



CONSUMER LAW PENALTIES RAMPING UP TO DETER BREACHES

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Legal Briefings - By **Camille Sullivan, Gila Segall and Philippa Bergin-Fisher**

Legislation has passed which significantly increases maximum penalties under the Australian Consumer Law. The ACCC Chair said of the increase “penalties need to hit the bottom line so they are not simply seen as the cost of doing business”.

On 23 August 2018, legislation which increases the maximum financial penalties under the Australian Consumer Law (**ACL**) passed through both houses of Federal Parliament.¹ The legislation increases maximum penalties to be consistent with those that apply to the competition provisions of the *Competition and Consumer Act 2010*. It came into force on 1 September 2018.

The maximum penalty for a corporation will increase from AU\$1.1 million to the greater of:

1. AU\$10 million;
2. 3 times the value of the benefit obtained from the contravention (where the value of the benefit can be determined); or
3. 10% of the annual turnover of the corporation during the 12 month period ending at the end of the month that the contravention occurred (where the value of the benefit cannot be determined).

The maximum penalty for individuals will increase from AU\$220,000 to AU\$500,000.

The new regime applies to the civil and criminal provisions of the ACL relating to:

- unconscionable conduct;
- unfair practices (such as misleading representations);
- goods and products safety; and
- information standards.²

The explanatory memorandum introducing the new legislation notes that deterring breaches of the ACL was a key objective behind the new regime, and follows the finding of the ACL Review Final Report that the existing penalties were ‘insufficient’ to achieve this objective.³ As such, *‘the penalties take into account the size of the business and the benefit gained from the breach so as to make a contravention or offence much more costly for the perpetrator’*.⁴

We [previously reported](#) on the high penalties being imposed in ACL cases recently, as a result of the ACCC’s enforcement activity. It appears that this trend is continuing and, given the increased maximum penalties outlined above, is likely to further continue. Additional recent examples include:

- Heinz was penalised AU\$2.25 million for breaches of the ACL arising out of misleading representations about the nutritional benefits of its Little Kids Shredz products. Justice White considered that this penalty took into account the size of Heinz and was *‘necessary, in particular, because of the serious and extensive nature of the contraventions, their effects and the need for deterrence, both specific and general’*.⁵ Heinz was also ordered to establish a consumer law compliance program – which involves risk assessments, training, compliance review and board reporting in relation to its ACL obligations.
- Meriton was ordered to pay AU\$3 million for misleading or deceptive conduct consisting of altering the email addresses of unhappy customers so as to prevent them receiving a prompt from TripAdvisor to leave a review. The conduct was aimed at preventing negative reviews on TripAdvisor and was found to mislead potential customers who relied on these reviews.
- Apple was ordered, by consent, to pay AU\$9 million for representations to customers about their rights under the ACL regarding repairing faulty iPhones and iPads.
- Domain Corp Pty Ltd and Domain Name Agency Pty Ltd were ordered to pay combined penalties of AU\$1.95 million for sending ‘renewal notices’ to businesses that misled the

businesses into thinking they were required to pay to renew their domain name, when in fact they were purchasing a new one.

Commenting on the Heinz decision, ACCC Chair Rod Sims noted that *'the ACCC wants to ensure that penalties for breaches of the consumer law are large enough to get the attention of the financial markets, boards and senior management'*. The new maximum penalties look set to capture plenty of attention.

KEY TAKEAWAYS FOR BUSINESSES

- Penalties for breaches of the ACL are increasing for both businesses and individuals, with a greater focus on achieving specific and general deterrence of the conduct.
- Given increasing penalties, businesses may consider it a good time to do an internal audit of their activities and ACL compliance programs.
- Remedies for breaches of the ACL can also include the imposition of consumer law compliance programs and orders for corrective advertising.

ENDNOTES

1. *Treasury Laws Amendment (2018 Measures No. 3) Bill 2018*.
2. See *Treasury Laws Amendment (2018 Measures No. 3) Bill 2018*, Explanatory Memorandum, [1.15]. This contains a detailed summary of the provisions of the ACL to which the new penalties apply.
3. *Treasury Laws Amendment (2018 Measures No. 3) Bill 2018*, Explanatory Memorandum, [1.5] - [1.6].
4. *Treasury Laws Amendment (2018 Measures No. 3) Bill 2018*, Explanatory Memorandum, [1.14].
5. *Australian Competition and Consumer Commission v H.J. Heinz Company Australia Limited (No 2)* [2018] FCA 1286, [75].

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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