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**To:** Consumer Protection Penalties Review  
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PARKES

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**Time:** 10.00am

**Date:** 21 December 2005

**4 Page(s) following**

Original to follow No  
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**Civil Penalties for Australia's Consumer Protection Provisions**

Regards  
Graeme Davidson

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# DPP

## Commonwealth Director of Public Prosecutions

19 December 2005

Consumer Protection Penalties Review  
Competition and Consumer Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Dear Sirs

### **Civil Penalties for Australia's Consumer Protection Provisions**

Thank you for inviting the Commonwealth Director of Public Prosecutions (DPP) to comment on the discussion paper on Civil Penalties for Australia's Consumer Protection Provisions.

#### *Role of the DPP*

The Commonwealth DPP is an independent statutory agency established under the *Director of Public Prosecutions Act 1983* and is responsible for prosecuting offences against Commonwealth law. The DPP carries out this function on a national basis in accordance with the Prosecution Policy of the Commonwealth. This policy applies to all Commonwealth prosecutions. The DPP also has responsibility for the recovery of proceeds of crime by action under the *Proceeds of Crime Act 2002* and other legislation and for enforcing civil remedies in cases where it is authorised to do so under the provisions of the *Director of Public Prosecutions Act 1983*.

The DPP is not an investigative agency and does not investigate criminal offences, however it is available to provide advice to investigators on legal and related issues during investigations. The decision to investigate an alleged breach and refer the matter to the DPP for prosecution is made by the investigative agencies.

#### *Relationship between DPP and ACCC*

The relationship between the DPP and the ACCC is governed by the Guidelines for Dealings between Commonwealth Investigators and the DPP. While the ACCC has power under section 163 of the TPA to institute a prosecution for an offence under the TPA, in practice, where the ACCC investigates a matter and forms the view that criminal proceedings should be instituted, it will refer a brief of evidence to the DPP for a decision on whether to prosecute for an offence. If a decision is made to prosecute, the DPP assumes responsibility for the proceedings.

The DPP's decision to prosecute is made in accordance with the Prosecution Policy and having regard to the views of the referring agency. The policy requires that there is prima facie evidence of an offence, reasonable prospects of conviction and the public interest requires a

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prosecution. Generally speaking, the more serious the offence, the less likely it will be that the public interest will not require that a prosecution be pursued. Factors that arise for consideration in determining whether the public interest requires a prosecution include<sup>1</sup>:

- the seriousness, or conversely the triviality of the alleged offence or that it is of a 'technical' nature only;
- any mitigating or aggravating circumstances;
- the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or victim;
- the alleged offender's antecedents and background;
- the staleness of the alleged offence;
- the degree of culpability of the alleged offender in connection with the offence;
- whether the alleged offence is of considerable public concern;
- whether the prosecution would be perceived as counter-productive, for example, by bringing the law in disrepute; and
- the availability and efficacy of any alternatives to prosecution.

#### *Prosecution of offences under the Trade Practices Act 1974*

Our records indicate that since 1983, the ACCC has referred approximately 134 briefs of evidence to the DPP involving alleged offences under Part VC (or its predecessor) of the TPA. Of these there was insufficient evidence to prosecute in 15 matters, 12 matters are in the pre brief stage, 2 matters are under assessment and 9 matters were withdrawn by ACCC. The DPP has instituted proceedings against 96 defendants resulting in successful convictions against 80 offenders and the court imposing criminal penalties ranging from \$250 to \$1.3 million dollars. In respect of the remaining 16 matters the charges were either withdrawn or dismissed.

The DPP considers that the existence of the offence provisions in Part VC of the TPA ensures that appropriate measures exist to prosecute offenders where they breach consumer protection law. The DPP notes while these matters are prosecuted summarily before the Federal Court the Court takes breaches of the Part VC of the TPA seriously.

The offences under Part VC of the TPA are in whole or part strict liability offences. However, in relation to some offences the prosecution is required to prove one or more fault elements, for example under section 75 AZD(2) of the TPA. Where strict liability applies, the defence of mistake of fact is available to the defendant under section 85 of the TPA.

The DPP would be concerned if amendments were made to introduce additional fault elements into the existing consumer protection offences. While the offences under Part VC of the TPA are strict liability offences or contain strict liability elements, the DPP considers that these provisions address conduct that the community regards as being dishonest, such as publishing false or misleading advertisements with respect to prices for goods and services.

The DPP notes the suggestion that criminal penalties are generally regarded as imposing a penalty on offenders who contravene the law. However, the courts also view criminal penalties as serving a deterrent, punitive, and retributive purpose.

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<sup>1</sup> Section 2.10 of Prosecution Policy of the Commonwealth.

In consumer protection matters in particular, the courts regard general deterrence as being an important sentencing factor. For instance, von Doussa J stated in *Trade Practices Commission v Farrow*<sup>2</sup> (and approved by Spender J in *ACCC v Hartwich*<sup>3</sup>):

*It is to be remembered that as the policy of the TPA is consumer protection it is important that the penalty is such that it will not only deter the particular offenders from engaging in similar conduct again, but will also deter others from engaging in conduct that is prohibited by the TPA.*

The DPP also considers that in respect of consumer protection matters, securing a conviction against an offender also makes it easier for consumers to obtain compensation under a civil claim.

The DPP notes that if it were proposed to introduce additional fault elements into the Part VC provisions this would entail not only a consideration of whether the maximum penalties should include imprisonment but also the maximum term of imprisonment and which courts should have jurisdiction to hear such offences.

#### *Civil Penalties*

The expression 'civil penalties' may encompass a variety of orders, such as declaration, a banning order, a disqualification order, injunction, compensation order and a pecuniary order.

The DPP notes that the rationale for civil penalties in the context of addressing conduct that might also form the basis for criminal action where that criminal conduct is only punishable by fine creates a number of issues.

Nonetheless, the DPP acknowledges that there will be circumstances in which criminal prosecution in a consumer protection matter is not appropriate, for example, due to insufficient evidence, or that a prosecution is not warranted on public interest grounds. In these circumstances, the option of pursuing a civil penalty may provide an intermediary between criminal penalty and civil remedy, particularly where deterrence and punitive outcomes are thought to be appropriate.

If a civil penalty regime is introduced, the DPP considers that it should be introduced in addition to the current criminal penalty regime. In particular, where an offender engages in conduct involving conduct that is regarded as dishonest, criminal prosecution is likely to be the only appropriate course of action expected by Government and community alike.

Further, if a civil penalty regime is introduced there should also be some guidance, either legislatively or administratively, as to the factors to be taken into account in proceeding down either the civil penalty path or the criminal path.

#### *Guidance on Rules of Evidence and Procedure in Civil Penalty matters*

The DPP submits that if amendment to the TPA is made to introduce a civil penalties regime to consumer protection provisions, then it would be necessary to incorporate some general guidance in the legislation as to whether civil or criminal rules of evidence and procedure are to be applied. This has become a particularly pertinent issue in recent ASIC civil penalty proceedings.

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<sup>2</sup> (1990) 95 ALR 53 at 64

<sup>3</sup> [2002] FCA 273

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The DPP notes that the courts have generally stated that the burden of proof is to be applied in accordance with the manner described by Dixon J in *Briginshaw v Briginshaw*<sup>4</sup> – that is, without an intermediary between criminal and civil standard of proof “*the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the satisfaction of the tribunal.*”

More recently, in *ASIC v Adler*<sup>5</sup> Santow J noted that although the proceedings before the court were not criminal, the character of the civil penalty proceedings required the court to invoke requirements for prosecutorial fairness and a standard of proof that took into account the gravity of the allegations.

Further, in *Rich v ASIC*<sup>6</sup>, the High Court has since formally modified the civil rules of procedure that govern applications for civil penalty orders by holding that the penalty privilege applies to such proceedings. The court held that once it was determined that the proceedings exposed a person to a penalty the proper course was to refuse an order for discovery.

#### *Double Jeopardy*

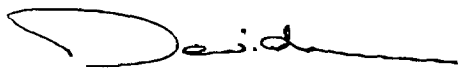
To alleviate concerns regarding double jeopardy if civil penalties are introduced for Part V matters, the DPP considers there is some merit in adopting provisions in the legislation akin to those under section 1317M and section 1317N of the *Corporations Act 2001*.

#### *Conclusion*

The DPP considers that the existence of offence provisions in Part VC of the TPA are a necessary part of the TPA ensuring that appropriate measures exist to prosecute offenders where they breach consumer protection law. As stated above, the Federal Court has taken breaches of Part VC of the TPA seriously.

If a civil penalty regime is to be introduced for Part V matters, then the DPP considers that the preferable option is that it be introduced in addition to the criminal penalty regime. Further, any amendments to the TPA in this regard should provide sufficient guidance, either legislatively or administratively, as to the factors to be taken into account in proceeding down a civil penalty path or the criminal path; the evidentiary rules and procedures to be adopted when seeking a civil penalty and direction on how civil and criminal proceedings are to proceed in the event that simultaneous proceedings have commenced in relation to the same conduct.

Yours sincerely



Graeme Davidson  
Acting Deputy Director

<sup>4</sup> (1938) 60 CLR at 368.

<sup>5</sup> *ASIC v Adler* (2002) 20 ACLC 576; 41 ACSR 72.

<sup>6</sup> *Rich v ASIC* (2004) 209 ALR 271; 50 ACSR 242.