Sweating the small stuff — big penalties for misleading consumers

By Sar Katdare, Special Counsel, and Johanna Croser, Associate, Johnson Winter & Slattery

Recent cases demonstrate that companies should immediately perform a comprehensive audit of trade practices compliance programs to ensure they are up to date, effectively implemented and well resourced.

Paying lip service to compliance no longer works. Not only is it likely to result in contraventions but those contraventions are now likely to result in substantial fines, adverse publicity and legal costs.

What you need to do

Companies must ensure that all representations, statements and other conduct in the ordinary course of business are true, accurate and verifiable. Products must be safe and comply with mandatory standards and representations regarding consumer guarantees must not be misleading or false.

Recent cases show that where representations and statements are made to the public, penalties are likely to be greater. Accordingly, advertising and marketing materials must be given high priority.

Companies’ trade practices compliance regimes to achieve these outcomes must be up to date, implemented effectively and well resourced. Such regimes serve two purposes. First, they minimise the risks of contraventions. Second, should a contravention nevertheless occur, they may assist in arguing that a substantial fine is unwarranted.

Why you need to do it now

In April 2010, the evidential burden of proof in seeking penalties for contraventions of certain consumer protection laws was lowered. While previously the Australian Competition and Consumer Commission (ACCC) was required to demonstrate that a contravention had occurred to the criminal standard, that is ‘beyond reasonable doubt’, since April 2010 the ACCC need only show on the ‘balance of probabilities’ that a contravention has occurred.

This lowering of the standard of proof has made it easier for the ACCC to seek penalties for contraventions of consumer protection laws.

In addition to this, the introduction of the Australian Consumer Law in January 2011 has given the ACCC impetus to pursue breaches of consumer protection laws. Recent cases demonstrate that this been undertaken vigorously and that courts are willing to hand down substantial fines for contraventions; in just over a year, penalties totalling more than $9 million have been imposed.

Even though penalties are not available for conduct that breaches the general prohibition of misleading or deceptive conduct, often such conduct will also be found to contravene prohibitions that attract penalties.
The maximum penalty for a contravention by a corporation is $1.1 million while the maximum penalty for a contravention by an individual is $220,000.

Recent examples

The ACCC has had the following successes in seeking penalties for contraventions of the consumer protection laws.

- In ACCC v Singtel Optus Pty Ltd (No 4) [2011] FCA 761, a penalty of $5.26 million was ordered against Optus for misleading advertisements about broadband internet plans.
- In ACCC v Yellow Page Marketing BV (No 2) [2011] FCA 352, a penalty of $1.35 million was ordered against each of two companies for a ‘directory scam’, including making misleading representations that created the false impression that they were affiliated with Yellow Pages® Business Directories.
- In ACCC v Marksun Australia Pty Ltd [2011] FCA 695, penalties of $430,000 were imposed for making a series of representations to the effect that ugg boots sold by it were made in Australia, when the ugg boots were made in China.
- In ACCC v Dimmeys Stores Pty Ltd [2011] FCA 372, a penalty of $400,000 was ordered against Dimmeys for supplying children’s dressing gowns that did not comply with mandatory safety standards regarding hazard information.
- In ACCC v MSY Technology Pty Ltd (No 2) [2011] FCA 382, penalties of $203,500 were ordered for making misleading statements regarding consumer warranties.

Misleading the public at large

The cases demonstrate that where misleading conduct and/or false representations are made to the public, such that the contravening conduct has the potential for creating large profits, courts are more likely to hand down larger fines. The decisions emphasise that larger penalties will deter others from engaging in conduct in breach of consumer protection laws. They also seek to ensure that companies recognise that penalties should not simply be seen as a cost of doing business.

Optus — the need for ‘effective’ compliance

ACCC v Singtel Optus Pty Ltd [2010] FCA 1177 demonstrates that the courts are willing to order substantial penalties for businesses whose compliance programs are ineffective and under-resourced.

In that case, Perram J agreed with the ACCC’s submission that — even though Optus had implemented a trade practices compliance regime which included an advertising vetting process — Optus had not allocated sufficient resources to the regime, and systemic failures were inevitable. Perram J held that while the contraventions were not deliberate, compliance was simply not taken seriously. The company was fined $5.26 million, a large amount for an inadvertent breach.

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489