



Your Ref:
Our Ref: LK:
Date: 14 December 2005

Contact: Loretta Kreet
Telephone: (07) 3238 3015
Facsimile: (07) 3238 3400
Email: lkreet@legalaid.qld.gov.au

Consumer Protection Penalties Review
Competition and Consumer Policy Division
Department of the Treasury
Langton Crescent
PARKES ACT 2600

Dear Committee Members

Consumer Protection Penalties Review

We welcome the opportunity to comment on the above discussion paper

The Civil Justice Team (consumer protection) at Legal Aid Queensland specialises in consumer injustices including disputes with credit providers, telecommunications providers and insurers. The unit provides advice and represents Queenslanders affected by unfair consumer transactions.

We give priority to matters there may be a more wide-ranging beneficial effect for all consumers and where clients have been victims of consumer injustices.

In our view the current civil remedies available to consumers fail to protect consumers as access to remedies is very limited. We remain unconvinced that the application of a civil penalty regime will deliver individual justice for the most vulnerable consumers unless alternative mechanisms are also put in place to deliver restorative justice to those consumers.

For example in Queensland the Consumer Credit Code¹ has a civil penalty regime. The civil penalty regime is primarily based on the requirement of lenders to provide full and accurate disclosure as a mechanism for providing consumer protection. Consumers may also apply to the courts if their contracts are unjust. Queensland unlike other states does not cap interest rates. In other states a 48% interest rate cap applies to unsecured credit. In our view the charging of exorbitant interest rates is unjust but borrowers only option is to apply to the court to have the contract set aside².

In 1999/2000 the Office of Fair Trading took civil penalty action against a number of non-compliant lenders. The Office of Fair Trading ('OFT') asked the Supreme Court to find that the lenders had breached key requirements of the Code³, to impose a civil

¹ Consumer Credit Code (QLD) 1996

² As above s70

³ As above

penalty and a lifelong ban. Most of the non compliant lenders settled their actions with the OFT and individual consumers received refunds. An excellent result for those consumers. One lender did not settle.

Justice Ambrose in the State of Queensland v Ward & Anor [2002] QSC 171 found that the lender used physical threats to ensure payment and charged interest rates of approximately 200%.⁴

He said in relation to the interest rates imposed that

*"It seems clear that many of the borrowers were people in desperate financial straits. The monies were lent out at rates of interest between 156% per annum and 208% per annum. With late payment fees the annual rate of interest sometimes reached 360% per annum."*⁵

When deciding what civil penalty to impose for breaches of the key requirements of the Code, Justice Ambrose took into account the fairness of the interest rate;

*"That Shark (as did his/its associates in loan sharking activities) lent monies to criminal classes of borrowers and to foolish and impoverished people unable to obtain loans elsewhere in relatively small sums at **outrageously exorbitant rates of interest**, non-payment of which on a weekly basis would attract the infliction of serious physical injury by groups of brutal and merciless people with ability to track down those seeking to hide from them."*⁶

In the latter parts of the judgment he clearly links the application of the charging of "extortionate rates of interest on loans"⁷ to the lenders "unjust conduct"⁸

The decision should have had the effect of reducing interest rates charged by other lenders in the fringe market as it is fairly clear precedent that the Supreme Court would find the imposition of similar interest rates unjust were they litigated.

However this decision has had no visible impact on lenders providing loans at exorbitant interest rates. When the decision in State of Queensland v Ward⁹ was handed down in 2002, the number of lenders (who consumers were complaining about to LAQ) charging effective interest rates of greater than 48% were relatively few. In the past year the Civil Justice Team (consumer protection) has seen a sizable increase in lenders charging exorbitant rates of interest.

⁴ State of Queensland v Ward & Anor [2002] QSC 171

⁵ As above

⁶ As above [103]

⁷ As above [104]

⁸ As above [104]

⁹ State of Queensland v Ward & Anor [2002] QSC 171

The following is a list of some of lenders where annual interest rates are above 48% where consumers have sought advice from the Civil Justice Team (consumer protection):¹⁰

1. Company A – 240%
2. Company B – 468% (1600)
3. Company C – 120%
4. Company D – 67.2%
5. Company E – 120% (240%)
6. Company F – 240%
7. Company G – 520% (1000%)
8. Company H – 168%
9. Company I – 300%
10. Company J – 216%
11. Company K – 240%
12. Company L – 66.41%
13. Company M – 60.8%
14. Company N – 120%
15. Company O – 240%

The above examples do not include payday lenders who typically charge fees calculated on each \$100.00 borrowed for periods ranging from 2 days to 1 month. When those fees are converted to interest rates they average 520% to 1300% per annum.

For most consumers taking legal action is not feasible considering the cost and the risks of taking such action especially when those loans are secured.

Where legal action was taken by Civil Justice Team (consumer protection) matters settled before hearing or before any court action was commenced. Any legal action taken did not result in the entity changing its interest rates. Even where the lender ceased trading because of the myriad of errors in their contracts this did not appear to effect the rest of the market where interest rates and the number of lenders have continued to rise.

In *State of Queensland v Ward*¹¹ Justice Ambrose was of the view that the civil penalty regime would not have protected consumers from the most abhorrent lending and enforcement practices if the lender had complied with the disclosure requirements. When deciding whether to impose a banning order he said

“I give significant weight to the undoubtedly “unjust conduct” of Shark in the conduct of his/its loan sharking activities which justifies a prohibition order under s 23(5) of the Act, when, at the end of the day, I remain unpersuaded that Shark’s unwavering compliance with all the key and non-key requirements of

¹⁰ Some of the disclosed interest rates are incorrectly calculated and the rates in parenthesis are the approximate effective interest rates.

¹¹ [2002] QSC 171

*the Code would have made the slightest difference to the willingness of the borrowers to take the loans with the clear understanding of the painful consequences for them should they fail to meet their obligation to make timely payments of interest as it fell due.*¹²

One of the most disappointing aspects of the decision in *State of Queensland v Ward & Anor*¹³ is that constraints within the legislation meant that there was no capacity for the government to direct the penalty imposed to the individual consumers who at considerable risk to themselves had testified and who had suffered severe financial detriment.

Generally speaking there have been only a handful of civil penalty actions by the OFT under the Code taken in Queensland since the legislation's enactment in 1996.

However we believe that the availability of civil penalties has assisted the OFT in negotiating settlements with lenders on behalf of consumers. As mentioned previously there were a number of lenders against whom the OFT took action, most of whom settled their claims before the hearing in *State of Queensland v Ward & Anor*¹⁴.

We acknowledge that it is not practically possible for every consumer to have access to legal representation however it is critical that avenues of redress are available to the typical consumer without the necessity of legal representation.

One of the ways in which the typical consumer can obtain effective redress is where the industry itself is required to provide the mechanism for that redress with the regulatory body ensuring that the redress mechanism meets certain criteria. The Telecommunication Industry Ombudsman which is statute based¹⁵ is one such example.

Another example is the alternative dispute resolution mechanisms available in the financial services sector. In the financial services sector the Australian Securities and Investment Commission (ASIC) is tasked with:

*the function of monitoring and promoting market integrity and consumer protection in relation to the payments system*¹⁶

The Corporations Act 2001 (the Act) stipulates that entities who provide financial services to retail clients and are required to have an Australian financial services licence (AFS licence) must also have a dispute resolution system in place to deal with consumer complaints about any of the financial products and services provided under the licence.¹⁷

¹² As above [104]

¹³ [2002] QSC 171

¹⁴ As above

¹⁵ Telecommunications (Consumer Protection and Service Standards) Act 1999 s128

¹⁶ S12A (3) *Australian Securities and Investment Commission Act 2001*

¹⁷ Corporations Act 2001 s912A(2)

The dispute resolution system must consist of an internal dispute resolution procedure that meet standards set out in ASIC's policy¹⁸; and membership of one or more approved external dispute resolution (EDR) schemes to cover all products and services provided to retail clients.

ASIC Policy Statement 139¹⁹ provides guidance to the industry on how ASIC will approve external dispute resolution schemes.

Access to cheap alternative dispute resolution that has the proper checks and balances to ensure that schemes are meeting their consumer protection functions is critical for consumers.

As caseworkers we believe that the ASIC requirement for licensed financial services providers to belong to an approved EDR scheme has provided positive outcomes for many thousands of consumers who were unable to access court based solutions.

The schemes are particularly effective for consumers as:

- Access is free for the consumer;
- Decisions of the scheme are binding on the industry member but not the consumer;
- They often take into account not only the law, but what is fair and reasonable in the circumstances and good industry practice;
- Most schemes will accept telephone complaints or will provide assistance to put a complaint in writing if the consumer is unable to do so;
- It is not necessary have legal representation though consumers can elect to retain an advocate.

In the financial services area, lenders who only provide credit services are not required to have an AFS license and therefore are not required to belong to an approved EDR scheme.

For consumers who have complaints with these entities (eg finance brokers, fringe lenders and finance companies), the only option for resolving complaints is expensive time consuming legal action.

The schemes are required to provide information to regulatory bodies about systemic issues. If the scheme members does not address the systemic issue the regulatory body can use that information in determining whether to pursue civil or criminal penalties.

In our view consumer protection mechanisms that just focus on civil penalties will not provide restorative justice.

¹⁸ Policy Statement 165

¹⁹ Policy Statement 139 Approval of external complaints resolution schemes is available from the Asic website

Current Provisions

Issues to consider

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

Legal Aid Queensland believes that the existing enforcement mechanisms available to consumer protection agencies are ineffective as the cost in bringing actions and the limited resources available mean that regulatory agencies must prioritise where cases may have equal merit for assistance.

- **If not, what are the problems and how significant are they?**

Enforcement mechanisms ought to encourage entities to change their practices without the need for costly and time consuming legal proceedings, be a tool to change market practice and to provide restorative justice to individual consumers affected by entities who breach the legislation.

The current enforcement mechanisms where there is insufficient evidence available to bring criminal prosecution may not produce such a result.

For example in 1996/1997 Legal Aid Queensland made a complaint to the ACCC on behalf of a number of consumers who had entered agreements to pay tuition fees for a nanny course.

The college had engaged in particularly tough enforcement practices. In one case the consumer was successful in defending a claim for tuition fees in the Magistrates Court and the college had pursued the matter to the Supreme Court.

In that environment it was critical that the ACCC acted as the consumers affected were all very young, some were from non English speaking backgrounds and with very limited resources to defend aggressive enforcement processes.

The company was found to have engaged in misleading and deceptive conduct when the decision was handed down in April 2001²⁰.

Orders were made that meant that the consumers who were part of the application did not have to pay their tuition fees.

However by this stage the college was in liquidation and consumers were not able to recover any tuition fees already paid by the College but they were ultimately able to recover amounts directly from the directors of the College but not without a further hearing in the Federal Court in 2002.

²⁰ Australian Competition & Consumer Commission v Black on White Pty Ltd [2001] FCA 187

In this particular case the threat of civil penalties may have assisted the ACCC in negotiating a settlement of the matter at a much earlier stage of the proceedings.

Though we are of course unable to establish whether the decision affected the market place for educational courses, Legal Aid Queensland is unaware of any other courses that have come onto the market that so fragrantly mislead and deceive.

In another example, Legal Aid Queensland made a representative complaint to the ACCC on behalf of a number of consumers affected by a company's debt collection practices. In that particular case the company agreed to give an undertaking not to engage in specified conduct. The agreement not to engage in that conduct will of course have an enormous benefit for all consumers who have dealings with that company.

The ACCC have also used their powers to make guidelines in respect of the harassment provisions contained in s60 TPA. These give guidance to the debt collection industry as to what practices the ACCC is likely to consider as harassment.

They were developed in consultation with industry and consumer groups and were recently updated.

In our view a civil penalty regime could assist in the ensuring stakeholder participation in the development of guidelines as those guidelines could then be used when assessing an appropriate penalty to show that the industry were aware of the expectations held by the consumer protection agency as to their obligations under the legislation.

Options for Possible Change

Issues to consider

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

Pecuniary penalties should be introduced for breaches of Australia's consumer protection law.

If pecuniary penalties are introduced, what breaches of Australia's consumer protection law should be subject to them?

An analysis of all laws needs to be undertaken to assess not only ones that have clear consumer protection mandates such as the *Trade Practices Act 1974* and the *Australian Securities and Investment Commission Act 2001* at the Federal level, its state based equivalent Fair Trading Acts, but also other legislation that may have particular sections that aim to protect consumers. For e.g. Corporations Act 2001.

Where breaches of those sections may jeopardise the protection of consumers those sections ought to have a civil penalty attached to it. There ought to be consistency as to the application of civil penalties across all legislation where the legislation has a function in protecting consumers.

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

No it should not.

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

Yes it should.

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? What should the criteria be?

We support the thrust of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Of primary importance in developing criteria when a pecuniary penalty ought to be preferred over a criminal penalty is how the penalty can enhance restorative justice to individuals, and protect consumers in the future. Priority should not be given to the punishment of individuals or corporations where such punishment will adversely affect consumers access to restorative relief.

If pecuniary penalties are introduced, what is the maximum pecuniary penalty appropriate for breaches of the consumer protection law?

Civil penalties ought to be consistent with those available under other legislation and increase with CPI at least every 2 years.

Banning Orders

We make no submissions in relation to this issue except to say that we support banning orders against individuals and corporations who consistently breach consumer protection laws .

Conclusion

Legal Aid Queensland supports the introduction of a civil penalties regime.

It is important that the resources of consumer protection agencies are used strategically to provide relief for individual consumers and to change market practice. It is critical that consumers have access to effective alternative dispute resolution schemes that meet the benchmarks contained in ASIC's policy statement 139 and that the effectiveness of those schemes is continually monitored.

However the use of alternative dispute resolution by consumers should not be used as an excuse by consumer protection agencies not to take action where the industry or particular entity has engaged and/or is continuing to engage in systemic breaches of the consumer protection legislation and or where market failures have occurred.

Please contact Loretta Kreet on 07 3238 3015 if you wish to discuss this further.

Yours sincerely,

per 

Legal Aid Queensland

Loretta Kreet
Solicitor