

## CGW COMPETITION AND CONSUMER COMMITTEE

### SUBMISSIONS IN RESPONSE TO ACL REVIEW INTERIM REPORT

#### 1. CHAPTER 3 – ADMINISTRATION AND ENFORCEMENT

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- 1.1 Chapter 3 of the Interim Report<sup>1</sup> focuses on the administration and enforcement of the Australian Consumer Law (**ACL**).
- 1.2 Cooper Grace Ward (**CGW**) wishes to provide succinct submissions on a number of topical issues concerning the enforcement of the ACL namely, the extension of follow-on provisions and an increase in the maximum financial penalties and non-pecuniary penalties available to regulators and courts.

#### Follow-on provision

- 1.3 The ‘follow-on’ provision in the *Competition and Consumer Act 2010* (Cth) (**CCA**) primarily at section 83 but also section 137H, allows a finding of fact by a court against a corporation in one proceeding to be used as prima facie evidence against that corporation in another proceeding. Typically, this situation is seen where the ACCC has brought the first proceeding and a private litigator brings subsequent proceedings.
- 1.4 The ‘follow-on’ provision recognises that consumers and small businesses face difficulties in bringing private litigation in the Federal Court due to the evidentiary burdens that must be met.
- 1.5 The Interim Report sought submissions on whether the ‘follow-on’ provision should be expanded to allow private litigants to rely on facts and admissions established in earlier proceedings.
- 1.6 CGW recognises the ‘follow-on’ provision has been somewhat extended to the ACL by virtue of section 137H of the CCA in respect of damages actions under section 236 of the ACL and supports an extension of the ‘follow-on’ provision to all facts established in any proceedings brought under the ACL.
- 1.7 However, the ‘follow-on’ provision should not be extended to include admissions of fact by parties in prior proceedings. As highlighted in a number of submissions to the Interim Report and noted by the Harper Review,<sup>2</sup> the extension of the ‘follow-on’ provision to admissions made by corporations may in fact have negative ramifications and dissuade corporations from engaging in efficient litigation and settlement agreements.

#### Increase in financial penalties and non-punitive orders

- 1.8 The maximum financial penalties available under the ACL are currently \$1.1 million for corporations and \$220,000 for individuals. These were set when the ACL was introduced in January 2011 and have not been increased since that time.
- 1.9 There was wide-ranging support in stakeholder submissions to the Interim Report for the increase in financial penalties available under the ACL. This recommendation is also supported by CGW. The current maximum financial penalties do not sufficiently deter large corporations from breaching the ACL in circumstances where there is significant financial benefit to be had. An increase in the maximum financial penalty will ensure the financial

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<sup>1</sup> Commonwealth of Australia, *Australian Consumer Law Review*, Interim Report (2016).

<sup>2</sup> Commonwealth of Australia, *Competition Policy Review*, Final Report (2015).

penalties are adequate to deter future breaches and provide some disincentive to large corporations.

- 1.10 In addition to the above recommendation that the financial penalties be increased, CGW submits that the maximum financial penalties prescribed in the ACL should be stated in penalty units thereby indexing and eliminating the requirement of statutory amendment for increases to penalties over time.
- 1.11 The Interim Report also recognised that non-punitive penalties may be more effective than financial penalties.
- 1.12 Currently under the ACL, a court can order non-punitive orders such as:
  - (a) community service orders;
  - (b) corrective advertising orders; and/or
  - (c) orders that require a company to implement an education or training program.
- 1.13 These orders are highly effective in rectifying harm caused by a breach of the ACL, and preventing further harm from occurring by deterring large corporations that may not be greatly concerned about the financial penalties imposed.
- 1.14 CGW submits that the range of existing non-punitive orders available under the ACL is sufficient although CGW recognises the United Kingdom's 'enhanced consumer measures' regime does ensure flexibility in the non-punitive orders available to enforcers who have the ability to seek any order or undertaking in the civil courts provided the proposed measure falls within one of the prescribed categories being redress, compliance or choice.
- 1.15 In conjunction with an increase in the maximum financial penalties, the current non-punitive orders provide regulators and courts with appropriate mechanisms to enforce the ACL but greater flexibility may improve this ability.

## **2. CHAPTER 4 – EMERGING CONSUMER POLICY ISSUES**

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- 2.1 Generally, the ACL provides adequate flexibility to deal with emerging consumer policy issues, such as online purchasing. Such issues should continue to be monitored by the Australian Competition and Consumer Commission (**ACCC**) and addressed through regularly updated and distributed guidelines. This principles-based approach protects consumers while fostering innovation in the online environment, which might otherwise be thwarted by a more prescriptive regulatory regime.
- 2.2 However, the following targeted reform to the ACL may be desirable:
  - (a) Introduce an outright prohibition on using pre-selected options during booking or payment processes which add to the upfront price.
    - (i) The prevalence of drip pricing in the online marketplace (e.g. on flight and travel booking websites) indicates the ACL's section 48 requirement for traders to prominently display the minimum quantifiable single price either does not prevent the practice or is being inadequately enforced.
    - (ii) Anecdotally, drip pricing:
      - (A) can generally cause confusion for consumers;
      - (B) can mislead consumers about the true cost of the core product;

- (C) can trick consumers into purchasing ancillary goods or services they do not actually want; and
- (D) particularly affects consumers who are rushing to make a purchase, are not competent in the language used by the platform, or are unfamiliar with the platform or the online marketplace generally.

If platforms complied with the suggested prohibition on pre-selected options, these problems would likely be reduced.

- (iii) The efficacy and effect of the prohibition in the European Union should be examined in considering whether to introduce a similar prohibition in Australia. We do not make any submissions in this respect.
- (b) Develop consumer regulations tailored for digital content which includes similar concepts, rights and remedies as adopted in the corresponding UK regime.
  - (i) In formulating the above suggestion, we only considered the information regarding the UK regulations described in the Interim Report. It would be prudent to undertake a detailed study of the UK regime and consider possible improvements to it prior to making similar reform to the ACL.

2.3 The following should be examined in considering whether to introduce any of the reform recommended above:

- (a) the costs of implementing the necessary reform; and
- (b) the costs and transitional requirements necessary for industry to comply.

We do not make any submissions on these factors.

2.4 Regarding the issues raised in the Interim Report relating to:

- (a) The sharing economy, online reviews and comparator websites: no legislative intervention required (largely due to our general position stated in paragraph 2.1), but we suggest the ACCC continues to monitor such issues; and
- (b) Online auctions and the ordinary sale-by-auction exemptions to consumer guarantees: the uncertainty as to when online auctions fall within the ACL's definition of 'sale by auction' should be addressed by guidelines issued by the ACCC clarifying the exemptions do not apply to online auctions which do not bear the traits of auctions, which prompted the introduction of such exemptions.

**COOPER GRACE WARD**

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