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AUSTRALIAN CONSUMER LAW MARKS 10 YEARS WITH SOME LARGE PENALTIES



Australian Consumer Law marks 10 years with some large penalties

The Australian Consumer Law marked its tenth anniversary on 1 January 2021. Some belated presents were recently delivered in the form of the confirmation of, and the handing down of, Australia's two largest ever penalties for contraventions of the *Competition and Consumer Act 2010* (Cth) (CCA). On 9 April 2021, the Full Court of the Federal Court confirmed that the penalty of **\$125 million** that was imposed by the Court on Volkswagen in December 2019 was not excessive, let alone manifestly excessive.¹ Then on 13 May 2021, the Federal Court imposed a penalty of **\$50 million** on Telstra.

Given the potential for significant penalties to flow from fresh contraventions of the ACL, companies should re-evaluate their compliance priorities in circumstances where the Courts will sanction consumer law contraventions just as seriously as they do competition law contraventions.

In addition to higher penalties, other changes may be made to the ACL in the coming 12 months, including changes to the Unfair Contract Terms regime.

10 years of the ACL

This year is the tenth anniversary of the ACL which was introduced on 1 January 2011. It was designed to provide a renewed framework for fair dealings between consumers and businesses. Over the last decade, the ACL has been enhanced and strengthened.

These enhancements include:

- the introduction of substantiation and infringement notice powers which allow the ACCC to deal with lower-level infringements of the ACL by companies without having to resort to court enforcement;
- giving the ACCC the power to issue public warning notices to alert consumers to a suspected breach of the substantive provisions of the ACL where it is in the public interest to do so;
- the extension of the Unfair Contract Term provisions to standard form agreements offered to small businesses by larger businesses; and
- the imposition of a nationally consistent approach to product safety, including mandatory safety standards, product bans, product recalls and mandatory reporting and notification requirements.

ACL enforcement stronger than ever

ACCC enforcement of the ACL is vigorous and the Federal Court is handing down significant penalties. Penalties totalling in excess of \$475 million have been imposed by the courts since the commencement of the ACL. In the last 16 months alone, penalties amounting

to over \$250 million were imposed on corporations for consumer law contraventions. This, in part, reflects the amendments made to the ACL in September 2018 which substantially increased the magnitude of the pecuniary penalties for contravention of the ACL, bringing them in line with the penalties that apply to contraventions of the competition provisions in the CCA. Although the single largest contributing factor was the penalty imposed by the Federal Court on Volkswagen in December 2019.

The maximum penalty for contravening conduct after 1 September 2018, is the greater of (per offence):

- \$10 million;
- if the value of the benefit can be determined, 3 times the value of that benefit; or
- if the value of the benefit cannot be determined, 10% of the annual group turnover of the contravening company during the 12-month period leading up to the contravening conduct.



Cases with significant penalties in the last 12–16 months

In the last 16 months the Federal Court has made a number of significant penalty decisions including the two largest penalties ever imposed in competition or consumer law matters prosecuted by the ACCC. The largest penalty, imposed on Volkswagen, was, on 9 April 2021, held by the Full Court of the Federal Court not to be excessive, let alone manifestly excessive, following an appeal by Volkswagen against the significant penalty. The second largest penalty was imposed on Telstra.

ACCC v Volkswagen and Audi

On 20 December 2019, Justice Foster of the Federal Court handed down his penalty decision in the long-running ACCC case against the car manufacturing giant Volkswagen.² The ACCC alleged that Volkswagen had made false representations about its compliance with Australian diesel emissions standards.

Initially, Volkswagen defended the proceedings. However, later Volkswagen decided to settle with the

¹ *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49 (9 April 2021).

² *ACCC v Volkswagen Aktiengesellschaft* [2019] FCA 2166 (20 December 2019).

ACCC. Volkswagen admitted that when it sought approval to supply and import 57,000 motor vehicles into Australia between 2011 and 2015 it did not disclose to the Australian Government the existence of its vehicles' "Two Mode" software. That software had the effect of switching the vehicles to "Mode 1" for the purposes of emissions testing, causing the vehicles to produce lower nitrogen oxide (NO_x) emissions. However, when the vehicles were driven in "on road" conditions, the software would switch to "Mode 2" and the vehicles would produce higher NO_x emissions.

Justice Foster, the primary judge, imposed a pecuniary penalty of \$125 million on Volkswagen which was \$50 million greater than what the ACCC and Volkswagen themselves had jointly submitted to the Court was an appropriate penalty. It is significant that this penalty related to conduct that occurred prior to 1 September 2018 (i.e. prior to when the penalties were significantly increased).

Volkswagen appealed the decision. That appeal was dismissed by the Full Court on 9 April 2021.

The Full Court of the Federal Court, held that Justice Foster did not fall into error by rejecting the jointly proposed penalty and imposing in its place a far more significant penalty. The Court observed that Volkswagen had admitted to having engaged in 473 separate contraventions of the ACL. The Court also noted:

- The fact that Volkswagen had not been found to have engaged in similar conduct in the past did not mean that Volkswagen was entitled to be penalised on the basis that it was a good corporate citizen at the time of the contraventions (i.e. a mitigating factor);³
- Volkswagen's contraventions were plainly extremely serious contraventions involving systematic, deliberate and covert conduct involving the deception of the Commonwealth and Australian consumers in respect of an important matter over a considerable period of time;⁴
- It was open to the primary judge to conclude that the agreed penalty was manifestly inadequate to secure specific and general deterrence. Virtually every objective feature of Volkswagen's conduct suggested that a very significant penalty was required, irrespective of the estimated profit derived from the contravening conduct;⁵ and
- The primary judge was plainly entitled to have regard to Volkswagen's conduct of the proceeding in assessing the appropriate penalty; it was open to the judge to find that it was demonstrable of a lack of contrition on Volkswagen's part.⁶

The Court concluded that the very serious nature of the contraventions and Volkswagen's size, profitability and lack of contrition compelled the imposition of a very large penalty. A penalty of \$125 million could not be said to be manifestly excessive in circumstances where the potential maximum aggregate penalty was at least \$500 million.⁷

ACCC v Telstra Corporation Limited

On 13 May 2021, Justice Mortimer of the Federal Court handed down her penalty decision in respect of conduct that Telstra had admitted was unconscionable under the ACL.⁸

Between January 2016 and August 2018, sales staff at five licensed Telstra-branded stores (three of which were located in regional or remote areas) signed up over 100 Indigenous consumers to multiple post-paid mobile contracts which they did not understand nor could afford. In some instances, the sales staff:

- failed to properly explain the potential costs of the contract to the consumers;
- falsely represented that consumers were receiving products for 'free'; and
- manipulated credit assessments, so consumers who otherwise may have failed its credit assessment process could purchase post-paid mobile products, including falsely indicating that a consumer was employed when they were not.

Telstra admitted that its conduct was unconscionable under the ACL and, with the ACCC, jointly submitted that a penalty of \$50 million was appropriate.

In agreeing that the proposed penalty was, in the circumstances, an appropriate penalty, her Honour said: "*a significant penalty is necessary to send a strong and clear message to all those who might be tempted to take advantage of vulnerable consumers in similar ways. A strong and clear message must also be sent to those who might then be slow to remediate their conduct out of self-interest. Both the unconscionability and any delay in remediation are likely to be firmly and heavily punished.*"⁹

In addition to the orders made by the court, the ACCC accepted a court enforceable undertaking from Telstra in which it has undertaken to provide remediation to affected consumers, improve its existing compliance program, review and expand its Indigenous telephone hotline, and enhance its digital literacy program for consumers in some remote areas.

³ *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49, [142].

⁴ *Ibid*, [144].

⁵ *Ibid*, [158].

⁶ *Ibid*, [197].

⁷ *Ibid*, [213].

⁸ *ACCC v Telstra Corporation Limited* [2021] FCA 502.

⁹ *Ibid*, [73].

Other recent significant penalties imposed for ACL contraventions

While the Volkswagen and Telstra penalties represent the two largest penalties ever imposed by the courts for contraventions of the CCA, there has over the past few years been a noticeable increase in the penalties the courts have been prepared to impose for contraventions of the ACL. As future cases will predominantly involve contravening conduct occurring post 1 September 2018, penalties will only increase as such conduct will be subject to the new maximum penalty regime.

ACCC v Cornerstone Investment Aust Pty Ltd (in liq) (No 5) (2019)	<p>Cornerstone, trading as Empower Institute provided VET FEE-HELP Diploma courses which cost up to \$15,000 per course. It marketed and sold those courses using face-to-face marketing, including door-to-door sales. Courses marketed to consumers included a number of Diploma courses. Empower marketed and sold the VET FEE-HELP funded courses to consumers in remote and indigenous communities and low socio-economic areas in all States except Tasmania.</p> <p>The Court found that Empower had engaged in unconscionable conduct when it enrolled consumers in the courses, by marketing courses to the relevant target customers, making false or misleading representations and using recruiters who were practically untrained and offered inducements such as free Google Chromebooks.</p>	<p>Penalty of \$26.5 million imposed by the Federal Court</p> <p>Contravening conduct occurred prior to 1 September 2018</p>
ACCC v Campbell (No 3) (2021)	<p>Between March 2016 and July 2019 Jump Swim offered for sale "Jump Swim" branded learn-to-swim school franchises. Representations were made to up to 174 franchisees that they would have an operational swim school within 12 months of entering into a franchise agreement. Franchisees paid to Jump Swim amounts ranging between \$150,000 and \$175,000 for their franchised business. Jump Swim went into liquidation in August 2019.</p> <p>Jump Swim admitted that that it made false and misleading representations when it made these representations to franchisees and wrongly accepted payments from them.</p>	<p>Penalty of \$23 million imposed by the Federal Court</p> <p>Contravening conduct occurred prior to and after 1 September 2018</p>
ACCC v STA Travel Pty Ltd (2020)	<p>STA Travel promoted a product called the "MultiFLEX Pass" under which a customer who acquired it would not be charged to change the date of a flight booking. The price of the Pass ranged from \$49 (which authorised one date change) to \$149 (which authorised unlimited date changes). The sale of the MultiFLEX Passes generated STA Travel revenue of \$1.6 million per year for approximately four years.</p> <p>STA Travel admitted that it engaged in misleading or deceptive conduct when, at the relevant time, it continued to levy certain amounts on customers who changed their flight date, despite having acquired one of the MultiFLEX Passes.</p>	<p>Penalty of \$14 million imposed by the Federal Court</p> <p>Contravening conduct occurred prior to and after 1 September 2018</p>
ACCC v We Buy Houses Pty Ltd (No 2) (2018)	<p>Between January 2011 and March 2015, WBH represented to consumers at free seminars, "boot camps", on its website and in related materials that consumers could:</p> <ul style="list-style-type: none">• buy a house for \$1• buy a house without needing a deposit, bank loan or real estate experience• buy a house using little or none of the consumer's own money• build property portfolios without investing their own money or new bank loans• make profits immediately• create wealth. <p>The Federal Court held that WBH and its sole director had made false representations and had engaged in misleading or deceptive conduct.</p>	<p>Penalty of \$12 million imposed by the Federal Court on the company and \$6 million imposed on the company's sole director</p> <p>Contravening conduct occurred prior to 1 September 2018</p>

ACCC v Viagogo AG (No 3) (2020)	<p>Viagogo made representations in online advertisements that it was an 'official' seller of tickets for live music and sports events, when in fact Viagogo was a ticket reseller. In addition, Viagogo made representations on its website that the seats remaining for sale were the only ones available at the venue, when in fact they were the only seats that Viagogo had for sale. Viagogo also failed to adequately disclose fees.</p> <p>The Court held that each of the representations were misleading and deceptive, the contraventions were serious, and that Viagogo had acted deliberately, in some instances 'on an industrial scale'.</p>	<p>Penalty of \$7 million imposed by the Federal Court</p> <p>Contravening conduct occurred prior to 1 September 2018</p>
ACCC v Reckitt Benckiser (Australia) Pty Ltd (2016)	<p>Over a period of 5 years, 5.9 million packs of Nurofen Specific Pain were sold (often at double the normal price). These products were represented as being able to specifically target particular types of pain, which was not true. The quantity of the active ingredient in the Specific Pain products was no different than the cheaper regular Nurofen products. Reckitt admitted to engaging in misleading or deceptive conduct.</p>	<p>Penalty of \$6 million imposed by Full Federal Court (increased from \$1.7 million)</p> <p>Contravening conduct occurred prior to 1 September 2018</p>

What lies ahead over the next 12 months?

In addition to continued ACCC enforcement and larger penalties, there will likely be further developments in 2021, most notably:

- 1 Proposal for pecuniary penalties to apply to Unfair Contract Terms
- 2 Increase to consumer monetary threshold from 1 July 2021
- 3 ACCC being active in the protection of consumer data and data privacy
- 4 ACCC push for further reforms to the ACL

1. Pecuniary penalties to apply to Unfair Contract Terms

In November 2020, the Federal Government, together with the State and Territory Governments agreed to make a number of changes to the Unfair Contract Terms (UCT) regime to strengthen the protections for consumers and small businesses. If implemented the proposed changes will:

- make unfair contract terms unlawful and give courts the power to impose a pecuniary penalty – currently a court can only declare an unfair contract term to be void;
- empower the ACCC to commence court proceedings and seek remedies on behalf of non-party small businesses that have suffered or are likely to suffer loss or damage as a result of an unfair contract term. The law will also be amended to include a rebuttable presumption that a contract term is unfair if, in a separate case, the same or a substantially similar term was used by the same entity or in the same industry sector and was declared by a court to be unfair;
- expand the definition of “small business contract” by:

- removing the requirement for the upfront price payable under the contract to be below a certain threshold;
- increasing the maximum employee threshold from 20 to 100 employees; and
- introducing an annual turnover threshold of less than \$10 million as an alternative threshold for determining eligibility; and
- improve clarity on when the protections apply, such as what is a “standard form contract”.

Legislation to amend the ACL is currently being prepared. The legislation is expected to be introduced into the Federal Parliament during 2021. If enacted, the ACCC will be likely to increase its enforcement proceedings involving unfair contract terms.

2. Increase to consumer monetary threshold

A key aspect of the ACL is who is a “consumer”. Section 3 of the ACL provides that a person is taken to have acquired particular goods or services as a “consumer” if, and only if, the amount paid or payable for the goods or services did not exceed \$40,000 (or a greater prescribed amount), or the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

This definition of “consumer” is particularly relevant to the consumer guarantees included under the ACL. Those guarantees apply only to transactions involving the supply of goods or services to a “consumer”.

From 1 July 2021 the current threshold of \$40,000 will increase to \$100,000.¹⁰

¹⁰ Treasury Laws Amendment (Acquisition as Consumer – Financial Thresholds) Regulations 2020 (Cth).

Manufacturers and retailers will need to ensure their terms and conditions of sale are updated to reflect the increase in this threshold. If they don't, they may be at risk of making false or misleading representations concerning the existence of the statutory guarantee regime.



3. Protection of consumer data and data privacy

As evidenced by the [ACCC's recent case against Google](#), the ACCC is increasingly focussed on the disclosures provided by companies regarding how personal data is collected, used and disclosed. Businesses need to consider how they present their terms and conditions, especially in relation to consumer data.

4. ACCC push for further reforms to the ACL

The ACCC continues to advocate for further reforms to the ACL. ACCC Chair Rod Sims recently said the ACCC will also be seeking to make the [following changes to the ACL](#):

- the inclusion of a penalty provision for failing to comply with the consumer guarantees (similar to the one already proposed for the UCT regime);
- the inclusion of an unfair trading practices prohibition; and
- the establishment of national product safety standards, including a prohibition on the supply of unsafe goods.

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