AUSTRALIAN CONSUMER PROTECTION LAW GETS SERIOUS

In August 2017, Consumer Affairs Ministers agreed to reforms to improve the operation of the Australian Consumer Law (**ACL**). In response, the Government recently released exposure draft legislation and accompanying explanatory materials reflecting the agreed reforms.

The reforms seek to clarify existing terms, ease the evidentiary burden for litigants, enhance the ACCC's information-gathering powers, widen the scope of potential contraventions and significantly increase penalties to align with those in the Competition and Consumer Act 2010 (Cth) (**CCA**).

Contraventions of the ACL can have significant reputational impacts as well as now significantly increased risk of higher monetary penalties under the proposed amendments. Accordingly, corporations should consider the amended provisions and update their business risk assessment and compliance programs.

BACKGROUND

In June 2015, Commonwealth, State and Territory Consumer Affairs Ministers agreed that Consumer Affairs Australia and New Zealand would conduct a review of the ACL (**ACL Review**). This was the first broad review of Australia's national consumer law since it commenced on 1 January 2011.

In August 2017, in response to the ACL Review, the Consumer Affairs Ministers agreed to a package of 14 legislative reforms that would seek to improve the operation of the ACL. These reforms are set out in the recently released exposure draft legislation and regulations.

The Australian Treasury has sought submissions on the exposure draft legislation, which will inform the final drafting of the Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018 (**Draft Exposure Bill**) and the Competition and Consumer Amendment (Australian Consumer Law Review) Regulations 2018.

A second tranche of proposed reforms to the ACL was tabled in Parliament on 15 February 2018, as contained in the Treasury Laws Amendment (2018 Measures No 3) Bill 2018 (**Penalties Bill**), which proposes to increase the maximum financial penalties under the ACL to align with the competition provisions in the CCA.

Key issues

- Companies should update their risk assessments and compliance programs based on the increased penalties to be introduced by the reforms to the ACL.
- The Government has proposed the significant increase in ACL penalties because of the views expressed by the ACCC that some corporations factor in the existing lower penalties as a "cost of doing business".
- The increases may see a step change in how corporations conduct their businesses. While businesses may disagree with the views of the ACCC, the proposed penalty increases should nonetheless involve a stocktake of current compliance programs to ensure that, should contraventions occur in the future, senior management can point to concrete compliance steps to ensure meaningful compliance with the ACL. This may help ameliorate the penalties a Court would otherwise impose.

OVERVIEW OF KEY PROPOSED CHANGES

The key proposed changes to the ACL, as outlined in the Draft Exposure Bill and the Penalties Bill, amend and expand the scope of the ACL so that:

- The maximum financial penalties for body corporates under the ACL will be increased from $1.1 million to the greater of: (a) $10 million; (b) three times the value of the benefit obtained from the offence, if that benefit can be determined; or (c) 10% of annual turnover, if the value of the benefit cannot be determined in that instance.
- Companies will be required to include charges automatically applied in their headline price. This is particularly relevant for airlines and other companies with an online booking platform.
- The ACCC will have power to issue disclosure notices to third parties to obtain information about the safety of goods or services and to issue compulsory information-gathering notices to investigate whether contract terms are unfair.
- Existing terms and definitions in respect of false billing, unsolicited consumer agreements, voluntary recalls and consumer guarantees will be clarified and/or expanded, thereby capturing conduct that currently may not be caught.
- Publicly listed companies are now also able to enforce the unconscionable conduct provisions.

We set out in greater detail each of the proposed changes below.

KEY PROPOSALS FOR BUSINESSES TO CONSIDER

Increase in the maximum financial penalties under the ACL

The current maximum penalties in the ACL are $1.1 million for a body corporate and $220,000 for a person other than a body corporate. The Government considers these amounts are insufficient to deter large corporations from breaching the ACL, particularly where the relevant non-compliant conduct may be highly profitable.

The Penalties Bill proposes to increase the maximum penalties under the ACL so that a business would not be prepared to treat the risk of such a penalty as simply "a cost of doing business", as the ACCC has alleged has become the case for some corporates. The Penalties Bill proposes to increase those penalties for body corporates to the greater of: (a) $10 million; (b) three times the value of the benefit obtained from the offence, if that benefit can be determined; or (c) 10% of annual turnover, if the value of the benefit cannot be determined in that instance. For persons other than body corporates, the maximum penalty will increase from $220,000 to $500,000.

While the proposed penalty increases would not apply to misleading and deceptive conduct (s 18) and the unfair contract term provisions (s 23) of the ACL, given penalties do not apply for contraventions of those provisions, the increases will apply to most of the existing ACL civil penalty and offence provisions including those relating to unconscionable conduct, a range of unfair practices (such as false or misleading representations, unsolicited supplies, pyramid schemes and single pricing) and offences relating to product safety and information standards.

These proposed increases bring the maximum penalties under the ACL into line with the penalties applicable to the competition provisions of the CCA.

Improvements in price transparency

Currently, section 48(7)(a) of the ACL does not require that optional charges payable to a person making a representation are included in the single price or "headline price".

The Draft Exposure Bill requires that the headline price must include all charges automatically applied by the "seller" (even though during the transaction the "buyer" may deselect these options) unless, before the seller made the representation, the buyer had deselected the charge or not asked that the charge be applied.

This proposed change is particularly relevant for airlines and other companies with an online presence that preselect certain additional options on behalf of the consumer that require an additional fee as part of their online purchasing process. However, any business that uses any form of "drip pricing" may be caught by these proposed amendments.

Extension of unconscionable conduct protection to publicly-listed companies

Whilst the ACCC has instituted proceedings for alleged contraventions of the unconscionable conduct provisions in a business-to-business context in recent years, the unconscionable conduct provisions of the ACL do not currently extend to publicly listed companies.

Schedule 2 to the Draft Exposure Bill seeks to amend section 21 of the ACL so that publicly listed companies are also protected by the unconscionable conduct provisions. This stems from the recognition that public listing is not necessarily a reflection of a corporate's size, level of resourcing or its ability to withstand unconscionable conduct. Where there is a significant imbalance in bargaining power, a publicly listed company could find itself subjected to conduct that meets the threshold of unconscionable conduct. This proposed change, if passed, will provide publicly listed companies with an additional avenue of legal recourse should such a company be subjected to conduct that is unfair, oppressive or unconscionable having regard to relevant industry norms.

Clarification of existing provisions relating to false billing, unsolicited consumer agreements

The Draft Exposure Bill also seeks to clarify and widen a number of existing provisions and definitions.

The existing definition of 'unsolicited services' at section 2(1) of the ACL is limited to services supplied to a person without the person requesting the services.

Schedule 3 to the Draft Exposure Bill proposes to amend the definition of 'unsolicited services' so that it also includes unrequested services which are purported to have been supplied but have not been supplied. This is said to allow for better enforcement of the false billing provisions under sections 40 and 162 of the ACL (which prohibit a person from asserting a right to payment

for unsolicited services unless the person has reasonable cause to believe there is a right to the payment).

The Draft Exposure Bill also proposes to amend the unsolicited consumer agreement provisions at section 69 of the ACL to include agreements entered into in a public place, which need not be a place the dealer cannot enter without the consumer's consent or invitation. Those agreements cannot be entered into without the consumer's consent or invitation.

Voluntary recalls

The Draft Exposure Bill proposes to clarify the product safety recall framework by inserting a definition of recall into the ACL. Under the new definition, a *voluntary* recall is corrective action taken by a person engaged in trade or commerce to mitigate a consumer safety risk. This could include, but is not limited to, withdrawing faulty products from sale or notifying customers of a fault. This is quite a significant change as it could involve preliminary steps to assess whether there is a safety risk. It would be preferable if this proposed amended definition were to still allow a person to take pro-active steps to assess safety risks, without triggering a recall notification.

Increases in the penalties that apply where a person fails to meet its voluntary recall notification requirements are also proposed to be increased. For a body corporate, the penalty will increase from $16,650 to the greater of: (a) $165,000; or (b) three times the value of the benefit attributable to the body corporate and any related bodies corporate as a result of the act or omission.

Consumer Guarantees

Section 63(a) of the ACL currently provides an exemption from the consumer guarantees regime under the ACL where a consumer guarantee does not apply to services that are supplied under "a contract for or in relation to the transportation and storage of goods for the purpose of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported". The Draft Exposure Bill clarifies this exemption so that it applies where the consumer is a business but does not apply where the consumer is not a business.

Enhance information-gathering powers of the ACCC for investigations in relation to product safety and unfair contract terms

The existing section 133D of the CCA gives the Commonwealth Minister, or an inspector appointed by the regulator, the power to issue disclosure notices to a supplier to obtain information about the safety of goods or services.

Schedule 6 to the Draft Exposure Bill proposes to broaden this power so that disclosure notices will be able to be issued to third parties including but not limited to safety consultants and consumers who have been injured by a hazardous product.

Controversially, the Draft Exposure Bill also seeks to amend section 155 of the CCA to extend the ACCC's investigative powers to enable it to use its compulsory information-gathering powers under section 155 to determine if a term in a contract may be unfair. The ACCC currently cannot issue section 155 notices in the context of unfair contract terms, as the ACCC's section 155 powers are triggered where there are "contraventions" or "possible contraventions" of the CCA. The unfair contract terms provisions currently set out possible consequences of using unfair terms (such as declaring the term

void) rather than *prohibiting* their use in such a manner that would give rise to a contravention. This proposal would, if implemented, enable the ACCC to issue potentially wide-ranging compulsory information gathering notices in relation to determinations that would be largely resolved by objectively considering the terms of a particular standard contract. This could potentially result in a substantial (and disproportionate) cost burden for businesses without providing a corresponding benefit to the ACCC in the sense of making it simpler for the ACCC to access relevant information.

Concern has also been expressed regarding the potential use of such an extended power by the ACCC to undertake wide-ranging initial or preliminary assessments of contracts and conduct, rather than limiting the issue of such notices to cases where the ACCC has identified specific concerns. This is particularly problematic given that, under current case law, there is no restriction on the ACCC's ability to issue such a notice even where it is significantly onerous or burdensome for the recipient of the notice to comply with it.

In this context, it should be noted recent changes to section 155 have required the ACCC to be mindful of the burden of the issue of such notices in an environment of modern corporations holding substantial amounts of data. However, our practical experience is that, notwithstanding these amendments, the compliance burden has not been meaningfully reduced.

Given that unfair contract terms investigations are already usually coupled with unconscionable conduct or misleading and deceptive conduct investigations, the rationale for this additional section 155 power to assist the ACCC is unclear. There has been no commentary as to why the power is being broadened. For example, there have been no examples given by the Government or the ACCC of where the ACCC has been stymied in its ability to successfully bring an action because of the existing restrictions on its section 155 powers.

Easing the evidentiary burden for litigants

Schedule 1 to the Draft Exposure Bill would amend section 137H of the CCA to enable private litigants and the ACCC to rely on admissions made by the respondent in ACL court proceedings as well as facts established in earlier proceedings as evidence in their own case. Agreed facts from earlier proceedings will remain available to litigants.

This mechanism is aimed at helping reduce the cost of private actions by allowing a person to rely on a previous admission of fact as prima facie evidence of those matters in a subsequent action.

Expansion of remedies available to the courts for contraventions of the ACL

The Draft Exposure Bill would amend section 246 of the ACL to clarify that a court may issue a community service order requiring a person who has contravened the ACL to engage a third party, at the person's expense, to perform the services required in the order.

A court may consider using this remedy when the person in breach is not qualified or trusted to give effect to an order. For example, a court may consider that it is not appropriate for a person who has caused financial harm to low-income or vulnerable people to provide financial counselling to those people.

CONCLUSION

The proposed changes included in the Draft Exposure Bill and Penalties Bill cover a range of matters that are intended by the Government to strengthen and clarify the consumer protection regime to ensure that consumers are well-informed and that consumers and traders better understand their rights and obligations. Businesses will need to take these strengthened provisions very seriously.

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