

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: WAD215/2019
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
SMART CORPORATION PTY LTD ACN 134 192 297 & ORS
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF
AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 17/04/2019 10:30:00 AM AWST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Concise Statement

No.



Federal Court of Australia

District Registry: Western Australia

Division: General

Australian Competition and Consumer Commission

Applicant

Smart Corporation Pty Ltd ACN 134 192 297 (and others listed in the Schedule)

First Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1 Since January 2014, the First Respondent, Australian 4WD Hire (**A4WD**) has offered 'self-drive recreational four-wheel drive (**4WD**) vehicles' for hire by consumers (mainly Australian and international tourists) throughout Australia for off road use. This proceeding concerns the conduct of A4WD in relation to its vehicle hire contracts which contain unfair terms, a misleading representation made by A4WD in relation to the insurance of its vehicles, and unconscionable conduct engaged in by A4WD towards certain consumers in connection with retaining part or all of their security bond for purported damage caused to rental vehicles.

A4WD's website – misleading and deceptive conduct; a false or misleading representation

2 A4WD has represented to consumers, via the publication of statements made on its website since about January 2014, [australian4wdhire.com.au], that:

- (a) all A4WD's rental vehicles have the benefit of being 'insured for off-road use'; and
- (b) should any damage occur to the vehicle while being hired, including while being used on unsealed roads, it would be insured under A4WD's insurance policies (together, the **Insurance Coverage Representation**).

3 However not all A4WD's rental vehicles were so insured; in fact only approximately 46% of its vehicles were insured for accidents causing damage to the rental vehicle. Further, A4WD's vehicle hire contract gave it sole discretion to elect not to submit an insurance claim to its insurers for damage caused in single vehicle accidents and instead held the consumer liable for all costs.

A4WD's standard form contracts – unfair contract terms

4 Consumers who hired a 4WD vehicle from A4WD were required to enter into a standard form contract.

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[Form approved 01/08/2011]

5 There were different versions of the contracts in force at different (and often overlapping) times, but the contracts used by A4WD during the period 2016 to 2019 included terms to the effect that:

- (a) A4WD was permitted to use GPS tracking data on the hired vehicle to monitor where the vehicle was driven, the times when the vehicle was being driven and how fast it was being driven;
- (b) A4WD could use this GPS data to conclude that a consumer had operated the vehicle in a manner which was a **Prohibited Operation** (defined in the contract to include, among other things, driving above the speed limit, driving outside of built-up areas between the times of sunset and dawn and driving during periods of low visibility including but not limited to fog and heavy rain);
- (c) engaging in a Prohibited Operation would cause excessive wear and tear and would likely cause other damage to the vehicle (defined as **Driver Behaviour Damage**);
- (d) in the event that the GPS data evidenced that a Prohibited Operation had occurred, the consumer would be liable to compensate A4WD for the deemed Driver Behaviour Damage in an amount determined by A4WD of up to \$500 for each Prohibited Operation, and the consumer authorised A4WD to deduct the amounts thereby deemed to be 'owed' to A4WD from the consumer's security bond (paragraphs 5(a) to 5(d) being the **GPS Clause**);
- (e) in the event of a single vehicle accident, A4WD had the sole discretion to elect not to submit an insurance claim to its insurers for damage caused to the vehicle, the consequence of which was that the consumer was then liable to pay for the costs of rectifying the damage, the vehicle's replacement value or the payout figure under A4WD's finance contract, even in circumstances where the vehicle was in fact insured for the damage (**Insurance Discretion Clause**); and
- (f) consumers were required to act at all times in A4WD's best interests (**Non-Disparagement Clause**).

[Note: the relevant contracts are set out in the Key Documents in Support of the Applicant's Concise Statement].

A4WD's conduct post hire period – unconscionable conduct

6 Some A4WD consumers, following the completion of the hire period and the return of the vehicle, received an email from A4WD alleging that they had seriously breached the terms of their contract due to, among other things, the vehicles being returned with a '*shocking*' or '*unimpressive*' driver behaviour report which A4WD had obtained by downloading information from a website run by its GPS data provider (**Driver Behaviour Report**). The standard form

email sent by A4WD asserted that the Driver Behaviour Report provided evidence that the consumers had incurred 'speeding violations' or otherwise engaged in a Prohibited Operation when using the vehicle.

- 7 The emails A4WD sent to the consumers contained intemperate language that was intimidating and threatening, including to the effect that:
- (a) A4WD would be retaining part or all of the security bond (usually \$5,000) because the consumer engaged in one or more Prohibited Operations (described as a fee for 'excessive wear and tear');
 - (b) A4WD was considering pursuing the consumer for 'gross misuse and extreme endangerment' of A4WD's property and reserved its right to sue the consumer on a full indemnity basis; and
 - (c) if A4WD heard from the consumer again, it reserved its right to take the entire security bond (if not already taken), sue for legal costs and/or for defamation and provide the Driver Behaviour Report to 'the authorities' for further action.

8 In response to receiving these emails some consumers contacted, or attempted to contact, A4WD to dispute the matters set out in paragraphs 6 and 7. In nearly all instances, A4WD either refused to speak to the consumers on the telephone and/or sent to the consumers further correspondence which was aggressive and threatening, and included representations that a state or territory transport department was the source of the GPS data.

9 Subsequent to sending the emails referred to in 6 and 7 above, A4WD, relying on the consumer's alleged Prohibited Operation of the vehicle, as purportedly evidenced by the Driver Behaviour Report, deduct an amount of the consumer's security bond for what it described as 'excessive wear and tear', before returning the balance, if any, to the consumer. Such conduct was detrimental to the consumers and caused them to suffer financial loss.

B. THE RELIEF SOUGHT FROM THE COURT

10 The Applicant seeks the relief set out in in the accompany originating application and summarised as follows: declarations, pecuniary penalties, injunctions, non-punitive orders, orders for non-party consumer redress, disqualification orders in respect of the Second Respondent and Third Respondent, costs and other orders.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

Misleading or deceptive conduct; a false or misleading representation – ss 18 and 29(1)(g) of the ACL

11 By making the Insurance Coverage Representation A4WD engaged in conduct that is misleading or deceptive, or likely to mislead or deceive, and made a false or misleading

representation about the characteristics, uses or benefits of its rental vehicles, in connection with the supply or possible supply of goods, in contravention of ss 18 and 29(1)(g) of the ACL.

Unfair contract terms – s 24 of the ACL

- 12 Each of the contracts referred to in paragraphs 4 and 5 above is a consumer contract, and a standard form contract, for the purposes of Part 2-3 of the ACL and the Applicant relies on the presumption in s 27(1) of the ACL.
- 13 The GPS Clause, the Insurance Discretion Clause and the Non-Disparagement Clause are unfair contract terms within the meaning of s 24 of the ACL because they cause a significant imbalance in the parties' rights and obligations, are not reasonably necessary to protect the legitimate interests of A4WD, and cause detriment if relied on.
- 14 The significant imbalance arises because:
- (a) in respect of the GPS Clause, consumers are obliged to accept financial liability for, and A4WD has the right to deduct amounts for, Driver Behaviour Damage deemed to have been caused to vehicles as a result of a Prohibited Operation purportedly evidenced by a Driver Behaviour Report. Consumers do not have the right to challenge the accuracy of a Driver Behaviour Report with A4WD or obtain proof of Driver Behaviour Damage before or after amounts are deducted from their security bond;
 - (b) in respect of the Insurance Discretion Clause, A4WD has a unilateral right to decide whether to make an insurance claim for single vehicle incidents and charge consumers for damage that may in fact have been covered under A4WD's insurance policies;
 - (c) in respect of the Non-Disparagement Clause, A4WD imposes an obligation on a consumer to act at all times in the best interests of A4WD, with no corresponding obligation imposed on A4WD to do the same, and prohibits a consumer the right to leave genuine negative reviews on any online forum.
- 15 The GPS Clause, the Insurance Discretion Clause and the Non-Disparagement Clause are not reasonably necessary to protect A4WD's legitimate interests. The Applicant relies on the presumption in s 24(4) of the ACL.
- 16 The financial detriment suffered by consumers varies widely. In respect of the GPS Clause the amount could be many multiples of \$500 depending on the number of Prohibited Operations recorded on the Driver Behaviour Report and the amount A4WD decides to deduct from the consumer's security bond. In respect of the Insurance Discretion Clause, the financial detriment depends on the extent of the damage to the vehicle and the amount required to rectify or replace the vehicle or pay out the finance contract.

- 17 The non-financial detriment suffered by consumers in respect of the Non-Disparagement Clause is, the limitation on their rights to publish honest and genuinely held statements about their experience with A4WD.

Unconscionable conduct – s 21 of the ACL

- 18 By reason of the matters outlined above and by engaging in the conduct outlined in paragraphs 6 to 9 above, A4WD engaged in conduct that was, in all the circumstances, unconscionable, in contravention of s 21 of the ACL.

Knowingly concerned

- 19 The Second Respondent (**Mr Roesch**) and the Third Respondent (**Ms Kosukhina**) were each responsible for, and had knowledge of, all aspects of the operation and management of A4WD's business including all marketing, operations, policies and overseeing A4WD's dealings and communications (including regarding complaints) with consumers.
- 20 Each of Mr Roesch and/or Ms Kosukhina was, directly or indirectly, knowingly concerned in, or a party to, the contraventions of A4WD on the basis set out in 19 above.

D. THE ALLEGED HARM SUFFERED

- 21 Consumers have been charged for purportedly driving in a prohibited manner which A4WD claims to cause damage to vehicles, and some consumers have paid this charge. Consumers may have also entered into vehicle hire contracts with A4WD on the understanding that the vehicle was fully insured and may have suffered loss if they have subsequently been charged for vehicle repairs that would have been covered by insurance. The Non-Disparagement Clause has had the effect of preventing honest, critical reviews of A4WD from being posted online, thereby distorting genuine consumer choice and indirectly damaging A4WD's competitors.

Date: 12 April 2019



Signed by Dylan McKimmie
Lawyer for the Applicant

This concise statement was prepared by Dylan McKimmie of Norton Rose Fulbright and settled by Matthew Howard SC and Jenny Thornton of counsel.

Certificate of lawyer

I Dylan McKimmie certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in it.

Date: 12 April 2019

A handwritten signature in blue ink, consisting of a large initial 'D' followed by several loops and a long horizontal stroke extending to the right.

Signed by Dylan McKimmie
Lawyer for the Applicant

Schedule

No. of 2019

Federal Court of Australia
District Registry: Western Australia
Division: General

Australian Competition and Consumer Commission
Applicant

Smart Corporation Pty Ltd ACN 134 192 297
First Respondent

Vitali Roesch
Second Respondent

Maryna Kosukhina
Third Respondent