



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD2066/2016

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

Applicant

**MSY TECHNOLOGY PTY LTD (ACN 093 529 401)**

First Respondent

**MSY GROUP PTY LTD ACN 604 737 028**

Second Respondent

**M.S.Y. TECHNOLOGY (NSW) PTY LTD ACN 102 819 821**

Third Respondent

**ORDER**

**JUDGE:** JUSTICE MARKOVIC

**DATE OF ORDER:** 25 October 2017

**WHERE MADE:** Sydney

**THE COURT DECLARES THAT:**

1. The First Respondent, MSY Technology Pty Ltd (**MSY Technology**), during the period from January 2013 to March 2015 operated, maintained and controlled the website [www.msy.com.au](http://www.msy.com.au) (**MSY Website**) used to promote MSY Technology, M.S.Y. Technology (NSW) Pty Ltd (**MSY NSW**); MSY Technology (QLD) Pty Ltd (**MSY QLD**), MSY Technology (SA) Pty Ltd (**MSY SA**) and MSY Technology (WA) Pty Ltd (**MSY WA**) (together, for the purposes of this Declaration, **MSY**):
  - (a) in trade or commerce, in connection with the supply or possible supply of computer parts, computer peripherals and computer software (**Computer Products**) or in connection with the promotion of the supply of Computer Products to consumers;
  - (b) by displaying and publishing on the MSY Website terms and conditions (**Terms and Conditions**) which, in relation to faulty Computer Products



supplied by MSY, expressly or impliedly represented to consumers who accessed those Terms and Conditions that consumers:

- (i) had to return the Computer Product to MSY within 7 days of receiving it to obtain a remedy;
  - (ii) were only entitled to a refund or replacement remedy on a case by case basis and at the relevant MSY company's discretion;
  - (iii) were only entitled to a Return-to-Base warranty on Computer Products sold by any MSY company and that the remedy to be provided was at the MSY company's discretion;
  - (iv) may incur an administrative fee if the Computer Product was not under warranty; and
  - (v) were not entitled to a remedy with respect to faulty software,
- (c) and therefore:
- (i) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law, Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**);
  - (ii) made false or misleading representations in relation to the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in contravention of s 29(1)(m) of the ACL; and
  - (iii) made false or misleading representations in relation to a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy in contravention of s 29(1)(n) of the ACL,
- (d) by reason of the fact that:
- (i) Div 1 of Pt 3-2 of the ACL provides consumers with guarantees for goods supplied in trade or commerce which are non-excludable under s 64 of the ACL; and



- (ii) the availability of ACL remedies for goods supplied to a consumer that fail to comply with the consumer guarantees, which are available under Div 1 of Pt 5-4 of the ACL:
  - A. are not dependent on the return of goods within 7 days of receipt;
  - B. are not at MSY's discretion and are otherwise available as specified in the ACL;
  - C. are not limited to the remedies proposed by MSY or otherwise at MSY's discretion;
  - D. do not require a fee to be paid by the consumer; and
  - E. apply to software.
- 2. The Second Respondent, MSY Group Pty Ltd (**MSY Group**), during the period from March 2015 to January 2016 operated, maintained and controlled the MSY Website used to promote MSY Technology, MSY NSW, MSY QLD, MSY SA, MSY WA and MSY Technology (Tas) Pty Ltd, (together, **MSY**):
  - (a) in trade or commerce, in connection with the supply or possible supply of Computer Products or in connection with the promotion of the supply of Computer Products to consumers;
  - (b) by displaying and publishing on the MSY Website Terms and Conditions which, in relation to faulty Computer Products supplied by MSY, expressly or impliedly represented to consumers who accessed those Terms and Conditions that consumers:
    - (i) had to return the Computer Product to MSY within 7 days of receiving it to obtain a remedy;
    - (ii) were only entitled to a refund or replacement remedy on a case by case basis and at the relevant MSY company's discretion;
    - (iii) were only entitled to a Return-to-Base warranty on Computer Products sold by any MSY company and that the remedy to be provided was at the MSY company's discretion;



- (iv) may incur an administrative fee if the Computer Product was not under warranty; and
  - (v) were not entitled to a remedy with respect to faulty software,
- (c) and therefore:
- (i) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL;
  - (ii) made false or misleading representations in relation to the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in contravention of s 29(1)(m) of the ACL; and
  - (iii) made false or misleading representations in relation to a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy in contravention of s 29(1)(n) of the ACL,
- (d) by reason of the fact that:
- (i) Div 1 of Pt 3-2 of the ACL provides consumers with guarantees for goods supplied in trade or commerce which are non-excludable under s 64 of the ACL; and
  - (ii) the availability of ACL remedies for goods supplied to a consumer that fail to comply with the consumer guarantees, which are available under Div 1 of Pt 5-4 of the ACL:
    - A. are not dependent on the return of goods within 7 days of receipt;
    - B. are not at MSY's discretion and are otherwise available as specified in the ACL;
    - C. are not limited to the remedies proposed by MSY or otherwise at MSY's discretion;
    - D. do not require a fee to be paid by the consumer; and
    - E. apply to software.



3. The Third Respondent, MSY NSW, operated MSY branded stores in NSW for the retail supply of Computer Products to consumers and on 27 April 2015, 28 April 2015 and 29 April 2015:
- (a) in trade or commerce in connection with the supply or possible supply of Computer Products, or in connection with the promotion of the supply of Computer Products to consumers;
  - (b) by and through the conduct of MSY NSW employees who, when dealing with a consumer who had purchased a faulty Computer Product from MSY NSW, made both oral and email representations that:
    - (i) the ACL remedy available to the consumer depended upon recourse against the manufacturer, and impliedly represented that MSY NSW was not required to provide a remedy to consumers;
    - (ii) were silent in response to the consumer's reference to their specific ACL rights and impliedly represented that MSY NSW was not required to provide an ACL remedy to consumers; and
    - (iii) the applicable consumer guarantee only applied for an unreasonably short time period,
  - (c) and therefore:
    - (i) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL; and
    - (ii) made false or misleading representations in relation to the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in contravention of s 29(1)(m) of the ACL,
  - (d) by reason of the fact that:
    - (i) Div 1 of Pt 3-2 of the ACL provides consumers with guarantees for goods supplied in trade or commerce which are non-excludable under s 64 of the ACL; and
    - (ii) the availability of ACL remedies for goods supplied to a consumer that fail to comply with the consumer guarantees, which are available under Div 1 of Pt 5-4 of the ACL:



- A. are not dependent on the manufacturer of the goods;
- B. are not confined to an unreasonably short time period; and
- C. are required to be provided to consumers as specified in the ACL.

4. The First Respondent, MSY Technology, operated MSY branded stores in Victoria for the retail supply of Computer Products to consumers and on 22 July 2015:
- (a) in trade or commerce in connection with the supply or possible supply of Computer Products, or in connection with the promotion of the supply of Computer Products to consumers;
  - (b) by and through the conduct of MSY Technology employees who, when dealing with a consumer who had purchased a faulty Computer Product from MSY Technology, made oral representations that:
    - (i) the relevant consumer guarantee only applied for an unreasonably short time period; and
    - (ii) for the consumer to obtain a remedy for faulty Computer Products, the goods had to be returned to the MSY Technology store in original packaging,
  - (c) and therefore:
    - (i) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL;
    - (ii) made false or misleading representations in relation to the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in contravention of s 29(1)(m) of the ACL,
  - (d) by reason of the fact that:
    - (i) Div 1 of Pt 3-2 of the ACL provides consumers with guarantees for goods supplied in trade or commerce which are non-excludable under s 64 of the ACL; and
    - (ii) the availability of ACL remedies for goods supplied to a consumer that fail to comply with the consumer guarantees, which are available under Div 1 of Pt 5-4 of the ACL:



- A. are not confined to an unreasonably short time period; and
  - B. are not dependent on the goods being returned to the supplier in their original packaging.
5. The First Respondent, MSY Technology, operated MSY branded stores in Victoria for the retail supply of Computer Products to consumers and on 27 November 2015:
- (a) in trade or commerce in connection with the supply or possible supply of Computer Products or in connection with the promotion of the supply of Computer Products to consumers;
  - (b) by and through the conduct of MSY Technology employees who, when dealing with a consumer who had purchased a faulty Computer Product from MSY Technology, made oral representations that the remedy available to the consumer depended upon recourse against the manufacturer, and impliedly represented that MSY was not required to provide a remedy to consumers,
  - (c) and therefore:
    - (i) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL;
    - (ii) made false or misleading representations in relation to the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in contravention of s 29(1)(m) of the ACL,
  - (d) by reason of the fact that:
    - (i) Div 1 of Pt 3-2 of the ACL provides consumers with guarantees for goods supplied in trade or commerce which are non-excludable under s 64 of the ACL; and
    - (ii) the availability of ACL remedies for goods supplied to a consumer that fail to comply with the consumer guarantees, which are available under Div 1 of Pt 5-4 of the ACL are not dependent on the manufacturer of the goods.

**THE COURT ORDERS THAT:**

6. Each of MSY Technology and MSY Group, whether by itself, its servants, its agents or otherwise, for a period of five years from the date of this Order, in trade or



commerce be restrained from publishing or causing to be published on any website operated, maintained and controlled by MSY Technology or MSY Group, written statements representing to consumers that the consumers' rights or remedies for faulty Computer Products purchased from any MSY business, are in any way limited, restricted or varied from those conferred on consumers under the ACL.

7. Each of MSY Technology and MSY NSW, whether by itself, its servants, its agents or otherwise, for a period of five years from the date of this Order, in trade or commerce be restrained from making representations to consumers who approach MSY Technology or MSY NSW in relation to faulty goods or services purchased from any MSY business, to the effect that the consumers' rights or remedies from MSY Technology and MSY NSW are in any way limited, restricted or varied from those conferred on consumers under the ACL.
8. Within 90 days of these Orders:
  - (a) MSY Group pay a pecuniary penalty to the Commonwealth of Australia in respect of contraventions of ss 29(1)(m) and (n) of the ACL in the amount of \$200,000;
  - (b) MSY NSW pay a pecuniary penalty to the Commonwealth of Australia in respect of contraventions of s 29(1)(m) of the ACL in the amount of \$50,000; and
  - (c) MSY Technology pay a pecuniary penalty to the Commonwealth of Australia in respect of contraventions of ss 29(1)(m) and (n) of the ACL in the amount of \$500,000.
9. MSY Technology and MSY Group:
  - (a) within 5 days of these Orders agree the terms of a notice of the outcome of these proceedings with the Applicant (**Notice**);
  - (b) within 7 days of these Orders, at their expense, publish a colour copy of the Notice on the MSY Website homepage (<http://www.msy.com.au/home.php>) and ensure the Notice is:
    - (i) viewable immediately on a computer screen on access to the MSY Website homepage;



- (ii) published directly above the location and contact details for the stores on the MSY website homepage;
  - (iii) published in a box of a size equal to the banner advertising display box viewable above the location and contact details for the stores on the MSY website homepage (but replacing the current banner advertising display box);
  - (iv) static (i.e. not scrolling such that the notice remains on the page and does not scroll across the page or scroll in rotation with other advertising);
  - (v) crawlable (i.e. its contents may be indexed by a search engine); and
  - (vi) maintained on the MSY Website homepage for a period of 90 days from the date of these Orders;
- (c) within 15 days of these Orders, agree the terms of a webpage titled "Your ACL Rights" with the Applicant, being a sufficiently detailed description of the consumer guarantee rights conferred on consumers under the ACL and available from any MSY company (**Your ACL Rights material**);
- (d) within 30 days of these Orders, include an accessible and prominent hyperlink labelled "Your ACL Rights" located on the MSY Website homepage, linking through to a section of the MSY Website containing the Your ACL Rights material;
- (e) within 30 days of these Orders ensure that any "Terms and Conditions" or "Terms of Trade":
- (i) published on the MSY Website contain a hyperlink labelled to the Your ACL Rights material; and
  - (ii) made available at any MSY store they operate attach and include a copy of the Your ACL Rights material,
- (f) within 90 days of these Orders:
- (i) publish, or cause to be published, at their expense, on the MSY Website in a prominent position on the MSY Website homepage a phone number that consumers can use to raise consumer guarantee



issues with a senior MSY Group, MSY Technology or MSY NSW employee; and

- (ii) ensure the person nominated under Order 9(f)(i) to respond to consumer guarantee issues raised by consumers has attended the training referred to in Order 11(a) below, and has had specific annual training for 3 years on the application of Div 1 of Pt 3-2 of the ACL and Div 1 of Pt 5-4 of the ACL.

- 10. MSY Group, MSY NSW and MSY Technology at their own expense:
  - (a) within 90 days of these Orders establish and implement a Compliance and Education/Training Program (**Compliance Program**), which in all respects complies with the requirements set out in Annexure A to these Orders;
  - (b) maintain and continue to implement the Compliance Program referred to in Order 10(a) above for a period of three years from the date of these Orders; and
  - (c) provide any documents to be provided to the Applicant pursuant to Annexure A.
- 11. MSY Group, MSY NSW and MSY Technology at their own expense:
  - (a) within 90 days of these Orders ensure that their employees, the Compliance Officer appointed in accordance with Annexure A, and any MSY Group, MSY NSW and MSY Technology directors attend and undertake ACL compliance training with particular emphasis on the responsibilities and obligations of suppliers under ss 18 and 29, Div 1 of Pt 3-2, and Div 1 of Pt 5-4 of the ACL;
  - (b) ensure the training referred to in Order 11(a) is administered annually to the persons referred to in Order 11(a) for a period of three years from the date of these Orders; and
  - (c) ensure the training referred to in Order 11(a) is to be administered by a qualified compliance professional or legal practitioner with expertise in the ACL.
- 12. The Director of MSY Group, MSY NSW and/or MSY Technology provide an affidavit deposing to compliance with:



- (a) Order 9, to be filed in the proceeding within 10 days of complying with each obligation specified in Orders 9(a) to 9(f);
  - (b) Order 10, to be filed in the proceeding within 10 days of complying with each obligation specified in Orders 10(a) and 10(b); and
  - (c) Order 11, to be filed in the proceeding within 10 days of complying with each obligation in Orders 11(a) and 11(b).
13. MSY Group, MSY NSW and MSY Technology together, within 30 days of these Orders, pay the Applicant's costs of the proceeding in the amount of \$50,000.
14. The proceeding be otherwise dismissed.

**PENAL NOTICE**

To: The First, Second and Third Respondents

If you (being the person bound by this order):

- (a) refuse or neglect to do any act within the time specified in the order for the doing of the act; or
- (b) disobey the order by doing an act which the order requires you to abstain from doing, you will be liable to imprisonment, sequestration of property or other punishment.

Any other person who knows of this order and does anything which helps or permits you to breach the terms of this order may be similarly punished.

Date that entry is stamped: 25 October 2017

  
Registrar



## Annexure A

### COMPLIANCE AND EDUCATION/TRAINING PROGRAM

- 1 MSY Group, MSY NSW and MSY Technology must establish a Consumer Compliance Program (**Compliance Program**) that complies with each of paragraphs 2 to 18 of this Annexure A, and must undertake and complete each of the requirements specified.

#### Appointments

- 2 Within 30 days of the date of these Orders, appoint a director or a senior manager with suitable qualifications or experience in corporate compliance as a Compliance Officer with responsibility for ensuring the Compliance Program is effectively designed, implemented and maintained (**Compliance Officer**).

#### Risk Assessment

- 3 Within 90 days of the date of these Orders, MSY Group, MSY NSW and MSY Technology:
  - (a) appoint a suitably qualified, external, compliance professional with demonstrated expertise in Australian Consumer Law (**ACL**), comprising Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**Compliance Advisor**);
  - (b) instruct the Compliance Advisor to:
    - (i) undertake an ACL risk assessment covering the areas where MSY Group, MSY NSW and MSY Technology are at risk of contravening ss 18 and 29 of the ACL and any gaps in the existing procedures and documentation for managing these risks; and
    - (ii) provide recommendations for any action to be taken having regard to the outcome of the risk assessment described in paragraph 3(b) of this Annexure A to the Director(s) and senior management of the MSY Companies (**Risk Assessment Report**);



- (c) review and implement the findings and recommendations of the Compliance Advisor as recorded in the Risk Assessment Report.

### **Compliance Policy**

- 4 Within 30 days of the date of the Orders of the Court, issue a policy statement outlining MSY Group, MSY NSW and MSY Technology's commitment to compliance with the ACL (**Compliance Policy**), which policy must contain:
  - (a) a statement of commitment to compliance with the ACL;
  - (b) an outline of how the commitment to ACL compliance will be realised by MSY Group, MSY NSW and MSY Technology; and
  - (c) a requirement for all staff of MSY Group, MSY NSW and MSY Technology to report any Compliance Program issues and ACL compliance concerns to the Compliance Officer.

### **Complaints Handling System**

- 5 Ensure that the Compliance Program includes a competition and consumer law complaints handling system (**Complaints Handling System**) which is consistent with AS/ISO 10002:2006 *Customer satisfaction - Guidelines for complaints handling in organizations*.
- 6 Ensure that MSY Group, MSY NSW and MSY Technology staff and any customers making an ACL inquiry of any of their staff are made aware of the Complaints Handling System.

### **Staff Training**

- 7 Ensure that MSY Group, MSY NSW and MSY Technology staff receive the training referred to in Order 11 of the Orders of the Court, including ensuring that this training forms part of the induction of all new directors, officers, employees, representatives and agents.



### **Compliance officer reports to Director(s) and Senior Management**

- 8 Ensure that the Compliance Officer reports to the Director(s) and senior management of MSY Group, MSY NSW and MSY Technology every six months on:
- (a) whether any improvements to the Compliance Program are required;
  - (b) whether staff require additional or refresher training on MSY's ACL obligations; and
  - (c) all consumer guarantee issues reported under the Compliance Handling System or otherwise communicated to MSY Group, MSY NSW and MSY Technology by consumers in writing (including by email, via social media, or otherwise) over the last six months.

### **Compliance Program Review**

- 9 MSY Group, MSY NSW and MSY Technology undertake, at their own expense, an annual review of the Compliance Program (**Review**) to be carried out in accordance with each of the following requirements:
- (a) *Scope of Review* – the Review should be broad and rigorous enough to provide MSY Group, MSY NSW and MSY Technology and the ACCC with:
    - (i) a verification that the requirements specified in Orders 9(c), 9(e) and 9(f) of the Orders of the Court have been complied with;
    - (ii) a verification that MSY Group, MSY NSW and MSY Technology have put in place a Compliance Program that complies with each of the requirements detailed in paragraphs 2, 4, 5, 6, 7 and 8 of this Annexure A; and
    - (iii) the Compliance Reports detailed at paragraph 11 of this Annexure A.
  - (b) *Independent Reviewer* – ensure that each Review is carried out by a suitably qualified, independent compliance professional with demonstrated expertise in Australian Consumer Law (**Reviewer**).



- (c) The Reviewer will qualify as:
  - (i) a suitable expert where he or she advises on ACL matters on an ongoing and regular basis and has done so for at least 3 years.
  - (ii) independent on the basis that he or she:
    - (A) did not design or implement the Compliance Program;
    - (B) is not a present or past staff member or director of any of MSY Group, MSY NSW and MSY Technology or any other MSY entity;
    - (C) has not acted and does not act for, and does not consult and has not consulted to, MSY Group, MSY NSW and MSY Technology or any other MSY entity in any competition and consumer law related matters, other than performing Reviews under the Orders of the Court; and
    - (D) has no significant shareholding or other interests in any of MSY Group, MSY NSW and MSY Technology or any other MSY entity.
- (d) *Evidence* – use its best endeavours to ensure that each Review is conducted on the basis that the Reviewer has access to all relevant sources of information necessary to carry out the review, including without limitation:
  - (i) the ability to make enquiries of any officers, employees, representatives and agents of any of MSY Group, MSY NSW and MSY Technology;
  - (ii) documents relating to the risk assessment referred to in paragraph 3(b)(i) of this Annexure A, including the Risk Assessment Report;



- (iii) documents relating to the Compliance Program, including documents relevant to the Compliance Policy, Complaints Handling System, staff training and induction program; and
- (iv) any reports made by the Compliance Officer to the Board or senior management regarding the Compliance Program.

10 Ensure the Review is completed within one year of the date of the Orders of the Court, and that a subsequent Review is completed annually for three years.

### **Compliance Report**

- 11 Use its best endeavours to ensure that within 30 days of the completion of a Review, the Reviewer includes the Review findings and recommendations in a report provided to the Director(s) and senior management of MSY Group, MSY NSW and MSY Technology (**Compliance Report**).
- 12 Ensure the Compliance Report covers whether:
- (a) the Compliance Program includes all the elements detailed in paragraphs 2, 4, 5, 6, 7 and 8 of this Annexure A, and if not, what elements need to be included or further developed;
  - (b) the Compliance Program adequately covers matters identified in the risk assessment referred to in paragraph 3(b)(i) of this Annexure A, and if not, what needs to be further addressed;
  - (c) the staff training and induction is effective, and if not, what aspects need to be further developed;
  - (d) the Complaints Handling System is effective, and if not, what aspects need to be further developed; and
  - (e) there are any deficiencies in the Compliance Program, or whether there are or have been any instances of non-compliance with the Compliance Program, and if so, the recommendations for rectifying the deficiencies identified.



### **Response to Compliance Report**

- 13 Within 30 days of MSY Group, MSY NSW and MSY Technology receiving the Compliance Report, implement promptly and with due diligence any recommendations made by the Reviewer in the Compliance Report.
- 14 Ensure that the Compliance Officer within 30 days of the requirement in paragraph 13 of this Annexure A reports to the Director(s) and senior management of MSY Group, MSY NSW and MSY Technology confirming whether the Compliance Report recommendations have been implemented or remain outstanding, and continues to do so until the recommendations have been implemented.

### **Reporting to the ACCC**

- 15 Within 90 days of the Director(s) and senior management of MSY Group, MSY NSW and MSY Technology receiving the Compliance Report, the Reviewer is to provide a report to the ACCC on:
  - (a) steps taken to implement the recommendations made by the Reviewer in the Compliance Report; or
  - (b) any outstanding steps required to implement the Compliance Report recommendations and will then inform the ACCC once those steps have been implemented.

### **Provision of Compliance Program documents to the ACCC**

- 16 MSY Group, MSY NSW and MSY Technology to maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than five years.
- 17 If requested by the ACCC during the period of five years following the date of the Orders of the Court, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
  - (a) the Compliance Policy;
  - (b) the Risk Assessment Report;



- (c) an outline of the Complaints Handling System;
- (d) staff training materials and induction materials;
- (e) all Compliance Reports that have been completed at the time of the request;  
and
- (f) copies of the reports to the Board and/or senior management referred to in paragraphs 3(b)(ii), 8, 11, 14 and 15 of this Annexure A.

### **ACCC Recommendations**

- 18 MSY Group, MSY NSW and MSY Technology to implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that MSY Group, MSY NSW and MSY Technology maintain and continue to implement the Compliance Program in accordance with the requirements of the Orders of the Court.