

Article Information

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'Heinz Sigh' is a Wonderful Thing: Food Giant Ordered to Pay \$2.25 Million in Penalties

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Following a finding on 19 March 2018 that Heinz had engaged in misleading and deceptive conduct, the Federal Court of Australia last week hit the food giant with a \$2.25 million penalty. The decision marks a fresh approach to the regulation of the marketing of food products to address concerns that health benefits not be overstated, especially when targeted at children and their parents or carers, who are the purchasers of the products. It is a reminder for companies that the Australian Competition and Consumer Commission (ACCC) has power to request the imposition of significant penalties, and is not afraid to do so.

The misleading or deceptive conduct case

The ACCC's case against Heinz concerned three products in its "Little Kids - SHREDZ" range, which were marketed as a healthy snack for children between the ages of 1 and 3. The ACCC alleged that the packaging of the products contravened the *Australian Consumer Law (ACL)* in that the packaging conveyed various representations about the product being healthy, nutritious and otherwise encouraged healthy eating habits in children.

The ACCC did not succeed on every aspect of its claim; however it did succeed in proving that the packaging conveyed the representation that the product was a nutritious food that was beneficial to the health of children. Justice White held that this representation was false and misleading, and despite the fact that the product could be considered nutritious, found that the high sugar level and sticky consistency of the product could not be said to be beneficial to the health of toddlers.

His Honour dismissed the ACCC's claim that Heinz had actual knowledge that it had made the false or misleading representation, however, he concluded that Heinz ought to have been aware that such a representation was made.

The penalty

The ACCC sought a staggering \$10 million fine, arguing that Heinz's conduct was "egregious" and involved "wilful blindness or recklessness". Justice White did not consider that to be an appropriate characterisation of Heinz's state of mind, holding that the evidence from the Heinz employees was "inconsistent with Heinz having engaged in a form of advertent or subjective recklessness or with wilful blindness" and that it did not "support a conclusion that Heinz acted with the high degree of carelessness associated with the notion of objective recklessness".

Justice White rejected Heinz's submission that a penalty of \$400,000 should be imposed, due to the need for deterrence (both specific and general), and due to the "extensive and serious" nature of the contraventions. Justice White held that Heinz had made the false or misleading representations on every packet of the products sold, which totalled at least 1,207,560 occurrences over a period of two years and nine months. The ACCC pointed out that the number of contraventions was likely to have been greater (probably much greater) than the number of sales, because (it was argued) the misleading representation was made every time a consumer viewed the packaging, though no finding was made in respect of that matter.

The parties have until 14 September 2018 to appeal the penalty decision.

Recent increases in penalties

Heinz's \$2.25 million penalty may have been greater were the case determined in light of recent Federal legislation passed on 23 August 2018, which increases maximum financial penalties and provides three alternative methods of calculation of penalties under the ACL.

Under the new law, the maximum penalties for corporations will increase, per contravention, from AUD \$1.1 million to the greater of:

1. AUD \$10 million;
2. three times the value of the benefit; or
3. if the value of the benefit cannot be determined, then 10% of the annual turnover.

The ACCC has welcomed the change, with Chairman Rod Sims recently suggesting that the threat of such high penalties would result in higher compliance for companies as there is now more than just reputational damage on the line.^[1] Mr Sims recently stated that "The ACCC wants to ensure that penalties for breaches of the consumer law are large enough to get the attention of the financial markets, boards and senior management."^[2] The penalties are now on par with the penalties for breaches of competition law provisions in the *Competition and Consumer Act 2010* (Cth).

The decision on a larger scale

In recent months, there have been several large penalties imposed on corporations for contraventions of the ACL, including a \$6 million penalty against Nurofen manufacturer Reckitt Benckiser for misleading and deceptive conduct, a \$10 million penalty against Ford for unconscionable conduct, and an \$8 million penalty against Get Qualified Australia for multiple breaches of the ACL.

The Heinz case, however, is one of a few cases that is primarily concerned with the marketing responsibilities of food producers, suggesting a push by the ACCC to protect consumers, particularly when it concerns the health of young children.

The Heinz case represents a significant development in the law, and those responsible for food packaging must ensure compliance with the ACL or face the risk of hefty fines. One can expect food packaging and labels to be the subject of much scrutiny now and in the future, not only by corporate watchdogs such as the ACCC, but by competitors keen to take advantage of their rivals' mistakes.

[1] Nassim Khadem, 'Companies face \$1b fines under tougher consumer law penalties', 23 August 2018, *Sydney Morning Herald* [<https://www.smh.com.au/business/consumer-affairs/companies-face-1b-fines-under-tougher-consumer-law-penalties-20180823-p4zzdm.html>]

[2] <https://www.accc.gov.au/media-release/heinz-ordered-to-pay-225-million-penalty-over-misleading-health-claim>