

COMMERCIAL CPD SEMINARS

WEDNESDAY 31 OCTOBER 2018

Ground Floor Auditorium, Monash University Law Chambers
555 Lonsdale Street, Melbourne VIC 3000

Session Three

RECENT DEVELOPMENTS IN TRADE PRACTICES

Just deserts

**Increasing serving sizes in civil penalties
under the Australian Consumer Law**



Catherine Dermody

Just deserts

Increasing serving sizes in civil penalties under the Australian Consumer Law

Background

- Section 224 of the Australian Consumer Law (schedule 2 to the *Competition and Consumer Act 2010*) sets out maximum pecuniary penalties that a court may order for contraventions of provisions prohibiting, amongst other things:
 - unconscionable conduct (Part 2-2)
 - unfair practices, which includes false or misleading representations about goods or services (Part 3-1)
- The maximum pecuniary penalties were increased with effect from 1 September 2018:
 - For body corporates the pecuniary penalty is not to exceed:
 - \$10 million
 - if the court can determine the value of the benefit that the body corporate, or any related body corporate have obtained directly or indirectly and that is reasonably attributable to the act or omission – three times the value of that benefit
 - if the court cannot determine the value of that benefit—10 per cent of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur
 - For individuals the maximum penalty is \$500,000
- Prior to the recent amendments, the maximum penalties were \$1.1 million for a body corporate and \$220,000 for an individual
- However, even prior to these amendments pecuniary penalties were on an upwards trajectory
- Court required to have regard to relevant matters in determining the appropriate pecuniary penalty:
 - nature and extent of the act or omission and of any loss or damage
 - the circumstances in which it took place
 - whether the person has previously been found by a court to have engaged in similar conduct

Recent pecuniary penalties

- *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181
 - \$6 million
 - Note: Full Court observed that in all the circumstances an appropriate penalty for the contraventions had to be not less than \$6 million (and could have been many millions more, the Commission's figure being at the bottom of the appropriate range in all the

circumstances of the case) and that the penalty imposed at first instances was manifestly inadequate

- *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2018] FCA 571 (26 April 2018)
 - \$10 million
 - Note: Agreed penalty, proceedings taken under consumer protection provisions in the *Australian Securities and Investment Commission Act 2001* (section 12GBA) where maximum penalty was (and is) 10,000 penalty units (currently \$2.1 million)
 - As at 28 September 2018 Telstra had also refunded \$9.3 million to 72,000 customers in respect of the premium direct billing service
- *Australian Competition and Consumer Commission v Ford Motor Company of Australia Limited* [2018] FCA 703 (22 May 2018)
 - \$10 million
 - Note: penalty agreed
- *Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)* [2018] FCA 953 (18 June 2018)
 - \$9 million
 - Note: penalty agreed
- *Australian Competition and Consumer Commission v Meriton Property Services (No 2)* [2018] FCA 1125 (31 July 2018)
 - \$3 million
 - Note: penalty not agreed, Commission had sought \$20 million, Meriton submitted \$330,000 - \$440,000

Things to watch out for

- Court may express a degree of discomfort as to the imposition of single penalty for multiple contraventions
- How to approach agreed penalties: ultimately the Court's decision
- Commission's "new framework" for penalties – has indicated that it will be having "very different discussions" to resolve matters when it comes to agreed penalties

Catherine Dermody

31 October 2018

Liability limited by a scheme approved under Professional Standards Legislation