

PROPOSED INCREASES TO PENALTIES AND OTHER AMENDMENTS TO AUSTRALIAN CONSUMER LAW

The Treasury Laws Amendment (2018 Measures No.3) Bill 2018 (Cth) (Penalties Bill) has been introduced into parliament

This Bill proposes to increase the maximum penalties payable for breaches of the Australian Consumer Law (ACL).

In addition to the Penalties Bill, other amendments to the ACL are being proposed under the Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018 (Cth) (ACL Review Bill).

PENALTIES BILL

Penalties for Misconduct

The Consumer Affairs Australian and New Zealand (CAANZ) conducted a comprehensive review of the ACL and concluded that the current penalties are insufficient to deter highly profitable misconduct.

The current maximum penalty for civil and criminal breaches of the ACL is \$1.1 million for a corporation or \$220,000 for a company officer.

CAANZ's report identified that some businesses simply factor these penalties into the "cost of doing business."

To counter this problem, the Penalties Bill is significantly increasing these penalties to the greater of:

- \$10 million; or
- If the court can determine the total value of the benefit obtained from the offence, three times the profit or value generated from that benefit; or
- If the court cannot determine the value of the benefit, 10 percent of the corporation's annual turnover in the preceding 12 months.

Types of misconduct

There are a number of provisions under the ACL which attract a monetary penalty for breach. These include provisions relating to unconscionable conduct, unfair practices (such as making false or misleading representations), referral selling, non-compliance with a recall notice and various product safety provisions.

ACL REVIEW BILL

There are 14 proposed amendments in the ACL Review Bill. This article will touch on some of the significant amendments. For information on all of the proposed amendments, contact Industry Legal Group.

Unconscionable Conduct

Under the proposed amendments in the ACL Review Bill, publicly-listed companies will no longer be excluded from bringing an unconscionable conduct claim.

Voluntary Product Recall Notification Obligations

Under the current legislation businesses are given the flexibility to define a recall action in their own terms and therefore come to their own conclusion as to whether the action is technically a "recall" that would trigger an obligation to notify the Commonwealth Minister for the purposes of the ACL.

Under the proposed amendments in the ACL Review Bill, a business must notify the Commonwealth Minister if they do any of the following:

- Withdraw faulty products from sale at any level of the supply chain;
- Modify a product so that it is no longer faulty; or
- Notify customers of the fault.

Further, the proposed amendments will require a business to notify the Commonwealth Minister if their remedial actions fall within the strict definition of a product recall:

"corrective action taken by a person engaged in trade or commerce to mitigate safety risks of the consumer goods, which may include action taken to remove the consumer goods from distribution, sale or consumption."

If the business performs actions falling under the above definition, it will be required to notify the Commonwealth Minister of the recall and comply with its other obligations under the ACL in relation to removing the unsafe product from the market.

Under the proposal, the penalty imposed on a corporation for failing to notify a recall substantially increases from \$16,500 to the greater of:

- \$165,000; or
- If the court can determine the total value of the benefit obtained by not notifying, three times the value of that benefit.

The penalty for individuals increases from \$3,300 to \$33,000.

These penalty increases are considered justified given the recent Takata airbag recall and the fact that the existing penalties for failing to notify the Commonwealth Minister are generally lower than the costs businesses face in notifying the public of a recall.

Mandatory Text in Warranties Against Defects

Under consumer law, a business must include specific wording in any warranty document advising consumers that the express warranty against



defects provided by the business operates in addition to their rights against defects in the ACL.

However, currently, the mandatory text only covers warranties against defects for goods, not services. Under the proposed amendments, businesses that provide warranties against defects in relation to services will need to update their warranty documents to include new mandatory wording regarding services.

Making litigation easier for private litigants

Currently, a person bringing a consumer law action can use a court's findings of fact about a respondent in previous proceedings as evidence of those facts in their own case.

If the proposed changes to these so called 'follow-on' provisions are introduced, that plaintiff will also be able to rely on previous admissions made by a respondent (in addition to facts established by a court) as evidence in their case.

These changes are designed to make it easier for individuals to bring consumer law actions against companies.

What is next?

If the Penalties Bill is passed, the changes will take effect by 1 July 2018.

The public consultation period for the ACL Review Bill ended on 28 February 2018 and it is possible that there will be amendments to the ACL Review Bill following this consultation. Industry Legal Group will keep you informed of any developments as they unfold.

This article is intended for information purposes only and should not be regarded as legal advice. Please contact Industry Legal Group for specific legal advice.

AAAA Member Benefits

If you have any queries about the proposed changes to the ACL and how they may impact your business, please contact Industry Legal Group on 1300 369 703 or aaaa@industrylegalgroup.com.au