

AUSTRALIAN CIVIL AND CRIMINAL CONVICTIONS FOR ONLINE TRAVEL INSURANCE PRODUCTS: WHAT DO YOU NEED TO KNOW?

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In June 2022, Allianz Australia Insurance Limited ("Allianz") and AWP Australia Pty Ltd ("AWP") pleaded guilty to seven criminal charges of misleading and deceptive conduct. Further details of the charges and consequences can be found in the first article in this series [here](#).

In this second article, we consider the impact of the breaches and prosecution and conviction of Allianz/AWP on online platforms offering goods and services to Australian consumers.

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BACKGROUND

- Allianz, AWP and Expedia entered into a master agreement and a series of local agreements to offer insurance products on Expedia websites;
- The convictions, including the fines and penalties, are publicly available; and
- Allianz and AWP self-reported these breaches and terminated their relationships with Expedia which was presumably to moderate the penalties and consequences.

THE BREACHES:

| Policy requirement/term/condition | Breach |
|---|--|
| Premium Calculation Methodology Breach: the regulatory disclosure statement and website content indicated a number of factors which the court found created a false impression of a bespoke insurance product. | In fact, only the cost and duration of the journey determined the cost of the insurance. |
| Journey Criterion Breach: the regulatory disclosure statement and website content included a requirement that the insured journey commence or conclude in Australia. | Allianz/AWP did not take steps to ensure that the Expedia websites had a control mechanism to prevent customers, who did not meet this requirement, from buying insurance. |

| Policy requirement/term/condition | Breach |
|--|---|
| Age Criterion Breach: the regulatory disclosure statement and website content included a requirement that the maximum age to be insured was 61. | The court found that Allianz/AWP failed to monitor the Expedia websites to ensure a check box confirming the maximum age was included. |
| Smart Traveller Breach: in the insurance booking flow, customers had three options: cancellation, essentials and opt out. In the case of an opt out, the Expedia websites included a statement that the Dept of Foreign Affairs' Smart Traveller website ("DFAT") advised that travel insurance is as 'as essential' as a passport. | This was a misquotation of the DFAT website and was applied to products that did not contain hospital or medical expenses cover. The court found that Allianz/AWP failed to monitor the Expedia websites to ensure that this statement was not displayed and ensure its prompt removal in relation to the cancellation-only policy. |

Although some of the charges and convictions relate to financial products, the prosecutions and outcomes are not specific to insurance products nor are they dependent on an Australian consumer being offered such a product. The breaches and convictions demonstrate that the critical issue and trigger point was the conduct of Allianz, AWP and Expedia in dealing with Australian consumers.

Prosecution and evidence during proceedings, together with convictions are publicly available and easily accessible through a number of online search engines. This may serve to encourage similar claims in jurisdictions with similar legal regimes. Detailed analysis of the breaches and offences may serve to encourage further litigation, including class actions, against other products and services offered online to Australian consumers.

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The role of Expedia in the breaches and convictions is public knowledge and was analysed in some detail by the Australian courts, including as set out above. The US domicile of Expedia played no role in whether or not it could be prosecuted.

The prosecutions and convictions highlight the role of platforms and other online intermediaries in offering and selling products and services online to consumers. These are often structured to maximise both exposure of the inventory supplier to users of the platform and the rewards and remuneration paid by the inventory supplier to the platform whilst simultaneously avoiding or minimising the role of the platform and its responsibility and liability for the products and services offered and sold through and on it.

As prosecutions and convictions, such as that of Allianz/AWP, become increasingly widespread and more frequent, the roles of the inventory supplier and platform are likely to be subject to closer scrutiny and assessment. Terms and conditions are expected to be the subject of more intense negotiations and focus. This is likely to result in a more delicate balance between risk/liability exposure and commercial objectives for both inventory suppliers and platforms. This will be reflected in more complex and complicated clauses defining the obligations of inventory suppliers and platforms, and in relation to the liability of each party.

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While platforms can often rely on their distribution channels, market presence and size to extract favourable contractual indemnities from inventory suppliers, the impact on a platform's brand and trustworthiness can be significantly greater than the monetary value of an indemnity. In addition, contractual indemnities provide little or no comfort in the face of criminal investigations and prosecutions.

A platform facing investigation and/or prosecution will need to objectively assess how the terms and conditions of its dealings with both inventory suppliers and consumers define its role with both. Some of the critical terms and conditions include:

- making the inventory supplier responsible for keeping the platform updated on applicable law and regulations;
- clear statements defining the role of the platform, particularly where the platform acts as a purely passive portal;
- representations and warranties from the inventory supplier that their content on the platform complies with local laws;
- representations and warranties from the inventory supplier that their products and/or services can be validly offered and sold through and on the platform;
- representations and warranties from the inventory supplier that their products and/or services offered through and on the platform comply with local laws and regulations; and
- indemnification of the platform by the inventory supplier for breaches of the above.

While contractual terms and conditions will play a significant role in defining the roles of the platform and inventory supplier, whether a platform would escape investigation, prosecution and/or conviction will depend on how a court interprets and defines its relationship with the inventory supplier rather than how the parties have defined the relationship in their agreement(s). In this regard, conduct is likely to play a more powerful and determinative role than terms and conditions. The conviction of Allianz and AWP underlines the role of the conduct of each party and how this will be assessed objectively by a court. Determination of conduct can depend on the facts and circumstances of each investigation and prosecution and will not remain static. Acceptable conduct today may become a breach tomorrow.

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