# Forum

## Reforming court processes

*The following commentary was presented by Commissioner Sitesh Bhojani at an Australian Institute of Judicial Administration (AIJA) conference on the reform of court rules and procedures in criminal and civil law enforcement cases.*

*Held in Brisbane on 3–4 July 1998, the conference was proposed following concerns expressed at Heads of Commonwealth Law Enforcement Agencies about delays in major litigation. The AIJA was subsequently asked to develop a proposal to conduct the conference.*

*The purpose of the conference was to consider Federal and State court rules and procedures, and to discuss the difficulties experienced by regulatory and prosecuting agencies, legal practitioners and the courts with a view to improving the handling and disposition of cases at all stages of the litigation process. The conference was attended by judges, legal practitioners, court administrators, legal academics, and representatives of regulatory and prosecution agencies, government departments and legal aid commissioners.*

## Introduction

Is the effective enforcement of the Trade Practices Act through, inter alia, civil and criminal proceedings, being achieved? The aim of this paper is to discuss whether a change in the practice and procedure through the court's rules could enhance the effective enforcement of the Act.

### Act and Commission objectives

The object of the Act is set out by Parliament in s. 2 as follows:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The Commission, in so far as its role requires it to achieve compliance by business with the provisions of the Act, pursues that role by numerous means. These include preparation of generic compliance materials such as the *Best and Fairest* training program; presentations at various business, industry and community seminars or conferences to assist the business community and public at large to better understand their rights and obligations under the Act; and its enforcement activities as provided for under the Act.

Its enforcement activities range from administrative resolution of specific complaints (including the acceptance of court enforceable undertakings), civil proceedings (including proceedings for the recovery of civil penalties for breaches of Part IV of the Act) and criminal prosecutions for offences under Part V.

In pursuing its enforcement activities the Commission has the following objectives:

- to stop the unlawful conduct;
- restitution/compensation for the victim;
- prevent and/or deter future breaches of the Act (either a repetition by the current offender or by others who might be minded to offend); and/or
- punishment (arguably through civil penalty proceedings for Part IV breaches as well as

through the criminal prosecutions for Part V offences).[1]

## Statistical overview of litigation under the Act

The statistical overview listed below of cases brought under the Act over the previous decade highlights the fact that few cases are brought under the criminal provisions. Although the majority of criminal offences under Federal law are prosecuted through the State court system,[2] Parliament clearly intended the Federal Court to be the appropriate court to deal with criminal offences under the Act. This is outlined in s. 163 of the Act, which states that:

> 163(1) Prosecutions for offences against this Act shall be brought only in the Court.
>
> 163(2) Jurisdiction is conferred on the Court to hear and determine prosecutions under this Act.

Section 4 of the Act states that 'the Court means the Federal Court of Australia'. It is arguable that the lack of comprehensive Federal Court rules in relation to criminal matters is one contributing factor to the paucity of cases.

Order 49 of the Federal Court rules sets out the means of instituting proceedings for an offence in the Federal Court. Other than providing some guidance as to the initiating process and requiring that any evidence to assist the Court in determining the appropriate fine shall be by way of affidavit, the rules do not provide any further guidance on the procedure to be followed in prosecuting criminal offences. Presumably, one has to fall back on rules for civil proceedings in the Federal Court. The question therefore arises whether these are appropriate or need to be modified for criminal proceedings. In particular, is the effective pursuit of the parliamentary intention of providing for injunctions with criminal prosecutions (s. 79(4) of the Act) and/or findings of fact for use in subsequent proceedings (s. 83 of the Act) assisted by the current rules?

## Concluded ACCC court actions since 1991

| Year | Part IV civil proceedings | Part IVA/ Part V civil proceedings | Part V criminal proceedings | Total |
|---|---|---|---|---|
| current* | 14 | 17 | 2 | 33 |
| 1997–98 | 6 | 13 | 2 | 21 |
| 1996–97 | 18 | 25 | 7 | 50 |
| 1995–96 | 5 | 2 | 0 | 7 |
| 1994–95 | 10 | 6 | 3 | 19 |
| 1993–94 | 7 | 10 | 5 | 22 |
| 1992–93 | 3 | 8 | 3 | 14 |
| 1991–92 | 3 | 4 | 1 | 8 |

Compiled principally from ACCC and TPC Annual Reports
* as at 30 April 98

1 There is a degree of uncertainty in the current state of authority as to whether punishment is one of the purposes for the imposition of pecuniary penalties for breaches of Part IV of the Act. See *TPC v CSR Ltd (1991)* 13 ATPR 41-076; *NW Frozen Foods Pty Ltd v ACCC* (1997) ATPR 41-546 at p43,585 per Burchett & Kiefel JJ but compare Carr J at p43,587; Goldberg J in *ACCC v Australian Safeway Stores P/L* (1997) ATPR 41-562 at 43,811; Mansfield J in *ACCC v Alice Car & Truck Rentals P/L* (1997) 19 ATPR 41-582; and Heerey J in *ACCC v J McPhee and Sons P/L* (1997) 19 ATPR 41-570.

2 Refer Part X, *Judiciary Act 1903*.

# Injunctions under the Act

In criminal prosecutions brought under Part V of the Act, the Court has the power to grant an injunction in relation to the conduct that constitutes the contravention. Despite this power to grant injunctions there have been few injunctions granted in the past. There is, furthermore, a degree of uncertainty as to how the Federal Court would approach this issue if confronted by it.

The problem with injunctions would appear to arise from the fact that equity has held that an injunction is not available in criminal proceedings. The reason for this limitation is that conduct should not be prohibited in the criminal sense unless the accused has been afforded the full protection of the criminal law, including the criminal burden of proof. This is a potential problem area for the Commission in those cases where it decides to commence criminal proceedings, particularly given the Commission's objectives as set out earlier.

Section 79(4) of the Act is designed to overcome some of the equitable restraints. It states:

> In proceedings under this section against a person for contravening Part V, the Court may;
>
> (a) grant an injunction under section 80 against the person in relation to;
>
> (i) the conduct that constitutes, or is alleged to constitute, the contravention
>
> (ii) other conduct of that kind; or
>
> (b) make an order under s. 80A in relation to the contravention.

It is the dual nature of the Commission's action which may lead to some problems. The Commission in criminal prosecution will seek not only to ensure that the action is stopped but in some cases also seek punishment. The full extent of s. 79(4) remains unclear. The question which arises is whether the Commission is entitled to achieve its objective of stopping the conduct: (a) when prosecution is contemplated, or (b) when a prosecution has commenced? This is highlighted by Heydon in *Trade Practices Law* Volume 2 at 18.660 where he states that 'the phrase "is alleged to constitute" raises the question of whether an injunction may be granted even though the defendant is acquitted of the allegations. It is, therefore, theoretically possible that the prosecution might fail to establish its case beyond a reasonable doubt but succeed in doing so on the balance of probabilities'.

Parliament clearly intended for s. 79(4) to overcome the equitable limitations as is reflected by the Trade Practices Revision Bill 1986 Explanatory Memorandum which states:

> The Federal Court Rules do not permit the joining of a criminal action with an action for a civil remedy (such as an injunction or corrective advertising order). At present, the Trade Practices Commission, in proceedings against a person for a contravention of Part V, cannot seek injunctions at the same time to restrain the person from engaging in the offending conduct. A new sub-s. (4) is therefore being inserted to allow the Court to grant an injunction or make a corrective advertising order in addition to imposing a fine on the person in the prosecution proceedings.

How the Federal Court will interpret s. 79(4) remains unclear at this stage but it would appear likely that it would construe the provisions broadly as is reflected by Gummow J in *ICI Australia Operations Pty Ltd v TPC* (1992) ATPR 41-185 at 40,532 where His Honour noted that:

> subsection 79(4) makes it plain that an injunction may be granted under s. 80 in proceedings in which convictions are sought in respect of contraventions of certain provisions of Part V, a notable departure from the traditional attitude to the use of injunctions in aid of the criminal law.

It must, however, be noted that the question remains as to how widely the Federal Court is willing to interpret s. 79(4) as His Honour refers to 'certain provisions' of Part V without enumerating which provisions will be covered. Furthermore, His Honour's statements are *obiter dicta* as ICI Australia was a case dealing with s. 48 of the Act and so it could be said that its precedent value may be limited in relation to prosecutions under Part V.

It is, however, anticipated that the courts may adopt a broad interpretation of s. 79(4) consistent with the approach reflected in Justice Lockhart's statement (in the ICI case) where His Honour states at 40,524, albeit with regard to s. 80, that:

> In my opinion sub-ss (4) and (5) are designed to ensure that once the condition precedent to the

exercise of injunctive relief has been satisfied, the Court should be given the widest possible injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly.

The Commission, in conjunction with the Director of Public Prosecutions (DPP) is looking to test the law in relation to injunctions in aid of criminal prosecutions under the Act with an appropriate test case notwithstanding the current uncertainty in relation to the procedural aspects of such proceedings.

## Findings of fact under the Act

Parliament has endeavoured to provide through s. 83 of the Act a mechanism to enable a person to utilise in subsequent legal proceedings a finding of fact made by the Court, *inter alia*, in proceedings for an offence under s. 79 (where the person prosecuted is found to have contravened a provision of Part V of the Act). The 'production of a document under the seal of the Court' becomes *prima facie* evidence of that fact in the subsequent proceedings. The most common subsequent proceedings would be private litigation for damages.

Given the contemporary issues of access to justice and cost of justice for private litigants and the courts' desire to minimise the length and extent of litigation wherever possible, it is suggested that rules which readily facilitate such findings of fact being made by the Federal Court in criminal proceedings may prove to be an effective reform. As with injunctions in aid of criminal proceedings the Commission, in conjunction with the DPP, is looking to clarify the position of findings of fact for the purposes of s. 83 of the Act in an appropriate test case criminal prosecution for breach of Part V.

## Negotiated penalty cases

From as early as 1981, but more particularly since 1994, Australian and New Zealand courts have expressed a willingness to accept negotiated penalty submissions in civil proceedings for the recovery of pecuniary penalties.[3] In issues of competition law enforcement, this has normally involved the Commission coming to an arrangement with the defendant parties on a penalty. The penalty is negotiated with the relevant defendant by consideration of the factors relevant to assessment of penalty as set out in the statute (s. 76 of the Act) and also as enunciated by the Court in prior cases (e.g. see summary of relevant factors collated by French J in *TPC v CSR Ltd* (1991) ATPR 41-076). This agreement on penalty and all the relevant factual circumstances on which it is based are then submitted to the Federal Court for adjudication to decide upon the actual penalty to be imposed by the Court. This development was judicially discussed in *NW Frozen Foods v ACCC* (1997) ATPR 41-546 where Burchett and Kiefel JJ accepted the notion that joint submissions by both the Commission and the respondent as to the appropriate level of penalty may be presented to the court in agreed statements. Burchett and Kiefel JJ went on to say:

3 *TPC v Allied Mills Industries Pty Ltd and others* (1981) 37 ALR 256 [24 September 1981]; *Commerce Commission v New Zealand Milk Corporation Ltd & Ors* (1994) 2 NZLR 730 [29 April 1994]; *TPC v Hymix Industries Pty Ltd (Trading as Hymix Concrete Queensland) & Ors* (1995) ATPR 41-369 [25 August 1994]; *TPC v Simsmetal Ltd & Ors* (1996) ATPR 41-449 [9 November 1994]; *TPC v Amatek Ltd (Trading as Rocla Concrete)* (Unreported Decision, Lockhart J, Sydney, Delivered 24 November 1994) *TPC v CC (NSW) Pty Ltd* (1994) ATPR 41-363 [24 November 1994]; *TPC v Axive Pty Ltd* (1994) ATPR 41-368 [15 December 1994]; *TPC v TNT Australia Pty Ltd & Ors* (1995) ATPR 41-375 [31 January 1995]; *TPC v CC (NSW) Pty Ltd* (No.2) (1995) ATPR 41-406 [5 May 1995]; *TPC v CC (NSW) Pty Ltd* (No.3) (1995) ATPR 41-415 [5 May 1995]; *TPC v CC (NSW) Pty Ltd* (No.6) (1995) ATPR 41-431 [8 September 1995]; *ACCC v Pioneer Concrete (Qld) Pty Ltd* (1996) ATPR 41-457 [4 December 1995]; *ACCC v Monier Roofing Ltd & Ors* (1996) ATPR 41-464 [4 December 1995]; *Commission v Hymix Industries Pty Ltd & Anor* (1996) ATPR 41-465 [4 December 1995]; *ACCC v Ampol Petroleum (Vic) Pty Ltd & Ors* (1996) ATPR 41-469 [12 March 1996]; *ACCC v Ampol Petroleum (Vic) Pty Ltd & Ors* (1996) ATPR 41-500 [17 May 1996]; *ACCC v Hugo Boss Australia Pty Ltd* (1996) ATPR 41-536 [25 July 1996]; *ACCC v Jaycee Rectification and Building Services Pty Ltd* (1996) ATPR 41-539 [30 September 1996]; *ACCC v NW FrozenFoods Pty Ltd & Ors* (1996) ATPR 41-515 [25 July 1996]; *NW Frozen Foods Pty Ltd & Ors v ACCC* (1997) ATPR 41-546 [20 December 1996]; *ACCC v Alice Car & Truck Rentals Pty Ltd & Ors* (1997) ATPR 41-582 [12 August 1997]; *ACCC v Foamlite (Australia) Pty Ltd & Ors* (1998) ATPR 41-615 [12 December 1997].

> Because the fixing of the quantum of a penalty cannot be an exact science, the court, in such a case, does not ask whether it would without the aid of the parties have arrived at the precise figure they have proposed, but rather whether their proposal can be accepted as fixing an appropriate amount. (at 43,580)

Justices Burchett and Kiefel in *NW Frozen Foods* identified an important 'public policy' aspect to the negotiated penalty process. Their Honours stated:

> When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that await their attention. At the same time, a negotiated resolution in the instant case may be expected to include measures designed to promote, for the future, vigorous competition in the particular market concerned. (at 43,580)[4]

In practice, agreements between the Commission and defendant parties on appropriate penalties and other relief to be put before the court for the court's adjudication have been struck at various stages of the litigation process. In some instances defendant parties have been keen to reach such agreements before any formal proceedings have been instituted by the Commission. The benefit to proposed defendant parties in reaching an agreement at such a stage appears to be at least twofold: first, to maximise the benefit to the party in terms of discount from the normal penalty for cooperation with the authorities and the court; second, to minimise the extent and period of publicity such contraventions will inevitably produce.

No formal rules of court appear to contemplate a process where the parties are seeking the first return date of a matter to also be the final hearing of the matter. That can occur if the court accepts the material filed by the parties — namely, the submissions on the relevant law and factual circumstances, the detailed factual material on which the court can be satisfied that the alleged contravention(s) have occurred, the parties' agreement on penalties to be imposed and the other relief to be granted, and the factual material relevant to the agreement between the parties.

However, the Federal Court has been very flexible in accommodating such matters. In particular, the Court appears to have been astute in recognising the public interest in the speedy resolution of such quasi-criminal matters. In most such cases, the matters are listed for the first time when a Judge has had an opportunity to consider the material filed by the parties and has adequate time to hear the matter as a final hearing notwithstanding that it is the first time that the matter is before the Court.

The Commission regards the negotiated penalty developments as a very positive step by the judiciary. The scope to extend it to criminal proceedings under the Act and elsewhere may warrant serious consideration. The Court has also identified the importance to the defendants of the negotiated penalty process. In *NW Frozen Foods*, Burchett and Kiefel JJ said:

These beneficial consequences [of a negotiated resolution] would be jeopardised if corporations were to conclude that proper settlements were clouded by unpredictable risks. A proper figure is one within the permissible range in all the circumstances. (at 43,580)

## Mediation

In view of the fact that the Court has accepted the negotiated penalty process, there may be a role for mediation where the parties are inclined to go down the negotiated penalty path. The mediator's role in these proceedings would be to take into account similar issues which the Court would take into account in viewing a negotiated penalty matter and assist the parties in reaching an agreement on the various issues to then put before the Court for adjudication.

## Part IVA Federal Court Act — representative actions

A highly efficient way that the Commission fulfils the objects under s. 2 of the Trade Practices Act is by taking an active part in a range of representative actions. The Commission holds a unique position in these representative actions as its presence in them is as a result of being an accountable public authority fulfilling a role defined by Parliament.

4 See also *TPC v Allied Mills Industries Pty Ltd* (No.4) (1981) 37 ALR 256; *TPC v TNT Pty Ltd* (1995) ATPR 41-375; *ACCC v Pioneer Concrete (Qld) Pty Ltd* (1996) ATPR 41-457.

This stands in contrast to private litigants who are seeking personal compensation in the action and do not have a wider community interest. The courts have also accepted the view that the Commission has a public interest in these proceedings.

Part VA of the *Federal Court of Australia Act 1976* sets out the provisions on who can participate in a representative action. Section 33C of the Act states:

> 33C(1) Subject to this Part, where:
>
> (a) 7 or more persons have claims against the same person; and
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all those persons give rise to a substantial common issue of law or fact;
>
> a proceeding may be commenced by one or more of those persons as representing some or all of them.

One area of contention has been whether or not the Commission has standing in representative proceedings. The Federal Court has adopted a flexible approach and held that the Commission does have a role in these proceedings.

Justice Branson of the Federal Court in *ACCC v Chats House Investments* (1996) 142 ALR 177 accepted the argument put by the Commission that Part IVA of the Federal Court Act authorised the bringing of representative proceedings by the Commission despite the fact that it was not directly subject to the unlawful conduct in the matter. Section 33D(1) provides:

> A person referred to in paragraph 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons referred to in that paragraph.

It was held by Justice Branson that as long as the interests, although not identical, arose out of the same or similar circumstances, then that was enough for a representative action.

According to Justice Branson, the interests that the Commission served were public interests, to do with the enforcement of the Trade Practices Act. Furthermore, Her Honour held that it was clear that the Commission had sufficient interest to commence a representative proceeding against the respondent on behalf of the other group members. Justice Branson concluded that there was nothing in Part IVA of the Federal Court Act that prevented the Commission from bringing a representative proceeding.

Section 87(1B) of the Trade Practices Act authorises the Commission to bring representative actions. Justice Branson went on to ask whether the terms of s. 87(1B) compelled the reading down of Part IVA of the Federal Court Act so as to require a proceeding by the Commission to be brought under s. 87(1B). Justice Branson held that there was nothing to suggest that the legislature intended Part IVA of the Federal Court Act to be read down by reason of an existing provision such as s. 87(1B).

The Commission's interest in bringing representative proceedings has been further clarified in another case. In *ACCC v Golden Sphere International Inc and Ors* (unreported decision in matter QG 153 of 1996, Justice O'Loughlin, delivered in Adelaide on 1 June 1998 (heard in Brisbane)) the Commission's standing to bring representative proceedings under Part IVA of the Federal Court Act was challenged. As well as following the reasoning of Branson J in *Chats House*, O'Loughlin J said:

> The claim that there is a need to establish what has been described as some measure of 'commonality' does not stand up when one reflects upon the language of the Federal Court Act and the subpar 33C(2)(a)(iv) in particular: that is the provision that expressly states that a representative proceeding may be commenced whether or not the relief sought is the same for each person. The fact that two or more members of the group may be seeking different relief highlights the probability that there will be differences ... In that sense it can be said that there is a common interest pervading the claims of the Commission and the group members but that common interest does not and need not extend to the relief that is sought. (pp. 33–4)

*Golden Sphere* was a case involving a pyramid selling scheme with somewhere around 11 000 members of the public affected by the conduct. With effective use of case management principles and a reasonably flexible approach by the Court to the assessment of damages, an aggregate amount of damages in the sum of $550 000 was awarded. The Court's approach to the assessment of damages for the purposes

of Part IVA of the Federal Court Act proceedings can be seen from the following comments by O'Loughlin J:

> As will become apparent, the amount of damages that I propose to award will be *an aggregate amount without specifying amounts awarded in respect of individual group members* but I remain satisfied that the calculations that have been made by the Commission (as amended by me for the reasons hereinafter set out) constitute *a reasonably accurate assessment* of the *total amount to which group members will be entitled under the judgment*. The word 'assessment' used in the phrase 'assessment of damages' imports an element of judicial discretion: assessing damages is not the application of mathematical formulae. When it is qualified by the words 'reasonably accurate' it can be said, with confidence, that the judicial discretion has been widely extended. I am satisfied that the legislature has intended that the practical application of the provisions of Part IVA of the Federal Court Act is not to be read down through any evidentiary inability to identify every member of the group and the relevant amount of damage that each member has or may have suffered. (at p. 37, original emphasis)

### Interim and interlocutory orders

Interim and interlocutory orders form a critical component in some of the Commission's cases and the Commission has sought and succeeded in obtaining both Anton Piller orders and Mareva Injunctions. In matters where there is a high risk that assets would be dissipated the Commission will seek orders from the court to ensure that the assets are preserved until the court has an opportunity to hear the matter. The High Court in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 highlighted the limited nature and scope of the Mareva Injunction (see also Lord Denning in *Rahman (Prince Abdul) v Abu-Taha* (1980) 1 WLR 1268). The High Court noted that it does not exist to create additional rights for the plaintiff, but to enable a court to protect its processes from abuse in relation to the enforcement of its orders.

An important delineation that needs to be drawn is between reactive and pro-active interlocutory measures. In the past, Anton Piller orders have been used only as a reactive measure. When the Commission received information that business records were being removed from the business's premises, from the accountants' premises or the solicitors' premises, it would seek an Anton Piller order to ensure that the evidence was preserved. However, it now seems that courts are increasingly willing to allow *ex parte* orders sought at the time of filing of proceedings that prevent records from being removed from the premises. The reason behind this is to avoid subsequent reliance on Anton Piller orders at a stage when the evidence has already been destroyed.

The Commission is acutely aware of the impact that an Anton Piller order or a Mareva Injunction has upon a business. A Mareva Injunction may have a detrimental impact upon the relationship with the respondent and his/her bank which may also impact upon the respondent's credit rating. Similarly, an Anton Piller order may have a serious impact upon the running of a business. Consequently the Commission will seek these orders only in cases where it is of the view that serious damage will occur if the orders are not in place. The Commission does not wish to see any businesses cease trading as a result of interlocutory or interim orders it obtains. Such an objective would seem to be contrary to the overall object of the Act and the Commission's aims in pursuing enforcement activities to secure compliance with it.

The Commission would normally be interested in obtaining interim orders for a limited period only in order for the parties to be able to provide a proper undertaking to the Court ensuring that the assets are not dissipated.

## Conclusion

The development of cost effective solutions in civil cases, such as the negotiated penalties process and various interim and interlocutory orders, as well as the effective use of case management techniques have improved the effective and efficient enforcement of civil proceedings under the Act. The scope to improve and develop the efficient and effective use of criminal prosecutions under the Act remains a challenge.

The main challenges arising from criminal matters under the Act which should be highlighted at this stage are:

- the need for Federal Court rules to deal with criminal matters as well as civil matters;

- the need for an appropriate mechanism to enable findings of fact made by the Federal Court in prosecutions for offences of Part V of the Act to be readily used in subsequent proceedings as *prima facie* evidence as contemplated by s. 83 of the Act; and
- the current degree of uncertainty in combining certain forms of civil remedies such as injunctions with criminal prosecutions.

The Commission is of the view that the beneficial developments that have occurred in civil cases could also be carried across to criminal matters. It is hoped that this conference will be able to develop some suggestions which will assist in the efficient running of criminal matters under the Act in the Federal Court.

Finally, it should be noted (although the debate is more appropriate for a different forum) that another policy dimension may require serious consideration. That is the appropriateness of converting the consequences of breaches of Part V of the Act — which are currently criminal offences — to become, like breaches of Part IV, contraventions liable to civil penalties.

# Cooperation and leniency in enforcement

*The following article discusses the Commission's policy on the adoption of leniency in circumstances flowing from cooperation in enforcement matters. The policy is expressed in terms of flexible guidelines because it continues to evolve in the light of Commission experience and marketplace changes.*

## Introduction

Commitment to active enforcement of the law is fundamental to the achievement of the Commission's objectives of promoting competition and fair trading.

It is not possible for the Commission to pursue all potential or alleged breaches of the Trade Practices Act or other legislation under which it has responsibilities. The effective use of resources in the public's best interests require that the Commission have clear priorities in its selection of matters for enforcement and that it chooses the enforcement vehicle most appropriate to the circumstances.

This statement deals with one aspect of the Commission's approach to enforcement — its policy on the adoption of leniency in circumstances flowing from cooperation. Because the policy continues to evolve in the light of Commission experience and changing markets it is presented in terms of flexible guidelines.

There are separate, but in many respects similar, guidelines in respect of individuals and corporations. It is emphasised that they are flexible and intended only as an indication of the factors the Commission will consider relevant when considering leniency.

The Commission's purpose in publishing this policy is twofold:

- to promote awareness of it; and
- to encourage participants possibly in breach to come forward to assist Commission investigations.

Recognition of such cooperation and assistance takes a variety of forms, e.g. complete or partial immunity from action by the Commission, submissions to the Court for a reduction in penalty or even administrative settlement in lieu of litigation.

The policy on litigation necessarily relates only to civil matters. The Commission does not have power to grant immunity for actions for criminal conduct under Part V of the Trade Practices Act. In such cases the discretion lies with the Director of Public Prosecutions.

### Individual conduct

The following guidelines apply to directors, managers, officers or employees of a corporation who come to the Commission **as individuals** and not on behalf of the corporate entity with evidence of conduct contravening the