Nurofen specific pain range won't dull the sting from increased civil penalty

Bailey Neate *COLIN BIGGERS & PAISLEY*

In *Australian Competition and Consumer Commission (ACCC) v Reckitt Benckiser (Australia) Pty Ltd*,[1] the ACCC was successful in its appeal of the pecuniary penalty awarded by the Federal Court for Reckitt Benckiser (Australia) Pty Ltd's (RB) breaches of the Australian Consumer Law (ACL).[2]

I Material facts and context

RB made representations on product packaging and webpages that a range of Nurofen pain killers were targeted to treat four different types of pain (Specific Range).[3] In fact, there was no difference between the products in the Specific Range at all, nor were they any different from standard Nurofen. Despite that, the Specific Range was sold at double the price of standard Nurofen.

RB admitted that its webpages and packaging regarding the Specific Range constituted misleading or deceptive conduct, and conduct liable to mislead the public as to nature, characteristics and/or suitability for purpose of the products, thereby breaching ss 18 and 33 of the ACL.

On the basis of that admission, the Federal Court imposed a civil penalty of $1.7 million under s 224 of the ACL.

II The ACCC's grounds of appeal and court findings

It is prudent to deal with the ACCC's key grounds of appeal sequentially, and simultaneously analyse the way in which they were dealt with by the Full Federal Court of Jagot, Yates and Bromwich JJ.

A Assessing consumer loss

The ACCC's first two grounds of appeal focused on the primary judge's determination that quantifying the consumer loss that resulted from RB's representations was impossible. The ACCC contended that consumer loss was equal to the price difference between standard Nurofen and the Specific Range. The basis of that argument was that since standard Nurofen and the Specific Range were in fact identical, any additional amount that any consumer paid was as a result of RB's misleading or deceptive conduct.[4]

The Full Federal Court agreed with these submissions and both grounds of appeal were successful. It was remarked quite eloquently that "there was, in truth, no 'selection' involved"[5] for consumers as but for the contraventions, there would be no Specific Range at all.[6] The court therefore assessed that consumer loss was in the order of 50% of total revenue from the 5.9 million units of the Specific Range sold.[7]

B Was consumer harm only monetary?

The ACCC contended in its fourth ground of appeal that the primary judge erred by giving weight to the fact that the harm to consumers was only monetary, and not physical.[8]

The court agreed, holding that the primary judge reached a conclusion that wasn't open in the circumstances. Their reasoning was that the loss or distortion of consumer choice did in fact create an additional harm of prolonged pain.[9]

C Did RB "court the risk"?

RB's state of mind underpinned the ACCC's fifth ground of appeal. They contended that the primary judge erred by accepting that RB was not deliberate or reckless in its contraventions of the ACL. The primary judge reached that conclusion on the basis of a lack of any pleaded intention or recklessness.[10]

The Full Federal Court again agreed with the ACCC, and this ground of appeal was also successful.[11] It was held that penalties could not, and should not, be assessed on the basis that a contravention was "innocent", simply because no state of mind was pleaded.[12] It was clear that RB did "court the risk" that its representations had a misleading character, and that it had embraced the notion of objective recklessness.[13]

D Exercising the penalty discretion afresh

Throughout the appeal, it was noted that the objective of any pecuniary penalty is to ensure that any "would-be wrongdoers" are deterred from contravening the ACL.[14] The Full Federal Court held that the primary judge's pecuniary penalty of $1.7 million was too lenient to satisfy that purpose, particularly in light of the fact that

RB repeatedly breached a basic requirement of the ACL for commercial gain for over 5 years.[15] Citing consumer loss as a useful guide for any penalty, the court exercised its discretion afresh to order RB to pay a pecuniary penalty of $6 million.[16]

III Key takeaways

Firstly, "would-be wrongdoers" should consider themselves warned by Jagot, Yates and Bromwich JJ that the Federal Court is willing to order large pecuniary penalties to deter breaches of the ACL. The starting point of the pecuniary penalty could have been as high as $25 million according to the court,[17] who referred to the ACCC's requested penalty of $6 million as "modest".[18] Similarly, this decision will have the additional effect of emboldening the ACCC to seek stronger penalties in future.

Secondly, these somewhat harsher penalties will not be mitigated by cooperation comprising admissions made very late which save very little, if any, court time. In this case, RB's cooperation had little to no effect on the penalty ordered, as it was perceived as mere acceptance of the inevitable, with little effect on court time.[19]

Thirdly, in the event that no state of mind is pleaded, it is still open to the court to find that the party who contravened the ACL did so with intent or recklessness. Any party to proceedings under the ACL is on notice that their state of mind may be an issue, irrespective of whether it is specifically pleaded.

Bailey Neate
Paralegal
Colin Biggers & Paisley
www.cbp.com.au

Footnotes

1. *Australian Competition and Consumer Commission (ACCC) v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181; BC201610966.
2. *Australian Competition and Consumer Commission (ACCC) v Reckitt Benckiser (Australia) Pty Ltd (No 7)* (2016) 343 ALR 327; [2016] FCA 424; BC201603031.
3. Above n 1, at [5].
4. Above n 1, at [61].
5. Above n 1, at [76].
6. Above n 1, at [84].
7. Above n 1, at [98].
8. Above n 1, at [111].
9. Above n 1, at [114].
10. Above n 1, at [117].
11. Above n 1, at [136].
12. Above n 1, at [121].
13. Above n 1, at [136].
14. Above n 1, at [150].
15. Above n 1, at [160].
16. Above n 1, at [180].
17. Above n 1, at [158].
18. Above n 1, at [178].
19. Above n 1, at [147].