FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v LG Electronics Australia Pty Ltd [2019] FCA 1456

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| File number: | VID 919 of 2015 |
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| Judge: | **MIDDLETON J** |
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| Date of judgment: | 6 September 2019 |
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| Catchwords: | **CONSUMER LAW** – remittal by Full Court on question of appropriate relief and costs of hearing – application for pecuniary penalties, injunction and disclosure order – where respondent found to have contravened ss 18 and 29(1)(m) of the Australian Consumer Law – where number of contraventions proven substantially less than those alleged at trial and on appeal – consideration of principles relevant to imposition of penalties – costs  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2, Australian Consumer Law, ss 18, 29(1)(m), 224, 232, 246(1) |
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| Cases cited: | *Australian Competition and Consumer Commission v Apple Pty Ltd* [2012] FCA 646*Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)* [2018] FCA 953*Australian Competition and Consumer Commission v Dataline Net.Au Pty Ltd (in liq)* (2007) 161 FCR 513*Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2019] FCA 797*Australian Competition and Consumer Commission v LG Electronics Australia Pty Ltd* [2006] FCA 1118*Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* [1999] FCA 18; (1999) 161 ALR 79*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249  |
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| Date of hearing: | 31 May 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 115 |
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ORDERS

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|  | VID 919 of 2015 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | LG ELECTRONICS AUSTRALIA PTY LTDRespondent |

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| JUDGE: | MIDDLETON J |
| DATE OF ORDER: | 6 September 2019 |

THE COURT ORDERS THAT:

1. The parties confer and provide a minute of order reflecting these reasons, and any submissions on costs of the penalty hearing, within 7 days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MIDDLETON J:

# OVERVIEW

1. This matter, now on remittal before me, calls on me to determine the appropriate relief and orders as to costs in respect of, as held by the Full Court on appeal (*Australian Competition and Consumer Commission v LG Electronics Australia Pty Ltd* [2018] FCAFC 96), two instances in which the respondent (‘**LG**’) made false representations to certain consumers in contravention of ss 18 and 29(1)(m) of the Australian Consumer Law (‘**ACL**’), being Sch 2 to the *Competition and Consumer Act 2010* (Cth) (‘**CCA**’).
2. At trial, the applicant (the ‘**ACCC**’) alleged that LG made 41 false or misleading representations to consumers, retailers and repairers regarding their rights under the ACL. Of these, the Full Court concluded that LG had engaged in two instances of false or misleading conduct. The contraventions occurred when LG’s agents represented that certain ACL consumer guarantees did not exist, were excluded, or had no effect in relation to LG televisions. In each of the two instances, the statements were made to individuals who were not in fact misled.
3. As held by the Full Court (at [3]), ‘the ACCC did not prove that the consumers would have had a cause of action against the person who supplied the television to them or that LG would have been bound to indemnify the supplier as provided for in ss 259, 271 and 274 of the ACL’. As also held by the Full Court (at [3]), ‘the ACCC also did not prove that either LG or the persons with whom it dealt knew or believed that the consumers would have any such cause of action or LG any such liability’.
4. Relevantly to my consideration of appropriate relief, and notwithstanding the two instances in question, there was no finding (by me or the Full Court) that there was a widespread or systematic programme of LG misleading consumers in the manner alleged by the ACCC. As held by the Full Court (at [6]-[7]):

*[6] … The ACCC did not plead or run its case on the basis that LG’s policy, practice or system for dealing with consumers who complained about faulty televisions contravened ss 18(1) and 29(1)(m) of the ACL. During the hearing a witness, Ms Warwood, who was the team leader of LG’s Direct Dealer Support team, gave evidence in which she agreed that “unless the ACL was specifically invoked by the consumer, your training was that you should not treat it as an ACL claim”. Ms Warwood did not agree that this was a “way of heading off the invocation of the ACL”. The ACCC did not seek to amend its case before the primary judge as a result of this evidence. It did not raise with the primary judge any suggestion to the effect that LG’s policy, practice or system for dealing with consumers who complained about faulty televisions contravened ss 18(1) and 29(1)(m) of the ACL. For the ACCC now to be given leave to run such a case would offend the principle that in an appeal of this kind a party is bound by the way in which it conducted its case below; had such a case been put below, LG might well have called other evidence about its training, policies, practices and systems.*

*[7] Apart from this, proving the existence of a policy, practice or system of dealing with consumers does not itself prove a contravention of ss 18(1) or 29(1)(m) of the ACL. Contraventions, if they exist, arise from the actual dealings with consumers (that is, conduct). The existence of a particular policy, practice or system, if proven, may support the drawing of various inferences including that a particular dealing or dealings occurred or did not occur in a particular way or that dealings were likely to mislead or deceive. Theoretically it may be that having an indiscriminate system in place of never mentioning the ACL consumer guarantee regime unless raised could, depending upon the circumstances, be conduct likely to mislead (if communications informed by such a policy were made to a class of persons likely to include persons ignorant of such rights). But no such case was run here.*

1. It follows that the focus of my determination as to the appropriate relief must be on the two contraventions identified by the Full Court; not on an alleged (and unproven) ‘system’ at play within LG. However, I do take into account the circumstances surrounding the contraventions, including the training, policies, practices and systems that may well have been relevant to or given rise to the proven contraventions.
2. Having regard to this appropriate focal point, I substantially accept the submissions of LG and have concluded that the two contraventions must be viewed in light of the following circumstances:
3. each contravention involved statements made to only one customer;
4. the customers involved in the two contraventions had a good working knowledge of the consumer guarantees and neither of them were misled;
5. the customers did not suffer loss or damage as a result of the infringements, with LG bearing the cost of the labour and the parts for the repair in both instances;
6. the contravening statements were made by low-level customer service agents in contravention of LG’s policies and procedures, and as such were not authorised by senior LG personnel;
7. noting that LG receives between 20,000 and 25,000 telephone calls per month, 14% of which result in referrals to service agents, the occurrence of errors like the contraventions does not demonstrate that LG’s customer service training and processes were fundamentally deficient; and
8. the contraventions occurred following the recent transition of LG’s call centre operations to the Philippines, and occurred despite a detailed training process of the new call centre agents.
9. However, I note that three representatives were involved in the first infringement, and a separate representative was involved in the infringement relating to the second infringement. These are not single incidents; they are better characterised as relatively isolated incidents. This is certainly not a case where LG has been involved in wholesale or systematic fault in its training process, as seems to be pressed upon by the ACCC in this remittal.
10. For the reasons that follow, I find that the appropriate relief in respect of each contravention is a pecuniary penalty of $80,000 (for a total of $160,000). I do not find that the other relief sought by the ACCC is appropriate in the circumstances of the two contraventions in question.

# THE TWO OCCASIONS

1. As already noted, there were two occasions on which LG, by its agents, made representations that were found by the Full Court to contravene ss 18 and 29(1)(m) of the ACL. Details of each occasion and their surrounding context may be found in the Full Court’s reasons at [45]-[47] and [61]-[62], but for present purposes it suffices to summarise them as follows:
2. the first occasion, which was labelled the ‘**First DW Statement**’, took place on 23 July 2014 when three LG representatives said to a customer words to the effect that there was nothing LG could do in respect of the customer’s faulty LG television because it was beyond the manufacturer’s warranty period; and
3. the second occasion, which was referred to as the ‘**Third PG Statement**’, occurred in or around August 2014 and involved an LG representative telling a customer that LG would not repair the customer’s faulty LG television because it was out of warranty. This representation was made by the LG representative after the customer had stated words to the effect that it should not matter that the television is no longer subject to the manufacturer’s warranty, and that ‘*it should be repaired or replaced if it falls within a reasonable period after it is purchased*’.
4. The Full Court concluded that on each occasion, LG by its agents had falsely represented that the ACL did not exist, was excluded, or did not operate with respect to the LG televisions in question merely because LG’s manufacturer’s warranty had expired. LG thereby contravened ss 18 and 29(1)(m) of the ACL, notwithstanding the fact that neither of the individuals were actually misled.
5. At the outset, I make this observation about the fact that neither of the individuals were actually misled and its relevance to penalty.
6. Where contravening conduct is substantial and serious, then the fact that there is no loss or damage by consumers is not of great significance. If there is significant potential to mislead or deceive consumers, where the goods or services are of a general nature impacting on a large portion of the community, then the objective seriousness of the misleading conduct must be taken into account. However, in this case, there is not proof of similar conduct involving many products, or over an extended period or territorial area, or any evidence of earnings accrued by reason of the offending conduct in the two contraventions. LG is entitled to be treated on the basis that the conduct did not cause harm; a fact known to the Court and importantly relevant to the only two contraventions found to have been made by LG: see generally *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [58]-[59].

# THE PARTIES’ SUBMISSIONS AS TO RELIEF

1. The ACCC submits that the following relief is appropriate:
2. pecuniary penalties under s 224 of the ACL in the amount of $350,000 for the First DW Statement and $350,000 for the Third PG Statement (for a total of $700,000);
3. an injunction pursuant to s 232 of the ACL; and
4. a disclosure order pursuant to s 246(2) of the ACL (and an associated order requiring an LG representative to file and serve an affidavit verifying that the company has carried out its obligations under the orders of the Court).
5. In stark contrast, LG submits that the only appropriate relief is *either*:
6. total pecuniary penalties in the amount of $20,000 – in the event that the Court finds LG could not have reasonably done anything more to prevent the infringements; *or*
7. total pecuniary penalties in the amount of $100,000 – in the event that the Court finds that LG could have (and should have) done more to prevent the infringements (by, for instance, improving its processes at the time of transitioning its call centre operations to the Philippines).
8. Further, in the course of oral submissions, LG added a third alternative contention in respect of the appropriate pecuniary penalties. It said that if the infringements arose out of a lack of monitoring for a short period of time in 2014, then appropriate pecuniary penalties would be in the amount of $50,000 per contravention infringement (for a total of $100,000).
9. Regarding the injunction and disclosure order sought by the ACCC (and the associated order regarding the affidavit), LG opposes these orders on the grounds that such relief is inappropriate and unnecessary in the circumstances.
10. With the parties’ high-level positions in mind, it is convenient for me to now go into further detail as to the bases upon which the ACCC claims the orders that it seeks are appropriate. I will deal with each of the orders in turn.

## Pecuniary penalties

1. The ACCC contends that the two contraventions are serious breaches of the ACL that warrant the imposition of substantial pecuniary penalties. It says that the circumstances of the offending and the nature of the offender give rise to a number of factors that support this contention.
2. First, the ACCC submits that the need for both general and specific deterrence are heightened in this case having regard to LG’s business and its ACL compliance record. In so arguing, the ACCC relies on well-established case law that recognises the importance of deterrence: see, eg, *Australian Competition and Consumer Commission v Apple Pty Ltd* [2012] FCA 646 at [18]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [64]-[66]; *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [55], [59] and [110].
3. In respect of general deterrence, the ACCC submits that the substantial pecuniary penalties proposed make clear that consumer-facing businesses must maintain effective compliance programs to ensure that consumer protection laws are adhered to, and that such compliance programs are not seen as ‘optional’. The ACCC says this is especially so for businesses operating in large consumer markets, such as the consumer electronics market in which LG operates.
4. It further says that if the burden of a penalty is seen by market participants to be less than the cost or effort of maintaining such programs, businesses may opt to absorb fines (or the mere risk of a fine) as a ‘cost of doing business’, rather than complying with the law.
5. In respect of specific deterrence, the ACCC submits that in circumstances where LG has contravened equivalent statutory provisions in the past, substantial pecuniary penalties are critical to deter LG from engaging in such conduct again in the future.
6. Second, but related to the need for specific deterrence, the ACCC submits that LG’s history of non-compliance compounds the need for substantial pecuniary penalties. While the ACCC accepts that LG ought not to be penalised again for its previous contraventions, it urges the Court to take account of its record in determining the appropriate penalties. This record was addressed in the affidavit material of Ms Snell, who is employed as the General Manager of the Victorian and Tasmanian branch of the ACCC’s Enforcement Division. That evidence, which I accept, summarised LG’s compliance history as follows:
7. In 2005, LG gave a court-enforceable undertaking to the ACCC pursuant to s 87B of the then *Trade Practices Act 1974* (Cth) (‘**TPA**’) in which it undertook to publish corrective notices and implement a trade practices compliance program. The undertaking related to four models of washing machines which LG represented were certified and licensed under a water conservation rating scheme in circumstances where, although the machines had been tested and met the requirements for certification, the certification had not yet been obtained.
8. In 2006, LG gave a second court-enforceable undertaking to the ACCC pursuant to s 87B of the TPA in which it again undertook to publish corrective notices and implement an updated trade practices compliance program. It also undertook to compensate affected customers. The undertaking was given after the ACCC raised concerns that LG may have misled consumers in contravention of ss 52 and 53(c) of the TPA in relation to air conditioner models that did not meet the energy efficiency ratings claimed on rating labels.
9. In 2010, LG gave a third court-enforceable undertaking to the ACCC pursuant to s 87B of the TPA. The undertaking was given after the ACCC raised concerns that LG may have contravened ss 52, 53(c) and 55 of the TPA by making representations that may have misled the public as to the energy efficiency of particular models of refrigerators sold by LG. LG undertook to compensate affected consumers, implement specific compliance measures and implement a compliance program.
10. Ms Snell’s evidence also explained that in late 2005, the ACCC commenced proceedings against LG in relation to express statements contained in certain of its user manuals which represented that consumers only had the benefit of a manufacturer’s warranty, thereby denying the existence of an earlier iteration of what are now known as the ACL consumer guarantees. LG admitted to the contraventions alleged by the ACCC and orders were made by consent which required LG to implement a compliance program for consumer protection.
11. In this context, the ACCC characterises the contraventions in this case as especially concerning because they occurred despite LG’s court-ordered compliance programs.
12. Third, the ACCC submits that the contraventions were a result of a failure of LG’s legal compliance policies, procedures and ACL training. In this sense, the ACCC says that because the contraventions were the product of inadequate systems, senior personnel within LG were responsible for the contraventions, not just the low-level call centre agents who made the statements on LG’s behalf. The ACCC highlighted that the contraventions took place one month after LG had moved its customer service function offshore to the Philippines. The ACCC says that it was ‘*entirely predictable that the new call centre staff in the Philippines … might not have understood LG’s obligations under the ACL initially*’. It says that for this reason, it was particularly important that these staff were provided with comprehensive training, adequate support materials, and clear instructions as to escalating ACL complaints. On the ACCC’s submission, any training received was evidently inadequate. This was said to be due to: (1) the duration of the training; (2) the time between periodic training sessions; (3) the manner in which comprehension of training was measured; (4) the expertise of the staff members providing the training; and (5) the ongoing general supervision of call centre staff. I will turn to the evidence relating to this submission later in these reasons.
13. Fourth, the ACCC submits that the offending occurred on account of a ‘deliberate approach’ by LG whereby its agents, whether on account of instruction or practice, would not refer to the ACL in their dealings with customers, unless it was first raised by the customer. As part of the ACCC’s submission on this point, reference was made to my comments at first instance (at [59]):

*The conscious approach of LG to its communications with the retailer or consumer was to respond to the enquiry in the context of that specific enquiry. By this I mean that unless the ACL was raised, LG would not mention it or bring it to a consumer’s attention. …*

It was said that LG’s ‘deliberate focus on the express warranty’ in its dealings with customers brought with it the risk that contraventions of the ACL would occur and that this is relevant to penalty.

1. Fifth, the ACCC pointed to LG’s size and financial capacity as a further reason why substantial pecuniary penalties were necessary. In making this submission, the ACCC again relied on the affidavit evidence from Ms Snell. Exhibited to that affidavit was correspondence between the parties’ legal representatives that included details of LG’s revenue, net profit, assets and liabilities for the financial years ending 30 June 2014, 2015, 2016 and 2017. I will not make mention of the relevant figures in these reasons, but it suffices to say that the figures disclosed show that LG is a substantial business with considerable financial capacity. The ACCC also referred to comments made by Lee J in *Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)* [2018] FCA 953. In that case his Honour imposed a $9 million penalty on Apple Pty Ltd (the Australian subsidiary of the well-known manufacturer and retailer of consumer electronic devices) for contraventions of the ACL and observed at [56] that ‘*if a penalty does not impose a ‘sting’ or burden, it will be unlikely to achieve the necessary deterrent effects*’. The ACCC submits that LG (like Apple), is a significant participant in the Australian consumer electronics market, and that having regard to LG’s size and financial capacity, the court should favour the pecuniary penalties sought by the ACCC in this case so that there is a sufficient ‘sting’ to be felt by LG. The ACCC also submit that LG’s size and financial capacity should have meant it had the resources to devote to ensuring it maintained appropriate compliance arrangements to prevent contraventions of the ACL.
2. Finally, the ACCC assert that LG should not be entitled to any discount as to the penalty on account of its cooperation with the ACCC because the findings of contraventions were made following a full contested hearing on the merits, and an appeal.

## Injunction

1. By its terms, the ACCC’s proposed injunction would operate to restrain LG for a period of three years from representing in trade or commerce that the ACL consumer guarantee as to acceptable quality (found in s 54 of the ACL) does not exist, is excluded, or does not operate with respect to LG products merely because LG’s manufacturer’s warranty has expired.
2. The ACCC contends that the injunctive relief sought is appropriate because it is designed to prevent LG from making false or misleading representations in the future and is expressed in terms that are closely tied to the terms in which LG has been found to contravene the ACL. The ACCC says it will deter repetition of the contraventions by LG, has practical utility in the context of the proceeding, and serves the public interest by reinforcing the need for businesses to take appropriate steps to comply with the ACL.

## Disclosure order

1. The ACCC has also sought a non-punitive disclosure order requiring LG to publish a ‘Consumer Rights Notice’ pursuant to s 246(2) of the ACL. It is argued that such an order will help redress the harm caused by LG’s contraventions of the ACL by providing information about the consumer guarantee regime to businesses and consumers, which is in the public interest.
2. Relatedly, the ACCC also seeks an order that LG file and serve an affidavit on the ACCC verifying that LG has complied with the obligations imposed by this Court.

# EVIDENCE

1. During the course of the hearing, it became apparent that the adequacy of LG’s policies, procedures and training was the most substantial issue in dispute. I have set out the parties’ arguments on this point above, but in summary:
2. the ACCC consider the training to be evidently inadequate having regard to the quality of the training, the expertise of the persons delivering the training, the apparent lack of proper comprehension testing, and the infrequency of the training; and
3. LG claim the training provided to its overseas call centre agents was as good as that which was previously provided to its Australian agents, and that it is difficult to conceive of ways in which LG could have further improved its compliance program.
4. Because the adequacy of the training has, it seems to me, taken centre stage in the debate regarding appropriate pecuniary penalties for the contraventions, it is appropriate that I set out the evidence that was before me.

## Affidavit of Michelle Scott

1. Ms Scott was employed by LG from December 2010 until 15 September 2016 and, relevantly, is familiar with the policies and processes implemented by LG in respect of compliance with the ACL, particularly as they related to its call centre and customer service functions. During the course of her employment, she held various roles relating to the training and supervision of customer service staff (including the role of a Customer Service Manager), and was directly involved in the outsourcing of LG’s call centre functions to Sitel Operating Corporation (‘**Sitel**’), a third party provider based in Manila, the Philippines.
2. Her evidence, which I accept, concerned the practices and procedure of customer service staff (including those based in Manila) when dealing with customer enquiries.

### Call centre operations

1. The call centre was staffed by customer service agents who were designated as either ‘Tier 1 Agents’, ‘Tier 2 Agents’ or ‘Coaches’ depending on the extent of their authority to resolve customer queries.
2. By the time Ms Scott left the employ of LG, LG’s customer service function (including the call centre, which was based in Manila from June 2014 onwards) received on average 25,000 calls and emails each month from Australia and New Zealand. Of those inquiries, approximately 14% resulted in a referral to an LG Authorised Service Repairer for an assessment of what the customer claimed was a faulty LG product.
3. Tier 1 Agents were responsible for handing incoming calls and Coaches were responsible for supervising the Tier 1 Agents and dealing with certain escalated inquiries. Prior to November 2014, LG required all Tier 1 Agents to escalate any customer claims relating to products which were out of the manufacturer’s warranty period first to a local Coach and then to the Sydney-based LG customer support team. This changed as the transition to Sitel advanced and a more sophisticated ‘Delegation Matrix’ was introduced. From the introduction of the Delegation Matrix in November 2014, LG permitted local Tier 2 Agents (which were an intermediate level of customer service staff introduced around that time) and Coaches to finally resolve a broader range of matters without further escalation to the Sydney-based customer support team, although this still occurred in cases where the customer query was unusual or difficult to resolve (such as queries regarding warranty related matters and ACL related questions). Relevantly, the Delegation Matrix provided that queries regarding products that were less than three months outside of the manufacturer’s warranty period must be escalated from Tier 1 Agents to Coaches who had the authority to resolve them. This meant that queries regarding products that were more than three months outside of the manufacturer’s warranty could not be resolved by local Coaches and needed to be escalated to the Sydney-based customer support team.
4. The performance of LG’s various customer service staff (from the Tier 1 Agents to members of the Sydney-based customer support team) was regularly reviewed (at least three reviews of telephone calls per month for each staff member). One of the criteria of the review was compliance with the ACL. If a staff member was found to have failed to comply with the ACL, that staff member would receive a ‘zero’ on their review, which would then lead to that staff member being referred to one-on-one coaching to address the issues identified.

### Training

1. As part of her various roles, Ms Scott received annual training on LG’s obligations under the ACL. This training was delivered by LG’s legal team. As a result of this training, Ms Scott said that at the time she understood that:
* *consumers have rights under the ACL to have products repaired, replaced or refunded where a fault occurs within a reasonable period due to a manufacturing defect;*
* *consumers’ rights under the ACL are additional to their rights under LG’s manufacturer's warranty:*
* *consumers’ rights under the ACL can last longer than the LG manufacturer’s warranty but there is no defined period for which these rights last for each product, rather, the period must be a reasonable period after purchase into account the type and cost of the product;*
* *where the fault is a major one, the consumer has the right to choose whether to have the product repaired, replaced or refunded;*
* *where an LG product has a fault due to a manufacturer's defect and that fault occurs within a reasonable period after purchase of the product, it is the retailer who will be responsible to the consumer for the costs of repairing, replacing or refunding the cost of the product (even though, in [Ms Scott’s] experience most retailers try to push this responsibility onto LG);*
* *where a consumer is entitled to a repair remedy that entitlement covers both parts and labour; and*
* *LG’s responsibility is either to:*
	+ *indemnify the retailer for the costs incurred if the retailer repairs, replaces or refunds a product due to a manufacturing fault with the product; or*
	+ *to compensate a consumer for the drop in value or consequential loss if the consumer makes a claim.*
* *LG must not make misleading statements to customers about their rights and obligations under the ACL, including telling them that they had no rights other than those under the manufacturer’s warranty.*
1. Furthermore, as part of the training Ms Scott received, it was never suggested that unless the ACL was specifically invoked by a consumer it should not be treated as an ACL claim, or that the ACL should not to be mentioned to a customer. To the contrary, LG’s training instructed that the consumer’s ACL rights should always be considered and that LG should never mislead a consumer about the existence of rights under the ACL.

### The two contraventions

1. Ms Scott also gave evidence about the two contraventions as found by the Full Court.
2. In respect of the Third PG Statement, based on her inquires and observations of LG’s records, Ms Scott relevantly noted that:
3. the call was handled by a Tier 1 Agent named Melody Pinca who was at the time new to the call centre operations being provided by Sitel on LG’s behalf;
4. the LG television in question was outside the manufacturer’s warranty period;
5. this meant that, according to LG’s procedures in force at the relevant time, the matter should have been escalated to, at first instance, a local Coach or to a member of the Sydney-based customer support team;
6. the records indicate that the matter was not escalated as required under LG’s procedures; and
7. the failure to escalate the matter in these circumstances was a failure on Ms Pinca’s part to comply with LG’s procedures and training.
8. In respect of the First DW Statement, based on her inquires and observations of LG’s records, Ms Scott relevantly noted that:
9. the relevant customer had conversations with four different Tier 1 Agents named lllet Panganiban, Jessie Banga, Kim Catungal and Alex Locquiao, each of whom were at the time new to the call centre operations being provided by Sitel on LG’s behalf;
10. the LG television in question was outside the manufacturer’s warranty period;
11. each of the agents said that there was nothing they could do as the television was out of warranty but this did not reflect LG’s procedures or training;
12. the customer’s enquiry was subsequently escalated to the Sydney-based customer support team in accordance with LG’s policies, however this was after the agents had already made the statement at subparagraph (3);
13. the customer asserted that LG was responsible for replacing the television, or paying for the costs of repairing it under the ACL; and
14. subsequent correspondence between LG, the customer and the retailer from which the television was purchased indicate that LG disagreed with the customer’s view that LG was obliged to replace or pay for the repairs to the television.

## Affidavit of Teremoana Mose

1. Ms Mose was employed by LG as a Customer Service Co-ordinator from 22 May 2017 (and remained so as at the date her affidavit was sworn). In that role, she is responsible for the day-to-day management of the call centre in Manila.
2. Ms Mose’s evidence, which again I accept, covered similar ground to that addressed in the evidence of Ms Scott.

### Call centre operations

1. While the call centre itself is operated by Sitel, Ms Mose, as an employee of LG oversees the day-to-day operations of that call centre which involves ensuring that staff are performing their roles, fulfilling their responsibilities and meeting the expectations of LG.
2. Regulatory and compliance responsibilities, including ACL compliance, are key performance indicators under LG’s outsourcing agreement with Sitel. Non-compliance with legal obligations such as the ACL by Sitel agents is not tolerated by LG. Where an agent has not complied with the ACL, a warning will first be given, and any further instance of non-compliance will result in their termination as a Sitel agent on LG’s account.
3. Ms Mose attends weekly teleconferences with Sitel at which ACL compliance is regularly discussed, and visits the call centre in Manila at least four times a year for a number of weeks on each visit. On these occasions, Ms Mose sits with Tier 1 and Tier 2 Agents to monitor customer calls, takes customer calls herself, and provides direction to the Agents as required. Ms Mose also vets would-be Tier 2 Agents which involves her interviewing candidates and asking them, among other matters, questions on ACL compliance.

### Training

1. Ongoing training in respect of ACL compliance is delivered on an annual basis for all Sitel agents on LG’s account. Ms Mose explained that Ms Evelyn Soud (Legal Counsel of LG) visits the call centre to provide ACL training at least twice per year. (Ms Soud’s evidence is considered below). The training that Ms Mose received from Ms Soud has given Ms Mose confidence in her understanding of, and clear direction on what LG’s obligations are under the ACL. This means she can, and does, make appropriate decisions on a customer’s rights and LG’s obligations under the ACL.
2. Ms Mose was made aware by Ms Soud of the findings made by the Full Federal Court in the appeal proceedings, and the two instances in which LG’s call centre staff were found to have engaged in false or misleading conduct.
3. Further, she is not aware of there being any direction or practice on the part of LG that call centre agents, or anyone else at LG involved in customer service, should not consider or mention the ACL if the ACL is not first referred to by a customer. As part of the training Ms Mose attended the instructions were to ensure that the ACL is always considered and to not do or say anything which might mislead a customer about their rights under the ACL.

## Affidavit of Paul Gaynes

1. Mr Paul Gaynes was employed as the National Service Support Manager on 21 September 2015 (and remained employed in this role as at the date of his affidavit). As part of this role, Mr Gaynes is responsible for supervising LG’s field technicians (engineers employed by LG who carry our service repairs of LG in major metropolitan centres in Australian state capitals) and managing the relationships with LG’s ‘Authorised Service Centres’ (third party repair service providers). From May 2017 onwards, Mr Gaynes also served as an acting Customer Service Manager (being the same role as that occupied by Ms Scott but on an acting basis). This acting role saw Mr Gaynes oversee operations of the LG call centre operated by Sitel.
2. Mr Gaynes evidence, which I accept, discussed call centre operations, the terms of the outsourcing agreement between LG and Sitel, and the ACL training provided to call centre agents. The evidence given by Mr Gaynes is in a similar vein to that which was given by Ms Scott and Ms Mose.

### Sitel

1. LG’s outsourcing agreement with Sitel contains specific obligations and key performance indicators which Sitel (and by extension, its agents) is required to meet. These include compliance with the ACL, LG’s compliance processes and LG’s compliance training requirements. Multiple instances of non-compliance with these key performance indicators may result in the termination of the agreement by LG. It is Mr Gaynes’ responsibility to, among other things, monitor Sitel’s compliance with its obligations under its outsourcing agreement with LG. As part of this role, Mr Gaynes visits the call centre in Manila to oversee operations at least twice a year.
2. Mr Gaynes and others meet weekly via teleconference with Sitel staff including the Operations Manager, the Operations Director, and Coaches. During these meetings any major issues, technical product issues, key performance indicators and processes are discussed and reviewed. Lengthier and more detailed meetings also take place each month.

### Call centre operations

1. The call centre is currently organised into Tier 1 and Tier 2 Agents. There is a Coach for each area of the call centre: ‘Tier 1 Voice’ and ‘Tier 1 Non-Voice’ (which I take to mean email inquires), and ‘Tier 2 Resolution and Troubleshooting’. A fourth area, ‘Tier 2 Special Functions/Projects’ is managed by six Coaches and one Operations Manager. There are more than 80 agents in the call centre, however this number may vary according to seasonal requirements.
2. Tier 1 Agents are the initial point of contact with the customer and are tasked with resolving general customer inquiries or product issues. Every telephone call received at the call centre is recorded but not all calls are logged onto LG’s customer relationship management database. A call may not be logged in circumstances where the customer inquiry is easily resolved or where the customer has not provided sufficient details for identification purposes. Tier 1 Agents have defined authority levels in resolving customers’ claims of faults with LG products. These authority levels are set out in the Delegation Matrix.
3. Customer queries are escalated to Tier 2 Agents if the customer wants a different resolution to that which has been offered by a Tier 1 Agent, or the issue is outside the authority level of a Tier 1 Agent. Any customer inquiry which is escalated must be logged by the relevant agents in a spreadsheet. If the inquiry cannot be resolved at the Tier 2 level, the spreadsheet will be sent to the Sydney-based customer support team, commonly with the relevant agent’s recommendation for resolution. On some occasions, the Sydney-based customer support team will simply approve the agent’s recommendation, while on other occasions, a member of the Sydney-based team will go on to deal directly with the relevant customer.

### Training

1. Previously, all Tier 1 Agents were required to have six months’ experience in English speaking call centres, but as of April 2018, this requirement is now 12 months’ experience. Before they are permitted to deal with ‘live’ customers, agents are provided with at least one month of training on various topics, such as product training and LG’s obligations (and customers’ rights) under the ACL including the consumer guarantees. Agents are also chaperoned by a Coach for an initial period who listens to all the agent’s calls with customers.
2. All agents are trained on the ACL by a dedicated Sitel trainer who has in turn been trained by LG’s General Counsel. Dedicated Sitel trainers must then present the training back to LG’s General Counsel, who will then certify whether or not the person is suitable to be a trainer. Mr Gaynes and his team were similarly trained in ACL compliance by Ms Soud.
3. Mr Gaynes gives evidence that, as far as he is aware, it has never been the practice of LG (or anyone on behalf of LG) for call centre agents not to consider or mention the ACL unless the ACL is first referred to by a customer. He has always orally reinforced to LG and Sitel staff that LG’s position is that every customer inquiry is to be dealt with on its merits, including any rights or obligations under the ACL.
4. Further, it is Mr Gaynes’ experience that LG regularly provides customers with remedies under the ACL, even going beyond its legal obligations to assist its customers. By way of example, if a LG product has been damaged in transit and there has been no manufacturing defect, LG will give the customer assistance in contacting the logistics company to obtain a remedy, even where it has no obligation to do so.

## Affidavits of Toolendrie (Evelyn) Soud

1. Ms Soud is the General Manager of Legal and Compliance at LG. She is responsible for providing legal and regulatory support to LG’s business units and managing LG’s compliance program including delivering staff training on the ACL.
2. She is responsible for reviewing compliance policy and procedures, giving advice to the LG business units, and dealing with escalated consumer claims involving legal issues that are unable to be resolved by these business units. She is also responsible for driving awareness of the legal compliance culture across LG and implementing actions arising from enforceable undertakings agreed with the ACCC. These actions include undertaking risk assessments, implementing agreed compliance programs and training and coordinating audits of LG’s compliance program.
3. Ms Soud made two affidavits in connection with this proceeding, both of which I accept. The first affidavit (dated 30 January 2019) deals with a similar array of topics as covered by LG’s other witnesses, including call centre operations, training programs, and LG’s compliance programs and culture. The second affidavit (dated 30 May 2019) was limited strictly to clarifying her earlier evidence in respect of the training materials provided to staff in Manila versus the training materials provided to staff in Australia. All that needs to be noted here is that Ms Soud’s (clarified) evidence was that the material provided to staff, whether in Australia or the Philippines was the same, save for any necessary updates to reflect developments in the law.

### Call centre operations

1. Due to her role in negotiating and drafting the outsourcing agreement between LG and Sitel, Ms Soud is familiar with the terms of that agreement. Relevantly, it includes obligations on Sitel and certain key performance indicators which focus on compliance with relevant laws, including the ACL.
2. Sitel’s performance of its obligations under the outsourcing agreement is regularly monitored by LG. Ms Mose, supervised by Mr Gaynes, has day-to-day responsibility for this monitoring and for raising any issues with Sitel regarding its compliance.
3. The LG call centre in Manila is dedicated to dealing with customer inquiries about LG's products sold in Australia. It does not deal with other company’s products or customer inquiries. It is staffed by Sitel employees, who are referred to as ‘agents’. As the other evidence indicated, agents are divided into different tiers with different levels of authority to deal with customer inquiries. Tier 1 Agents have the lowest authority levels, Tier 2 Agents have higher authority levels, and Coaches and other supervisors oversee the work of the Tier 1 and Tier 2 Agents.
4. Under the escalation procedure in force at the time of the contraventions any consumer product which was out of the manufacturer’s warranty period was required to be escalated to a Coach and, if the matter could not be resolved by the Coach, to LG’s Sydney-based customer support team.

### Training

1. Following the outsourcing of call centre operations to Sitel, Ms Soud personally trained Sitel agents on all aspects of the ACL in Manila. Ms Soud conducted training annually until 2015. From 2015, training was provided twice yearly. The training involved two modules, one dedicated to consumer guarantees and the other to misleading and deceptive conduct.
2. Training is also carried out by Sitel staff who were in turn trained by Ms Soud. Part of that training has required Sitel trainers to ‘train’ Ms Soud on the ACL before they are permitted to train other agents, using the training materials which Ms Soud uses to train them. Ms Soud uses this process to satisfy herself that the trainers have a thorough and up to date understanding of the ACL and that they are able to answer any questions raised by the agents.
3. Legal compliance training is also provided on a yearly basis to Australian based LG staff by either Ms Soud or one of the legal staff employed by or on behalf of LG. A consistent message in LG’s legal compliance training during Ms Soud’s employment at LG has been the role and importance of the ACL. Similarly, she has always instructed those who she has trained to have regard to the ACL in making decisions with respect to customer enquiries, and to ensure that they inform consumers that they have considered the consumer guarantees under the ACL. It has never been LG’s policy, nor has there ever been any training or direction given to any LG staff, not to mention the ACL unless it is specifically raised by a consumer.
4. Since the decision of the Full Court was handed down, Ms Soud has ensured that all LG training further emphasises the need to comply with the requirements of the ACL, including not doing anything which could be construed as misleading consumers about their ACL rights.

### Legal compliance processes

1. LG has implemented a legal compliance framework within which weekly meetings are convened to discuss escalated customer issues. LG’s compliance committee, of which Ms Soud is a member, also meets three times per year to assess organisational adherence to the compliance framework.
2. The two contraventions relevant to this proceeding occurred because the relevant Sitel call centre agents did not raise possible ACL consumer remedies with customers, despite the terms of their training. It is Ms Soud’s evidence that these were isolated failures in the context of the call centre which receives on average 800 to 1,000 calls each day and 20,000 calls per month. Ms Soud records that both contraventions occurred very early after call centre operations had commenced in Manila, and that in both instances the relevant agents failed to follow the escalation procedure in force at the time.
3. Ms Pinca was cautioned by Ms Soud on her obligations with respect to ACL compliance, and the Sitel call centre agents responsible for the breaches no longer work on the LG account.

### Legal compliance culture

1. At the commencement of Ms Soud’s employment at LG, she was aware that the company had been the subject of a Federal Court judgment concerning misleading and deceptive conduct, and two court-enforceable undertakings in 2005 and 2006. She was also involved in negotiating the enforceable undertaking given by LG in August 2010 and has been responsible for ensuring compliance with the terms of that undertaking.
2. One of Ms Soud’s responsibilities has been to improve LG’s record of compliance with Australian consumer protection laws. She identifies taking the following actions in connection with that responsibility:
3. ensured that the compliance program required under the 2010 enforceable undertaking has been continued, notwithstanding that the binding effect of the undertaking lapsed after three years;
4. arranged for the undertaking of risk assessments and audits required under the enforceable undertakings and implemented all necessary recommendations referred to in those assessments and audits;
5. ensured that all LG and Sitel staff have regular and up-to-date compliance training that is relevant to their roles and which uses practical examples to reinforce the ACL rights and obligations;
6. availed staff of opportunities to be educated on the ACL rights and obligations when the law was first changed in 2011, including attending workshops regarding the ACL;
7. ensured that she personally, as well as other LG legal staff, are always available to answer any questions and to give guidance on LG’s obligations under the ACL; and
8. in the wake of the Full Court’s decision in this case, Ms Soud updated LG’s compliance training to ensure that the matters giving rise to the two contraventions were brought to the attention of LG and Sitel staff and steps taken to ensure that similar contraventions do not occur again.

# CONSIDERATION ON RELIEF

1. I will commence my consideration in respect of the appropriate relief by addressing the issue of appropriate pecuniary penalties. This occupied the vast majority of time during the parties’ addresses to me at the hearing as to relief.

## Pecuniary penalties

1. Section 224 of the ACL relevantly provides that if the Court is satisfied that a person has contravened a provision of Part 3-1 of the ACL (which includes s 29), the Court may order the person to pay such pecuniary penalty as the Court determines to be appropriate. No pecuniary penalty applies to a contravention of s 18 of the ACL.
2. A person is not liable to more than one pecuniary penalty in respect of the same conduct: s 224(4). Relevantly, two contraventions (of s 29(1)(m)) have been found, so two pecuniary penalties must, if appropriate, be imposed. The maximum penalty for each contravention is $1.1m.
3. The law governing the assessment of appropriate pecuniary penalties is trite and need not be rehearsed here. A summary of the relevant principles can be found in recent decision of Perry J in *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2019] FCA 797 (‘***Jetstar Airways***’) at [47]-[60], which I respectfully adopt in these reasons.
4. In my view, the pecuniary penalties sought by the ACCC are beyond the appropriate range for the two contraventions. I have reached this conclusion for the following reasons.
5. First, the contravening representations were made by low-level agents and in violation of LG’s internal policies. As the uncontested evidence shows, Tier 1 Agents would ordinarily take the customer’s details, seek to troubleshoot the problem, refer the product for an assessment and escalate the matter to a Coach for resolution. From there, according to the evidence of Ms Scott and Ms Soud, if the product was not within three months of the expiry date of the manufacturer’s warranty period, the Coach should then have referred (and did refer in the case of the First DW Statement inquiry) the issue to the Sydney-based customer support team. In other words, the Tier 1 Agent should not have given a final resolution because, under LG policies, Tier 1 Agents did not have the authority to deal with out-of-warranty products in that manner.
6. In respect of the First DW Statement inquiry, I note that the relevant customer was (eventually) transferred to a supervisor who told the customer that the request could not be accommodated under the manufacturer’s warranty but that LG would escalate the complaint to another level. When this was done – that is to say, when LG’s internal policies were complied with – LG agreed to pay for parts and labour for the repair. This, in my view, illustrates that when LG’s policies were followed, the process worked and the ACL was complied with.
7. As a brief aside, I note that as part of LG’s submission in respect of its internal policies it expressed some confusion over the findings of the Full Court in relation to the Third PG Statement. Taking a step back, the evidence given in respect of that statement indicated that during the conversation in which the contravening Third PG Statement was made, the customer was also told (although in response to a statement by the customer) that if he wanted to exercise his rights under the ACL consumer guarantee, it was his right to do so. The confusion in respect of the Full Court’s findings arises, according to LG, insofar as the Full Court:

*… appears to assume (contrary to the undisputed facts) that the statement by the LG representative that [the customer] was free to exercise his rights under the ACL was made by a different representative to the one who made the Third PG Statement.*

I am not persuaded that this matter bears sufficiently on the question of the appropriate relief such that the confusion needs to be resolved here. It suffices to say that, at a general level, the Third PG Statement was another example of a statement which contravened the ACL in violation of LG’s internal policies.

1. Second, the earlier proceedings to which the ACCC referred (summarised in these reasons at [23]), and which the ACCC submits are cause for this Court to impose more substantial pecuniary penalties in this proceeding, are matters which concern behaviour quite different to the contravening conduct in this case. Of the four matters referred to, three involved LG giving undertakings in relation to misleading conduct following regulatory investigations, and one was a proceeding in which LG admitted to having engaged in misleading conduct by publishing a user manual which claimed to be in lieu of all other warranties: *Australian Competition and Consumer Commission v LG Electronics Australia Pty Ltd* [2006] FCA 1118.
2. While the facts of that case bear some similarities to this proceeding, I am not persuaded by the ACCC’s submission that the offending in that case was of the same nature. The statements in that proceeding (that is, those which were included in the user manual) were authorised by the relevant senior personnel within LG. In the present proceeding, the contravening representations were made, as noted above, by low-level call centre staff. On the evidence before me, I am not convinced that, as the ACCC would have it, these matters should have put LG on notice to reform its compliance programs and culture and that the contraventions here indicate the inadequacy or failure of those compliance programs or LG’s culture. On the contrary, and having regard to the evidence before me, in my view the contraventions were relatively isolated instances; they were cases of understandable human error that took place in a call centre that received thousands of calls every month and in the context of a complex legal regime.
3. Third, the training and ongoing supervision or monitoring of Sitel staff, while by no means perfect, was neither inadequate nor flawed to the extent the ACCC allege. As noted above, the contraventions were relatively isolated cases of human error that occurred *despite* LG’s training and procedures, not *because of* LG’s training and procedures.
4. As the evidence of Ms Soud discloses, LG’s compliance training was delivered in two modules with one relating to consumer guarantees, and the other on misleading and deceptive conduct.
5. First, and as submitted by LG, the training in the module on consumer guarantees:
6. gave an overview of the ACL and its purpose in protecting consumers and promoting fair trading;
7. emphasised the importance of compliance;
8. explained in detail the content of consumer guarantees under the ACL;
9. explained that there were differences between LG’s manufacturer’s warranty and the consumer guarantees (including that the consumer guarantees applied regardless of the manufacturer’s warranty);
10. contained a number of case studies illustrating how the manufacturer’s warranty and statutory warranties applied;
11. set out the remedies available to customers under the ACL; and
12. encouraged escalation of queries in the event of uncertainty.
13. Second, and again as submitted by LG, the training on misleading and deceptive conduct:
14. gave an overview of the law in relation to such conduct;
15. specifically stated that it was an offence to mislead anyone regarding their rights under the ACL (including a number of examples of where companies had been fined for stating that the consumer guarantees did not exist); and
16. contained examples of statements that might infringe (that is, examples of what not to say) including: “Your warranty has expired and therefore you have to pay for the repair” and “Your product is out of warranty, we can’t help you”.
17. Further, all of the evidence put forward by LG supported the view that the training never included a direction to LG or Sitel staff not to mention the ACL unless it was raised by the customer. I do not regard the evidence before me at trial and my comment at [59] of my reasons at first instance leads to a conclusion that there was a “deliberate approach” not to mention the ACL.
18. As noted above, the ACCC allege that the training materials provided to Sitel staff (who ultimately made the contraventions as LG’s agents) were not the same as those which were provided to LG’s (Australian-based) staff. While this evidence was rebutted by the evidence of Ms Soud in her second affidavit, the counsel for the ACCC at the hearing made a submission to the effect that it was expected that Sitel staff in Manila would need more training to understand the ACL than Australian-based LG staff. In response to this submission, in my view counsel for LG correctly observed as follows:

*There is no difference between training a staff member in Australia compared to training a staff member in the Philippines. You work from the assumption they don’t know what the rules are and you teach them. An Australian person doesn’t have a better understanding or a better ability to understand an Australian law than a Philippino call centre staff member.*

1. Strictly in the circumstances of this case, and having regard to the contraventions as found by the Full Court, I am not satisfied that the training described was, as the ACCC claims, so inadequate or flawed such that the Court should impose the substantial pecuniary penalties sought by the ACCC.
2. Fourth, the specific circumstances of the contraventions (namely that the contravening representations were representations made to individual customers, not the world at large) are relevant. They were such that the contravening representations had little or no impact on the market or other innocent third parties. LG also made no profit, nor derived any benefit as a result of the contraventions having ultimately paid for the television repairs (parts and labour) in each of the two occasions in which it was found to have contravened the ACL. I make these observations keeping in mind my earlier observations at [10] above.
3. Fifth, having regard to the business information included in documents annexed to Ms Snell’s evidence, LG is plainly a large and profitable company. However, I do not accept the ACCC’s submission that LG is akin to the size and financial capacity of Apple Pty Ltd (which, as noted above at [28], was referred to in the ACCC’s submissions). A simple comparison between the post-tax earnings of LG and Apple Pty Ltd undermines the force of the ACCC’s submissions in this respect. In any event, the pecuniary penalties are not to be imposed at a higher rate than is otherwise appropriate just because a company has significant financial resources.
4. Finally, I note the following additional matters:
5. as the evidence shows, LG has improved or modified its compliance systems since the contraventions occurred;
6. demonstrating contrition and remorse is difficult in circumstances where LG took what no doubt it regarded as a reasonable view that it had not engaged in any infringing behaviour and the behaviour was, in any event, contrary to the policies of LG;
7. no issue of disgorgement of profit and making reparations arises as no loss was incurred by those to whom the contravening statements were made;
8. although LG did not admit the offences, LG’s decision to defend was reasonable and LG’s defence of this case should not militate against the appropriate penalty in such circumstances; and
9. there is no evidence that LG suffered any particular extra-curial punishment or detriment arising from the finding that it contravened the law.
10. It is apparent from the reasons above that I do not accept the characterisations of the conduct involving just two isolated contraventions in the same light as the ACCC. It is for this reason I do not accept as being within the appropriate range the penalties sought by the ACCC. On the other hand, I accept the submission of the ACCC that a great emphasis could have been placed on the processes taking place at the time of transferring LG’s call centre to the Philippines. Whilst it is hard to pinpoint any one precise fault, more monitoring at this central time would probably have picked up the breach of the processes supposedly put in place. I have considered the principles of both specific and general deterrence, both of which are relevant to my assessment in this case. It will be apparent that I do not regard LG as showing a disregard for its obligations under the ACL, nor that any such disregard gave rise to the two contraventions ultimately proved by the ACCC.
11. Having regard to the above considerations, and in reliance on the well-established law helpfully summarised by Perry J in *Jetstar Airways*, I have concluded that pecuniary penalties of $80,000 per contravention (for a total of $160,000) to be appropriate in the circumstances of this case.
12. In relation to this amount, I recognise the ACCC’s submission that, in cases of this kind, it is important that the quantum of the penalty is enough to secure compliance not just by LG, but that of any other would-be wrongdoers. But this point cuts both ways. If I were to impose very substantial penalties for relatively minor infractions even where strong compliance regimes were in place, then the benefit to businesses of having such regimes in place would be substantially reduced. This might result in reluctance, on the part of companies, to spend substantial resources in implementing such regimes on the basis that it may not protect them in the event of human error.
13. For these reasons, I am satisfied that pecuniary penalties of $80,000 per contravention (for a total of $160,000) are appropriate in the circumstances of this case.

## Injunction

1. As the ACCC observes, in the circumstances of cases such as this, the Court has power pursuant to s 232 of the ACL to grant an injunction in such terms as it considers appropriate. Injunctions must be specifically and clearly expressed, so that it is capable of being readily obeyed and does not require the Court’s supervision: *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* [1999] FCA 18;(1999) 161 ALR 79 at [26].
2. However, injunctions will not be appropriate in all cases of contravening conduct. In this respect, the observations of the Full Court in *Australian Competition and Consumer Commission v Dataline Net.Au Pty Ltd (in liq)* (2007) 161 FCR 513 (at [111] and [114]) are apposite:

*[111] Many contraventions will simply not justify injunctive relief. We doubt whether unintentional misconduct in contravention of s 52 would lead to such relief. An isolated intentional breach may also not warrant it. Conduct which occurred many years before the enforcement proceedings may not do so, especially if the offender has not recently infringed the law, or is no longer in a position where contravention is likely. These are obvious cases, but they raise questions as to the relevant factors in considering whether to grant such relief. The discretion is at large. It is for the relevant applicant to demonstrate that the injunction will serve a purpose. That purpose may involve the protection of the public interest or private rights.*

*…*

*[114] The experience of the law is that unlawful or illegal conduct does not lead to an injunction against repetition of such conduct being sought or granted. A range of other remedies exist in the civil and criminal law which are treated as adequate and appropriate sanctions for such conduct. Normally, it is only where there is a real risk of further misconduct that injunctive relief is contemplated. It is, we think, no answer to this experience to say that subss (4) and (5) provide that absence of any threat of further contravention is no longer a bar to the grant of such relief. An injunction should not be seen as a necessary vindication of the applicant's conduct in bringing the proceedings. Other relief may better serve that purpose. Nor should an injunction be sought primarily for public relations purposes, however worthy such purposes may be.*

1. I consider this to be one such case where injunctive relief is not warranted. Cast in the bigger picture of LG’s engagement with customers, the contravening representations are, while still unacceptable, relatively isolated. Even taking into account the earlier proceedings brought against LG for conduct of a similar complexion, I am not persuaded that I ought to exercise my discretion to impose an injunction to prevent further misconduct. In my view, the Full Court’s declarations that LG has contravened the law are sufficient to mark the Court’s disapproval of LG’s conduct, and the pecuniary penalties which I have decided to impose make that unmistakably clear.

## Disclosure order

1. Section 246 of the ACL provides that the primary purposes of a disclosure order (or a ‘corrective publication order’) are:
2. to protect the public interest by dispelling an incorrect or false impression that has been created as a result of misleading or deceptive conduct especially where all of the misleading or deceptive conduct arose out of advertisements and other public statements and promotions;
3. to alert consumers to the fact of the misleading or deceptive conduct and inform them that they might have some remedy if they relied upon any of the misleading or deceptive conduct; and
4. to serve as an “aid in the enforcement of the primary orders and the prevention of repetition of the contravening conduct”.
5. In circumstances where the contravening statements were each made to only one person (who in fact knew the statements were inaccurate), I am not persuaded that any of the above specified purposes are served by the making of the disclosure order sought by the ACCC. Leaving aside the fact that no loss was actually suffered, the customers affected by the contravening representations are (and indeed were at the time) already aware of the existence of the ACL. An order that would, in effect, require LG to publish detailed disclosure statements on its website and in emails they send to retailers and repairers who sell or repair LG products, seems to me unnecessary in these circumstances. Accordingly I do not consider that the order sought should be made.

# COSTS

1. With the appropriate relief determined as above, I must now make orders as to the costs of both the trial and this hearing on relief.

## Parties’ submissions

1. The parties’ position on the appropriate orders as to costs can be briefly summarised as follows:
2. the ACCC seek an order that LG pay a proportion of 40% of the ACCC’s costs of the trial as was the order made by the Full Court in relation to the appeal relief; and
3. LG submit that it ought to be required to pay no more than 20% of the ACCC’s costs of the trial, for the reason that the ACCC failed on most of its pleaded misrepresentations, and many of the substantial elements of the trial were not part of the only partially successful appeal.

## Consideration

1. As to the costs of the trial, I agree with the submissions of LG. The costs order of the Full Court does not reflect the position at trial. While on appeal the ACCC argued 19 misrepresentations, at trial it alleged 41 different instances of misleading or deceptive conduct and relied upon expert evidence. In those circumstances, where significant time and expense was incurred in dealing with topics that were not raised, or were raised but were not successful on appeal, the order made by the Full Court relating to the appeal does not directly impact on the appropriate costs orders to make as to the trial for the reasons propounded by LG. It seems appropriate that LG be ordered to pay 20% of the ACCC’s costs at trial.
2. As to the costs of this penalty hearing, the ACCC has been largely unsuccessful in persuading the Court to impose various forms of relief (including a substantial penalty), but nevertheless LG has not been entirely successful in seeking the pecuniary penalty it sought. I would consider that the ACCC be awarded 50% of their costs of and incidental to the penalty hearing, it needing to come to Court and obtain the appropriate pecuniary penalty. However, on this question of costs I will give the parties the opportunity to put short submissions as to the appropriate costs order.

# DISPOSITION

1. I will order the parties confer and provide a minute of order reflecting these reasons, and any submissions on costs of the penalty hearing, within 7 days.

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| --- |
| I certify that the preceding one hundred and fifteen (115) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton. |

Associate:

Dated: 6 September 2019