



Express law fast track information for clients

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Full Federal Court decision on loss or damage in the context of civil penalty matters

A decision of the Full Federal Court has implications for regulators or agencies that administer legislation where contraventions can lead to the imposition of a pecuniary penalty.

In *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249, [2012] FCAFC 20 (*Optus Appeal*), the Full Federal Court considered, in the context of imposing a pecuniary penalty sought by the Australian Competition and Consumer Commission (ACCC) under what was then called the *Trade Practices Act 1974* (TPA) (since renamed the *Competition and Consumer Act 2010* (Cth) (CCA)), how loss or damage is to be taken into account in determining the amount of any penalty.

Background

The *Optus Appeal* was from a decision of Perram J. His Honour imposed a substantial pecuniary penalty on Singtel Optus under the CCA for misleading headline advertising of its broadband internet plans: *ACCC v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761 (*Optus*).

Over a number of months Singtel Optus conducted a multimedia advertising campaign promoting two broadband data service plans to consumers – the ‘Think Bigger’ and ‘Supersonic’ plans. The campaign involved advertisements in numerous different media: television, metropolitan and local newspapers, billboards, online and direct marketing. The ACCC commenced proceedings against Optus on various bases, including that the advertisements were misleading as to the quantity of data that a customer was entitled to upload or download under the plans.

Loss or damage as a consideration in the amount of a pecuniary penalty

In determining the appropriate pecuniary penalty, Perram J relevantly had regard to the mandatory matters specified under s 76E(2) of the TPA.

One of those matters was the ‘nature and extent of any loss or damage suffered as a result of the act or omission’ (s 76E(2)(a) of the TPA, now s 224(2)(a) of the Australian Consumer Law). There was no evidence before Perram J of loss or damage. However, his Honour found that, where the conduct in question was conduct which ordinarily might be expected to cause loss or damage to consumers, the absence of evidence of loss or damage allows the conclusion to be more readily drawn that no loss or damage was in fact caused. That conclusion was consistent with the conclusion that Perram J had drawn earlier in *ACCC v MSY Technology Pty Ltd (No 2)* (2011) 279 ALR 609 (*MSY Technology*).

Further, his Honour concluded that the absence of loss or damage was a matter that the Court was entitled to treat as a factor in mitigation of a penalty.

Perram J's reasoning in *MSY Technology* and *Optus* has been applied by the Federal Court in a series of subsequent matters, including *ACCC v Global One Mobile Entertainment Ltd* [2011] FCA 393 (*Global One*) at [135] per Bennett J; *ACCC v SMS Global Pty Ltd* [2011] FCA 855 at [92]–[96] per Murphy J; and *ACCC v Apple Pty Ltd* [2012] FCA 646 at [49] per Bromberg J. The Full Federal Court in the *Optus Appeal* has also now approved that reasoning (at [58]).

Implications of the decision

The Full Court of the Federal Court has approved a position that, in a case where loss or damage may reasonably be expected, a party may submit that the absence of evidence of loss or damage means that loss or damage was not caused by the conduct, and the fact that the conduct did not cause loss or damage is a mitigating factor.

A number of Commonwealth regulators and agencies administer legislation that provides for pecuniary penalties to be imposed if that legislation is contravened. In a case where a contravention would 'ordinarily' be expected to result in loss or damage to a party, and where loss or damage is a factor which the Court is, or may be, required to take into account, those regulators or agencies will need to consider carefully what evidence they have, or can obtain, as to loss or damage in order to avoid the submission that the absence of loss or damage is a factor in mitigation of any penalty. Where proceedings have not yet been commenced, agencies should consider how the loss or damage ought to be characterised and how evidence of loss or damage should be obtained – for example, by using their compulsory powers to gather information. Where litigation has already been commenced, agencies should consider using powers available to a party to proceedings, including discovery, notices to produce and the like. Of course, the availability of the Court's powers to compel production will also be influenced by whether the penalty is sought against an individual, who can claim privilege against exposure to a penalty, or a corporation, which cannot.

The courts have also held that, in circumstances where it is not possible to quantify loss or damage accurately, the position may be different. For example, in *Global One*, Bennett J indicated that while, in the absence of evidence of loss or damage, a party may be entitled to submit that a penalty should be determined on the basis that conduct has not caused harm, the position may be different where loss or damage is established but the extent of it cannot be quantified accurately. That would suggest that agencies are not required to lead evidence of *all* loss or damage (which in many circumstances would not be possible), but that they could lead evidence of the nature of the loss or damage arising and submit that it is not possible to accurately quantify the full extent of the loss or damage suffered as a result of the contravention.

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