



**AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**

SUBMISSION TO

MINISTERIAL COUNCIL ON CONSUMER AFFAIRS

**CIVIL PENALTIES FOR AUSTRALIA'S CONSUMER
PROTECTION PROVISIONS**

DECEMBER 2005

The Australian Securities and Investments Commission (ASIC) makes the following comments on the issues raised in the Discussion Paper.

1. Are the existing enforcement mechanisms available to consumer protection agencies effective? If not, what are the problems and how significant are they?

The enforcement mechanisms available to ASIC are reasonably effective, however difficulties remain with obtaining compensation for individuals. ASIC is not able to claim compensation unless all parties are joined to the proceedings, which is a significant impediment to obtaining consumer redress through the courts.

ASIC can commence action on behalf of a person to recover damages or property under s50 of the ASIC Act, if we consider it to be in the public interest to do so. Representative proceedings under s50 on behalf of individuals may only be commenced after obtaining the consent of each individual on whose behalf compensation is sought. This requirement causes considerable administrative difficulties if the class of persons is large, or if the members of the class are unknown.

There are cases where civil action, whilst stopping misconduct, does not provide a strong enough disincentive to the misconduct (which may yield very lucrative results). In the absence of some kind of class action, the current remedies may allow the perpetrator to retain the benefit of their misconduct.

ASIC would favour reform that would enable it to be able to seek compensation type orders or injunctions without the need to obtain the consents of individuals or commencing a s50 action.

2. Should pecuniary penalties be introduced for breaches of consumer protection law? If so, what breaches should be subject to them?

The availability of a variety of regulatory responses can benefit a regulator. Civil penalties would provide a useful intermediate level of enforcement action between civil action and criminal proceedings, on the basis that they include both compensatory and punitive remedies. The priority in using these remedies should be that the first use of any funds is compensatory. In assessing levels of civil penalty to impose, priority should be given to providing compensation to affected consumers.

We note however that if pecuniary penalty provisions are introduced for breaches of consumer protection law, there will be an expectation that they are used. They are not suitable for every case of wrongdoing.

As we have previously advised the working party, ASIC's experiences with civil penalty provisions in the Corporations Act have not been without difficulties. ASIC has experienced numerous interlocutory or other applications challenging the validity of civil penalty proceedings. If civil penalty proceedings seeking a penalty are taken against individuals, defendants are able to claim privilege against self incrimination and exposure to a penalty. Defendants are not required to file affidavits containing their own evidence before ASIC's case is closed, and are not

required to serve evidence of other witnesses, including expert witnesses. The effect of these procedural protections is a significant increase in the time and resources needed to prepare and present ASIC's case.

If pecuniary penalties are introduced for breaches of consumer protection law, these should be limited to the type of conduct that currently attracts a criminal penalty. The consumer protection provisions of the ASIC Act (ss12DA to 12 DN) are offence provisions except for s 12DA (misleading or deceptive conduct). We do not consider that it would be appropriate for s12DA to be a civil penalty provision.

3. Should pecuniary penalties be substituted for criminal penalties?

If it is proposed that ASIC Act provisions mirror the TPA, ASIC would not want to see criminal provisions dropped from the provisions in Part 2 Division 2 of the ASIC Act. ASIC would want to retain criminal sanctions for occasions where the gravity of a contravention warrants criminal action.

4. Should a parallel penalty regime be applied to consumer protection law?

As noted above, ASIC does not believe that pecuniary penalties should be substituted for criminal penalties. If civil penalties are introduced, they should be in addition to existing criminal sanctions.

5. If pecuniary penalties were to be an alternative to criminal penalties for breaches of consumer protection law:

a. How should the risk of double jeopardy be addressed?

In ASIC's view, it is easy to overstate the risk of double jeopardy arising from parallel civil liability and criminal liability. To adopt such a course would inevitably attract the most careful scrutiny from the community, Parliament and the Courts.

Neither a civil penalty nor a criminal verdict can be imposed upon a defendant by a regulator. Both must be imposed by the Courts, which have adequate discretion to protect the defendant against oppression and unfairness. The Courts are willing and staunch guardians against abuse of power.

In circumstances where ASIC has obtained any of the available civil penalty orders, and where a prosecution was subsequently commenced, the Court may take into account the making of those orders, and in particular any pecuniary penalty order, when sentencing the defendant. Subsection 16A(1) of the Crimes Act 1914 (Cth) provides that:

In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in **all the circumstances of the offence.** [Emphasis added]

Section 1317P Corporations Act shows a clear intention that prior civil penalties should not prevent subsequent criminal proceedings against a person for conduct that is "substantially the same as conduct constituting a contravention of a civil penalty provision", regardless of whether a pecuniary penalty order has been made.

b. Should the consumer protection law provide direction as to when a criminal penalty is to be preferred over a pecuniary penalty and what should the criteria be?

Civil penalty proceedings and criminal prosecutions are not two competing sanctions. The Corporations Act itself does not provide for when one of these will be appropriate. It sets out different evidentiary standards that must be reached for each type of proceeding. The level of misconduct and the available admissible evidence are the determinants.

Where a body corporate is prosecuted under the Corporations Act, Part 2.5 of the Criminal Code provides the requisite mental element.

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

The existing civil penalty provisions of the Corporations Act provide for a pecuniary penalty of up to \$200,000 for an individual or \$1 million for a body corporate. The existing maximum criminal penalties for contraventions of the Corporations Act are the same as the TPA, that is, \$220,000 for individuals and \$1.1 million for companies.

We think that in some circumstances, \$200,000 may be too low for individuals. In this regard we note the comments made by Finkelstein J in *ASIC v Vizard* (2005) 23 ACLC 1, 309 at para 45:

The proposed penalty is certainly low. Left uninstructed I would have imposed a higher penalty, but not substantially different from that suggested. If this penalty is insufficient, Parliament should increase the maximum. The current amount has been in place for more than 13 years and may require review.

7. Banning orders

- **Are cease trading orders in the state and territory legislation the same as a disqualification or banning order in the Commonwealth legislation?**
- **Should banning orders be introduced for breaches of the consumer protection law?**
- **If banning orders were introduced, what breaches of the consumer protection law should be subject to banning orders**
- **In what circumstances should the law allow for a court to make a banning order for conduct in breach of the consumer protection law?**

It is unclear what is meant by a 'banning order' as referred to in the Discussion Paper. A clear policy and its proposed implementation needs to be developed.

We have set out below a précis of ASIC's main banning and disqualification powers. If it is proposed to introduce banning orders for breaches of consumer

protection law, the provisions would need to be explicit as to who or what is the subject of the banning or disqualification order, and what the person or entity is being banned or disqualified from doing.

The disqualification orders described below apply to natural persons, and disqualify a person from managing a corporation. ASIC's powers to suspend or cancel a financial services licence, or ban a financial services licensee or their authorised representative, apply to a natural person, a partnership, a body corporate or multiple trustees (defined in the Act as 'a person'). These banning orders prevent a person from providing financial services.

As discussed below, the Corporations Act empowers ASIC to suspend or cancel a financial services licence or ban a licensee for breaches of its consumer protection laws.

The Discussion Paper refers to the proposed amendment to TPA to disqualify a person from managing a corporation for a contravention of the restrictive trade practices provisions. This amendment will insert a new section into the Corporations Act at *Part 2D.6 – Disqualification from managing corporations*. If it is intended that an amendment such as this be extended to the consumer protection provisions of the TPA, it should be referred to as 'disqualification' rather than a 'banning order' so as to accord with the terminology of the Corporations Act and to avoid confusion.

A 'cease trading' order, as described in the Discussion Paper, does not seem to have the same affect as a disqualification, which prevents a person from managing a corporation. That is why we consider it important that the ambit and purpose of any proposed disqualification or banning order is clearly defined.

Overview of ASIC's banning and disqualification powers

The Corporations Act empowers ASIC to make banning orders and disqualification orders. ASIC can also apply to the Court for disqualification orders. A banning order prohibits a person from providing financial services, either permanently or for a specified period. A disqualification order disqualifies a person from managing corporations.

Banning orders

ASIC can suspend or cancel a financial services licence, either immediately or after offering a hearing, depending on the circumstances (ss 915B and 915C). ASIC can also impose, vary or revoke conditions on a licence (s914A). ASIC can make a banning order against financial services licensees or their authorised representatives (s920A). Such a banning can be permanent or for a specified period. ASIC can only make a banning order after giving the person the right to a hearing, except in the case of serious fraud or an immediate suspension under s915B, when the person does not have a right to a hearing.

One of the grounds upon which ASIC can suspend or cancel a financial services licence, or ban a licensee, is for the licensee's failure to comply with a financial services law. A financial services law is defined to include the consumer

protection provisions of the ASIC Act. ASIC therefore has power to make banning orders for breaches of its consumer protection laws.

It is likely that a banning order against a financial services participant may constitute a "proceeding for the imposition of a penalty", following the decision of the High Court in *Rich & Anor v ASIC* (2004) 22 ACLC 1, 198. In *Rich* the majority held that civil penalty proceedings for the disqualification of a director are proceedings for the imposition of a penalty when deciding if the privilege against imposition of a penalty applies.

Prior to the High Court's decision in *Rich*, it was considered that disqualification orders were designed to protect the public, and were not intended to be punitive. However in *Rich* the High Court held that seeking a disqualification order exposes a defendant to a penalty, which allows the defendant to invoke the privilege against exposure to a penalty. This relieves the defendant from the obligation to give general discovery and produce affidavits or witness statements before the trial.

Disqualification orders

A person is automatically disqualified from managing a corporation if convicted of certain offences, is bankrupt or has entered into a personal insolvency agreement (s206B).

ASIC can disqualify a person from managing a corporation for involvement in failed corporations in circumstances set out in s206F.

ASIC may apply to the court for a disqualification order where a person has contravened a civil penalty provision (s206C), in certain circumstances relating to corporate insolvency and non-payment of debts (206D), or for repeated contraventions of the Act (s206E). ASIC may apply to the court for the disqualification of a person where it has already cancelled a financial services licence or made a permanent banning order against a person.