

## Submission to the Trade Practices Act Review

17 June 2002

The Australian Law Reform Commission (ALRC) makes the following submission in relation to the review of the *Trade Practices Act 1974* (Cth) (TPA).

The Commission would like to highlight two ALRC inquiries for the information of the Review. The first involved a review of compliance with the TPA, which was completed with a report tabled in Parliament in June 1994 (ALRC 68 *Compliance with the Trade Practices Act*). The second is the ALRC's current inquiry into civil and administrative penalties in the federal jurisdiction. While not specifically a review of the TPA, a number of general principles under review are likely to have an effect upon any consideration of the TPA by another body.

### **Compliance with the TPA**

A copy of ALRC 68 *Compliance with the Trade Practices Act* is enclosed with this submission.

The focus of the ALRC review of compliance with the TPA was the consumer protection provisions of Part V, although the applicability of the recommendations to Part IV and Part IVA also was considered. The ALRC found generally that the TPA was working, with the fair trading principles being effective and well regarded. However, it was noted that there were a number of impediments to effective operation, including:

- lack of understanding by consumers and business as to their rights and obligations under the TPA;
- inappropriate court procedures;
- limitations in the range of available penalties and the maximum of penalties; and
- lack of access to remedies under the TPA because of the high cost of litigation.

A number of recommendations from ALRC 68 were recently implemented by the *Trade Practices Amendment Act (No 1) 2001* (Cth), including:

- an increase in the maximum penalty levels for offences against the consumer protection provisions of Part V to \$1 million;
- providing the ACCC with the power to intervene in private proceedings and institute

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- representative actions for contravention of the restrictive trade practices provisions;
- increasing the range of orders available to the court by including non-monetary penalties such as community service orders, probation orders and adverse publicity orders; and
  - clarification that the courts are to give priority to compensation over fines or pecuniary penalties if both are ordered.

Other recommendations from the report have not yet been implemented. The discussion of the issues surrounding some of these recommendations may be of particular interest to the Review.

### **Civil Penalties for Part V**

Chapter 9 of ALRC 68 deals with the issue whether a greater range of possible responses is required for offences under Part V of the TPA.<sup>1</sup> These recommendations were influenced by the ‘pyramid of enforcement’ approach to regulation.<sup>2</sup> The ALRC recommended that civil penalties be made available in addition to the criminal penalties, with criminal penalties limited to situations where the offensive conduct was engaged in knowingly, intentionally or recklessly. The intention was to narrow the application of the criminal law, thereby increasing its impact, and to increase the range of responses available to assist with enforcement of the TPA.

The ALRC also considered a number of important issues stemming from the proposed introduction of civil and criminal penalties for the same conduct. These included the relationship between criminal prosecution and civil penalty proceedings,<sup>3</sup> the liability of corporations and individuals for corporate wrongdoing,<sup>4</sup> and the decision whether to pursue civil penalty proceedings or a criminal prosecution.<sup>5</sup>

### **Criminal Penalties for Part IV**

As directed by the terms of reference, the ALRC considered whether a similar approach should be introduced to Part IV – ie, the creation of civil and criminal penalties for the same conduct with different mental elements, in effect introducing criminal penalties in to the Part.<sup>6</sup> Most of the submissions opposed this suggestion – many on the grounds that the submitters did not like the approach of availability of both civil and criminal penalties in general, while others considered it inappropriate to criminalise the restrictive trade practices offences in Part IV, in particular.

In its submission to the ALRC inquiry, the Trade Practices Commission (as it then was) opposed the introduction of criminal penalties. However, its submission noted that there was likely to be increased international pressure on countries perceived to be lagging in the intensity of competition law enforcement following the establishment of the World Trade Organisation, and that it would be appropriate to review the issue again in “a few years’ time”.

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<sup>1</sup> Specifically Div 1 and 1A of Pt V.

<sup>2</sup> See, eg, I Ayres & J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, 1992.

<sup>3</sup> ALRC 68, *Compliance with the Trade Practices Act*, Australian Law Reform Commission, 1994, para 9.16-18.

<sup>4</sup> ALRC 68, para 9.19-9.20.

<sup>5</sup> ALRC 68, para 9.21-9.24.

<sup>6</sup> See ALRC 68, para 9.25-9.27.

The ALRC did not recommend the criminalisation of Part IV, primarily because the complex considerations for such a proposal and the need for a detailed appraisal of the implications for competition law policy were beyond the scope of its inquiry.

### **Administrative Actions**

Chapter 11 of ALRC 68 deals with a number of administrative powers of the Trade Practices Commission. The ALRC recommended legislative changes to clarify the administrative powers of the Trade Practices Commission in balance with the rights of individuals and companies. Of particular note are the discussions and recommendations relating to section 87B undertakings, which had been in force for only a short time when the inquiry reported, and the Trade Practices Commission's investigative powers.

The ALRC did not make extensive recommendations in relation to those investigative powers but noted the need for a separate review of the Trade Practices Commission's powers generally. One recommendation was that the court should have power to order a person found to have breached the TPA to repay the Trade Practices Commission's reasonable investigation costs.

### **Civil and administrative penalties**

In February 2000, the federal Attorney-General directed the ALRC to conduct an inquiry into the arrangements for civil and administrative penalties in the federal jurisdiction. Under the terms of reference, the Commission is to have regard to the importance of maintaining an effective and efficient Australian criminal justice system, the need for federal civil and administrative penalty systems to be based on clear and consistent principles, and the balance which ideally should be maintained in deterring and punishing wrongdoing in regulatory and supervisory regimes between the use of criminal sanctions, and administrative and civil penalties.<sup>7</sup>

As part of the consultative phase of the inquiry, the ALRC hosted an international conference *Penalties: Policy, Principles and Practice in Government Regulation* in Sydney on 7-9 June 2001. At that conference Professor Allan Fels made his first public call for stronger criminal sanctions for serious cases of collusion, and a reconsideration of the application of civil penalties to Part V. The full papers from the conference are available from the ALRC in CD format.

In May 2002, the Commission released Discussion Paper 65 *Securing Compliance*. The ALRC understands that the Review has already received a number of copies of DP 65. The ALRC would be happy to provide further copies upon request.

The DP highlights the increasing use of civil and administrative penalties, but also that this is an area that has grown very rapidly without a coherent structure, and in some areas of federal regulation the courts have been inconsistent in their approach.

The three main areas of reform being investigated by the ALRC are:

- *Regulatory consistency and transparency* – the need for greater standardisation of the parameters within which regulators operate.

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<sup>7</sup> The terms of reference can be found at [www.alrc.gov.au/inquiries/current/civiladmin/terms.htm](http://www.alrc.gov.au/inquiries/current/civiladmin/terms.htm)

- *Greater legislative clarity* – the law should be clear on various aspects of the imposition and recovery of civil and administrative penalties where at present it is silent, incomplete or confused.
- *Greater legislative consistency* – the ALRC is considering how best to structure new 'default' provisions for civil and administrative penalties, dealing with interpretation, application and procedural safeguards, as well as considering where to place them to avoid dispersing them throughout the large body of federal regulatory legislation.

Any changes to be made to the TPA should be considered in the light of the need to increase or maintain transparency and clarity, and consistency both with the TPA and amongst federal regulatory legislation generally. While the ALRC has not finalised its recommendations in this area, the Discussion Paper provides thoughtful discussion of the issues that must be considered and provides an indication of the direction in which the final report is likely to suggest reform. The Paper has already received positive judicial comment from Santow J in *ASIC v Adler & 4 Ors* [2002] NSWSC 483 (30 May 2002).

A number of issues discussed in the Discussion Paper may be of particular interest to the Review, including:

- enforceable undertakings,<sup>8</sup>
- negotiated penalties,<sup>9</sup>
- publicity,<sup>10</sup> and
- the extent of discretion to target, investigate or take proceedings.<sup>11</sup>

If there was any move towards placing civil penalties in Part V or criminal penalties in Part IV, consideration would need to be given to the issues that arise from multiple proceedings and multiple penalties.<sup>12</sup>

It is expected that the Commission's current inquiry and the Review's examination of the TPA will overlap in some areas. The ALRC would be happy to discuss further these issues with the Review team in the coming months. The ALRC is due to report by 30 November 2002.

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<sup>8</sup> DP 65, *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction*, Australian Law Reform Commission, 2002, para 7.170-182.

<sup>9</sup> DP 65, 7.150-7.169.

<sup>10</sup> DP 65, 7.183-7.187.

<sup>11</sup> DP 65, ch 15.

<sup>12</sup> DP 65, ch 8