

# **ESSENTIALS**

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## **An Australian Consumer Law: Fair Markets – Confident Consumers Discussion Paper 17 February 2009**

I thank the Department of Treasury and the Assistant Treasurer for the opportunity to make a submission in respect of Treasury's paper *An Australian Consumer Law: Fair Markets – Confident consumers*, dated 17 February 2009.

I write as a compliance professional of 20 years standing, and wish to comment on only one aspect of the paper: the proposed introduction of an Infringement Notice power. The relevant entry is at p51, ie:

The Australian Consumer Law will include a nationally consistent power for consumer regulators to issue infringement notices in relation to breaches of consumer protection provisions. ... A number of state and territory consumer regulators have the power to issue infringement (or penalty) notices in relation to a range of matters including both administrative breaches (concerning such issues as product safety, telemarketing, cooling-off and lay-by provisions) and substantive breaches of the relevant FTA (concerning such issues as, false representations and misleading conduct). At the national level, ASIC can issue infringement notices in respect of breaches of the *Corporations Act 2001*.

No 'consultation questions' have been posed in relation to this issue, which leads to the disturbing conclusion that it may be a *fait accompli*. The point of this submission is to urge caution and request additional consultation on this issue, for the reasons set out below.

### **Administrative breaches vs substantive breaches**

I find this distinction artificial and unhelpful: a product safety issue might easily fit both categories. A better distinction would involve the elements of the potential breach: do they require any form of "state of mind" assertion (such as the overall impression on a notional target audience) or is the breach obvious and undeniable on its face?

The Australian Government's *Guide to Framing Commonwealth Offences, Civil Offences, Civil Penalties and Enforcement Powers*<sup>1</sup> states that

An infringement notice scheme should only apply to strict or absolute liability offences. These offences should carry physical elements on which an enforcement officer can make a reliable assessment of guilt or innocence.

This is a sound principle, and it immediately rules out the application of such a regime to a provision as nebulous as section 52 of the *Trade Practices Act* and its State equivalents. An infringement notice regime is well suited to such matters as a failure to affix a prescribed warning label, but is potentially disastrous for what the Consultation Paper describes as “substantive breach”.

In other words, an isolated failure by a business to have the appropriate warning label on an imported elastic strap could and should be dealt with by way of an infringement notice; but an assertion by a regulator that an ordinary consumer would have interpreted a marketing communication in a particular way is nothing more than that, and ought not be the basis for an automatic penalty.

### **Evidence of usefulness**

The fact that “A number of state and territory consumer regulators have the power to issue infringement (or penalty) notices” should provide SCOCA with plenty of evidence as to how well or badly the power has operated. None of this is provided; instead the authors seem to have made the leap to “therefore every regulator should have it”. Another option would be to remove the power from the jurisdictions that have it, and this option should be given equal consideration.

### **Finality of Notice**

The ASIC Infringement Notice regime, in respect of alleged breaches of the continuous disclosure requirements, is an exception to the principle set out above. It can be justified by the need for swift outcomes from a market perspective, on the basis that the target of the Notice must consent to it, and by the finality it brings to the matter.

If the ASIC regime is the model, then the acceptance of an Infringement Notice is the end of the matter; there can be no further action in relation to that alleged breach. I find it implausible that the ACCC would accept that model. If it does not deliver the benefit of finality then there would appear to be no reason for the business to accept such a Notice. Or perhaps it isn't a matter for the business to accept or reject? The problem here is that the Consultation Paper provides none of this information so it is impossible to make a rational assessment.

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<sup>1</sup> Commonwealth of Australia 2004, p.45

## Reduced use of Undertakings: pros and cons

Currently the ACCC settles a large number of cases by way of Enforceable Undertaking, and the vast majority of these Undertakings include a mandatory Compliance Program element. Obviously these have to be negotiated with the business concerned. An Infringement Notice regime – if the Notice can be issued without the business’s acceptance, see above – provides a much quicker route to “closing the case”. In the alternative scenario, where acceptance is required, there is no doubt that the ACCC will simply add “accept this Notice” to its shopping list for the ultimate settlement.

It follows that if the first interpretation is right, an increasing proportion of these cases will follow the Infringement route and the opportunity to intervene in the offending business’s inadequate compliance program will be lost. Under the second interpretation, it is likely that more businesses will choose to fight the matter, leaving even more resources to be squandered on pointless litigation rather than invested in compliance.

Having said that, there is potentially one important benefit to business (and compliance generally) from an Infringement Notice system. In respect of alleged breaches of the mandatory product safety and product information standards, the current practice of the ACCC is to require a full-blown Undertaking – with annual training, audits etc – from the business in question; often this is a totally disproportionate remedy for a single, minor infraction. It would be much better dealt with via the issuance of a ticket and the payment of a nominal penalty.

## Summary

Many of the enforcement strategies of the ACCC have the “take it or leave it” quality that the Consultation Paper itself condemns in consumer contracts. The addition of another power to the ACCC’s arsenal is a matter of great significance, requiring mature consideration and a high level of skepticism. The Consultation Paper provides insufficient and/or inconclusive information about the scope of the power, the effect of a Notice or the experience of other jurisdictions with the exercise of this power for interested parties even to form a view. Yet it states “The Australian Consumer Law will include [the power]”. I find this surprising and hope that further consultation opportunities will be provided before this dramatic reform is implemented.

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17 March 2009

