



1 December 2005

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

Dear Mr French

Discussion Paper- Civil penalties for Australia's consumer protection provisions

I refer to our letter to you of 16 November 2005, providing comment from the Society's Commerce, Corporate and Tax Committee. In that letter we noted that we had been unable to provide a detailed response, given the deadline for provision of submission.

I am pleased to advise that we are now in a position to provide a more comprehensive response as a result of considerable work undertaken by the Society's Civil Litigation Committee.

A copy of their response is attached for consideration.

We look forward to receiving any feedback on the Discussion Paper in due course.

Yours sincerely

Jan Martin
EXECUTIVE DIRECTOR

Response of the Law Society of South Australia to:

Civil Penalties for Australia's Consumer Protection Provisions - a discussion paper from the Ministerial Council on Consumer Affairs dated September 2005

We refer to the discussion paper entitled "Civil Penalties for Australia's Consumer Protection Provisions" ("**the Discussion Paper**") and note that the following questions were posed for comment, namely:

1. Are the existing enforcement mechanisms available to consumer protection agencies effective?
2. If not, what are the problems and how significant are they?
3. Should pecuniary penalties be introduced for breaches of Australia's consumer protection law?
4. If pecuniary penalties are introduced, what breaches of Australia's consumer protection law should be subject to them?
5. Should pecuniary penalties be substituted for criminal penalties in Australia's consumer protection law?
6. Should a parallel penalty regime be applied to enforcement of Australia's consumer protection law?
7. If pecuniary penalties were to be an alternative to criminal penalties for breaches of Australia's consumer protection law:
 - a) how should the risk of double jeopardy be addressed?
 - b) should the consumer protection law provide direction as to when a criminal penalty is to be preferred over a pecuniary penalty beyond those distinctions that currently exist? and
 - c) what should the criteria be?
8. If pecuniary penalties are introduced, what is the maximum pecuniary penalty appropriate for breaches of the consumer protection law?
9. Are cease trading orders in the State and Territory legislation the same as a disqualification or banning order in the Commonwealth Legislation?
10. Should banning orders be introduced for breaches of a consumer protection law?
11. If banning orders were introduced, what breaches of a consumer protection law should be subject to banning orders?
12. In what circumstances should the law allow for a court to make a banning order for conduct in breach of a consumer protection law?

Many of the above questions pose important policy considerations and will be the subject of much debate within both State and Commonwealth regulatory bodies.

The Law Society of South Australia is not in a position to respond to a number of the policy considerations raised above, but wishes to raise issues that will directly impact upon whether and how any proposed amendments might operate.

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In particular, the manner of operation of pecuniary penalties in a parallel penalty regime and the manner of exercise of banning orders are primary considerations prior to drafting of any penalty regime.

We therefore make comment in reference to selected questions as numbered above and will not address the broader policy considerations.

Q1 Are the existing enforcement mechanisms available to consumer protection agencies effective?

The effectiveness and necessity for such legislation is one for broad community debate, including input from relevant Government agencies. The Society supports wide consultation and would welcome further consultation with it if draft legislation is prepared.

Q3 Should pecuniary penalties be introduced for breaches of Australia's consumer protection law?

The introduction of pecuniary penalties (within a civil penalty scheme) as an alternative to criminal sanctions is an option which requires careful examination as to the ramifications posed for those accused of conduct warranting inclusion in an alternative civil penalty scheme.

Q5 Should pecuniary penalties be substituted for criminal penalties in Australia's consumer protection law?

The basis for inclusion of an alternative civil penalty scheme (ie, as an alternative to other civil/disciplinary action and/or as an alternative to criminal prosecution) must be explored widely in the community. Identification of the criteria for operation of such a scheme is paramount if it is to address the intended "flaws" to be addressed.

Q6 Should a parallel penalty regime be applied to enforcement of Australia's consumer protection law?

The Society welcomes the debate, providing as it does an opportunity to explore more expedient and effective deterrence measures to protect the community and individual consumers.

Q7 If pecuniary penalties were to be an alternative to criminal penalties for breaches of Australia's consumer protection law:

- a) **how should the risk of double jeopardy be addressed?**
- b) **should the consumer protection law provide direction as to when a criminal penalty is to be preferred over a pecuniary penalty beyond those distinctions that currently exist? and**
- c) **what should the criteria be?**

The primary concern is the risk of double jeopardy with persons being penalised for their action by way of imposition of a criminal sentence and a civil penalty.

If a parallel pecuniary penalty scheme (or civil penalty scheme) is to be introduced, then the risk of "double jeopardy" is very real and measures must be put in place to evaluate the extent to which persons will be exposed to this risk.

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In particular, for many categories of "offending", criminal sanctions apply, followed by disciplinary proceedings (which are stayed whilst awaiting the outcome of the criminal proceedings), with further civil action where an effected party has suffered loss or damage as a consequence of an accused's actions.

The State jurisdictions have dealt with the risks of "double jeopardy" in many ways. Within a number of professions and trades the risk of criminal, disciplinary and other civil sanctions applying to the one set of conduct is not unusual.

However, where a parallel civil penalty scheme is to operate in conjunction with criminal penalties¹ then it is imperative that the pecuniary penalty operate as the only criminal sanction, regardless as to whether other civil proceedings continue. Whether or not any instituted civil (and stayed) proceedings are dismissed upon imposition of a pecuniary penalty is a secondary issue (albeit an important one).

We acknowledge a lack of consistency in this area, including in legislation such as *The Corporations Act 2001* (Cth) and other State provisions. However, for a pecuniary penalty to be an effective and appropriate deterrent, then the basis for election to a civil penalty scheme to effectively deal with the complained of conduct must be well understood, and may be appropriate for mid-level types of offences. Accordingly, determining the criteria for when a matter should be dealt with under a pecuniary penalty (as opposed to proceeding immediately to a criminal sanction) is crucial. If the consumer protection laws are to be amended then they should provide direction as to when a criminal sanction is to be preferred over a pecuniary penalty, above and beyond the current distinctions.

The types of criteria to be considered could include:

- the impact upon consumers (and the number of consumers) of the conduct;
- the remorse by the accused;
- how that conduct was identified;
- the period over which the conduct occurred (including any prior warnings);
- prior criminal convictions for breaches of any State, Territory or Commonwealth consume protection laws;
- where an offence requires proof of a mental element which amounts to an intent to defraud or "recklessness" then query whether such criminal offences should be included in a discretionary penalty scheme;
- determine how the discretion to be included in a civil penalty scheme will be exercised, including whether the regulatory authority alone (as opposed to Court sanction) will determine that matter;
- can civil penalty negotiations be the subject of election for oversight by a judicial officer, as in some other legislative schemes; *

¹ such that a pecuniary penalty may be applied as an alternative to the criminal penalty

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- determine to whose satisfaction the contravention of the offence must be established to the lesser burden of "on the balance of probabilities", and query what safeguards will be built in for accused who present fact scenarios inconsistent with the alleged contravention;
- consider the impact of *Briginshaw v Briginshaw* and the subtle shifts in reasoning shown by the Courts to discharge the civil onus therein, and the impact upon prosecution of such matters and how a parallel civil scheme may best address these issues;
- can more than one type of offence be dealt with in a pecuniary penalty and if so, what course of conduct should, as policy, be excluded;
- how are investigation and prosecution costs to be dealt with outside of the operation of a Court;
- if an accused elects to continue with a criminal trial and is not convicted, legislative restrictions upon subsequent commencement of any pecuniary penalty must be provided for;
- consider the tier of offending to be included and whether tiers of negotiated pecuniary penalties should also be provided for; and
- as any pecuniary penalty will comprise a "penalty" and not a "fine" (and thus no conviction will be recorded), consider when appropriate to negotiate/impose a penalty in reference to the time of offending to be included (eg, in respect of offences committed of up to two years prior?).

Q9 Are cease trading orders in the State and Territory legislation the same as a disqualification or banning order in the Commonwealth Legislation?

No. The capacity to order disqualification or banning orders pursuant to Commonwealth legislation (apart from *Corporate and Financial Services Regulation*) could provide a further avenue for deterrence where individuals either continue to act, (or in an isolated incident) or act in such a grievous manner so as to require their "banning" from operation in a particular sector or industry.

Q10 Should banning orders be introduced for breaches of a consumer protection law?

The issue of banning orders against individuals for breaches of Commonwealth consumer protection law could provide a further deterrent in addition to pecuniary penalties.

However, the introduction of banning orders needs to be reviewed in light of the reluctance of Courts in State and Territory jurisdictions to make "cease trading" orders in certain industries/trades, including where the conduct has impacted widely on consumers. There has been a noted reluctance by Courts/Tribunals to give effect to such orders and remove a person's capacity to earn a living in the only trade or industry sector for which they are skilled, thus denying them an opportunity to support themselves and those who depend upon them. In any consideration as to the merits of introducing banning orders under Commonwealth consumer protection laws emphasis must be given to identifying those discretionary elements to be considered when issuing such banning orders.