

Ref: BLS

2 December 2005

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

Dear Sir,

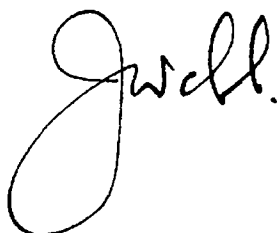
**CIVIL PENALTIES FOR AUSTRALIA'S CONSUMER PROTECTION PROVISIONS –  
OPTIONS FOR REFORM**

I have pleasure in enclosing a submission in response to a Discussion Paper entitled "Civil Penalties for Australia's Consumer Protection Provisions - Options for Reform" released by the Ministerial Council on Consumer Affairs in September 2005.

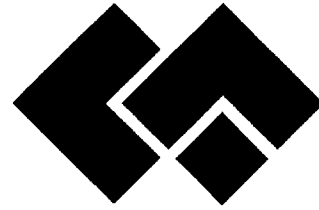
The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been considered by the Council of the Law Council of Australia.

Thank you for giving us the opportunity to comment on the Discussion Paper.

Yours sincerely,



Peter Webb  
Secretary-General



Law Council  
OF AUSTRALIA

*Business Law Section – Trade Practices Committee*

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# **Civil Penalties for Australia's Consumer Protection Provisions – Options for Reform**

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## **Submission to the Standing Committee of Officials of Consumer Affairs**

2 December 2005

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## Background

In May 2004, the Standing Committee of Officials of Consumer Affairs (SCCOCA) agreed to establish a working party to report on the desirability of adopting civil penalties or other flexible enforcement strategies in substitution for, or as an alternative to, criminal fines for breaches of the consumer protection provisions of the *Trade Practices Act 1974* (Cth) (**TPA**) and the State and Territory Fair Trading Acts (collectively as **Consumer Protection Provisions**).

In initiation of the public consultation process on this issue, in September 2005, the Ministerial Council on Consumer Affairs (**MCCA**) published a discussion paper entitled "Civil Penalties for Australia's Consumer Protection Provisions".

The discussion paper provided an invitation for interested parties to make written submissions to the working party on the issues raised in the discussion paper.

The Trade Practices Committee of the Business Law Section of the Law Council of Australia (**Committee**) makes this submission on the MCCA discussion paper "Civil Penalties for Australia's Consumer Protection Provisions".

## Current Consumer Protection Enforcement Mechanisms

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

At present, the enforcement mechanisms available for breaches of Australia's Consumer Protection Provisions are a mix of civil remedies and criminal penalties, but there are currently no civil pecuniary penalties available. State fair trading legislation largely mirrors parts of the fair trading and consumer protection provisions of the TPA, which contains civil offence provisions in Part V and criminal offence provisions in Part VC.

At the Commonwealth level, to enforce the consumer protection provisions of the TPA the Australian Competition and Consumer Commission (**ACCC**) can seek:

- declarations of contraventions;
- findings of facts;
- injunctions;
- damages;
- community service orders;
- probation orders;
- adverse publicity orders;

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- corrective advertising, public notices and disclosure; and
  - fines for the commission of criminal offences of up to \$1.1 million for companies and \$220 000 for individuals.<sup>1</sup>

Because the Consumer Protection Provisions are structured so as to have the criminal offence provisions replicating the civil offence provisions in a separate part of the legislation, enforcement agencies are required to exercise their discretion in determining whether to pursue civil or criminal action in response to particular breaches of the law.

In most cases, the commission of a criminal offence attracts a pecuniary fine, with a penalty of imprisonment unavailable at the Commonwealth level and in all States except New South Wales. The pursuit of a criminal fine for a breach of the Consumer Protection Provisions will generally preclude an enforcement agency from pursuing other avenues of civil redress, such as damages or injunctions, in the same proceedings.<sup>2</sup>

In determining whether the enforcement mechanisms currently available to consumer protection agencies are sufficient and effective in enabling them to respond to breaches of the Consumer Protection Provisions, it is important to consider the objectives of the types of redress being pursued and the purpose sought to be achieved by the Consumer Protection Provisions over which the enforcement mechanisms operate.

The introduction of corresponding criminal offences in a new Part VC to the civil consumer protection provisions contained in Part V of the TPA was effected by the enactment of the *Trade Practices Amendment Bill (No 1) 2000 (Bill)*. According to the Explanatory Memorandum, the objective of the Bill was to "improve the enforcement aspects of the regulatory regime contained within the Act and address the shortcomings in present legal remedies to encourage compliance with the obligations of the Act."<sup>3</sup>

For consumer protection agencies, the key objective in pursuing enforcement procedures for breaches of the law will generally be to prevent the continuation of the contravening behaviour so as to minimise any ongoing detriment to consumers and to provide appropriate redress, as well as to effect long-term change in the attitudes and behaviours of market participants. Realising these objectives will often require swift action from consumer protection agencies for which civil remedies will be better adapted than criminal penalties. In addition, as criminal penalties do not provide a means to obtaining consumer redress, this objective of consumer protection agencies will also not be accomplished by pursuing criminal avenues.<sup>4</sup>

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<sup>1</sup> *ACCC Annual Report 2004-2005* at 17, 11 October 2005, available at: <[www.accc.gov.au](http://www.accc.gov.au)>

<sup>2</sup> If criminal action is pursued in respect of a breach of Part VC of the TPA, a number of remedies are technically available upon the application of the ACCC, including fines, injunctions, community service orders, probation orders, disclosure orders, adverse publicity orders and a range of remedial orders under section 87(2), but not damages. However, while these remedies are technically available for breaches of Part VC, they are only available upon application by the ACCC, not the Director of Public Prosecutions to whom criminal prosecutions are referred. In addition, Courts may not be as receptive to these broader enforcement mechanisms when exercising criminal jurisdiction.

<sup>3</sup> Explanatory Memorandum to the Trade Practices Amendment Bill (No 1) 2000 at 2, circulated by the authority of the Hon. Joe Hockey, MP, 29 June 2000.

<sup>4</sup> Ministerial Council on Consumer Affairs Discussion Paper, "Civil Penalties for Australia's Consumer Protection Provisions" at 10, September 2005.

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Traditionally, the dichotomy between criminal and civil sanctions has been conveyed in terms of criminal sanctions expressing societal condemnation through punishment, while civil sanctions perform a more utilitarian function of deterring undesirable behaviours through the imposition of a cost and providing a private remedy to enforce and restore individual rights.<sup>5</sup>

However, contemporary regulatory theorists have emphasised the need for a more practical approach to the classification of breaches of the law, valuing a proportional approach that discards the formal civil/criminal split and takes into account the harm caused, the seriousness of the penalty available, and the need for regulators to maximise their resources and to achieve a deterrent effect.<sup>6</sup> This is consistent with the ACCC's statement in its Annual Report 2004-2005 that it " had a consistent position of being selective in its choice of enforcement actions involving litigation and of giving priority to cases which are most likely to improve overall compliance with the Act."<sup>7</sup>

It is this pragmatic approach to sanctioning contraventions of the law that has resulted in the blurring of the distinction between criminal and civil penalties.<sup>8</sup> The result is that civil sanctions, which provide greater flexibility in the type of enforcement measures that may be pursued, and which are also less burdensome in terms of the investigatory resources required and evidentiary rules that must be adhered to, are able to accommodate many of the same underlying objectives that are achieved by criminal penalties.

Because imprisonment is unavailable for breaches of the Consumer Protection Provisions, the principal criminal sanction available to consumer protection agencies is to pursue a criminal fine. Corresponding civil pecuniary penalties are not currently available under the Consumer Protection Provisions, yet in essence, there is no difference between the purpose of civil pecuniary penalties and criminal fines. As noted by the ALRC:

"Both are imposed in retribution for a contravention of legislation; both are calculated by reference to the level of 'wickedness' of the conduct and the aim of deterring further such conduct."<sup>9</sup>

While the consequences flowing from a penalty categorised as civil may be different from those of a criminal fine, it is arguable that in the context of Consumer Protection Provisions, the pursuit of criminal fines is not justified in terms of its utility in realising the objectives of consumer protection agencies.

At present, consumer protection agencies may wish to pursue criminal penalties in order to deter market participants from continuing to engage in contravening behaviour by literally "paying" for their breach. However, the inability to pursue civil pecuniary penalties often compels agencies to seek criminal redress. This was confirmed by the ACCC in its Annual Report 2004-2005, where it was stated that "An advantage of taking a criminal action is the

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<sup>5</sup> J Coffee, "Paradigms Lost: The Blurring of the Criminal and Civil Law Modes – And What can be Done about It?" (1992) 101 *Yale Law Journal* 1875, referred to in Australian Law Reform Commission Discussion Paper 65, "Securing Compliance: Civil and Administrative Penalties in Federal Regulation" at 556, available at: <[www.alrc.gov.au](http://www.alrc.gov.au)>

<sup>6</sup> Australian Law Reform Commission Discussion Paper 65, "Securing Compliance: Civil and Administrative Penalties in Federal Regulation" at 556, available at: <[www.alrc.gov.au](http://www.alrc.gov.au)>

<sup>7</sup> *ACCC Annual Report 2004-2005* at 24, 11 October 2005, available at: <[www.accc.gov.au](http://www.accc.gov.au)>

<sup>8</sup> A Freiberg and P O'Malley, "State Intervention and the Civil Offence", (1984) 18(3) *Law & Society Review* 373 at 374.

<sup>9</sup> Australian Law Reform Commission Discussion Paper 65, "Securing Compliance: Civil and Administrative Penalties in Federal Regulation" at 80, available at: <[www.alrc.gov.au](http://www.alrc.gov.au)>

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ability to obtain financial penalties which is not available under the current civil regime."<sup>10</sup> The unavailability of civil penalties and the consequential pursuit of criminal proceedings to impose fines may be distorting the most appropriate enforcement response to a breach of the Consumer Protection Provisions.

In addition, the pursuit of criminal penalties poses significant challenges to consumer protection agencies, as identified by the ACCC Chairman Mr Graeme Samuel in his paper for the Competition Law Conference held on 12 November 2005:

"Criminal prosecutions do raise challenges. They affect both the process of investigation that we undertake, obviously in terms of the admissibility of evidence, and they involve collaboration with the DPP... We are contemplating future criminal prosecutions for breaches of the consumer protection provisions where consumers have been deliberately defrauded, and where we believe that it is appropriate to elevate the level of prosecution to that of a criminal offence."<sup>11</sup>

However, the ACCC's desire to criminally prosecute cases where consumers have been deliberately defrauded would not be frustrated by the removal of criminal sanctions for breaches of the Consumer Protection Provisions, because these cases could still be the subject of a criminal prosecution for fraud under the *Crimes Act*.

Nonetheless, Graeme Samuel's comments raise a number of issues pertinent to the sufficiency of the enforcement mechanisms currently available to consumer protection agencies. Firstly, they highlight the procedural difficulties inherent in seeking criminal redress. Because special rules and procedures, designed at preserving procedural fairness for defendants to criminal prosecutions, apply to the collection of evidence and its use during legal proceedings, the burden on consumer protection agencies is considerably greater than that which applies to civil proceedings. Consequently, criminal proceedings can be a substantial drain on the time and resources of agencies, forcing them to be highly selective in the matters that they pursue at the criminal level.

As indicated by Graeme Samuel, it is necessary for agencies to limit criminal prosecutions to cases where there is a need to make a decisive statement to the public that such conduct is unacceptable and will be the subject of severe sanctions. However, there is nothing to indicate that such a statement cannot be made through the range of civil sanctions already available if used in conjunction with civil penalties that could be introduced. In addition, the higher evidentiary burden associated with criminal proceedings and the strict rules applicable to the collection of evidence could result in a damaging public loss for consumer protection agencies that would undermine the deterrent function that they are seeking to achieve. Conversely, civil proceedings enable enforcement agencies to negotiate with offenders to arrive at a range of flexible outcomes, such as securing enforceable undertakings or imposing adverse publicity orders.

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<sup>10</sup> ACCC Annual Report 2004-2005 at 5, 11 October 2005, available at: <[www.accc.gov.au](http://www.accc.gov.au)>

<sup>11</sup> Graeme Samuel, ACCC Chairman, "The Enforcement Priorities of the ACCC" at 4, paper presented at the Competition Law Conference 2005, Sydney, 12 November 2005.

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In addition to evidentiary concerns, criminal prosecutions require consumer protection agencies to hand over control of these matters to the relevant Director of Public Prosecutions (DPP) at the applicable Commonwealth, State or Territory level, which will then determine whether or not to run a matter and the manner in which it should be pursued. While consumer protection agencies are able to negotiate effective arrangements with the DPP, the objectives of the agencies and the DPP may not always be aligned.

Finally, the application of criminal penalties as a means to deter corporate offenders from breaching the Consumer Protection Provisions is not fully effective. A corporation has no physical or mental personality, and a criminal punishment cannot truly serve its purpose of expressing societal condemnation so as to cause an offender shame.<sup>12</sup> Arguments have been advanced on behalf of retaining criminal sanctions for corporations on the basis that they continue to have an important symbolic function, singling out particularly serious contraventions of the law for public recognition.<sup>13</sup> The ALRC formed the view that:

"For corporations, there are sound arguments for the use of the criminal law where the behaviour of the corporation has caused, or is capable of causing, significant harm to others or where there are parallels with dishonest practices by individuals. ...The purposes of the criminal law in these circumstances is to indicate society's concern about, and condemnation of, the behaviour of the corporation."

However, while criminal prosecutions may be appropriate for corporations in certain circumstances, it must be questioned whether such prosecutions are warranted for a contravention of the Consumer Protection Provisions. Public censure of serious contraventions of the Consumer Protection Provisions can be expressed in a wide variety of ways that do not necessitate criminal prosecution, such as through the imposition of significant civil pecuniary penalties, declarations of contraventions, adverse publicity orders, or community service orders. Being forced to comply with very significant pecuniary penalty orders, often in the millions of dollars, will be of considerably greater impact on corporations that are answerable to shareholders, lending institutions, public sector procurement agencies, unions and consumers who purchase their goods and services.

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<sup>12</sup> Australian Law Reform Commission Discussion Paper 65, "Securing Compliance: Civil and Administrative Penalties in Federal Regulation" at 578, available at: <[www.alrc.gov.au](http://www.alrc.gov.au)>

<sup>13</sup> B Fisse, "Who Carries the Corporate Can? Allocation of Responsibility for Offences or Breaches of Civil Penalty Provisions", paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001.

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**Comment 1.1:** The Committee supports a broad range of consumer protection enforcement mechanisms being available to consumer protection agencies in sanctioning contraventions of the Consumer Protection Provisions.

**Comment 1.2:** The Committee believes that the existing civil range of consumer protection enforcement mechanisms are generally effective.

**Comment 1.3:** The unavailability of civil pecuniary penalties for breach of the Consumer Protection Provisions is an unnecessary deficiency in the enforcement mechanisms available to consumer protection agencies.

**Comment 1.4:** The unavailability of civil pecuniary penalties has the potential to distort the regulatory response to a contravention of the Consumer Protection Provisions, as evidenced by consumer protection agencies electing to pursue criminal penalties partly because civil pecuniary penalties are not presently available for breach of the Consumer Protection Provisions.

**Comment 1.5:** The Committee questions the need for criminal sanctions for conduct in contravention of the Consumer Protection Provisions, having regard to the following considerations:

- (a) Pursuing criminal sanctions presents significant difficulties for consumer protection agencies from a procedural and evidentiary perspective;
- (b) Criminal sanctions may not be the most appropriate response to breaches of the Consumer Protection Provisions, given that the Court's criminal jurisdiction is not suited to delivering a timely end to contravening behaviour, providing consumer redress and deterring such conduct amongst market participants;
- (c) While breaches of the Consumer Protection Provisions may be sufficiently serious to warrant the imposition of a pecuniary penalty, they do not ordinarily involve conduct of such moral blameworthiness to justify the adverse consequences associated with a criminal conviction (see also Section 3 of this Submission); and
- (d) Criminal fines may not be the most effective means of sanctioning corporate offenders for contraventions of the Consumer Protection Provisions because they are less susceptible to the social condemnation associated with criminal punishment directed against individuals.



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## **Pecuniary Penalties for Breaches of the Consumer Protection Provisions**

**"Should pecuniary penalties be introduced for breaches of Australia's Consumer Protection Provisions? If pecuniary penalties are introduced, what breaches of Australia's Consumer Protection Provisions should be subject to them? If pecuniary penalties are introduced, what is the maximum pecuniary penalty appropriate for breaches of the Consumer Protection Provisions? Should pecuniary penalties be substituted for criminal penalties in Australia's Consumer Protection Provisions? Should a parallel penalty regime be applied to enforcement of Australia's Consumer Protection Provisions?"**

Civil pecuniary penalties are closely aligned with criminal "fines" or penalties, because they aim to serve a punitive and deterrent purpose rather than to compensate individuals who have suffered harm as a result of the impugned conduct. Pecuniary penalties, both civil and criminal, have received criticism from the ALRC on a number of grounds, including that:

- pecuniary penalties may not force corporate offenders to discipline responsible employees or institute proper internal controls;
- the burden of the penalty is felt by shareholders and consumers rather than by the officers of the offending corporation;
- pecuniary penalties may send a message that corporations can "buy" their way out of contravening conduct;
- some corporations may not be able to pay large pecuniary penalties, forcing the court to either send a corporation into liquidation or to impose a penalty that does not reflect the seriousness of the offence.<sup>14</sup>

It is the Committee's experience that the imposition of pecuniary penalties does provide a very strong impetus for corporations to discipline employees and to institute proper internal controls. The governance responsibilities placed on corporate officers are such that they are now motivated to respond to internal deficiencies that have led to substantial financial losses. The imposition of penalties sends a message of deterrence sufficient to cause corporate offenders to institute internal training and compliance programs, to effect appropriate disciplinary action against responsible employees, and to terminate employment in some circumstances. While it is the case that the initial impact of pecuniary penalties may be felt by shareholders and consumers, responsible officers and employees are ultimately held accountable for their actions.

While some corporate offenders will not be in a position to pay the significant maximum pecuniary penalties that may be imposed under the legislation, the Court is well equipped to avoid imposing penalties that would unnecessarily destroy a corporation. The amount of the penalty required to communicate a

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<sup>14</sup> Australian Law Reform Commission Report 68, "Compliance with the *Trade Practices Act 1974*", (1994) at paragraph 10.3 of Chapter 10, available at: <[www.alrc.gov.au](http://www.alrc.gov.au)>

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message of deterrence and to punish a corporation will be relative to the particular circumstances of each offender, and the Court is experienced in arriving at such judgements.

Accordingly, while civil pecuniary penalties may have some limitations, this does not prevent them from being highly effective in many circumstances, particularly when used in conjunction with other civil enforcement mechanisms with differing impacts upon offenders.

Therefore, the Committee favours the introduction of civil pecuniary penalties for contraventions of the Consumer Protection Provisions. The Committee is of the opinion that civil pecuniary penalties would offer a significant and valuable expansion of the enforcement mechanisms currently available.

Civil penalties offer the significant advantage over criminal fines in that the proceedings to recover them are subject to a lower standard of proof and less strict rules of evidence and procedure and may include redress for consumers and an injunction (whether interlocutory or final) to end the contravening conduct. In addition, the agency is able to maintain control of the proceedings. In this way, civil penalties are considerably better adapted to achieving the objectives of consumer protection agencies in seeking to swiftly minimise harm to consumers while also communicating a message of deterrence through the threat of pecuniary penalties.

The Committee supports the introduction of civil pecuniary penalties in substitution for the current regime of criminal penalties contained in the Consumer Protection Provisions. It is the view of the Committee that, for the reasons cited above, civil penalties in conjunction with the broad range of other civil enforcement mechanisms currently available under the Consumer Protection Provisions are better suited to achieving the objectives of consumer protection agencies and to realising the purposes for which the Consumer Protection Provisions has been designed.

The theoretical advantage proffered in favour of criminal sanctions that they are able to convey the disapprobation of society becomes less convincing in practice, particularly when considered in light of the fact that criminal sanctions are most often enforced against corporate offenders that are less susceptible to the force of condemnation. In addition, if any conduct in breach of the Consumer Protection Provisions involves dishonesty or other criminal behaviour, then it would seem more appropriate to prosecute the offender under the general criminal law through the existence of offences relating to dishonest or fraudulent conduct. By way of example, in the New South Wales jurisdiction the following offences are contained in the *Crimes Act 1990* for relevant types of dishonest conduct:

- obtaining money or property by deception (s 178BA);
  - obtaining money or property by false or misleading statements (s 178BB);
  - obtaining money or property by false pretences (s 179);
  - causing payment by false pretences (s 178);
  - inducing entry into certain arrangements by misleading statements (s 185B); and
  - providing false or misleading information or documents (ss 307B and 307C).
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It is acknowledged that many of the practices presently caught by Part VC do not necessarily involve any fraudulent or dishonest behaviour. Part VC of the TPA establishes as a criminal offence the following conduct:

- specific false or misleading representations (s 75AZC);
- false or misleading representations in relation to land (s 75AZD);
- misleading conduct in relation to employment (s 75AZE);
- failing to state the cash price of goods or services in certain circumstances (s 75AZF);
- false or misleading conduct in relation to offering gifts or prizes in connection with the supply of goods or services (s 75AZG);
- misleading the public as to the nature or characteristics of goods and services (s 75AZH);
- false or misleading conduct in relation to services (s 75AZI);
- bait advertising (s 75AZJ);
- referral selling (s 75AZK);
- accepting payment for goods or services without being able to supply as ordered (s 75AZL);
- misleading representations about the nature of business activities (s 75AZM);
- harassment and coercion (s 75AZN);
- pyramid selling (s 75AZO);
- supplying unsolicited credit and debit cards (s 75AZP);
- asserting a right to payment for unsolicited goods or services (s 75AZQ); and
- offences relating to product safety standards and unsafe goods (ss 75AZS – 75AZU).

The question arises whether these various practices should attract criminal sanction.

All the offences in Part VC are strict liability. Section 6.1 of the *Criminal Code* makes it clear that while the defence of mistake of fact is available, the prosecution is not required to establish fault elements for any of the physical elements of the offence. In other words, to prove the offence, the prosecution does not need to prove that a business carried out the conduct complained of knowingly, recklessly or dishonestly – see, for example, ss 75AZC-75AZI. While the Committee is comfortable with strict liability offences in the civil jurisdiction, it is much less comfortable with this regime in the criminal jurisdiction.

A number of the practices listed above involve false or misleading representations which do not necessarily involve any fraud, dishonesty or recklessness. It seems difficult to justify that such practices, if committed, should constitute criminal offences.

A number of the other listed practices involve fair trading breaches which do not seem to involve such reprehensible or blameworthy behaviour as to warrant society's reprobation in the form of criminal sanction.

It is important, particularly in remedial and protection legislation like the TPA, that the remedy correlates with the obligation. The remedy should neither fall short of protecting the obligation nor exceed it.

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It is the Committee's view that proportionality between the various obligations under the Consumer Protection Provisions and their remedies is best achieved by confining the enforcement mechanisms in respect of most of the above practices to the civil jurisdiction.

The offence of harassment and coercion contemplates a broad range of conduct, much of which will be appropriately addressed by civil penalties. However, where the conduct reaches a level which may constitute assault, that conduct should be punishable under the *Crimes Act* for the relevant jurisdiction. This would not leave a gap in the ability of enforcement agencies to pursue an appropriate remedy for the varying degrees of conduct encompassed by the offence of harassment and coercion.

However, there may be some limited practices [such as pyramid selling (s 75AZO) and offences relating to product safety standards and unsafe goods (ss 75AZS – 75AZU)] which continue to warrant criminal sanction.

The Committee is of the view that:

- civil pecuniary penalties should be available as a remedy for all those practices listed in Part VC which currently attract a criminal fine;
- many of the practices listed in Part VC should be removed from Part VC on the basis that they do not warrant criminal sanction; and
- those practices which should continue to be a criminal offence be retained in Part VC.

The Committee recognizes that there is a wide continuum of contraventions to which the provisions of the Consumer Protection Provisions pertain, ranging from unintentional conduct by a first-time offender that causes relatively little harm to the public, to deliberate, large-scale and ongoing conduct that causes substantial harm to numerous parties. Consequently, the maximum civil penalty applicable to breaches of the Consumer Protection Provisions should be set at a substantial level so as to provide the Court with the ability to exercise its discretion in setting the amount of the penalty in each case which reflects the gravity of the conduct concerned.

It is the Committee's view that the maximum pecuniary penalty, at least at the Commonwealth level, should be set at the same level as that currently available under the criminal fine regime contained in Part VC of the TPA; that is, \$1.1 million for each contravention by a corporation and \$220,000 for an individual. The Committee notes the view of the ALRC that the \$10 million maximum penalty for a corporation and \$500,000 for an individual for a contravention of the restrictive trade practices provisions in Part IV of the TPA is inappropriate because of the different operating environments of the two parts.

Having regard to the nature of the conduct involved with breaches of the Consumer Protection Provisions, the Committee is not in favour of introducing banning orders against individuals who are involved in such breaches, except in respect of those offences which are to be retained as criminal offences in Part VC. This is because these orders, which may prevent affected individuals from continuing to manage companies, effectively limit individuals' future earning opportunities. This reduced potential to earn a living may

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impact unfairly upon those who are dependant upon the relevant individuals for their livelihoods. As such, these types of banning orders should be confined to the most serious offences under the law.

**Comment 2.1:** The Committee supports the introduction of civil pecuniary penalties for all those practices listed in Part VB to which criminal fines currently apply.

**Comment 2.2:** The Committee recommends that many of the practices listed in Part VC be removed from Part VC on the basis that they do not warrant criminal sanction.

**Comment 2.3:** The Committee submits that there may be certain practices presently listed in Part VC which, following a further review, warrant being retained in Part VC as a criminal offence.

**Comment 2.4:** It is the Committee's view that at the Commonwealth level, the maximum pecuniary penalty should be set at the same level as the criminal fines that currently apply to offences under Part VC of the TPA.

**Comment 2.5:** The Committee does not support the introduction of banning orders for breaches of the Consumer Protection Provisions, except in respect of those offences which are retained in Part VC.

2 December 2005

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