraken was undertaken after months of planning, testing and design and that Origin adopted a staged and carefully planned approach to the migration of customers from the R1

system architecture (comprising SAP) to RX, which utilised the Kraken-based model, in order to minimise the risk of migration errors and compliance issues. Although Origin acknowledges that the contraventions occurred, it maintains that they must be seen as against the scale of the transition project and the great care taken to maintain compliance during the transition.

221 Further, upon identifying the error, Origin notified all affected customers and re-issued bill change alerts and tariff feed-in notices according to their preferred method of communication. For those customers who had received a bill change alert or feed-in tariff change alert by a method other than their preferred method of communication, Origin took steps to ensure that the customers did not bear the cost of any pricing increases until after they were notified of the change via their preferred method of communication. Origin did this by offering *ex gratia* credits reflecting any difference between the old and new pricing detailed in the alert.

Previous contraventions

222 The Commission relies on Origin's conduct in the LS/PDF Proceeding as evidence of conduct which constitutes contravention of a civil penalty requirement, or similar conduct in the BD Proceeding. Relevant to the PDF provision of information contraventions, the Commission relies upon previous contraventions on the part of Origin found to have occurred by the Federal Court of Australia in relation to hardship customers with respect to requirements imposed under the National Energy Retail Law and the National Energy Retail Rules ('NERR').

223 In *AER v Origin*,[34] the Federal Court found that Origin had breached its hardship obligations on more than 100,000 occasions by unilaterally establishing new customer payment plans if the customer's previous payment plan had been cancelled for non-payment while failing to consider a customer's capacity to pay, increasing a customer's payment amounts following a review of the customer's energy usage while failing to consider the customer's capacity to pay, and cancelling customer

34 *AER v Origin* (n 10).

payment plans where it was unable to discuss with the customer a review of their payment plan, including in circumstances where customers were continuing to make their payments under an existing plan. In the case of 18 customers, Origin breached its hardship obligations by failing to adhere to the provisions of its own hardship policy. The Court ordered by consent that Origin pay a total penalty of $17 million in relation to the contraventions, which were said to be significant and affected the most vulnerable cohort of customers. Origin emphasises that the conduct in that case involved Origin's automation of various aspects of its financial hardship program, the Power On Program, which Origin mistakenly believed to be consistent with its regulatory obligations. Notably, the Power on Program is the same program affected by the PDF provision of information contraventions in the present case. Origin emphasises that the Federal Court proceeding did not concern system errors, but rather a feature of an automated system designed that Origin incorrectly believed to be compliant. Therefore, Origin's conduct in that case was 'systemic' in nature.

224 In the case of the LS contraventions, the Commission points to proceedings which have been instituted by the Australian Energy Regulator ('AER') in the Federal Court of Australia against Origin for breaches of Origin's life support obligations, which have been admitted by Origin in its defence. The proceeding involves breaches of the NERR occurring between February 2019 and September 2022, and involved Origin deregistering premises for life support without taking all the steps required before doing so. Its other breaches included failing to register customers, inform distributors or provide information packs to customers who had advised Origin that they or a person residing at their premises required life support. In the proceeding initiated by AER, Origin has admitted that it breached the NERR on more than 5,000 occasions, and that as a result, some customers were unregistered and did not have the protections that the life support provisions provided for up to 188 days, whilst others were disconnected and without power for between 1 and 66 days. The AER and Origin

have proposed a joint penalty.[35]

Previous compliance notices

225 It is common ground that this factor is not applicable as the Commission has not served a compliance notice on Origin in relation to the contraventions in either the LS/PDF Proceeding or the BD Proceeding.

Other relevant factors

Size and financial position and Origin's degree of market power

226 It is not in dispute that Origin is a large electricity and gas retailer. It is one of the three largest energy retailers in Victoria and more broadly across Australia (with AGL and Energy Australia), and is a highly sophisticated business within the essential services industry.

227 For each of the financial years FY22 and FY23, as at 30 June, the total number of small gas and electricity customers supplied by Origin in Victoria was as follows:

Customer Type	Fuel	Number of Customers as at 30 June 2022	Number of customers as at 30 June 2023
Residential	Electricity Gas	447,662 319,426	467,630 318,988
Small Business	Electricity Gas	40,887 22,502	43,401 22,324

228 As at the end of the first quarter of the 2023 financial year, Origin supplied the second largest number of small electricity customers and the third largest number of small gas customers of energy retailers operating in Victoria, supplying an estimated 18.62% of Victorian small electricity customers and 17.66% Victorian small gas customers. As at the end of the third quarter of the 2024 financial year, Origin supplied 18.70% of Victorian small electricity customers and 17.30% of Victorian small gas customers.

229 For each financial year between FY2021 and FY2023, the total revenue for Origin Electricity and the Origin Group as a whole (including revenue from its Integrated Gas business which primarily focuses on the exploration for and production of gas)

[35] The agreed penalty appears in confidential exhibit DJM-2 to the Marquet Affidavit sworn on 23 September 2024.

and across all jurisdictions is set out in table below:[36]

	Revenue and net profit after tax ($ million)		
	FY2021	**FY2022**	**FY2023**
Origin Electricity	$8,519 ($974)	$9,804 ($2,210)	$10,609 $1,472
Origin Group	$12,097 ($2,279)	$14,461 ($1,425)	$16,481 $1,058

230 The Commission emphasises that when Origin engages with customers, it does so as 'Origin', without regard to the individual corporate entity and that Origin operates as a group, in a reporting and operational sense.

231 The group companies are also party to a deed of cross-guarantee, by which the parent entity has guaranteed the debts of the three defendant companies in this case.

232 The Commission submits, therefore, that the Court should have regard to the financial position of the group as a whole in determining the appropriate penalty. The Commission emphasises that Origin's large size and vast resources are highly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent for it and other market participants like Origin. The Commission submits that the penalties must have a sufficient 'sting'.[37] To deter Origin from contravening again, it must be also sufficiently large (in the context of Origin's financial position) to act as a deterrent to others like it.

233 The Commission relies upon the observations of the High Court in *Pattinson*:[38]

> It is simply undeniable that, all other things being equal, 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.

234 Whilst Origin accepts that its size and financial resources are relevant to the determination of penalty, Origin notes that the revenues and profit figures relied upon

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36 The revenue figure appears in the first line of the table and the net profit after tax in the second line. The Origin Group does not prepare audited financial accounts for Origin Gas.

37 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, [116].

38 *Pattinson* (n 6) [60].

by the Commission take into account jurisdictions and business activities that have no relevance to the proceedings and that the particular revenues are not 'broadly related' to the contraventions, which means that their relevance to deterrence is diminished.[39]

235 Origin also draws attention to the observations of O'Bryan J in *Australian Competition and Consumer Commission v Uber B.V.*[40] where his Honour noted that:

> It is not possible to assess the appropriate penalty to achieve deterrence by reference to the financial size of the respondent without attention to the nature, extent and circumstances of the contravening conduct, including particularly the harm caused or potential harm that might have been caused by the contravening conduct.

Deliberateness of the contraventions, the period over which the contraventions extended and whether the contraventions comprised isolated or systemic conduct

The LS contraventions

236 The Commission accepts that the LS contraventions were inadvertent and the product of human or agent error in nine of the 10 incidents and that in the case of the tenth incident (customer PM), the error was not an intended consequence of the software issue which arose out of SAP and was not a systemic issue that affected many other customers.

The PDF provision of information contraventions

237 The Commission also accepts that the PDF provision of information contraventions were inadvertent IT errors, but submits that they were systemic in nature. It emphasises that notwithstanding that the conduct was not deliberate or intentional, all businesses (and particularly sophisticated large businesses like Origin) must ensure that their processes are compliant with legal requirements to consumers. According to the Commission, energy retailers like Origin have highly automated and sophisticated IT systems and they ought not lead to the systemic errors that occurred with the PDF provision of information contraventions.

238 The Commission notes that deficiencies in automated systems have been discussed in

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39 *ACCC v Valve Corporation (No 7)* [2016] FCA 1553, [7].

40 [2022] FCA 1466, [29] ('*Uber*').

other civil penalty cases, and particularly draws attention to the statement of Anderson J in *AER v AGL Sales Pty Ltd & Ors*,[41] where his Honour said the case was one where:

> … yet another recent occasion where this Court has before it a large business that has contravened statutory obligations (at least in part) by reason of (what might be described as) information technology system issues.…
>
> … large businesses in particular should formulate and maintain governance processes and arrangements that are adequate to ensure compliance with statutory obligations.[42]

The BD contraventions

239 The Commission likewise accepts that the contraventions the subject of the BD Proceeding were not deliberate.

240 However, the Commission asserts that the extent and breadth of Origin's carelessness was alarming and that the BD Proceeding reveals a wide array of contravening conduct by Origin in its legal obligations regulating billing, and occurred at a time when many customers are suffering economic hardship and energy costs for consumers have been increasing. The Commission submits that such behaviour is likely to undermine consumer confidence in the market and the regulatory regime as a whole.

241 Similar to its assertion in relation to the PDF provision of information contraventions, the Commission argues that energy retailers such as Origin have sufficiently sophisticated IT systems that they should not lead to the errors that occurred with the contraventions in the BD Proceeding. The Commission submits that it is clear that SAP had material deficiencies and was sub-optimal, and that it is unacceptable for a supplier of an essential service to use a system (like SAP) which has material deficiencies, but at the same time then seek to minimise the consequence of its contravening conduct by relying on a transition to a new system (like Kraken) at the time of its choosing, without preventing or detecting additional contraventions during

41 [2020] FCA 1623 ('*AER v AGL Sales*').
42 Ibid [90]-[91].

the transition period.

242 Origin submits that inadvertence as opposed to a strategy of deliberate recalcitrance is a moderating force on penalty.[43] Since the object of penalty assessment is the public interest in deterrence of future contraventions, a penalty greater than that necessary to achieve deterrence is oppressive. Origin emphasises that where the conduct is not deliberate, a modest penalty may provide effective deterrence against future contraventions.

243 In these proceedings, Origin emphasises that the statement of agreed facts ('SAFA') records acceptance on the part of the Commission that the contraventions were not deliberate, and takes strong issue with the Commission's submission that the totality of the inadvertent contraventions equates to carelessness at all, much less of an alarming nature which has the capacity to undermine consumer confidence in the market and the regulatory regime as a whole. According to Origin, to characterise its conduct as such is neither accurate nor appropriate.

Does the conduct arise out of the conduct of senior management or those operating at a lower level; does Origin have a corporate culture that is conducive to compliance?

244 The most significant area of controversy between the parties relates to Origin's compliance culture. Origin submits that it has an 'undeniably strong commitment to compliance' which is conducive to adherence to the regulatory obligations imposed upon it as an energy retailer. The Commission in contrast asserts that the number and extent of the contraventions admitted by Origin which are the subject of these proceedings (along with Origin's prior contraventions relating to the PDF the subject of the Federal Court's decision in *Origin Energy Electricity*[44]) is revealing of a problematic corporate culture emblematic of carelessness, and one which has the potential to undermine consumer confidence in the market and the regulatory regime as a whole.

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43 *Pattinson* (n 6) [46]-[47].

44 *AER v Origin* (n 10).

245 Origin refers among other things to the following:

(a) First, in Ms Morgan's evidence, she referred to Origin's introduction of additional controls and other quality assurance mechanisms post the occurrence of the LS contraventions and the introduction of additional quality control checks and processes since the conduct the subject of the proceeding as well as individual coaching being provided to the agents involved in the particular areas the subject of the proceeding and the implementation of various system changes in Kraken.

(b) Mr Magee's evidence in which he referred to, among other things, Origin's decision to invest in a significant transformation of its IT system architecture via its implementation of the Kraken customer service platform, which was a platform originally designed and built for the UK retail energy market and regulatory environment, but which has been adapted by Origin so as to accommodate the complexities of the Australian regulatory environment.

(c) Among other things, Mr Magee gave evidence of the modifications to Kraken so as to accommodate the Australian energy market, the progressive and planned transition of customers to that network from January 2022 to May 2023 and the significant involvement with subject matter experts across Origin's retail business and compliance teams in order to ensure that the modified Kraken system had the system capabilities of accommodating the Australian regulatory environment.

(d) In particular, Mr Magee gave detailed evidence as to the steps taken by Origin to transition its customers to the Kraken system and the enhanced incident detection, incident management and compliance measures now undertaken in the Kraken operating environment.

(e) The evidence of Mr Briskin who is a member of Origin's senior executive team and who is its Executive General Manager of Origin Retail. Mr Briskin gave

evidence, among other things, of the development of Kraken and the migration of customers from R1 to RX technology platforms and Origin's significant investment of a total $193.2 million in transition and project costs associated with the transition from SAP to Kraken between FY 2020 and FY 2023 and the expenditure of approximately $64 million on post-transition stabilisation costs in FY 2023 and FY 2024. Specifically, Mr Briskin gave evidence that in building the Kraken platform, Origin mapped out its regulatory obligations and developed the business processes and requirements for Kraken functionality to deliver on those obligations and conducted testing of those processes and functionality to ensure that it worked. He gave evidence that Origin held design sessions which considered compliance issues, learnings and irregular customer scenarios (or 'edge cases') that had previously arisen in SAP and how those similar issues could be avoided in Kraken. He also gave evidence of Origin's staged and cautious approach to migrating customers from SAP to Kraken.

(f) Mr Briskin was the senior manager with ultimate responsibility for Origin's Retail Business' compliance with regulatory obligations. As EGM Retail, he gave evidence of Origin's Compliance Improvement Program which commenced in March 2022 and was endorsed by Origin's Board, and of Mr Briskin's own involvement reporting regularly and directly to the Origin Board on progress in implementing the Compliance Improvement Program. He also gave evidence as to his attendance at meetings with the Commission accompanied by Origin's CEO and General Counsel on 1 July 2022 where they explained the components of the Compliance Improvement Program and Origin's plan for implementation of the program.

(g) As the EGM of Origin Retail, Mr Briskin attends meetings of the Board's Audit and Risk Committee, which has delegated authority from the Board of Origin to oversee Origin's compliance with legal and regulatory requirements. Mr Briskin also reports to Origin's Board on compliance issues.

(h) Mr Briskin otherwise gave evidence in some detail as to Origin's operational process controls and assurance functions, and its approach to detecting, investigating and reporting breaches.

(i) Mr Briskin also gave evidence that Origin accepts full responsibility for the contraventions and deeply regrets that the customers were not provided with the protections that they were entitled to. He gave evidence that Origin recognises its responsibilities as a supplier of essential services and 'the largest energy retailer in Australia'.

(j) Mr Briskin gave evidence that with the introduction of the Kraken technology platform, and the implementation of the Compliance Improvement Program within the Retail Business, the combined efforts have resulted in a 55% reduction in the number of compliance breaches in Victoria from FY23 to FY24 and a 92% reduction in the number of life support-related compliance breaches in Victoria over the same period.

(k) Mr Briskin also explained the three instances of self-reported breaches of Origin's regulatory requirements relating to best-offer requirements and preferred methods of communication, since the commencement of these proceedings. He explained that in the case of these breaches:

    (i) Origin sent bill change alerts and feed-in-tariff notifications contrary to customers' preferred method of communication which was said to be due to an issue with the source code in Origin's online product switch application integrated with Kraken, which was promptly fixed upon identification;

    (ii) Origin's failure to provide best offer messages on bills within prescribed timeframes in certain instances due to Origin's billing logic not accounting for irregular billing frequency as a result of which Origin has updated the Kraken system logic to provide a best offer message to

customers with every bill on the customer's ordinary billing cycle, regardless of the customer's billing frequency; and

(iii) Origin's failure to provide certain customers with the correct best offer message due to various reasons as a result of which Origin has now established a working group to conduct a post-implementation review to better understand how the deemed best offer calculation was returning incorrect results, and make recommendations in relation to process and control improvements.

(l) Relevantly, Mr Briskin described compliance as a long term and evolving journey in respect of which Origin maintains a commitment to continued investments towards a goal of zero breaches.

246 The Commission relies upon the following broad matters in support of its submission that Origin had a problematic compliance culture. First, the Commission drew attention to the number and variety of contraventions alleged which also needed to be considered in the context of the admitted further contraventions that have occurred after the implementation of Kraken, as well as the separate past and pending proceedings involving Origin.

247 The Commission submits that it is artificial and inappropriate to consider the contraventions alleged in the present proceedings on an atomised basis and that the nature and variety of contraventions itself speaks to an insufficient investment in or attention being given to Origin's compliance obligations. Secondly, the Commission drew attention to the fact that no member of the board or Audit and Risk Committee had given evidence and that the sole senior executive who had given evidence was Mr Briskin whose evidence, insofar as it condescended to expressions of regret and personal responsibility, was couched in materially identical terms to the evidence he had given in the previous Federal Court proceeding. Thirdly, the Commission noted the absence of any evidence of disciplinary action on the part of Origin directed towards any of those employees said to have been involved in the contraventions.

Fourthly, the Commission noted the absence of any apology on the part of Origin to customers.

Origin's co-operation

248 The Commission however accepts that Origin has cooperated with the Commission and acknowledged its liability at the earliest available stage in the proceedings by filing defences which made admissions of facts and its liability for the contraventions alleged. The Commission also acknowledged that Origin cooperated in the preparation of the SAFA in both proceedings.

249 As the Commission noted, and as was recorded in the SAFA in respect of each proceeding, the cooperation had the effect of avoiding the need to prepare for and conduct a contested hearing in relation to liability, which resulted in the saving of cost and time for the Court as well as for the Commission.

250 The Commission submitted that as a result of that cooperation, the Commission allowed a discount of 25% on the penalties that it otherwise would have sought. In attributing a discount of 25%, the Commission drew attention to *Fair Work Ombudsman v 85 Degrees Coffee Australia Pty Ltd*[45] in which Bromwich J considered it appropriate to apply a 25% discount in circumstances where a respondent admitted liability before proceedings had been commenced or soon after they had commenced.

251 In so doing, his Honour stated the following:

> The following is the approach to discounts for cooperation that I have decided to apply to an otherwise appropriate penalty in this case, and perhaps to future cases, each of which is predicated upon the regulator accepting the admission as being in full satisfaction of the contraventions alleged in the originating application and any associated concise statement or statement of claim:
>
> (1) Admission of liability before the proceedings have commenced or soon after they have commenced: 25% discount.
>
> (2) Admission of liability in the defence that is filed: 20% discount.
>
> (3) Admission of liability after the defence has been filed, but before the

45 [2024] FCA 576 ('*85 Degrees Coffee*').

proceeding is listed for trial: 15% discount.

(4) Admission of liability after the proceeding has been listed for trial but before the trial commences: 10% discount.

(5) Any admission of liability that takes place after the trial has commenced: no discount.

What is important about the above is the structure, rather than the particular percentages.[46]

252 The Commission submits that I should follow the same approach and signify that an admission of liability either before proceedings had commenced or soon after they had commenced ought attract a 25% discount.

253 In contrast, Origin submits that I should not follow his Honour's approach and argues that such a course is inconsistent with the approach endorsed by the Full Federal Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union.*[47] In that case, the Court said it was not necessary for the Court to specify a specific percentage discount in respect of cooperation and that doing so may be undesirable and that the process of fixing appropriate pecuniary penalties should not be approached as a mathematical exercise.

254 Their Honours stated further that it was inappropriate to adopt a starting point by reference to the maximum penalty otherwise and then to increase or reduce that amount having regard to aggravating or mitigating considerations, and nor was it generally appropriate to approach the 'course of conduct' and 'totality' principles as if they were simply part of a mathematical equation.[48]

255 Otherwise, and if the Court was disposed to approach the question of penalty in such a fashion, Origin submitted that the appropriate discount was in the order of 30-40%.

Determination of the appropriate civil penalty

256 I do not accept that the matters relied upon by the Commission outlined above are

46 Ibid [58].
47 (2017) 254 FCR 68.
48 Ibid [166].

sufficient to conclude that Origin has a problematic compliance culture.

257 On the contrary, on the basis of the evidence before me, I accept that Origin is committed to ensuring that its processes comply with all relevant regulatory obligations and takes those responsibilities seriously with appropriate commitment and investment. I do not accept that the fact that Origin has now implemented the new bespoke Kraken customer management system necessarily means that the SAP processes were deficient or more pertinently that acting reasonably Origin ought to have realised those deficiencies at an earlier stage and implemented appropriate remedial measures at an earlier point.

258 Similarly, I do not accept that the apparent decision by Origin not to terminate or reduce the employment status of any of the employees involved in the contraventions, or the failure on the part of any member of Origin's Board or its CEO to give evidence or apologise for the conduct underlying the contraventions, has significance. Disciplinary action against an employee involves a range of considerations. Once the inadvertent nature of many of the contraventions is accepted, the apparent absence of disciplinary type action by the employer is understandable.

259 Mr Briskin is an appropriately senior employee with responsibility for Origin's residential and small to medium enterprise electricity business. In expressing regret and accepting full responsibility for the contraventions, Mr Briskin was clearly authorised to offer such regret and accept such responsibility on behalf of Origin as a whole. Origin has in addition, agreed to the making of adverse publicity orders and the content of a public notice to be published in the Age and Herald Sun newspapers which records that 'Origin regrets that these contraventions occurred and has already remediated affected customers where appropriate.'

260 Examination of the causes of each individual contravention on a case-by-case basis is required by the mandatory factors but pertinently is material to an assessment of whether the specific circumstances which resulted in the contraventions are revealing of a systemic or cultural problem at Origin, which itself requires the imposition of a

substantial penalty on the grounds of specific deterrence. I decline to draw that conclusion and do so notwithstanding that Origin has been the subject of prior proceedings and that there have been further contraventions, self-reported by Origin post the implementation of the Kraken system.

261 Similarly, I accept that the new Kraken software platform with the attendant additional safeguards now in place, mitigates against the risk of further or repeat contravening conduct, and that this is a relevant consideration.

262 However, Origin's focus on the particular explanation for each contravention only takes Origin's position so far. Whilst those matters are relevant to and have been taken into account in terms of the specific deterrence component of the need to impose penalties that have an appropriately deterrent effect, it is also necessary to have regard to the principles of general deterrence.

263 Whilst the steps that Origin has taken and its recognition of the need for further monitoring and improvement mitigate against placing under significance on the need for specific deterrence, the task of framing an appropriate penalty is not undertaken in such a narrow context. If the Court does not impose penalties of sufficient magnitude in light of the conduct that has been found to have occurred, there is a risk that other energy retailers who are currently complying with all relevant obligations may drop their present standards, particularly in circumstances where the cost of compliance is significant. In such a case, unless the penalties are significant there will be a disincentive to incurring high compliance costs. It is also important to ensure that the penalty has sufficient sting in it to ensure that Origin maintains its present commitment notwithstanding that it acknowledges such a task is both ongoing and requires ongoing commitment and vigilance.

264 These considerations are particularly pertinent to those contraventions where there is the greatest potential for customer harm or the greatest incentive for retailer gain, either because the cost of compliance is high or the commercial benefit of non-compliance is appreciable (or both).

265 In the case of the LS contraventions, there is mutual acknowledgment of the seriousness of the failure to register contraventions. However, as noted above, there is agreement between the parties that the appropriate penalty for each of the failure to register contraventions is $90,000. The parties must therefore be taken to agree that a penalty of this size is one which has appropriate deterrent effect.

266 The highest penalties sought by the Commission are $9,150,000 for the PDF provision of information contraventions in respect of which Origin proposes $2,650,000 (28.9% of the penalty sought); $1,912,500 for the undercharging contraventions in respect of which Origin proposes $700,000 (36.6% of the penalty sought) and $10,125,000 for the best offer contraventions in respect of which Origin proposes $5,050,000 (49.8% of the penalty sought).

267 The undercharging contraventions and the best offer contraventions are those contraventions where the need for general deterrence is most critical. In both instances, the opportunity for retailer gain in the event of non-compliance is at its most prevalent. In the case of the undercharging contraventions, the provision contravened prevents retailers from recovering undercharged amounts beyond a period of four months from notification of the undercharging. Notwithstanding that the cause of the contraventions in this case was inadvertence and a product of the SAP/Kraken migration, a penalty of sufficient size is warranted to deter Origin, and equally important, others like Origin, from transgressing such prohibitions, particularly where the consequence of transgression is financial harm to the consumer and correlative gain to the retailer.

268 Likewise in the case of the best offer contraventions, Origin's actions resulted in consumers being denied the opportunity of being informed of what was in truth the best available alternative offer for that consumer.

269 Whilst Origin's evidence suggests that the best offer message regime has been somewhat ineffective insofar as it has not resulted in the switching by customers between plans that might otherwise have been expected, I do not regard such evidence

as diminishing the seriousness of the best offer contraventions or ameliorating the need to impose a penalty which has sufficient deterrent effect, particularly general deterrence. The need for general deterrence is further reinforced, not undermined, by Origin's evidence to the effect that the task of identifying the best offer can be a complex one. Whilst I accept that this may well be the case, particularly where the retailer offers a variety of plans and that this may explain occasional instances of non-compliance, a court must be astute in imposing penalties of sufficient magnitude, less retailers are incentivised to refrain from incurring the compliance costs on the basis that the costs of compliance outweigh any penalty.

270 The stickiness of customers to existing plans notwithstanding the provision of information to them which suggests they are not on the cheapest plan available is a little counter-intuitive.

271 The best offer obligations were introduced into the ERC by the Commission's code change decision dated 30 October 2018, set out in the Commission's document, 'Building trust through new customer entitlements in the retail energy market: final decision' ('Code Change Decision').

272 One of the purposes of the Code Change Decision was to implement the recommendations of an *Independent Review into the Electricity and Gas Retail Markets in Victoria* (2017) ('the independent review') which included recommendations to:

> 3F Require retailers to notify a customer of the best offer available by that retailer, and reference the Victorian Energy Compare website, in advance of any price or benefits change.
>
> 3G Require retailers to include the following information on customer bills:
>
> - How the customer can access the Victorian Energy Compare website
> - How the customer can access the Basic Services Offer (see Recommendation 1)
> - The retailer's best offer for that customer based on their usage patterns
> - The total annual bill for that customer based on the customer's

current offer and usage patterns.

273 The Code Change Decision included the following statement:

> The retail market review found that many Victorian customers are paying more than is necessary for their energy, and that the complexity of the market makes customers disinclined to shop around, even when they could make significant savings.
>
> We have established new customer entitlements to cut through this complexity and make it easier for customers to understand when a better deal is available from their retailer. Under our final decision, retailers are required to regularly display their "best offer" on customers' bills, along with advice on how to access it. Retailers are required to personalise the information by using the customer's actual meter data to calculate the savings that may be available.

274 The rationale behind the Code Change Decision remains apparently sound. It may well be the case price elasticity of demand over time may increase as consumer awareness of the ability to switch plans to cheaper offers becomes more widely known.

275 In any case, the Origin data alone does not diminish the importance of the obligations or the need to impose a penalty of sufficient size to act as an effective deterrent to energy retailers.

276 General deterrence continues to be an important consideration for all remaining contraventions, but I see it as a less significant factor than in the case of the undercharging and best offer contraventions. Whilst I consider that Origin's proposed penalties do not sufficiently recognise the need for general deterrence, generally speaking, in relation to all contraventions, the understatement is most pronounced in the case of the undercharging and best offer contraventions. In the case of the overcharging notification contraventions, the best offer frequency contraventions and the pay-by date contraventions, the essential gist of the contraventions was a failure to perform actions at the correct time. The legacy nature of the causes of the contraventions at Origin, combined with the enhancements in Kraken, mean that the need for specific deterrence is less, with the rationale for the penalty being more influenced by general deterrence. Whilst it is, of course, crucial for an energy retailer

to ensure that its systems are compliant and invest accordingly,[49] in the case of these particular contraventions, unlike the undercharging and best offer contraventions, there is less risk of customer harm and also less risk of high compliance costs acting as a disincentive to retailer compliance.

277 In the case of the PDF provision of information contraventions, the legacy nature of the causes of the contraventions, given that the customers have now migrated to Kraken, the provision of similar information to customers by Origin in any event, and the irony that the placement of protective locks on the accounts of vulnerable customers to prevent disconnection and collections activity had the unintended effect of preventing the sending of the prescribed PDF correspondence, all diminish the need for a significant specific deterrence component to the relevant penalty. However, the Commission's submission that it is important that retailers adhere to the prescribed regime in respect of the provision of information to vulnerable customers is well made and warrants a substantial penalty for general deterrence purposes.

278 When viewed overall, I consider that the penalties sought by the Commission with respect to many of the contraventions alleged are excessive, likely influenced by a view that Origin's compliance culture is defective and deficient, and hence that the penalty must incorporate a significant specific deterrence element.

279 However, in contrast, the penalties submitted by Origin are too low, particularly insofar as they relate to the more serious contraventions, as they fail to pay sufficient regard to the need for general deterrence. Additionally, Origin's past and ongoing breaches also are suggestive of a need for specific deterrence, notwithstanding what I accept are Origin's good faith and significant investments in ensuring that it is compliant with the regulatory obligations.

280 Before setting out my conclusions as to the appropriate penalty, some further matters warrant comment. Where the parties have agreed on penalty, and in accordance with the approach taken by the High Court in *Commonwealth v Director, Fair Work Building*

49 *AER v Origin* (n 10).

Industry Inspectorate (Agreed Penalties Case),[50] I am satisfied that the penalty proposed by the Commission and agreed to by Origin is an appropriate penalty and as such I shall impose that penalty in those instances.

281 I do not accept the Commission's argument that the fact that the maximum penalty increased on and after 19 July 2022 is sufficient to impose a greater penalty on Origin with respect to the failure to update contraventions in circumstances where, as the Commission accepted, the subject matter of the failure to register contraventions was more serious than the mere failure to update. Prior to 19 July 2022, the maximum penalty for one single contravention was $110,000. After this date, there was a significant increase in penalty.[51] The increase in penalty came about from Regulations and thus reflected the attitude of the Executive. The substantial increase in amount of penalty was applied by the Commission for 309 different contraventions.[52] It cannot be meaningfully said that the marked increase in penalty reflected any change in community attitudes or legislative response to the effect that the subject matter of contraventions required such a substantial increase in penalty. Whilst I have had regard to the increase in maximum civil penalties, in my view, that alone is a wholly insufficient basis to impose a considerably higher penalty for much less significant conduct, particularly when it occurred within a reasonably proximate time of the more serious conduct.

282 More generally, whilst I have had regard to the maximum penalties applicable and accept the Commission's submission that the maximum penalty is not strictly reserved for the worst possible cases, the size of the maximum penalties in question here is so large that they are of no or very little meaningful assistance. To cite just two examples, the maximum penalty for failing to update the register maintained by Origin for a life support customer from 'medical confirmation not received' to 'medical confirmation received' is $11 million. The consequences of such a breach, as outlined above, are

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50 (2015) 258 CLR 482 ('*Agreed Penalties Case*').
51 *Electricity Industry (Penalty Regime) Regulations 2022*; *Gas Industry (Penalty Regime) Regulations 2022*.
52 Ibid Schedule 2.

relatively less severe. To suggest that a penalty of $11 million is appropriate in such a context, particularly bearing in mind pertinently the protective rationale for the imposition of such penalties, makes no real sense.

283 Further, the total monetary penalty for the PDF provision of information contraventions, in respect of one category of breaches under the ERCOP (clause 130(6)), but excluding other associated breaches arising from the same conduct, is $534 million in the case of Origin Electricity and $370 million in the case of Origin Gas. The size of such maximum penalties therefore is of no real assistance in determining the appropriate penalty.

284 The Commission rightly emphasises that Origin's size and financial standing is a relevant consideration in determining the appropriate level of penalty. I accept, of course, that all other things being equal, it may well be necessary for a larger penalty to be imposed on a large, well-resourced retailer as compared to a small, financially strained operator. If a penalty of sufficient size is not imposed on the larger retailer, there is an obvious risk that such a retailer or others like it might not bear the compliance costs of implementing and maintaining a coherent and comprehensive compliance regime. However, I agree with O'Bryan J's observations in *Uber* to the effect that it is not possible to determine the appropriate penalty to achieve deterrence by reference to financial size of the respondent without attention to the nature, extent and circumstances of the contravening conduct, including particularly the harm caused or potential harm that might have been caused by the contravening conduct.

285 The revenue and profit figures for Origin Group and Origin Electricity as set out above are important but, even in that context, their use has certain limitations. First, the figures for the group take into account jurisdictions and business activities that have no relevance to the proceedings. In that sense, the revenues are not 'broadly related' to the contraventions, which diminishes their relevance for deterrence.[53] Moreover, if one looks at profitability in contrast to revenue, the penalties proposed by Origin

53 *ACCC v Valve Corporation (No 7)* [2016] FCA 1553, [7].

represent a substantial and significant impost. Conversely, if size of the company determined by its revenue is a more relevant factor, even the penalties advocated for by the Commission are dwarfed by the size of the group revenue.

286 The Commission also argued that the Court should give significant weight to the views of the regulator, in this case, the Commission, regarding the level of penalty necessary to achieve specific and general deterrence.[54]

287 Whilst I accept that the Commission's views are relevant and have been put forward on an informed and reasonable basis, they are not determinative.

288 In the Agreed Penalties Case,[55] the High Court, while accepting that the regulator would be in a position to offer informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance, observed that:

> The submissions of a regulator will be considered on their merits in the same way as the submissions of a respondent and subject to being supported by findings of fact based upon evidence, agreement or concession.

289 Otherwise, I am not disposed to adopt the approach urged upon me by the Commission, said to be based on the approach of Bromwich J in *85 Degrees Coffee*, where the appropriate penalty was effectively determined by establishing the penalty and then discounting it by 25%.

290 To the extent that the Commission's submissions imply that his Honour was prescribing such an approach to cases of this nature, I do not read his Honour's reasons in that way. Such an interpretation is at odds with the approach endorsed by the Full Federal Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*[56] and, in any event, overstates what his Honour was saying in *85 Degrees Coffee*. As his Honour's judgment made clear, co-

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54 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; (2004) ATPR 41-993, [51]; cited in *ASIC v Noumi Limited (No 4)* [2024] FCA 1192, [118].

55 *Agreed Penalties Case* (n 50) [61].

56 [2017] FCAFC 113.

operation discounts were discounts which his Honour considered was appropriate to apply in that case 'and perhaps to future cases', but importantly his Honour emphasised that what was important was the structure of a sliding scale of discount depending on the stage at which admission of liability was made rather than the particular percentages.

291 An approach which endorses a prescriptive 25% discount, for example, in cases such as the present where an admission of liability is made before or shortly after proceedings have commenced, is somewhat incongruous in the context of a regulatory regime which requires self-reporting. Moreover, and in any event, the relevance of cooperation and acknowledgement of liability in the context of a penalty regime which is protective in nature and has deterrence as its primary aspect is that it speaks to a recognition on the part of the contravener of the importance of and necessity to adhere to the regulatory regulations and thus affects questions of specific deterrence.

Civil Penalty – LS/PDF Proceeding

292 In relation to the LS/PDF Proceeding, the Commission proposes a penalty of $1,725,000 in respect of the LS contraventions, while Origin submits that the appropriate penalty should be $850,000. The appropriate penalty is $900,000. In determining that figure, I have started with Origin's proposed penalty of $850,000, which is arrived at by applying the agreed penalty of $90,000 for each failure to register contravention and $60,000 for each failure to update contravention. However, I have increased this by $50,000, because I consider that the appropriate penalty for the failure to update contraventions is $70,000 each, rather than $60,000. This means that the total pecuniary penalty for the LS contraventions is $900,000, of which $735,000 is payable by Origin Electricity and $165,000 is payable by Origin Gas.

293 In the case of the PDF provision of information contraventions, the Commission submits that the appropriate penalty is $9,150,000, while Origin submits that the appropriate penalty is $2,650,000. The appropriate penalty is $5,000,000, of which $2,783,000 is payable by Origin Electricity and $2,217,000 is payable by Origin Gas.

294 The total penalty imposed on Origin in the LS/PDF Proceeding therefore is $5,900,000 which shall be imposed on Origin Electricity as to $3,518,000 and Origin Gas as to $2,382,000.

Civil Penalty – BD Proceeding

295 The appropriate penalties in the BD Proceeding are that set out in the column headed Penalty; the parties proposed penalties also appear in the table.

Contravention	**Commission**	**Origin**	**Penalty**
Disconnection	$75,000	$75,000	$75,000
Overcharging notification	$1,500,000	$500,000	$750,000
Undercharging	$1,912,500	$700,000	$1,500,000
Best Offer (failure to send)	$1,650,000	$550,000	$825,000
Best Offer (incorrect message)	$10,125,000	$5,050,000	$8,100,000
Pay-by date	$375,000	$125,000	$185,000
Preferred method of communication	$750,000	$250,000	$270,000
TOTAL	**$16,387,500**	**$7,250,000**	**$11,705,000**

296 Otherwise, in apportioning the penalty between Origin Electricity and Origin Gas, I have adopted the same proportionate penalties as proffered by Origin.[57]

297 As such, the penalty payable by Origin Electricity in the BD Proceeding is $7,017,775 and the penalty payable by Origin Gas is $4,687,225.

Declarations in relation to prior conduct

298 The remaining issue is whether the Court should make declarations with respect to Origin's breaches of the ERC in circumstances where a breach of the ERC did not sound in the making of a contravention order.

299 In both proceedings, the Commission seeks declaratory relief in relation to conduct

[57] Based on the number of customers affected by the contraventions, there was no real disagreement as to how the penalty should be split up as between Origin Electricity and Origin Gas. The apportionment of penalty is based on the following percentage being met by Origin Electricity with the balance met by Origin Gas. Disconnection – Origin Electricity 100%; Overcharging notification – Origin Electricity 50%; Undercharging – Origin Electricity 78.6%; Best offer (failure to send) – Origin Electricity 55.5; Best offer (incorrect message) Origin Electricity 56.4%; Pay-by Date – Origin Electricity 50%; Preferred method of communications – Origin Electricity 100%.

which Origin admits has contravened the ERC, in respect of conduct occurring prior to 1 December 2021.

300 It is common ground that those contraventions cannot be the subject of contravention orders, or civil penalty orders, and related relief under the ESC Act.

301 The Commission's authority to apply for a contravention order in respect of contraventions of civil penalty requirements was enacted by the *Essential Services Commission (Compliance and Enforcement Power) Amendment Act 2021* (Vic), which came into effect on 1 December 2021. The Amendment Act established an entirely new regime for addressing contraventions of, *inter alia*, the ERC. It conferred on the Commission the power to seek a contravention order in respect of a contravention of a 'civil penalty requirement'.

302 The Amendment Act introduced transitional provisions into part 8 of the ESC Act, the effect of which is that contraventions of the ERC that occurred before 1 December 2021 are dealt with under the old regime contained in ss 70-74 of the Act, save for certain contraventions of the ERC which are deemed to be civil penalty requirements insofar as they occurred after 1 December 2021, which are to be dealt with under the new regime (see s 77 of the ESC Act).

303 Under the old regime, s 54A of the ESC Act allowed the Commission to serve a notice on a person where that person had contravened or was contravening the conditions of a licence and the Commission considered the contraventions were not of a trivial nature. The notice served by the Commission required the person to cease contravening or take such rectifications or corrective actions as specified in the notice. A person who failed to comply with the notice was liable to pay a pecuniary penalty to the Commission.

304 This s 54A enforcement procedure remains applicable in respect of contraventions that occurred before 1 December 2021.

305 Section 53 of the ESC Act, as in force before 1 December 2021, provided for the

Commission to serve a provisional order or a final order on a person in circumstances where the Commission was of the opinion that the person was likely to contravene a licence condition, amongst other things.

306 Section 54 of the ESC Act entitled the Commission to apply to the Supreme Court for an injunction, or declaration, or both in respect of a provisional or final order served under s 53.

307 Origin therefore submits that because the Commission did not serve a provisional order or final order on Origin with respect to the 1 December 2021 conduct, the Court ought not, as a matter of discretion, grant the declaratory relief sought by the Commission.

308 Origin submits that the Court should not make the declarations sought because they cut across the legislative intention which 'eschewed giving the Commission the ability to apply to the Supreme Court for declarations in respect of pre-December 2021 contraventions,' save where the Commission had first served a provisional order or final order on the person requiring that person to comply with the licence conditions.

309 I am not persuaded by Origin's submission. It is not in dispute that the Court has the power to make such declarations and the question of whether the declarations should be made is ultimately a matter of discretion. Relevantly, amongst the matters relevant to the exercise of the discretion is whether the declaration has utility, whether the proceeding involves a matter of public interest and whether the circumstances call for the marking of the Court's disapproval of the contravening conduct.[58]

310 There are important reasons why the Court should make a declaration in respect of the conduct which occurred prior to 1 December 2021. I do not accept Origin's submission that it is sufficient in the circumstances for the reasons to record the fact of Origin's contraventions. The declarations mark the Court's disapproval of Origin's

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58 *Secretary, Department of Health and Aged Care v Vapor Kings Pty Ltd* [2023] FCA 1297, [28]; *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561, 571.

contravening conduct, inform the conduct which is unlawful and provide a consequence for Origin's conduct. Further, without declaratory relief, the contravention orders will not reflect the true nature of Origin's contravening conduct.

311 In the context of those matters, I do not accept that the fact that the Commission has not served a provisional or final order on Origin matters much. The nature of the contravening conduct is such that it involved conduct that had already taken place. Whilst it would have been open to the Commission had it become aware of such conduct to have served notice to the effect that Origin take remedial steps to address such issues of non-compliance as had occurred, the fact that it did not do so is no barrier to granting the relief sought. There is no evidence as to when the Commission discovered the fact of Origin's non-compliance. The most likely inference is that it discovered the non-compliance, when Origin reported its more recent post-1 December 2021 non-compliance which formed the basis of the contravention orders made in this proceeding. By that time, the pre-1 December 2021 contravening conduct was historical. There was no utility in the Commission serving notices in respect of conduct which had taken place some years before.

312 It is appropriate therefore that the full extent of Origin's contravening conduct be reflected in declarations made by the Court.

313 Accordingly, the declarations will be made in the form provided (and with which Origin agrees, assuming that the Court was minded to make declarations).

Conclusion and orders

314 I will make orders and declarations in the LS/PDF Proceeding in the form provided, including imposing a civil penalty of $5,900,000 (apportioned as to $3,518,000 to Origin Electricity and $2,382,000 to Origin Gas).

315 I will also make orders and declarations in the BD Proceeding in the form provided, imposing a civil penalty of $11,705,000 (apportioned as to $7,017,775 to Origin Electricity and $4,687,225 to Origin Gas).

CERTIFICATE

I certify that this and the 79 preceding pages are a true copy of the reasons for judgment of Justice M Osborne of the Supreme Court of Victoria delivered on 21 March 2025.

DATED this twenty-first day of March 2025.

Rabia Masood

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Associate