> port points out that there is no serious suggestion that directors should not be accountable for irresponsible behaviour, particularly where it affects creditors of a company. The recommendations in this area would impose a positive statutory duty on a director not to permit a company to engage in trading when the company is insolvent. If the duty is breached, each director would be liable, without limitation, for the unpaid debts of the company incurred from the time when it would have been reasonably apparent that the company was unable to pay its debts.

The Commission's recommendations relating to the liability of directors was supported in an editorial comment in the *Australian Financial Review* (*AFR*) (16 December 1988).

> If the Commission's recommendations cause honest directors to err on the side of caution, some potentially strong companies may well be wound up in insolvency earlier than might be the case at present.
>
> However, this seems a small price to pay for discouraging company promoters from playing fast and loose with other people's money, safe in the knowledge that their own wealth is tucked away neatly behind the corporate veil.

bankruptcy. In the area of personal insolvency or bankruptcy, the ALRC expressed its concern at the increased numbers of persons who become 'voluntarily' bankrupt. The increased numbers is partly a product of the general availability of credit, sometimes combined with economic factors affecting the community such as inflation, interest rates and unemployment. There is little that an insolvency law can or should do to prevent this. However, the ALRC considered that changes to the law are necessary to take account of the credit economy.

The changes include

- provision for a debts payment plan as an alternative form of administration to bankruptcy (which would enable a person with a debt problem to effect a simple and inexpensive form of composition with creditors)
- where a person seeks voluntary bankruptcy as the cure to financial problems, advice be first obtained as to the alternatives available to the person and
- a new form of discharge from bankruptcy for many of those who do become bankrupt and whose financial affairs do not warrant an extended period of bankruptcy based on the issue of a certificate by the trustee declaring that the person is eligible for discharge.

the form of insolvency legislation. The ALRC's recommendations are not directly affected by the continued uncertainty and debate over proposed exclusive federal administration and responsibility for corporate laws. Whether the future administration of corporate law remains largely as it is or is taken over exclusively by the Commonwealth, the recommendations can be adapted either way. If, however, that administration is in some way fragmented between the Commonwealth and the States (such that the Commonwealth has responsibility for 'public' companies and the States and Territories for 'private' companies), the ALRC recommended national insolvency legislation to cover all forms of corporate insolvency. These issues aside, the recommendations urge that, so far as is possible, the law relating to bankruptcy and corporate insolvency be more uniform.

availability of report The two volume report and a summary may be purchased from Australian Government Bookshops.

* * *

class actions

> Oh world, no world, but mass of public wrongs.
>
> Thomas Kyd, *Spanish Tragedy*, 1602

report tabled. The ALRC's class actions report was tabled in federal Parliament on 13 December 1988. The report, *Grouped Proceedings in the Federal Court*, recommends changes to the law to allow individuals or businesses who have similar or related claims against the same respondent to group their claims together in one proceeding.

aim of reforms. The reforms are designed to help individuals and businesses who suffer significant but relatively small loss to obtain access to the courts. At present those suffering loss of, say, $1000 are discouraged from claiming compensation because of the high cost of legal proceedings. The reforms allow the costs of the proceedings to be shared among all those who have sufferred loss so that they can all obtain any compensation to which the law says they are entitled. The reforms also allow claims for larger amounts to be grouped together so that common questions can be determined at the same time. This promotes efficiency in the administration of justice.

no change to legal liability. The report does not contain any recommendations to extend the legal liability of businesses or others. The changes relate to the procedural, not the substantive law. But because these procedural changes will make existing rights less expensive to enforce, those unlawfully causing loss of, say, $1000 to 500 people will be less likely to escape liability.

class actions in australia and overseas. There are two features of the Commission's proposals, and of most other class action procedures, which set them apart from other procedures involving multiple parties such as joinder or representative actions:

- they may include claims for damages, the amount of which may vary from person to person
- proceedings can be commenced without the need to identify or obtain the consent of each member of the group, but group members may opt out of the proceedings on receiving notice if they do not wish to be included.

Class actions incorporating both these features are already available in South Australia as a result of new rules introduced at the beginning of 1987. Class actions are also available in the US and in the Canadian province of Quebec.

The traditional representative proceedings rule, which is available in most Australian jurisdictions, allows one person to commence proceedings on behalf of numerous persons who have the same interest in the proceedings. This rule has been interpreted by the courts to be limited to cases where the relief sought is an injunction or declaration. It cannot be used to claim damages. Other multiple party procedures (such as joinder and consolidation) permit damages to be claimed but require the consent of the parties in most cases. There is currently no procedure in federal jurisdiction under which proceedings claiming damages can be brought on behalf of a class or group individuals or businesses.

examples. There are a number of instances where the proposed grouping procedure would be useful:

- *Losses by cruise passengers.* An attempt was made to bring representative proceedings for 83 passengers on a cruise ship who suffered injury and lost baggage when the ship sank. The Supreme Court (NSW) decided that a representative proceeding could not be used to claim damages. Individual claims would be needed.
- *Camera goes out of production.* A leading camera manufacturer marketed a brand of instant camera over a number of years. It announced that it would no longer produce film for its instant cameras, an action which rendered the camera useless. The Trade Practices Act gives customers a right to recover in such cases. Under existing procedures the costs of bringing litigation for the recovery of loss incurred in such cir-

cumstances would clearly outweigh the amount to be recovered in respect of any individual claim.

- *Advertisement by credit union.* A pamphlet was distributed by a large credit union advertising insurance for people entering into personal loans. It suggested that loan payments would be covered by insurance in the event of sickness or injury for as long as any disability lasted. A number of individuals who had obtained loans in response to the advertisement were unable to meet their payments due to illness. It was discovered, however, that their insurance cover only applied if they were totally or permanently incapacitated. Proceedings were instituted by the credit union for the recovery of money owing. The defendants concerned alleged that they had been misled to believe that the insurance would cover them in the event of partial incapacity. Separate proceedings have been necessary in respect of each individual affected to determine whether the representation was misleading or deceptive. In each case separate applications, statements of claim, requests and replies in relation to further particulars, lists of documents on discovery and other procedural steps have been required. The costs involved in such duplication could have been reduced if the claims could have been run as one proceeding.

protection against abuse. The recommended scheme has a number of provisions which ensure that it will be cost effective and that there will be little, if any, scope for trivial claims or blackmail suits.

- *Cost effectiveness.* Where the claims are divergent or complex, the overall costs to the parties and to the administration of justice may be more than the combined cost of separate proceedings. Where the court is unable to deal with grouped claims economically as compared with individual proceedings, the proceedings can be separated. Each member of the group would then become responsible for conducting his or her own claim.

- *Impracticability of distribution.* If the costs that the respondent would have to bear in relation to identifying group members and distributing to them any monetary relief would be excessive having regard to the total amount in issue, the proceedings should not be grouped. To preserve the right of individual group members to conduct or to bring their own proceedings, the court should be able to separate, stay or dismiss any of the proceedings without prejudice to any further claim by group members.

- *Blackmail actions.* There will be little scope to commence proceedings without merit in the hope of forcing a settlement. First, the court can dismiss the proceedings if they are frivolous, vexatious or an abuse of process. Secondly, the general rule that the loser pays the winner's costs, which the ALRC recommends not be changed, means that the person commencing the proceedings on behalf of others (the principal applicant) will be liable for costs if the case fails. These costs would be higher than for individual proceedings. Consequently, there would be a stronger disincentive to the commencement of blackmail suits than is the case for individual proceedings.

costs. Retention of the existing costs rule for grouped proceedings means that, in most cases, a principal applicant will be better off bringing individual proceedings where the amount at stake is high enough to justify them. In order to overcome the costs disincentives of bringing grouped proceedings so that the benefits of access to the court and judicial efficiency can be obtained, the ALRC recommended that special costs agreements between claimants and solicitors be permitted subject to the court's approval. Such agreements could provide for

- costs to be shared among the members of the group and deducted from compensation when received
- no costs to be paid if the case is lost and for costs to be assessed at a special rate (but not as a percentage of any award) if the case is successful.

scope of the proposals. The ALRC's report relates only to proceedings in the Federal Court and covers

- actions under federal laws including the Trade Practices Act, administrative law Acts and Acts covering industrial and intellectual property
- proceedings against the Commonwealth and
- matters under the laws of the Australian Capital Territory.

The report is available from Australian Government Publishing Service bookshops.

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deregulate or perish?

Work is the curse of the drinking classes.

Mike Romanoff

The Victorian Law Reform Commission (VLRC) and the Victorian Regulation Review Unit (RRU) have produced the second of a series of reports in a 'rolling' reference on regulatory laws. The report's purpose is set out in its title, *Principles of Occupational Regulation.* It sets out a series of principles which, it recommends, should be applied in every case where any form of occupational regulation is proposed.

occupational regulation defined. Occupational regulation is complex. It may operate at a number of different levels. It has a number of different functions, including protection of the public by establishing standards which must be met by those seeking to provide different types of services, and the maintenance of a monopoly of services by particular groups. The report identifies 166 different occupational groups who are subject to some form of occupational regulation in Victoria, from abbatoirs and meat inspectors to zoologists, barriesters, chicken sexers and sheep skin buyers.

costs and benefits. The report identifies the major cost of occupational regulation as a reduction in competition. This provides a benefit to the members of the occupational group at the expense of the public. However, there are four major types of public benefit which flow from occupational regulation:

- protection of public health and safety
- protection against financial risks (especially in the case of those occupations entrusted with money belonging to others)
- provision of information to the public, enabling informed choices
- prevention of criminal activity.

The report acknowleges that all activities in society involve risks, and that nothing will eliminate risks entirely. It concludes that some occupational regulation is necessary. But before any scheme is introduced, it should be justified by those who propose it. In addition, all schemes of occupational regulation should be subject to periodic review, so that no regulatory scheme is retained when it is no longer justified.

main recommendations. Among the main recommendations in the report are:

- The Victorian Government should adopt the principles set out in the report, and require agencies proposing occupational regulation to complete a standard questionnaire, attached to the report, to assess whether regulation is justified.
- Administrative responsibility for government controls should not normally be given to the occupational groups which are subject to regulation.