

# HIGH PENALTIES ORDERED FOR CONSUMER LAW BREACHES

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Legal Briefings - By **Camille Sullivan and Philippa Bergin-Fisher**

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The ACCC has been actively enforcing the Australian Consumer Law in a range of industries recently, resulting in the imposition of large penalties.

Thermomix was penalised over \$4.6 million for continuing to sell products between July and September 2014, despite being aware of incidences of the product lid opening during use and causing serious burns to users. The Federal Court held that Thermomix's failure to warn consumers of the risk of injury constituted the making of false and misleading representations. Thermomix was also found to have misled consumers about their consumer guarantee rights, falsely informing some customers that they did not have the right to a refund or replacement product without first signing a non-disclosure agreement.

The penalty imposed on Thermomix is one of a number of recent successes for the ACCC resulting in high penalties for misleading or deceptive conduct. Others include:

- Pental was penalised \$700,000 for making false and misleading representations that its White King 'flushable' toilet and bathroom wipes were specially designed with material that was suitable to be flushed into the sewerage system.
- Reckitt Benckiser was ordered to pay \$6 million in penalties for misleading consumers in its advertising of its specific pain relief range of Nurofen products.
- Valve Corporation was penalised \$3 million for false or misleading representations about consumer guarantees and terms in its subscriber agreements and refund policies.

There are no signs the ACCC is slowing down. It has a number of proceedings on foot relating to alleged misleading or deceptive conduct, including against:

- Kimberly-Clark for representations made in relation to ‘flushable’ personal hygiene products.
- GlaxoSmithKline and Novartis for statements made about its Voltaren Osteo Gel and Emulgel pain relief products. The ACCC alleges that by naming the product ‘Osteo Gel’ consumers would expect the Voltaren product to be more effective at treating osteoarthritis conditions, when in fact it contains the same active ingredient as the Emulgel products. The ACCC alleges consumers may also be misled by the fact that the Osteo Gel products are often sold at a price premium to the Emulgel products.
- Woolworths for environmental representations made about its ‘W select eco’ picnic products.
- Telstra for false or misleading representations to consumers in relation to its third-party billing service known as “Premium Direct Billing”. It has been reported that Telstra has admitted to the allegations and agreed to the imposition of a \$10 million penalty. Telstra admitted that they misled customers by charging for content through third party billing services, for examples games or ringtones, without the customer’s consent.

## **KEY TAKEAWAYS FOR BUSINESSES:**

- It is important to ensure that conduct in the marketing of products and services does not mislead or deceive consumers. It is relevant to consider the overall impression of marketing materials as well as specific claims.
- Withholding information from consumers, for example, failing to warn of known risks associated with the use of a product, can amount to misleading conduct.
- Businesses cannot alter a consumer’s statutory rights under the Australian Consumer Law. For example, conditions cannot be placed on the right of a customer to receive a refund or replacement product.
- In rare cases, individuals such as directors of companies who are knowingly concerned in the making of certain false or misleading representations may be personally liable for payment of a pecuniary penalty.

## 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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