Submission to Treasury regarding Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices

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By email: morecompetition@treasury.gov.au

Dear Treasury,

The level of penalties in the competition and consumer law matter if they are to have an effective public deterrence effect. Setting them at the right level will ensure that fewer companies mislead customers, engage in unconscionable conduct or limit competition in ways that ultimately lead to higher prices for consumers.

The Consumer Policy Research Centre (CPRC), the Consumer Action Law Centre (Consumer Action) and CHOICE strongly support increasing the maximum penalties in the *Competition and Consumer Act 2010* (the CCA).

However, we consider that the proposed *Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition and better prices* (the proposed amendment) can be enhanced to ensure policy objectives are achieved, including through:

- Applying the increased penalties to the consumer protection provisions in the *Australian Securities and Investments Act 2001* (Cth), which mirror the ACL;
- Applying increased penalties to breaches of the Consumer Data Right (CDR) regime;
- Increasing the level of penalty notices
- Increase the penalties that apply to the product safety regime.

We also consider that, separate from the proposed amendment, further consideration is given to ensuring there is a greater focus on consumer redress and remediation in regulator enforcement actions, and that penalties are applied to all substantive provisions of the ACL (i.e., address gaps such as unfair terms and consumer guarantees).

The proposed law addresses many weaknesses with the current penalty regime

The proposed amendment maintains equivalent penalties for contraventions of competition law and some elements of the consumer law. This is important – it signals to companies that breaching either element of the CCA is equally serious.

The proposed amendment also addresses many of the weaknesses with Australia's competition penalties regime, identified by the OECD in 2018.[1] The OECD found that the average pecuniary penalty for contraventions of the competition law in Australia was $25.4 million AUD which was lower

[1] OECD (2018) Pecuniary Penalties for Competition Law Infringements in Australia www.oecd.org/daf/competition/pecuniary-penalties-competition-law-infringements-australia2018.htm

than the average base penalty in comparative jurisdictions which, if applied, would have amounted to a total of $320.4 million AUD – 12.6 times higher.

One of the key recommendations from the OECD was that Australia should consider linking penalties to the length of the time that a company breached the law. The proposed amendment achieves this by changing the third limb of the maximum penalties available from 10% of annual turnover in the 12 months prior to the breach, to 30% of the adjusted turnover for the period of the breach. This important shift means that penalties can be increased in instances where the breach occurred over multiple years and truly reflect the harm caused.

Penalties must be mirrored for breaches of the ASIC Act general protections

The exposure draft legislation is a missed opportunity to increase penalties for the general consumer protections in the ASIC Act – including misleading and deceptive conduct, unconscionable conduct and consumer guarantees. Where the consumer protections are mirrored across the ACL and ASIC Act, the applicable penalties must also be mirrored.

In the casework experience of Consumer Action Law Centre, even where the breach of the consumer protection is clear, there can be ambiguity about whether the product or service is captured by the ACL or ASIC Act. This turns on whether it meets (regrettably) complex definitions of a 'financial product' or 'financial service'. This means in some cases, such as with predatory "debt help" companies, our lawyers and clients argue the misleading and deceptive conduct in the alternative as breaches of either the ACL or ASIC Act. There is no good reason in policy or common sense why the penalties applying to the same form of misconduct should depend on whether the product or services meets these terms of art, particularly when these very definitions are subject to widespread criticism and a current review by the Australian Law Reform Commission.[2] If this is not addressed, we will have a situation where a large telco or energy company is fined substantially more than a bank when they breach the same laws.

To fix this oversight, we strongly recommend that the Bill be amended to include an additional schedule to ensure that the increased penalties for ACL consumer protections are also increased and mirrored for the same consumer protections in the ASIC Act.

Increased penalties should also be applied to breaches of the CDR regime

The explanatory materials do not offer a justification for excluding the Consumer Data Right (CDR) provisions in the CCA from the proposed reform to penalties.

The penalties that currently apply to the CDR regime rightly mirror those that apply to breaches of competition protections and the ACL. For example 56BN(3) of the CCA outlines that offences committed by a body corporate tied to certain protections in the CDR regime can result in a fine of $10 million, three times the value of the benefit gained from the behaviour or 10% of the annual turnover during the 12 month period when the offence happened or began.

We can see no reason not to continue to mirror the penalties across the CCA, whether they apply to breaches of competition protections, the consumer law or the Consumer Data Right regime.

Infringement notice penalties need to be increased

Beyond maximum penalties, the proposed amendment should also increase the amount set for infringement notices and fines for non-compliance that the ACCC can issue under the ACL (and the ASIC Act).

[2] Australian Law Reform Commission, Financial Services Legislation: Interim Report A (ALRC Report 137): https://www.alrc.gov.au/publication/fsl-report-137/.

Currently infringement notice penalty amounts vary depending on the alleged breach. [3] In most cases they are fixed at:

- $133,200 for a listed corporation
- $13,320 for a corporation
- $2,664 for an individual.

The penalty amount for failing to comply with a substantiation notice is:

- $6,660 for a corporation
- $1,332 for an individual.

The penalty for providing false or misleading information under a substantiation notice is:

- $11,100 for a corporation
- $2,200 for an individual.

The penalty for a breach of rules for gift cards:

- $30,000 for a body corporate
- $6,000 for an individual.

These penalty amounts available to the ACCC are relatively low compared to the impact of the behaviour on consumers and the amount of money likely gained from the offending behaviour. For example, two funeral homes paid just $12,600 each in penalties for making false and misleading statements about their ownership.[4] The funeral homes used claims to imply they were locally owned when they were actually owned by Propel, the second largest funeral service provider in Australia.

At minimum, infringement notice penalty amounts should be lifted to match those available in the National Energy Market. *The National Electricity (South Australia) Act 1996* allows for infringement notice penalties up to $13,600 for an individual and $67,800 got a body corporate.

Penalties associated with the product safety regime also need to be lifted.

Penalties for non-compliance with product safety protections are exceptionally weak. The penalties for failing to notify the relevant Minister of a voluntary recall or to make a mandatory report that a person suffered serious injury, illness or death associated with a consumer good or product-related service is:

- $16,650 for a body corporate
- $3,300 for individuals.[5]

In *ACCC v Thermomix in Australia (2018),* the Federal Court found that Thermomix had made misleading representations about the safety of their products, about consumer guarantees and failed to make mandatory safety reports.[6] This serious case was linked to a major product failure that caused third degree burns to some customers. Thermomix was rightly required to pay a high penalty for misleading customers: $4.6 million. However, the penalty paid for failing to lodge mandatory reports about consumer injuries was just $108,000.

Thermomix Australia was aware of their products causing severe injuries to customers. Rather than reporting these within the two days as required they took, in some cases, over three years to make the mandatory report. Had this company made reports earlier, it's highly likely that product safety issues could have been identified by other parties sooner and greater pressure put on Thermomix to address safety issues. Compared to the $4.6 million penalty, the $108,000 for failing to make multiple mandatory reports does not have an adequate deterrence effect.

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[3] https://www.accc.gov.au/business/business-rights-responsibilities/fines-penalties
[4] https://www.accc.gov.au/media-release/two-propel-owned-funeral-homes-pay-penalties-for-alleged-misleading-local-ownership-claims
[5] https://www.productsafety.gov.au/product-safety-laws/legislation/fines-penalties
[6] ACCC v Thermomix in Australia PTY LTD (2018), FCA 556. See https://jade.io/article/581663

In Canada, the penalty for failing to notify the relevant Minister of a product that causes injury is same penalty that applies to other major breaches of consumer laws ($5 million or imprisonment up to two years).[7]

Given the serious consequences that occur when companies fail to act on product safety issues, penalties should be aligned with other parts of the consumer law. We recommend that the provisions in the ACL that require companies to provide notice of a voluntary recall (s. 128(2)) and notification of a harm caused from a product or product related service (s. 131 and 132) are amended to

1. introduce infringement notice penalties that allows the ACCC to act in cases of obvious breaches.
2. allow for conviction based penalties in line with breaches of the other ACL provisions of $50 million or 30 per cent of turnover over the period the breach occurred.[8]

Greater focus is needed on redress and compensation for consumers

The penalties regime for the CCA is set up to discourage poor behaviour. Relatively little consideration is given to redress and compensation for individuals and small businesses affected by breaches of the CCA.

In practice, many breaches of the competition and consumer law that result in penalties for companies do not lead to adequate compensation for affected parties. While section 227 of the ACL requires a court to preference an order for consumer compensation over pecuniary penalties, this only applies if the contravening party does not have sufficient financial resources to pay both compensation and the appropriate pecuniary penalty. Consideration should be given to other ways in which redress and compensation for consumers can be prioritised in regulatory actions.

In Consumer Action's experience, our clients are incredibly disappointed and aggrieved where they have suffered from the same or similar misconduct to that alleged in the regulator's enforcement action but receive no compensation for the harm and loss they suffered, with penalties generally going into the Government's consolidated revenue. These legitimate grievances about their lack of justice are even greater where our clients contributed to bringing the misconduct to light – through sharing their story in the media or in complaints to the ACCC – but despite their efforts receive no compensation due to the lack of a remediation program, or falling outside the scope of a limited remediation program. As a matter of justice, appropriate consumer redress should be factored into all ACL enforcement actions.

In some cases, the ACCC has some pushed companies to remediate customers as part of settlements, such as the court-enforceable undertaking the agency accepted from Telstra that will see some First Nations customers remediated for aggressive and unconscionable sales practices.[9] While in recent years remediation has been featured in ACCC settlements and actions, it is not consistently applied. While the law does allow private action, in practice this is relatively rare. Consumers either need to be exceptionally savvy, well-resourced and motivated to take on individual private action or the group of people affected and the amount lost needs to be large enough that class actions become viable.

Even where a class action is viable, it may be run too far after the misconduct to find all impacted consumers. Some of the people hardest to reach are often those experiencing very difficult circumstances – fleeing family violence, or without access to stable accommodation to receive mail or continuous phone service due to poverty (or even due to mis-selling and subsequent

[7] Section 14 (1) of the Canada Consumer Product Safety Act (2010) outlines that businesses must provide information about product safety failures within two days, similar to Australian laws. The penalties that apply are outlined in section 41(1) of the same Act.
[8] Note current penalties are outlined in s. 201 and 202 of the ACL.
[9] https://www.accc.gov.au/media-release/telstra-to-pay-50m-penalty-for-unconscionable-sales-to-indigenous-consumers

disconnection by the telco). Too often, the task of finding all impacted consumers and assisting them to access redress is left to the limited resources of consumer groups, rather than the company that engaged in the misconduct.

Previously, Assistant Minister Leigh has proposed amending s. 76 of the CCA to allow the court to apply higher penalties for conduct that targets or impacts disadvantaged Australians or lower penalties when firms have provided adequate compensation to those affected.[10] This proposal should be considered further as it would encourage courts to pay greater attention to remediation and encourage companies to proactively consider remediation as part of a settlement process.

Further guidance about penalty reduction if appropriate redress for customers is prioritised, even only as a note in the final explanatory memorandum, could encourage the return of money to consumers in more instances. ASIC's draft regulatory guidance on consumer remediation,[11] while needing some improvements, is a significant advance towards better practice in scoping and running remediation programs. Once finalised, this regulatory guidance could usefully inform the court's decision on adequate remediation.

Further reform is required to apply penalties to all obligations of the ACL

Companies do not face penalties when they breach some of the key elements of the Australian Consumer Law, including the consumer guarantee and unfair contract term provisions. While likely out of scope for this specific consultation, introducing new penalties in relation to breaches of Part 2-3 Unfair Contract Terms and Part 3-2, Division 1 Consumer Guarantees is necessary to deter big businesses from breaching the ACL.

Without powers that will allow the ACCC to seek penalties if a company breaches the existing prohibitions on unfair contract terms or if they fail to provide appropriate remedies for unsuitable goods or services (the consumer guarantees), compliance is effectively optional for businesses – with no meaningful consequence for long-term or widespread non-compliance.

We strongly support the introduction of a civil prohibition for failing to provide a consumer guarantee remedy. Consumers are often let down when there is a fault with a good or service they have purchased despite their legal entitlements. According to a June 2021 survey undertaken by CHOICE, approximately four in five people did not try to enforce their current consumer guarantee rights due to factors such as time, cost, and knowledge. This results in consumers having to continue using faulty products, purchase their own replacement, or to go without the product. When the good or service is essential to their life, such as a car, mobile phone, fridge, or laptop, it can have an immediate financial impact and, at times, a lasting impact on a person's quality of life.

Making unfair contract terms illegal and giving courts the power to impose strong penalties will deter businesses from using unfair contract terms. In the eleven years since the initial prohibition on unfair contract terms was introduced, consumer advocates have uncovered a wide variety of potentially unfair contract terms including:

- Energy Australia contracts that would allow them to introduce any new charges whenever they want;
- An ING mortgage contract that demands that you aren't loud or offensive in your home;

[10] Leigh, A. & Triggs, A. (2016), "Markets, Monopolies and Moguls: The Relationship between Inequality and Competition", *The Australian Economic Review, 49(4),* pp. 389-412.

[11] ASIC, CP 350: Consumer remediation: Further consultation (17 November 2021): https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-350-consumer-remediation-further-consultation/. For the joint views of Consumer Action Law Centre, Financial Rights Legal Centre and Super Consumers Australian on the Draft Regulatory Guide, see our submission here: https://consumeraction.org.au/consultation-paper-350-consumer-remediation/.

- Dating app Grindr containing clauses that gives the company the power to terminate a user's account for any or no reason;
- Bedshed forcing customers to buy a waterproof protector from them if you want to return an uncomfortable mattress under their "Comfort Guarantee”

We understand that the Treasury is considering reforms to address these issues. These reforms should be prioritised to stop the harms that consumers face when businesses fail to comply with all aspects of the ACL.

Yours sincerely

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