



Australian Government

Australian Law Reform Commission

**Professor David Weisbrot
President**

30 November 2005

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



Dear Sir/Madam

**ALRC submission on Standing Committee of Officials of Consumer Affairs (SOCA)
Discussion Paper on Civil Penalties for Australia's Consumer Protection Provisions**

The Australian Law Reform Commission (ALRC) makes the following submission to the Standing Committee of Officials of Consumer Affairs (SOCA) Discussion Paper on *Civil Penalties for Australia's Consumer Protection Provisions*.

The ALRC would like to highlight, for the information of the Committee, our previous work on the *Trade Practices Act 1974 (Cth) (Trade Practices Act)*, and civil penalties in federal regulation.

Compliance with the Trade Practices Act 1974

The ALRC inquiry into compliance with the *Trade Practices Act* began with terms of reference dated 17 December 1992. The ALRC was asked to report on ways of ensuring compliance with the consumer protection provisions of the *Trade Practices Act*; whether the law adequately provided for redress for those who suffer loss of damage because of a contravention of those provisions; what kinds of sanctions and penalties should be available in respect of such contraventions; and what provision ought to be made to ensure that those whose interests are or may be prejudiced by such contraventions can have access to quick, cost effective and fair remedies.

A Discussion Paper *Compliance with the Trade Practices Act 1974* (DP 56) was published in 1993. In 1994, the ALRC released *Compliance with the Trade Practices Act 1974* (ALRC 68) (available online at <www.austlii.edu.au/au/other/alrc/publications/reports/68/ALRC68.html>). A number of the ALRC's recommendations are relevant to SOCA's current inquiry, including those relating to civil penalties for Part V, and the introduction of a wider range of penalties for contravening the *Trade Practices Act*.

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Civil penalties for Pt V

The ALRC found that although there was an important role for the criminal law in Pt V of the *Trade Practices Act*, it had been over-emphasised and overused. The ALRC concluded that not all contraventions of Pt V warranted treatment as offences, and recommended that civil penalties should be made available in Divisions 1 and 1A of Pt V, in addition to the regime of criminal penalties. It was the ALRC's view that as well as narrowing the application of the criminal law, and thereby increasing its impact, introducing civil penalties to Pt V would increase the range of responses available to the Trade Practices Commission (as it then was) and thereby improve its ability to enforce the *Trade Practices Act*. The ALRC stated that in terms of the 'pyramid of enforcement' model, criminal liability should form the peak of the pyramid—reserved for the most serious transgressions.¹

Wider range of penalties

The ALRC noted that the *Trade Practices Act* (at that time) provided only for monetary penalties. The ALRC concluded that the purposes of the Act could be achieved more effectively if a wider range of penalties were available.²

The ALRC noted the significant limitations of monetary penalties as a sanction against corporations. While stating that monetary penalties should continue to play a useful and major role as a sanction against corporations that contravene the *Trade Practices Act*, the ALRC found that the range of sanctions available under the Act was inadequate. It was the ALRC's view that the court should have available to it a range of sanctions that is sufficiently flexible to cope with relatively minor contraventions as well as extremely serious offences. The ALRC recommended that the *Trade Practices Act* should be amended to provide for corporate probation and certain probationary conditions (including that the corporation develop and submit to the court a program to prevent and detect contraventions of the Act), corporate community service orders and adverse publicity orders.

The ALRC also recommended that the range of civil penalties available against individuals who have contravened the *Trade Practices Act* should be expanded to include probation, community service orders and adverse publicity orders.

Principled Regulation

In January 2000, the federal Attorney-General asked the ALRC to review Commonwealth laws and arrangements relating to the imposition of administrative and civil penalties with a view to identifying clear and consistent principles, and ensuring there is a fair, effective and practical system of decision making and enforcement.

A Discussion Paper, *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction* (DP 65), was published in May 2002. The final report *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95) (available online at <www.austlii.edu.au/au/other/alrc/publications/reports/95/>) was tabled in federal Parliament on 19 March 2003.

¹ ALRC 68, Ch 9.

² ALRC 68, Ch 10.

As a fundamental principle, the ALRC stated that the distinction between criminal and non-criminal (civil) penalty law and procedure is significant and adds to the depth and subtlety of regulatory law. The ALRC concluded that this distinction should be maintained and, where necessary, reinforced. It was the ALRC's view that Parliament should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal.³

A Regulatory Contraventions Statute

The ALRC found that government regulation, and the penalties schemes used to reinforce it, cannot be generated from a single mould but must be adapted to meet the particular demands and communities which each scheme seeks to regulate. Therefore, the ALRC did not recommend rigid uniformity across the various penalty schemes. Instead, the ALRC sought to introduce a greater degree of consistency across the various regulatory schemes by recommending the enactment of a Regulatory Contraventions Statute of general application. Although intended to provide a consistent basis of certain fundamental provisions relating to regulatory law, the demands of a particular regulatory or penalty scheme would entitle Parliament to diverge from the default provisions contained in the Regulatory Contraventions Statute.⁴

Other recommendations in ALRC 95 cover: the principles to be set out in proposed Regulatory Contraventions Statute, including principles relating to corporate responsibility; the liability of corporate officers; leniency and immunity; the privilege against self-incrimination; and legal professional privilege. A number of the recommendations are also directed at administrative remedies and quasi-penalties (which may include banning orders).

Double jeopardy

The SOCA Discussion Paper raises the issue of double jeopardy and choice of penalty in relation to parallel (criminal and civil) penalty regimes. These issues were addressed in Chapter 11 of ALRC 95. The ALRC recommended that the Regulatory Contraventions Statute should provide that:

- When the same physical elements can attract both a civil penalty and criminal liability, the physical and fault elements of both the contravention attracting a civil penalty and the criminal offence should be clearly distinguished in the legislation.⁵
- Any legislative provisions resulting in exposure to parallel criminal proceedings and civil penalty proceedings for the same, or substantially the same, conduct also should provide that:
 - civil penalty proceedings against a person must be stayed if criminal proceedings are or have been commenced against that person for a criminal offence constituted by conduct that is the same, or substantially the same, as the conduct alleged to constitute the civil penalty contravention;
 - no (or nor further) civil penalty proceedings may be taken against a person if that person has been convicted of a criminal offence constituted by conduct that is the

³ ALRC 95, Ch 3.

⁴ ALRC 95, Ch 6.

⁵ ALRC 95, Rec 11-1.

same or substantially the same as the conduct alleged to constitute the civil penalty contravention; and

- if the person is not convicted of that criminal offence, civil penalty proceedings may be instigated or resumed.⁶
- Any legislation that provides for criminal proceedings and civil penalty proceedings for the same or substantially the same conduct also should specify that evidence of information given or documents produced by a person is not admissible in criminal proceedings against the person if the person gave the evidence or produced the documents in civil penalty proceedings.⁷
- Where conduct constitutes a contravention of two or more provisions of legislation that would attract a civil penalty, a person should not be liable for more than one civil penalty in respect of the same or substantially the same conduct.⁸

The ALRC also recommended that regulators should develop and publish guidelines in relation to criminal and civil penalty proceedings for the same or substantially the same conduct that address issues of choice of proceedings, multiple penalties, and limits on the use of evidence.⁹

A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers

Principled Regulation is still under consideration by the Australian Government. However, the report has already had an influence on some developments. In April 2004, the Attorney-General's Department published on its website *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (available online at <www.ag.gov.au>). The Guide is a resource to assist in the framing of proposed criminal offences, civil penalties and certain other enforcement provisions that are intended to become part of Commonwealth law. Many of the provisions in the Guide are based on principles discussed and developed in ALRC 95, and in many circumstances the Guide refers users directly to ALRC 95 (while noting that a formal government response to the report is still in preparation).

As noted above, ALRC 68 and ALRC 95 are accessible online. However, for ease of use, I have *enclosed* a copy of the reports in CD-rom format.

Please do not hesitate to contact me if you have any questions or require any further information about the ALRC's findings and recommendations in this area.

Yours sincerely



Enclosure

⁶ This Recommendation was not intended to restrict the ability of a regulator to seek compensation orders, disqualification orders or preservation orders: ALRC 95, Rec 11-2.

⁷ ALRC 95, Rec 11-3.

⁸ ALRC 95, Rec 11-4.

⁹ ALRC 95, Rec 11-5.