



**The Law Society
of New South Wales**

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24 November 2005

Mr. Steve French
General Manager
Competition and Policy Division
The Australian Government Treasury
Langton Crescent
PARKES ACT 2600.

Dear Sir,

Re: Civil penalties for Australia's consumer protection provisions: Discussion Paper

I refer to your letter of the 26 September 2005 and provide for your consideration the comments of the Litigation Law and Practice Committee of the Law Society of NSW on the Discussion Paper.

General

The Litigation Law and Practice Committee (the Committee) submits that consumer protection agencies should enforce consumer laws using a wide range of legal powers and processes. The current criminal and civil mechanisms must be enhanced by additional measures as proposed in the Discussion Paper.

The Committee is unsure as to what is meant by the statement in Chapter 2 that civil penalties constitute a "middle ground" between criminal penalties and civil remedies. Civil penalties remain civil law measures subject to the required proof based on the balance of probabilities. They do not require a higher burden of proof as suggested in Chapter 2. The authority cited in the footnote on page 14 in support of this contention, *Briginshaw*, dealt specifically with the statutory higher burden of proof specifically imposed under section 86 of the Marriage Act 1928 in proving adultery in divorce proceedings. That decision does not appear to be authority for the proposition that the civil standard of proof will keep increasing where the penalty is higher. It is accepted, however, that a tribunal will satisfy itself that there has been a breach of the law before imposing the penalty.

The Discussion Paper does not contain an economic analysis of the impact of the measures proposed as options for possible change. There is, of course, some general economic discussion in relation to the lesser cost of pursuing civil measures as against criminal measures. For example, consideration should be given to whether the consumer protection agencies would pursue a "least cost measure" action in dealing with a breach of the law, rather than consider the issue strictly in criminal or civil action terms. It may be appropriate in certain circumstances to pursue a criminal action regarding the act or omission, but a consumer protection agency may consider that such an action would require more diligent pursuit of the evidence which would be more costly, whereas a civil

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penalty would be much easier, and less costly, to achieve. Where an agency is on a slender budget such options would be more attractive. Hence a crime would have gone unpunished or at least it would appear to be so. The recent public debate surrounding the actions taken against certain persons in relation to “insider trading” activities is illustrative of this comment. The task of proving “insider trading” breaches is more difficult than establishing a breach of directors’ duties. The corresponding outcomes are different.

Policy guidelines

The introduction of policy guidelines to assist in dealing with decisions whether a consumer protection agency should pursue a criminal action or a civil action is therefore supported. The publication of the “*Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*” can assist in framing a national policy framework for consumer protection agencies in taking appropriate measures. However, the policy guidelines should go further by distinguishing between public policy considerations and the enforcement of rights between individuals in commercial arrangements. Public policy issues would involve broader consideration of the commercial arrangements involving certain individuals having impact on a broader range of consumers, such as the regulatory measures in financial services. In such cases the policy needs to contemplate both the nature of the injury caused to the individual consumer and its impact on the broader community. If it is a breach of the law requiring criminal sanctions, then this course needs to proceed irrespective of any possible civil actions. Budgetary considerations, unfortunately, will play a significant part in these policy considerations. Where the matter is of significance and requires additional funds, the agency should involve the relevant Minister in its decision to proceed with a criminal action. The importance of dealing with a breach of consumer laws from a public policy perspective cannot be over-emphasised. The nature of the offence would determine the cost and need for further input from the Minister.

The policy guidelines must also recognise the possibility of “competition” between agencies, where another agency is involved in the prosecution of a criminal matter. While this might be viewed as a political matter it raises the possibility that a decision to take civil or criminal action may be influenced by such factors.

Concept of double jeopardy

The discussion of the concept of “double jeopardy” appears to make this criminal law concept have a broader application in civil matters. It is possible for a person to have more than one civil action against them in relation to the same matter. Where a plaintiff succeeds against the defendant then that is the end of the matter unless there is an appeal or a separate action arises against the defendant at a later date. However, in a criminal case the matter is resolved when the defendant is found guilty or not guilty and no further action can be brought in respect of the same matter.

The example drawn from the *Corporations Act 2001* demonstrates the economic approach taken in litigation where there is a criminal matter and a civil matter involving the same person. The burden of proof for a criminal matter and the outcome will later assist in a civil matter where the burden of proof is less. Consequently, delaying a civil action is sound litigation policy in these circumstances.

In the case of civil consequences of contravening civil penalty provisions under the *Corporations Act 2001*(Pt 9.4B), the provisions under sections 1317M to 1317P present a useful and practical solution to the debate over “double jeopardy”.



Pecuniary penalties and banning orders

laws a breach of consumer law could be taken with the assistance of the Australian Securities and Investments Commission (ASIC) or by ASIC on behalf of consumer protection agencies for a breach of consumer laws. ASIC has experience in dealing with consumer law in relation to financial markets. The involvement of the courts as provided for under the *Corporations Act 2001* (Pts 9.4B, 9.5 and 9.6) would assist the process. If necessary, State Parliaments could confer jurisdiction on federal courts to avoid constitutional problems arising. The experience of the law of corporations in recent times as applying to State and Federal jurisdictions would guide this approach. However, linking consumer law provisions to the *Corporations Act* may overcome the jurisdictional issue for vesting of powers by importing the provisions under the *Corporations Act 2001*, Pt 9.6A.

The consumer laws regime would need to also deal with suppliers who are not corporate entities. This would include sole proprietors who are not incorporated. While the application of banning orders may not appear to apply to non-incorporated persons, it may be possible to name a person to ban them from running a business in the relevant industry. A register of such names could be maintained for viewing by interested persons at the relevant consumer protection agency. It would be necessary to also impose a pecuniary penalty and award compensation in appropriate matters, in addition to orders requiring the person to cease to trade. Each of these enforcement measures should be available to consumer protection agencies to use as appropriate in each matter.

The quantum for pecuniary penalties should be consistent with measures in complementary jurisdictions. Also, the quantum needs to be in proportion to the injury caused to a consumer or to consumers generally. Where a range of measures are taken, the quantum needs to reflect the impact of the other measures, including the payment of compensation.

Yours sincerely,



John McIntyre
President