Response to Position Paper 7

Strengthening Penalties for Corporate and Financial Sector Misconduct

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Introduction

1 CHERPA, the Consumer Household Equipment Rental Providers Association, represents 45 businesses and over 90 individual businesses around Australia. Our members write approximately 25%[1] of all consumer leases written in the market and currently service approximately 230,000 consumers directly with consumer leases which indirectly service 550,000 people.

Background

The Consumer Household Equipment Rental Providers Association (CHERPA)

2 The rental of household goods to consumers has been taking place happily and without problem in Australia for at least 80 years. Many CHERPA members have a very long history, 40+ years, of successfully renting essential household goods to happy consumers.

3 In the early 2000's the nature of the industry began to change with advent of the "rent-to-own" paradigm interplaying simultaneously with credit finance companies who began providing financing and loans for small amounts of credit on consumer goods – and confusingly using the word "rent" in their business name and product offering.

[1] Note that Radio Rentals/Thorn has about 50% share of the market

4 The resulting consumer confusion created the need for clarification which was supposed to arrive in the form of the NCCP Act.

5 However, the introduction of the NCCP Act in 2010 left the industry in a significant state of confusion. Since that time lessors then operating in the industry have been increasingly concerned to see the entrance of many new players in the market, including a proliferation of operators who appear to be of dubious and unethical intent.

6 **Industry Code of Conduct** - In 2013 the industry formed a peak body, the Consumer Household Equipment Rental Providers Association, CHERPA, to address concerns that the long term industry operators held. CHERPA began engaging with stakeholders to understand their concerns and in 2014 an Industry Code of Conduct was accepted at CHERPA's Annual General Meeting.

7 CHERPA has continued engaging with stakeholders since that time culminating in the recent voluntary upgrade to its Industry Code of Conduct for members to include:

• Return of items at no cost under hardship

• Estimated Retail price disclosure

• Specific percentage caps on both the amount of net income and discretionary income that can be used as payment for a consumer lease provided by members.

CHERPA Members

8 On average CHERPA members have been in the industry for more than ten years

9 There are more than 10 members who have been in the business for more than 20 years

10 There are a few members who have been in the business as employees or business owners for more than 40 years.

11 The estimated total number of goods rented out by CHERPA members is currently 300,000

12 Businesses range in size from:

>$100,000 turnover with 200-300 units on lease and approx. 150 -200 customers to $40,000,000 turnover with approximately 27,000 units on lease and approx. 24,000 customers.

13 CHERPA members as a cohort in the consumer leasing industry have been highly compliant with regulatory requirements, have excellent customer relations and have demonstrated ongoing industry best practice as evidenced by the very low number of complaints received by our members – an order of magnitude less (one-tenth) than complaints for mainstream mortgages, credit cards and personal loans.

14 CHERPA welcomes a positive approach to:

a. More efficiently and more effectively applying regulation to industry

b. Co-regulation with industry

c. Enhancing both impact AND understanding of regulation

d. Improve regulatory outcomes for consumers and industry alike.

15 CHERPA is committed to building, sustaining and maintaining the integrity and reputation of the consumer leasing industry so that the community at large and direct consumers of the leases can be confident that the behaviour of licensed lessors not only comply with their legal obligations but are also ethical and within reasonable expectations of the community.

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16 CHERPA welcomes retribution for misconduct in the corporate and financial industry. However we believe penalties should take in to account the scale of business operation. Currently, almost all businesses in the consumer lease industry operate as small businesses and on a smaller scale of financial turnover. Thus we believe the scale of penalty should be reflective of this.

Questions

1. ***Is it appropriate that maximum terms of imprisonment for offences in ASIC-administered Acts be increased as proposed?***

The proposed penalties for criminal offences outlined in Annexure B are substantial increases. CHERPA's position is that the current maximum penalties for criminal offences already provide a sufficient deterrent for current businesses trading in the consumer lease industry. Currently, almost all businesses in the consumer lease industry operate as small businesses on a smaller scale of financial turnover to many of larger players in the financial industry. Given the likely gains from criminal activity are unlikely to be on the same scale, we propose that small businesses be treated as individuals in terms of maximum term of imprisonment. Thus for example pecuniary penalties should not be subjected to the given enforced penalty unit multiplied by 10.

2. ***Should maximum fine amounts be set by reference to a standard formula? If so, is the proposed formula appropriate?***

Referencing a formula for setting maximum fine amounts will certainly provide a level of predictability and standardisation to set penalties. However CHERPA believes that the formula should include a reflection of the business' scale of operation. As mentioned above, currently businesses in the consumer lease industry operate as small businesses. The imposition of fines on a small businesses, will not have the same effect as major financial institutions with most of the former likely to be bankrupted whilst the latter will be likely to continue to operate. CHERPA proposes that fines should reflect a result that restricts business operation but does not force bankruptcy.

3. ***Is it appropriate that the penalty for offences under section 184 of the Corporations Act be increased as proposed?***

CHERPA believes that the proposed penalties are again too excessive for the Consumer Lease industry.

4. ***Is the Peters Test appropriate to apply to dishonesty offences across the Corporations Act?***

CHERPA does not foresee any issue in using the Peters test for dishonesty.

5. ***Should imprisonment be removed from all strict and absolute liability offences in the Corporations Act (such as sections 205G and 606)?***

CHERPA agrees that imprisonment be removed from all strict and absolute liability offences in the Corporations Act.

6. ***Should all pecuniary penalties for Corporations Act strict and absolute liability offences have a 30 penalty unit minimum for individuals and 300 penalty unit minimum for corporate bodies?***

Again CHERPA believes that smaller businesses should not be subjected to the same minimum penalty rates as the larger corporate bodies.

7. ***Is it appropriate to introduce the new 'ordinary' offences as outlined in Annexure C? Are there any other strict/absolute liability offences that should be complemented by an ordinary offence?***

Whilst CHERPA has no objection to liabilities becoming 'ordinary' offences, the new penalty rates outlined in Annexure C are greatly increased and excessive for the consumer lease industry.

8. ***Should all Corporations Act strict and absolute liability offences be subject to the proposed penalty notice regime? Is the proposed penalty appropriate?***

CHERPA has no objection to the proposed penalty notice regime.

9. ***Should maximum civil penalties be set in penalty units in the Corporations Act, ASIC Act and Credit Act? If so,***

a. Should the maximum civil penalty for contravention of the consumer protection provisions in the ASIC Act be aligned with proposed increases to the Australian Consumer Law, although set by reference to penalty units?

CHERPA believes that penalty units should only be used if consideration is taken as to the annual turnover of the corporate body. A more appropriate penalty is those set in Australian Consumer Law and Competition and Consumer Act where penalties include 3 times the value of benefits obtained or 10% of annual turnover. CHERPA does however welcome a ceiling on the penalties chargeable and thus setting the maximum in penalty units alone is reasonable. Again this should be set to an amount that will not bankrupt the business.

b. Should the maximum civil penalty in the Corporations Act and Credit Act be increased as outlined above?

Again CHERPA believes the maximum civil penalties proposed are excessive for the Consumer Lease industry.

c. Should the maximum penalty for an individual be greater than 2,500 penalty units? If so, would $1 million (or equivalent penalty units) be an appropriate penalty?

CHERPA believes the maximum civil penalties proposed for individuals are excessive

10. ***Should the maximum penalty for an individual be the greater of a monetary amount or 3 times the benefits gained or losses avoided?***

CHERPA would prefer that 3 times the benefits gained or losses avoided be used as a maximum penalty

11. ***Should any provisions of the Corporations Act or Credit Act be aligned with the proposed increases to the Australian Consumer Law? In particular, should civil penalty provisions in Part 7.7A of the Corporations Act be so aligned?***

Whilst CHERPA endorses any changes that promote consistency in the prescribed regulations, we cannot comment on provisions in these Acts.

12. ***Should ASIC be able to seek disgorgement remedies in civil penalty proceedings under the Corporations Act, ASIC Act and/or Credit Act?***

CHERPA does not have any objection to ASIC seeking disgorgement remedies in civil penalty proceedings.

13. ***If so, should the making of the payment and where it is to be paid be left to the court's discretion?***

Yes CHERPA believes this should be left to the court's discretion.

14. Should the Corporations Act expressly require courts to give preference to making compensation orders where a defendant does not have sufficient financial resources to pay compensation and a civil pecuniary penalty?

Yes CHERPA believes that the Corporations Act require courts to give preference to making compensation orders where a defendant does not have sufficient financial resources to pay compensation and a civil pecuniary penalty. This is particularly pertinent in view of the fact ASIC is proposing to increase penalties.

15. Should the provisions in Table 6 be civil penalty provisions?

CHERPA has no objection to the provisions listed in Table 6 becoming civil penalty provisions. However, it would be better for those businesses more directly affected by the penalties in Table 6 to respond.

16. Should there be an express provision stating that where the fault elements of a provision and/or the default fault elements in the Criminal Code can be established the relevant contravention is a criminal offence?

CHERPA believes that is reasonable.

17. Should any of the provisions in Table 7 be civil penalty provisions?

CHERPA believes that it is reasonable to convert provisions in Table 7 to civil penalty provisions. The only exception would be where there is likely to be criminal intent.

18. Should any other provisions of ASIC-administered Acts be civil penalty provisions?

Again CHERPA believes that it is reasonable to convert unless there is likely to be criminal intent.

19. Should section 180 of the Corporations Act be a civil penalty provision?

Whilst CHERPA does not have any general objection to section 180 becoming a civil penalty, resulting penalties should be on the scale that the business operates at and not result in the business entering bankruptcy.

20. Should the provisions that impose general obligations on licensees be civil penalty provisions? If so, should this only apply to some obligations?

It would seem reasonable that not all obligations be made civil penalty provisions.

21. Should sections 23A(1), 32A(2), 39B(1), 154 and 179U of the Credit Code be civil penalty provisions?

These sections do not directly pertain to the consumer lease industry; however CHERPA has no issue with making these sections civil penalty provisions as long as they are defendable and not absolute liabilities.

22. Which current and new civil penalty provisions are suitable for infringement notices (see Annexure D)?

CHERPA agrees in principal to civil penalty provisions in Annexure D to be enforced using infringement notices for the purposes of simplifying the regulatory process. However, civil penalty

provisions that require proof of intent should not be regulated in this way and should be prosecuted formally. CHERPA expresses some concern that the use of infringement notices may be used incorrectly as a way to raise revenue. We believe this is inappropriate. For example, all breaches of a similar type should be treated as a class of breaches and penalised only once unless further breaches occur after the initial infringement notice.

23. Are the 12 penalty unit (individuals) and 60 penalty unit (corporations) default levels for infringement notices appropriate? Is the Credit Act model of a default proportion of the maximum penalty more appropriate for all ASIC-administered Acts?

Again CHERPA believes that small businesses should be penalised as individuals since they operate on a much smaller scale. Only the larger scale corporations should be subjected to 60 penalty unit default levels for infringement notices. In terms of the Credit Act model, CHERPA has no objection to using this model as a default proportion since it is familiar to the consumer lease industry unless the change introduces inconsistent and excessive penalties.

24. Would it be appropriate for ASIC to delegate to a peer review panel additional administrative functions in relation to financial services and credit sectors (apart from banning individuals from these industries as currently proposed by ASIC)?

CHERPA believes that a peer review panel is appropriate to perform additional administrative functions, particularly if this panel consists of industry experienced individuals.

25. If so, should the Panel be able to exercise powers, such as the power to issue infringement notices and/or the power to accept enforceable undertakings?

CHERPA believes that panel should have the power to issue infringement notices and/or the power to accept enforceable undertakings.

26. Should the Panel be comprised of industry and non-industry participants (for example, lawyers or academics) only or should members of ASIC be included?

CHERPA believes that a peer review panel should be comprised of panel members and should be drawn from a pool of industry experienced persons on a case-by-case basis, as is suited to the particular circumstances of that case. For example if the case relates to breaches in the consumer lease industry then a panel member from the consumer lease industry should be included.

27. Should the Panel be subject to minimum procedural standards? And, if so, what procedural standards are appropriate? For example, should publication of panel decisions be automatically stayed if an appeal is lodged?

CHERPA believes that the Panel should be subject to minimum procedural standards similar to a tribunal.