

Review of Trade Practices Act 1974 (Cth) — Enforcement and Compliance 1994

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The *Trade Practices Act 1974 (Cth)* (the Act) is almost certainly the most important piece of legislation dealing with regulation of corporate activity ever passed in Australia. As such it is not surprising that it has been the subject of numerous reviews by various bodies involved in law reform. This latest review of the Act was initiated in 1992 by the then Attorney General Michael Duffy. He referred to the Australian Law Reform Commission (ALRC) the task of inquiring into ways of ensuring compliance with the Act's consumer protection provisions. The ALRC's terms of reference also required it to consider whether any of the recommendations it made in relation to contraventions of the consumer protection provisions of the Act ought to be applied in relation to contraventions of Parts IV or IVA of the Act.

Pursuant to these terms of reference a discussion paper was released in 1993 and after consideration of public submissions, the ALRC's report was released in the middle of 1994. The Report contains 57 specific recommendations on steps that should be taken concerning compliance with and enforcement of the Act.

GENERAL OBSERVATIONS

Before examining some of the more important of these recommendations in some detail, a few general observations can be made about the Report and some of the basic concepts and views which informed and influenced these specific recommendations. The first of these is that the ALRC considered that the Act has, in general, been a great success. This view was adopted partly as a result of unanimous views to that effect from both business and consumer organisations.

Related to this acceptance of the Act's success is a view implicit within the Report that public regulation of business practices is both desirable and necessary. In this sense, the Report is a significant departure from the economic fundamentalist position which has influenced much policy making in Australia in recent years, that the market will, in time, resolve most, if not all, imperfections in the competitive process and that government interference in this process is costly, undesirable and inefficient. In this sense, the Report is a move away from deregulation of the economy towards greater regulation or, at least, an acceptance of the need for regulation. It may become part of a wider movement towards tighter controls on the private sector of the economy which has acquired increased power since the early 1980s.

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Possibly related to the apparent rejection of economic fundamentalism was the ALRC's decision not to undertake a cost/benefit analysis of its recommendations for the purposes of its discussion paper. Instead, it simply asserted that the costs of its recommendations were not significant and that the social benefit of its proposed changes exceeds their social cost. This was done in the face of some criticism from business of the failure to undertake such a study. The reluctance to undertake such a study suggests a reluctance to accept the view that benefits and costs can be objectively measured without reference to the subjective value of particular outcomes. For instance, the provision of any degree of consumer protection imposes a corresponding obligation on business and the cost of meeting that obligation. Whether the protection so provided justifies the costs imposed is to a large extent a subjective assessment based on the value placed on consumer protection as opposed to the need to minimise business costs.

One further view which informed the Report was the need to ensure, as far as possible, access to the legal system for the purposes of enforcement of the substantive provisions of the Act. Hence, there was an acknowledgment that unless consumers rights were protected in practice by ensuring that consumers or those representing them could enforce the Act in a cost efficient manner then the substantive provisions of the Act would be of limited effect. This inevitably led to a number of recommendations concerning the role of the Trade Practices Commission (TPC) in acting as the consumer watchdog as individual consumers, in general, have neither the resources nor sufficient interest in their individual claims to take action against breaches of the consumer protection provisions of the Act. Again these recommendations constitute an acknowledgment of the need for some public intervention in the operation of the market.

SPECIFIC RECOMMENDATIONS: NATIONAL FRAMEWORK OF CONSUMER PROTECTION LEGISLATION

One of the first recommendations made by the ALRC was that the Ministerial Council on Consumer Affairs should commence development of a national scheme of consumer protection laws. The most disappointing aspect of this recommendation is that it still needed to be made some 20 years after the introduction of the Act, and the Report indicates some pessimism about the establishment of such a scheme in the short term.

As noted in the Report, Australia is a single market that is too small to justify the expense of local variations in consumer protection laws, yet there are many variations in consumer protection laws between states. This imposes considerable additional burdens on business without any real benefit being conveyed to consumers. To cite but one example, every state or territory in Australia prohibits pyramid selling. The policy reasons for prohibiting pyramid selling are uniform, yet there are different statutory definitions of

pyramid selling in almost every state. Any business which wishes to adopt a multi-level marketing structure is placed in the absurd position of having to seek advice on whether its proposed marketing scheme contravenes any of seven different pieces of legislation dealing with the same topic.

The ALRC also noted that a national scheme can not be implemented in the short term because of the complexities of doing so. These complexities flow from the need for consultation between the Commonwealth, the states and the territories. The fact that such an uncontroversial, much needed reform can be so difficult to achieve, is an indictment of the operation of the Australian constitutional system. Of course, the constitutional impediments to the effective operation of consumer protection were outside the scope of the ALRC's terms of reference, but this aspect of the Report is a disappointing reminder of those impediments.

COMPLIANCE PROGRAMS AND CODES OF CONDUCT

As well as acknowledging the role of legislation and public institutions such as the TPC in regulating the economy, it was explicit within the Report that such public regulation should take a variety of forms. Hence the ALRC made a number of references to the need for a hierarchy or pyramid of responses to breaches of the Act. This suggested hierarchy of responses ranges from criminal prosecution for serious breaches, through to civil penalties, class actions brought by the TPC on behalf of groups of individuals, private civil actions by individuals and warnings from the TPC about possibly infringing behaviour.

In addition to this range of responses to actual breaches, there was an acknowledgment of the benefits of ensuring compliance with the Act via the use of educational methods such as compliance programs within firms and codes of conduct within particular industries. These programs and codes are often developed with the assistance of the TPC. They have the advantages of generating a corporate culture of awareness of the Act, increasing compliance with the Act and reducing the cost of enforcement of individual breaches of the Act by reducing the incidence of those breaches. Some submissions made to the ALRC suggested that this aspect of the TPC's work had not been sufficiently emphasised by it and suggested that greater emphasis be placed upon it.

The ALRC noted the importance of such activities and recommended that they continue and be increased. Such an approach is to be commended. It emphasises prevention rather than cure. It also provides benefits for a broader range of consumers than does concentration on curative litigation which, because of its expense, is usually reserved for individual matters of great import to the individual litigants but which may not be particularly important to consumers as a whole. The extent to which litigation has served private interests as opposed to the broader public interest of consumers is probably best exemplified by the operation of s 52 of the Act which is widely

used in disputes of a non-consumer nature between corporations rather than consumer matters.

The TPC's role in developing compliance programs and industry codes of practice concerning consumer protection is already enshrined in s 28 of the Act. As some doubt had been expressed about the statutory mandate of the TPC to be involved in such activities in respect of Parts IV and IVA of the Act, the ALRC recommended that s 28 be amended to make it clear that the TPC's educative role applies to all aspects of the Act's operation.

RESPONSES TO CONTRAVENTIONS

In addition to encouraging compliance with the Act, the ALRC saw the importance of considering the correct responses to contraventions of the Act. One of its recommendations in this regard was that the Act be amended to clarify the purposes to be borne in mind by a court when a contravention of the Act has been established. In particular, those purposes are:

- 1 To compensate a person who has suffered loss or damage as a result of the contravention;
- 2 To undo the effects of the contravention;
- 3 To prevent a future contravention of the Act, both immediately and in the longer term, and to promote and encourage community wide compliance with the Act; and
- 4 To provide deterrence and, as a secondary or incidental outcome, retribution.

In keeping with these purposes, the ALRC considered the need to expand the responses to contraventions of the Act and the relationship between the various responses. At present, the consumer protection provisions of the Act are enforced in two ways. Civil action can be taken by individuals in respect of a breach of most provisions of Part V of the Act, or criminal proceedings can be initiated by the TPC with the important exception of s 52 of the Act which can only be enforced by civil proceedings. It is also worth noting that the provisions under Part V of the Act impose strict liability on corporations. Intention is not relevant to either civil or criminal proceedings.

In contrast, Part IV of the Act can be enforced by individual litigants, or the TPC can seek various remedies including civil penalties. The effect of actions for civil penalties as opposed to fines for criminal offences is that corporations can be liable to significant monetary penalties (in the case of contraventions of Part IV of the Act, the maximum penalty is \$10 000 000), if the case against them is proved on a balance of probabilities rather than beyond reasonable doubt as is the case in criminal actions.

The ALRC recommended that three tiers of enforcement be available in respect of breaches of the consumer protection provisions of the Act. This would be achieved by adding further provisions which would provide for the imposition of civil penalties for breaches of Part V of the Act, in addition to the existing remedies of civil actions and criminal proceedings. In addition,

alterations would be made to the existing provisions concerning criminal offences to provide that such offences would be proved only if substantive elements of the offence are engaged in knowingly, intentionally or recklessly. Hence, contravention of Part V could lead to either civil proceedings, proceedings for civil penalties or criminal proceedings. Various recommendations were also made concerning the relationship between these different responses to contraventions. In particular, proceedings for civil penalties and criminal offences are to be mutually exclusive in the sense that under the proposed recommendations, a corporation can not be found liable for both civil penalties and a criminal offence. However, it would be possible for a court to impose a civil penalty at the conclusion of criminal proceedings if it found the case for a civil penalty to have been proved on a balance of probabilities but that the criminal case had not been made out for some reason such as failure to satisfy the criminal onus of proof.

The ALRC also recommended that in actions for civil penalties the TPC be entitled to require discovery from respondents although discovery will not be available in criminal proceedings. The effect of implementing this recommendation would be to effectively do away with criminal proceedings as the procedural advantages of actions for civil penalties over criminal proceedings would be considerable.

The effect of such recommendations, if they were to be enacted, would be to increase the prospects of successful enforcement against breaches of the consumer protection provisions of the Act. This in turn should increase the rate of compliance with the Act, by providing a greater deterrent to contravening activity.

CIVIL PROCEEDINGS

The relationship between civil penalties and criminal penalties on the one hand and liability for damages and other civil remedies on the other hand was also considered by the ALRC. It took the view that as compensation was the most important purpose of orders under the Act, the court should give preference to the issue of compensation if it appeared that a defendant would not be able to meet both a claim for compensation and a fine or order for payment of some other pecuniary sum.

The ALRC also recommended that damages be permitted under s 82 of the Act in respect of breaches of Part IVA of the Act, the part dealing with unconscionable conduct. Damages can already be obtained for such conduct under s 87 of the Act and this additional step would not significantly alter the existing position. However, the ALRC rejected a suggestion that punitive damages be available for breaches of the provisions of the Act. This is somewhat surprising as it permits a potential infringer to flagrantly breach the Act and to benefit from so doing in those circumstances where the cost of complying with the Act would exceed any damages payable for a breach.

In considering the nature of responses to contraventions of the Act, the ALRC also considered what measures could be taken to increase access to the

enforcement provisions of the Act. Its recommendations in this regard centred on the capacity of the TPC to bring representative proceedings and the issue of costs. At present, s 87(1B) of the Act permits the TPC to bring representative proceedings on behalf of persons who have suffered loss or damage as a consequence of conduct in contravention of Part IVA or Part V. However, the right to bring such actions is limited to situations in which a successful action is brought for an injunction pursuant to s 80 or there is a successful action by the TPC for a prosecution under s 79, the section which imposes criminal liability. The effect of the latter provision is to import the criminal standard of proof into s 87 actions. The ALRC recommended that these restrictions on the ability of the TPC to bring representative proceedings be removed by providing in the Act that the TPC be entitled to bring representative proceedings in respect of any provision of the Act in relation to which the TPC has an enforcement role.

The ALRC also recommended that the Act be amended to provide that a court may take into account the fact that litigation is in the public interest in determining whether or not to award solicitor/client costs as well as party/party costs to a successful litigant. This would increase the incentive for consumer organisations to bring litigation such as that in *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd* (1991) 100 ALR 568 in which the Australian Federation of Consumer Organisations brought an action pursuant to Part V of the Act against the Tobacco Institute for making misleading claims about the health effects of passive smoking. However, the ALRC backed away from suggestions that designated organisations or those individuals who bring public interest litigation be granted immunity from cost orders against them on the grounds that such an immunity could be abused.

CONCLUSION

Overall, this is a well considered Report which makes a number of practical, relatively uncontroversial recommendations which, if acted upon, would significantly contribute to the effectiveness of the Act as a vehicle for consumer protection. In addition to suggesting these uncontroversial reforms it recommends an increase in the powers of the TPC. In doing so, it acknowledges and emphasises the important role that governments and government authorities have in regulating business activity and the need for that regulation. As such, the Report may be part of a shift back towards an appreciation of the importance of the public sector in the operation of both an efficient and fair economic system. What remains to be seen is whether the Australian government is prepared to act upon these recommendations. In particular, changes to the statutory role and power of the TPC will have no effect if government funds are not made available to it to perform that role and exercise those powers.