

# Australian Consumer Law Review

Consumer protection laws have become an increasingly important issue for corporations to consider when conducting business in Australia. As in other jurisdictions, allegations of breach not only risk the imposition of significant penalties, but can also cause lasting damage to a corporation's reputation and brand. Given the growing importance of this aspect of Australian law, the current Review of the Australian Consumer Law (**ACL**) will be relevant to many corporations carrying on business in Australia.

The Review commenced on 31 March 2016 with the release of an Issues Paper outlining the main areas of interest and seeking feedback from interested parties by 27 May 2016. The Review is being undertaken by Consumer Affairs Australia and New Zealand (**CAANZ**). This is the first review of the ACL since its introduction in 2011. The Review's terms of reference are broad and it has the potential to result in significant change to the ACL.

Given the content of the Issues Paper, it seems likely that there will be targeted, but significant, changes to particular areas of the ACL.

In this briefing note, we focus on five key areas of potential change which we think are most relevant for corporations carrying on business in Australia. We also discuss some of the new and developing business models and practices that the Review has identified as emerging consumer policy issues.

## Background to the Review

The ACL is Schedule 2 to the Australian Competition and Consumer Act 2010 (**CCA**), and is a uniform legislation for consumer protection

incorporated into the law of each Australian State and Territory.

The Review of the ACL is required by an agreement made between the state and federal governments when the ACL was first introduced in 2009. This agreement required a review within 7 years.

The Issues Paper is divided into four topics which reflect the Review's terms of reference:

- *consumer policy in Australia*: whether the objectives of the national consumer policy framework remain relevant;
- *legal framework*: the effectiveness of the ACL's

## Key issues

- A wide reaching review of the ACL is currently underway, with a Final Report due in March 2017.
- Potential for significant change to the ACL.
- Key discussion areas to watch:
  - introduction of civil pecuniary penalties for misleading and deceptive conduct;
  - clarification of the scope of the prohibition on unconscionable conduct;
  - changes to the unfair contract terms regime, including clarification on what is a standard form contract and what is unfair or is an unfair term and an expansion of the remedies available;
  - introduction of a European style prohibition on unfair commercial practice; and
  - increases to penalties for breaches of the ACL.

existing rights and protections, whether new rights and protections should be introduced and whether the language and structure of the ACL is easy to understand and navigate;

- *administration and enforcement*: the activities of ACL regulators, the international reach of the ACL and the adequacy of remedy and offence provisions (including access to remedies and scope for taking private action); and
- *emerging consumer policy issues*: whether the ACL has the flexibility to respond to new and emerging issues.

## 1. Misleading or deceptive conduct penalties

The Review raises the prospect of a major change to misleading or deceptive conduct through the introduction of civil pecuniary penalties. This change would significantly increase the financial consequences for misleading and deceptive conduct given that these penalties are imposed in addition to any damages awarded.

Currently, civil pecuniary penalties can be imposed for some breaches of the ACL, such as false or misleading representations, unconscionable conduct, pyramid selling and certain product safety and product information provisions. However, these penalties cannot be imposed on persons who contravene the misleading or deceptive conduct provisions; such persons are only liable to pay damages, the amount of which is, generally speaking, referable to the loss or damage caused by the misleading or deceptive conduct.<sup>1</sup> (Non-financial remedies, such as injunctive relief

and publication orders, are also available.)

The Explanatory Memorandum for the legislation introducing the ACL stated that as the misleading and deceptive conduct provisions do not create liability but rather establish a norm of conduct, it is appropriate to exclude civil pecuniary penalties as an available remedy.<sup>2</sup> The Issues Paper asks whether the different penalty regime is still warranted.

The Australian Competition & Consumer Commission (ACCC) will likely be a strong advocate for the introduction of civil pecuniary penalties for misleading or deceptive conduct. The ACCC Chairman Rod Sims has stated that there is a "strong case" to examine the merits of extending civil pecuniary penalties to cover misleading and deceptive conduct.<sup>3</sup>

## 2. Unconscionable conduct

The Review is considering whether the unconscionable conduct provisions in the ACL should provide guidance to courts to facilitate a more consistent interpretation of "unconscionable". Recent decisions of the Federal and High Courts have provided some clarity by finding that in order for conduct to be unconscionable, it must be against conscience by reference to the 'norms of society' rather than by reference to moral culpability.<sup>4</sup>

Nonetheless, uncertainty still remains; for example, as to how to determine the 'norms of society'. Further guidance in the ACL as to what conduct could be unconscionable would be welcome.

Further, the Review is also considering whether the

unconscionable conduct provision should be extended to protect publicly listed companies and whether it should be extended to prohibit specific forms of unfair commercial practices (see section 3 below).

## 3. Unfair commercial practices

Unlike Europe or the United States, Australia does not have a broad prohibition against unfair commercial practices. The ACL's prohibition against unconscionable conduct does involve assessments of fairness, but has typically only been applied to conduct of relatively severe levels of unfairness, dishonesty or moral culpability. The Review is considering whether the absence of a general prohibition allows for the continuation of aggressive commercial practices or business models that result in significant risks of consumer harm.

The Issues Paper identifies three types of business models, which may only be viable because they take advantage of a consumer's reduced ability to protect their own interests in a transaction:

- business models that depend on a class of consumers that cannot access or are not aware of, alternative goods or services to meet their needs;
- business models that market goods or services to consumers who have characteristics that tend to be associated with consumer harm (such as physical or psychological injuries);
- business models based on ongoing fees, or fees significantly disproportionate to the cost of providing the good or service.

The introduction of a prohibition on unfair commercial practices was considered by the Productivity

Commission's Review into the ACL in 2008.<sup>5</sup> Ultimately, the Commission concluded it would be preferable to ensure that newly developed forms of unfair conduct are addressed by the law as they arise. They also recommended monitoring the development of the European model and considering the adoption of a general unfair practices provision in the future if warranted by strong evidence.<sup>6</sup>

#### 4. Unfair contract terms

The ACL renders void and unenforceable unfair terms in standard form contracts between businesses and consumers. These protections will extend to small businesses from November 2016 (as discussed in our [previous briefings](#)).

The Review notes several issues that have been raised about the unfair contract term provisions, including whether the current approach to determining if a term is unfair and if a contract is a "standard form contract" is sufficiently clear; whether the protections should extend to the contract as a whole rather than to the particular unfair terms; whether regulators should have the power to seek monetary penalties against businesses in breach of the unfair contract term provisions (in addition to having the unfair terms declared void); and, whether regulators should be able to take an action against systemic unfair contract terms. The latter two issues (additional penalties and additional regulator powers) have the potential to increase the risks significantly for businesses that use standard form contracts.

#### 5. Penalties

In addition to the expansion of civil pecuniary penalties for misleading or deceptive conduct, the Review is

considering the ACL's civil penalties regime and remedies more generally. The civil pecuniary penalties under the ACL are fixed at A\$1.1 million for companies and A\$220,000 for individuals for each offence. These amounts were fixed in 2011 and can only be amended by changing the law.

The appropriateness of this cap, particularly in the context of large companies with substantial resources, has been the subject of significant debate. In 2014, Gordon J (then of the Federal Court of Australia), awarded A\$10 million in penalties against a major grocery chain for breaches of the unconscionable conduct provisions in relation to dealings between the grocery chain and its suppliers. The grocery chain was also required to pay A\$1.25 million towards the ACCC's legal costs. In her judgment, her Honour made the following observations:<sup>7</sup>

*"...it is a matter for the Parliament to review whether the maximum available penalty of \$1.1 million for each contravention by a body corporate is sufficient when a corporation with annual revenue in excess of \$22 billion acts unconscionably...the current maximum penalties are arguably inadequate ..."*

The ACCC holds similar sentiments, with ACCC Chairman Rod Sims making several public comments raising concerns with the current level of penalties.<sup>8</sup> Accordingly, it is likely that the ACCC will be a strong advocate for penalty increases.

The Issues Paper proposes two alternative models for determining penalties. Firstly, the introduction of "penalty units" which are periodically updated to keep pace with inflation. Currently, this model is used in many Acts, including for breaches of the

*Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). Secondly, the model currently used under the competition provisions of the CCA which takes into account the size of the company and the benefit of the breach by allowing the court to impose a penalty which is the greater of:

- the maximum penalty (A\$10,000,000);
- three times the value of the benefit the company received from the breach; or
- if the benefit cannot be determined, 10% of the company's annual turnover in the previous 12 months.

#### Emerging consumer policy issues

The Review will also assess the flexibility of the ACL in responding to new and emerging issues to ensure it remains relevant into the future. The Issues Paper identifies several areas of interest, including:

- selling that occurs away from business premises, such as online and "pop up" stores, and how these new retail models interact with protections against unsolicited sales
- online shopping, in particular issues of price transparency (for example, drip pricing where a "headline" price is advertised at the beginning of the purchase process and additional fees and charges are then incrementally disclosed or component pricing, where the prominently advertised price is only part of the total price), the transparency of safety information for products sold online and transparency in

comparator websites and online reviews and testimonials

- emerging business models such as the "sharing" economic model used by Uber, Airbnb and Airtasker.

## Next steps

Following the release of the Issues Paper in March, the Review is engaging in 8 weeks of public consultation, with submissions due on 27 May 2016. An interim report will be released "later in 2016", with the Final Report due to be released in March 2017.<sup>9</sup>

<sup>1</sup> Section 236, ACL.

<sup>2</sup> Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No 1) 2010* (Cth), 57.

<sup>3</sup> L Keen, "ACCC head Rod Sims recommends review of penalties for breaches of the consumer act", *Australian Financial Review*, November 20 2015 (<http://www.afr.com/business/legal/acc-head-rod-sims-recommends-review-of-penalties-for-breaches-of-consumer-act-20151130-qlbhxu>).

<sup>4</sup> *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90; *Kakavas v Crown Melbourne Ltd* [2013] HCA 25

<sup>5</sup> Productivity Commission, *Inquiry into Australia's Consumer Policy Framework*, Final Report, 30 April 2008.

<sup>6</sup> *Ibid*, 141.

<sup>7</sup> *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, [106].

<sup>8</sup> R Sims, "Keynote presentation: Australasian Consumer Law Roundtable", *Australasian Consumer Law Roundtable 2015: Australian Consumer Law 2.0 – 2016 & beyond*, 1 December 2015; R Sims, "Priorities 2012",

*Committee for Economic Development Australia, Sydney*, 19 February 2015.

<sup>9</sup> ACL Review homepage, <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/about-the-review/>.

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