AUSTRALIAN CONSUMER LAW PENALTIES INCREASED TO ALIGN WITH PENALTIES UNDER COMPETITION LAW

On 23 August 2018, the Australian Parliament passed the *Treasury Laws Amendment (2018 Measures No. 3) Bill 2018* (Cth), which increased the maximum civil financial penalties applicable to certain contraventions of the consumer protection provisions of the Australian Consumer Law (**ACL**). The changes took effect from 1 September 2018.

The increased penalties are now consistent with penalties imposed for anti-competitive conduct under Part IV of the *Australian Competition and Consumer Act 2010* (Cth) (**CCA**). This means that penalties for certain contraventions of the ACL will be increased from:

- For companies: from A$1.1 million to the greater of: (a) A$10 million; (b) three times the value of the benefit received; or (c) if the benefit cannot be calculated, 10% of the annual turnover of the company and related bodies corporate in connection with Australia in the preceding 12 months; and
- For individuals: from A$220,000 to A$500,000.

BACKGROUND

The legislative amendments are a response to the recommendations by Consumer Affairs Australia and New Zealand in its final report on the ACL Review in March 2017. The final report found that the "*[former] maximum financial penalties available under the ACL … are insufficient to deter future breaches, particularly where the non-compliant conduct may be highly profitable or the company is large*" and that "*traders might be prepared to factor the risk of a low penalty into its pricing structures as a 'cost of doing business' rather than a deterrent*".

This is consistent with the Productivity Commission's recommendation into Consumer Law Enforcement and Administration and the OECD's recent report entitled "Pecuniary Penalties for Competition Law Infringements in Australia", which found that the maximum penalties imposed in Australia are lower than in comparable jurisdictions for competition law infringements (although we note Australia does have criminal cartel provisions and Europe does not). For instance, the average penalty in Australia in relation to cartel cases up until November 2017 is A$25.4 million, while the average base penalty in comparative jurisdictions would be A$320.4 million. The changes are also part of a global trend – the European Commission is similarly looking to increase penalties for breaches of consumer protection law by allowing individual EU countries to impose fines of up to 4% of the business' annual turnover in each respective Member State.

These amendments have been sought by the Australian Competition and Consumer Commission (**ACCC**) for some time due to the perceived lack of deterrence for big businesses in respect of contraventions of the ACL. Notably, the ACCC has consistently been of the view that non-compliance with the ACL cannot simply be viewed as a "cost of doing business in Australia". The ACCC recently sought a penalty of A$10 million for the food company Heinz in respect of making misleading health claims that its Little Kids Shredz

Key issues

- Maximum penalties in relation to certain provisions under the ACL have been increased in line with penalties under the CCA.
- For businesses, the maximum penalty will be the greater of: (a) A$10 million; (b) three times the value of the benefit received; or (c) if the benefit cannot be calculated, 10% of the annual turnover of the company and related bodies corporate in connection with Australia in the preceding 12 months.
- The increased penalty is for *each* contravention – this provides courts with the discretion to aggregate penalties in such a way that could result in companies being liable for very substantial sums of money.
- New penalties took effect from 1 September 2018 and will not be retrospectively applied.
- The ACCC is of the view that large businesses can no longer view penalties under the ACL as merely a "cost of doing business".

products were healthy. Days after the new penalties were announced, the Federal Court imposed penalties on Heinz totalling A$2.25 million as it found that while Heinz should have appreciated the impression that its advertising may have had, the conduct was not deliberate.

To date, the highest penalty awarded under the ACL has been A$10 million (in separate unconscionable conduct cases against Coles and Ford), which pales in comparison to the highest penalty awarded under the CCA, being A$46 million against Yazaki Corporation for engaging in cartel conduct (with penalties totalling A$113.5 million imposed against 14 airlines since the investigation into the air cargo cartel started in 2006 in Australia).

HIGHER FINES

The maximum penalty for businesses who breach the ACL will be the higher of: (a) A$10 million; (b) three times the value of the benefit directly or indirectly obtained from the offence by the business and its related body corporates, if that benefit can be determined; or (c) 10% of the business and its body related corporates' annual turnover in connection with Australia in the preceding 12 months, if the value of the benefit cannot be determined in that instance. For individuals, the maximum penalty is A$500,000.

The new maximum penalties apply to the following provisions of the ACL:

- Pt 2-2: unconscionable conduct;
- Pt 3-1: unfair practices (with the exception of s 47(1) – supplying goods at a price that is not the lowest price displayed);
- Ss 106-7: supplying goods and services that do not comply with safety standards;
- Ss 118-9: supplying goods and services covered by a ban;
- Ss 151-2 and 159: false and misleading representations;
- Section 154: offering rebates, gifts, prizes etc without intending to provide them;
- Section 155-6: misleading conduct as to the nature of goods and services;
- Section 157: bait advertising;
- Section 158: wrongly accepting payment;
- Section 161: unsolicited cards;
- Ss 162-3: assertion of right to payment for unsolicited goods or services or unauthorised entries or advertisements;
- Section 164: participation in pyramid schemes;
- Ss 166: single price to be specified in certain circumstances;
- Section 167: referral selling;
- Section 168: harassment and coercion;
- Ss 194-5: supplying goods and services that do not comply with safety standards;
- Ss 197-8: supplying goods and services covered by a ban;
- Section 199: compliance with recall orders; and
- Ss 203-4: supplying goods and services that do not comply with information standards.

The amended penalty regime will not apply retrospectively; rather, it will apply to breaches of the ACL from 1 September 2018.

IMPLICATIONS FOR YOUR BUSINESS

The Australian Government and the ACCC are making it clear that breaches of the ACL should be treated similarly to breaches of the competition provisions of the CCA. The changes also reflect an acceptance of the ACCC's increasingly stronger push to seek greater penalties from the courts in relation to breaches of the ACL, particularly in respect of misconduct by large businesses or where there is significant and widespread consumer harm.

As the maximum penalties are in respect of *each* contravention, businesses must now take greater care in ensuring that they do not breach the ACL. If conduct is found to constitute multiple contraventions of the ACL, courts will now have the discretion to impose total penalties that could result in companies being liable for very substantial sums of money (which could in some cases theoretically exceed penalties applicable to breaches of the competition provisions). Accordingly, non-compliance with the ACL can no longer be seen as a "cost of doing business".

In conclusion, businesses operating in Australia should review their interactions with customers and consumers, all external-facing materials and their compliance measures, including ensuring that all staff are aware of the increased penalties and are adequately trained on their obligations under the ACL.

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