

# **ALRC 68**

## **COMPLIANCE WITH THE TRADE PRACTICES ACT 1974**

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ALRC Reference: ALRC 68

The Australian Law Reform Commission was established by the *Law Reform Commission Act 1973*. Section 6 provides for the Commission to review, modernise and simplify the law. It started operation in 1975.

# Terms of reference

Law Reform Commission Act 1973

## Compliance with the Trade Practices Act 1974

1. I, **Michael Duffy**, Attorney-General of Australia, having regard to:

- the need to ensure effective compliance with the *Trade Practices Act 1974* (**the Act**) and
- difficulties that have been experienced in securing compliance with, and in enforcing, the consumer protection provisions of the Act; and
- the need for quick, cost effective and fair remedies to be available for contravention of the Act;

refer to the Law Reform Commission, for inquiry and report under the *Law Reform Commission Act 1973* section 6, the following matters:

- whether there are ways of ensuring compliance with the consumer protection provisions of the Act by appropriate orders, in particular, by orders that a person cease and desist action that is or may be in contravention of those provisions;
- whether the law adequately provides for redress for those who suffer loss or damage because of contraventions of those provisions or of orders of that kind;
- what kinds of sanctions and penalties should be available in respect of such contraventions including:
  - what penalty options other than fines and pecuniary penalties are appropriate; and
  - what levels of penalties are appropriate to reflect the community's disapproval of actions that constitute such contraventions;
- what provision ought to be made to ensure that those whose interests are or may be, whether directly or indirectly, prejudiced by such contraventions can have access to quick, cost effective and fair remedies, including what courts and tribunals should have jurisdiction in relation to such matters;
- any related matter.

2. The Commission is also to report whether any of the recommendations it makes in relation to contraventions of the consumer protection provisions of the Act ought to be applied in relation to contraventions of Part IV or IVA of the Act.

3. The Commission is to consult the Trade Practices Commission, the Federal Bureau of Consumer Affairs, the Attorney-General's Department, the National Competition Policy Review, the National Consumer Affairs Advisory Council, the Law Council of Australia, national organisations representing manufacturers and producers, retailers and consumers, State and Territory consumer affairs agencies and any other person it thinks fit, having special regard to the Commonwealth's Access and Equity policy.

4. The Commission is to report as soon as possible, but no later than 30 June 1994.

Attorney-General

December 1992



# Participants

## **The Commission**

The Division of the Commission constituted under the *Law Reform Commission Act 1973* for the purpose of this reference comprised the following:

### *President*

Justice Elizabeth Evatt AO (to November 1993)

Alan Rose AO (from May 1994)

### *Deputy President*

Sue Tongue (from September 1993)

### *Members*

Chris Sidoti

Stephen Mason (to October 1993)

Justice John von Doussa

Professor Brent Fisse

## **Officers**

### *Project Manager*

Russell Agnew

### *Senior Law Reform Officers*

Philip Kellow (from July 1993)

Margaret Ryan

### *Research Assistant*

Jackie Saisithidej (from March 1994)

### *Project Assistant*

Lynne Munnich

*Typesetting*

Anna Hayduk

*Library*

Joanna Longley *Librarian*

Louise Levido *Library Assistant* (to December 1993)

Raeanne Davis *Library Assistant* (from January 1994)

Anna Peden *Library Officer* (from March 1994)

**Consultants\***

Professor Mark Aronson, Faculty of Law, University of New South Wales

Mr Allan Asher, Commissioner, Trade Practices Commission

Professor John Braithwaite, Law Program, Division of Philosophy and Law, Research School of Social Sciences, Australian National University

Ms Liza Carver, Public Interest Advocacy Centre, (Councillor, AFCO)

Mr Brian Cassidy, First Assistant Secretary, Structural Policy Division, Department of the Treasury

Mr Michael Corrigan, Deputy Chairman, Trade Practices Committee, Law Council of Australia

Mr Brian Doherty, Senior Assistant Director, Commonwealth Director of Public Prosecutions

Mr Neil Francey, Chair, Consumer Law Committee, Law Council of Australia

Justice R French, Federal Court of Australia

Professor John Goldring, Dean, Faculty of Law, University of Wollongong

Dr Peter Grabosky, Senior Research Fellow, Urban Research Program, Research School of Social Sciences, Australian National University

Mr Paul Greenwood, President, State Council, Small Business People

Professor David Harland, Challis Professor of Law, Faculty of Law, University of Sydney

Justice P Heerey, Federal Court of Australia

Mr Philip Holt, Chief Executive, NSW Chamber of Manufactures

Associate Professor Bruce Kercher, School of Law, Macquarie University

Justice J Lockhart, Federal Court of Australia

Professor Warren Pengilley, Faculty of Law, University of Newcastle

Mr Alan Ransom, Barrister-at-Law

Mr Iain Ross, Vice-President Industrial Relations Commission (former Assistant Secretary, ACTU)

Mr Richard St John, Chairman, Trade Practices Committee, Law Council of Australia

Ms Lynnette Schifftan, QC, Director Legal Services, Coles Myer Ltd

Ms Louise Sylvan, Chief Executive Officer, Australian Consumers' Association

Mr Geoffrey Taperell, Member, Independent Committee of Inquiry into National Competition Policy

Mr Andrew Throssell, Proceeds of Crime Officer, National Crime Authority

Professor Roman Tomasic, Head, School of Law, University of Canberra

Dr Philip Williams, Graduate School of Management, University of Melbourne

Mr Doug Williamson, QC

Mr John Wood, Principal Policy Adviser, Office of the Commonwealth Ombudsman (former Director,  
Federal Bureau of Consumer Affairs)

\* The recommendations, statements of opinion and conclusions in this report are those of the members of the Commission. They do not necessarily represent the views of consultants or of the departments or organisations with which they are associated.

## Abbreviations

|                         |  |
|-------------------------|--|
| ABA                     | Australian Bankers' Association  |
| ACA                     | Australian Consumers' Association  |
| ACC                     | Australian Consumers' Council  |
| AFC                     | Australian Finance Conference  |
| AFCO                    | Australian Federation of Consumer Organisations  |
| AJAC                    | Access to Justice Advisory Committee   |
| AJAC Report             | <i>AJAC Access to justice: an action plan</i> Access to Justice Advisory Committee Canberra 1994                                       |
| ALRC                    | Australian Law Reform Commission   |
| ALRC 26                 | ALRC Report No 26 (Interim) <i>Evidence</i> AGPS Canberra 1985   |
| ALRC 27                 | ALRC Report No 27 <i>Standing in Public Interest Litigation</i> AGPS Canberra 1985   |
| ALRC 60                 | ALRC Report No 60 <i>Customs and excise</i> ALRC Sydney 1992   |
| ALRC 65                 | ALRC and Companies and Securities Advisory Committee Report No 65 <i>Collective investments: other people's money</i> ALRC Sydney 1993 |
| ALRC DP 30              | ALRC Discussion Paper No 30 <i>Sentencing: penalties</i> ALRC Sydney 1987  |
| ASC                     | Australian Securities Commission   |
| ASC Act                 | <i>Australian Securities Commission Act 1989</i> (Cth)   |
| ATPR                    | Australian Trade Practices Reports   |
| Attorney-General's Dept | Attorney-General's Department (Cth)  |
| BFCI                    | Business Forum on Consumer Issues  |
| CLA                     | The Commercial Law Association of Australia Ltd  |
| CLOC                    | Criminal Law Officers Committee of the Standing Committee of Attorneys-General   |
| CLOC Report             | <i>CLOC Model Criminal Code: Chapter 2 - General Principles of Criminal Responsibility</i> (Final Report) AGPS Canberra 1992           |
| Commerce Act            | <i>Commerce Act 1986</i> (NZ)  |
| Dept                    | Department   |

|                            |  |
|----------------------------|--|
| DP56                       | ALRC Discussion Paper No 56 <i>Compliance with the Trade Practices Act 1974</i> ALRC Sydney 1993   |
| DPP                        | Commonwealth Director of Public Prosecutions   |
| FBCA                       | Federal Bureau of Consumer Affairs   |
| FBCA Report                | FBCA <i>Post-sale consumer protection: report to the Standing Committee of Consumer Affairs Ministers</i> FBCA Canberra 1993   |
| Federal Court Act          | <i>Federal Court of Australia Act 1976</i> (Cth)   |
| Griffiths Committee Report | House of Representatives Standing Committee on Legal and Constitutional Affairs <i>Mergers, takeovers and monopolies: profiting from competition?</i> AGPS Canberra 1989 |
| Hilmer Report              | Independent Committee of Inquiry into Competition Policy in Australia <i>National competition policy</i> AGPS Canberra 1993 (Hilmer Report)                              |
| HREOC                      | Human Rights and Equal Opportunity Commission  |
| ICA                        | Insurance Council of Australia Limited   |
| LAC (NSW)                  | Legal Aid Commission of New South Wales  |
| Law Society (SA)           | The Law Society of South Australia   |
| LCA                        | Trade Practices Committee, Business Law Section, Law Council of Australia  |
| NCAAC                      | National Consumer Affairs Advisory Council   |
| NCAAC Report               | NCAAC <i>Consumer redress and Part V of the Trade Practices Act</i> AGPS Canberra 1988   |
| NCSC                       | National Companies and Securities Commission   |
| PIAC                       | Public Interest Advocacy Centre  |
| Shell                      | The Shell Company of Australia Limited   |
| TPA                        | <i>Trade Practices Act 1974</i> (Cth)  |
| TPC                        | Trade Practices Commission   |
| TPC Guideline              | TPC <i>Guideline on administrative resolution</i> TPC Canberra 1993  |
| TPT                        | Trade Practices Tribunal   |
| Treasury                   | The Treasury (Cth)   |
| VECCI                      | Victorian Employers' Chamber of Commerce and Industry  |

Young Lawyers Young Lawyers Business Law Committee, The Law Society of New South Wales

# List of recommendations

## Chapter 2 - National framework

1. The Ministerial Council on Consumer Affairs should commence development of a national scheme of consumer protection laws (para 2.17).
2. In developing a national scheme of consumer protection laws, the Ministerial Council on Consumer Affairs should consider the issues of language and structure of legislation (para 2.18).

## Chapter 3 - Encouraging compliance

3. Section 28 of the TPA should be amended to state that the role of the TPC is to promote a competitive and fair market environment in Australia and to include a non-exhaustive list of the functions of the TPC. That list should include

- enforcement of the TPA
- encouragement and development of corporate compliance programs
- development of codes of conduct (para 3.4).

4. Section 28 of the TPA should be amended to make it clear that the TPC may exercise the functions listed in that section in respect of all provisions of the TPA (para 3.18).

## Chapter 4 - Responding to contraventions

5. The TPA should be amended to include a preamble or other provision stating: The objective of this Act is to promote a competitive and fair market environment in Australia (para 4.2).

6. Section 7 of the TPA should be amended to provide that knowledge of, or experience in, consumer protection and fair trading may qualify a person for appointment as a member of the TPC (para 4.3).

7. The TPA should be amended to make it clear that where the court has found a contravention of the Act it may make orders for one or more of the following purposes:

- to compensate a person who has suffered loss or damage as a result of the contravention
- to undo the effects of the contravention
- 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 TPA
- to provide deterrence and, as a secondary or incidental outcome, retribution (para 4.8).

8. The TPC should expand its education and information role by preparing and making publicly available a document describing various orders that could be sought in different specified and illustrated situations (para 4.17).

9. The TPA should be amended to provide that, where the TPC considers it appropriate to do so, the TPC may, with the leave of the court and subject to any conditions imposed by the court, intervene in proceedings brought under the TPA (para 4.21).

10. The TPA should be amended to require the TPC, when commencing proceedings relating to a contravention of the TPA, to consider all orders that would be necessary to serve the purposes that are relevant in the circumstances (para 4.22).

11. The TPA should be amended to make it clear that administrative action undertaken by the TPC should be taken to achieve one or more of the following purposes:

- to compensate those who have suffered loss or damage as a result of the contravention
- to undo the effects of the contravention, both immediately and in the longer term, and to promote and encourage community-wide compliance with the TPA
- to prevent future contravention of the Act (para 4.23).

## **Chapter 5 - Access and cost issues**

12. Section 87(1B) of the TPA should be amended to

- remove the restriction that a representative action may only be brought where the TPC has brought a prosecution under s 79 or proceedings for an injunction under s 80
- allow a representative action to be brought for a contravention of any provision of the TPA in relation to which the TPC has an enforcement role (para 5.18).

13. The TPA should be amended to give the TPC standing to bring representative proceedings under Pt IVA of the Federal Court Act on behalf of persons who suffer loss or damage from a contravention of the TPA regardless of whether the TPC has a claim in its own right (para 5.21).

## **Chapter 6 - Post sale consumer protection**

14. Section 75A of the TPA should be amended to include a right to a replacement (para 6.9).

## **Chapter 7 - Compensating persons who suffer loss or damage**

15. The TPA should be amended to provide:

- where a court considers it appropriate to make an order for compensation and to impose a fine or make any other order for the payment of a pecuniary sum and it appears to the court that the defendant has insufficient means to pay both, notwithstanding anything in s16A of the *Crimes Act 1914* (Cth) the court must give preference to compensation



- before imposing a fine or making any other order for the payment of a pecuniary sum, the court may adjourn consideration of the matter to enable enquiries to be made to ascertain the identity of any victim of the contravention and the extent of the victim's loss or damage
- the court may give directions as to the manner in which, and by whom, the enquiries should be made (para 7.4).

16. Section 82(2) of the TPA should be amended to allow the court to extend the period in which a claim for damages can be commenced if the court considers it appropriate to do so (para 7.13).

17. Section 87(1CA) of the TPA should be amended to provide that the time limit for any application under s87(1A) is three years and that the court has a discretion to extend that time if the court considers it appropriate to do so (para 7.16).

18. The TPA should be amended to provide that in assessing damages under s82 a court shall do what is reasonable and appropriate in the circumstances and not be constrained by the common law principles of the law of contracts and torts (para 7.21).

19. The TPA should be amended to provide expressly that courts may make orders for contribution and indemnity and that contribution and indemnity may be claimed in the proceedings in which the plaintiff claims damages from the respondent (para 7.23).

20. Section 82 of the TPA should be amended to allow recovery of damages under that section for a contravention of a provision of Pt IVA (para 7.28).

## **Chapter 8 - Undoing the effects of, and preventing further, contraventions**

21. The TPA should be amended to require the court to take into consideration the estimated profits of a contravention when imposing a penalty, civil or criminal (para 8.4).

22. Section 80A of the TPA should be amended to make corrective advertising orders available for contraventions of Pt IV and IVA, as well as for Pt V (para 8.7).

23. Section 80 of the TPA should be amended to make it clear that reassessment or revision of a corporation's internal compliance controls may be required as a term of injunctive relief (para 8.11).

24. Section 230 of the Corporations Law should be amended to enable the Federal Court, on application by the TPC, to prohibit a person who has been found, in a prosecution or a civil penalty proceeding, to have contravened the TPA from managing a corporation for such period as is specified in the order (para 8.14).

## **Chapter 9 - Penalty regime for Pt V**

25. Criminal penalties should be retained in Pt V, for both individuals and corporations but criminal liability should depend on proof of a particular advertent mental state (para 9.10).

26. Civil penalties should be made available in Divisions 1 and 1A of Pt V, in addition to the regime of criminal penalties (para 9.11).

27. If each element of prohibited conduct is present, the contravener should be liable to a civil penalty, subject to the operation of statutory defences. If each substantive element is engaged in knowingly, intentionally or recklessly, the conduct should constitute an offence (para 9.12).

28. If civil penalties are introduced to Pt V as recommended by the Commission, the TPA should provide that

- (i) if civil penalty proceedings in respect of particular conduct have been completed, no criminal proceedings may be commenced in respect of that conduct.
- (ii) if criminal proceedings in respect of particular conduct have been completed, no civil penalty proceedings may be commenced in respect of that conduct (see, however, (vi)).
- (iii) if civil penalty proceedings have been commenced but not completed, criminal proceedings may be commenced. The civil penalty proceedings shall be permanently stayed unless the criminal proceedings are withdrawn before completion.
- (iv) if a prosecution has been commenced in respect of particular conduct civil penalty proceedings may not be commenced.
- (v) if in criminal proceedings the Court is not satisfied beyond reasonable doubt that an offence has been committed but it is satisfied on the balance of probabilities that a person has contravened a civil penalty provision, the Court may make a declaration to that effect.
- (vi) if the Court makes a declaration that a provision of Pt V has been contravened, an application for imposition of a civil penalty may be made to the Court on the basis of that declaration (para 9.18).

29. The TPA should provide that the TPC may initiate civil penalty proceedings against an accessory, even if the corporation is prosecuted in respect of the same conduct, and that an accessory may be prosecuted even if civil penalty proceedings are taken against the corporation (para 9.20).

30. Section 84 should, in so far as it attributes criminal liability to a corporation, be amended to reflect the CLOC principles (para 9.35).

31. Section 84(3) of the TPA should be amended to reflect the general principle that criminal responsibility requires intention or advertence (para 9.37).

32. The time limit for bringing proceedings under Pt IV for the imposition of a civil penalty should remain six years (para 9.41).

33. If civil penalties are introduced into Pt V, the time within which civil penalty proceedings under Pt V must be commenced should be three years (para 9.41).

34. Section 77 should be amended so that it provides for the *imposition* of a penalty (para 9.43).

## **Chapter 10 - Penalties for contravening the TPA**

35. The TPA should be amended to provide expressly for corporate probation and probationary conditions of the following types:

- the corporation is to develop and submit to the court a program to prevent and detect contraventions of the TPA, including a schedule for implementation
- upon approval by the court of a program to prevent and detect contraventions of the TPA, the corporation is to notify its employees and shareholders that it has contravened the TPA and advise them of the steps it has taken to avoid repetition
- the corporation is to make periodic reports to the court or the independent representative appointed by the court regarding the corporation's progress in implementing the compliance program
- the corporation is to submit to a reasonable number of regular and unannounced examinations of its books and records at appropriate business premises by the independent representative and to inquiries made of knowledgeable individuals within the corporation (para 10.9).

36. The TPA should be amended to provide expressly for corporate community service orders (para 10.17).

37. Section 80A should be amended to provide that an adverse publicity order may be imposed where a corporation is found to have contravened the Act and the court wishes to impose a penalty (para 10.21).

38. Whatever range of penalties is available against a corporation convicted of an offence against Pt V of the TPA should be available as civil penalties under Pt V of the TPA (para 10.28).

39. Section 80A of the TPA should be amended to provide that adverse publicity orders may be made against individuals who have contravened Pt V of the TPA (para 10.32).

40. The range of civil penalties available against individuals who have contravened Pt V should include probation, community service orders and adverse publicity orders (para 10.33).

41. Section 241 of the Corporations Law should be amended to prohibit corporations from indemnifying their officers, employees or agents or any other person implicated in a contravention against criminal or civil penalties imposed upon the officers, employees or agents or other person (para 10.34).

42. The same range of sanctions that is available against a corporation or individual convicted of an offence against the TPA should be available as civil penalties for contraventions of Pt IV of the TPA (para 10.35).

43. The TPA should be amended to delete from s 76 the reference to relevant factors to be considered by the court. A new provision should be created to require the court, when determining a sentence or a civil penalty, to have regard to the relevant factors currently listed in s76 and the following additional factors:

- (if the contravener is a corporation) whether a revision of the contravener's compliance controls is necessary and the extent to which defective internal controls have been revised in light of the lessons learned from the circumstances in which the contravention occurred
- how much, if any, profit was made as a result of the contravention
- whether the contravener continued the relevant conduct notwithstanding a written request from the TPC to discontinue it (para 10.38).

44. The TPA should be amended to provide that the court may require a corporation that has contravened the Act to provide to the court, prior to the court assessing the need for or the amount or nature of a penalty, a report detailing what steps have been taken by the corporation since the contravention to improve the corporation's internal controls and to discipline the persons implicated in the contravention (para 10.40).

45. The maximum civil penalty in PtV should be \$200000 for a body corporate and \$40000 for a person other than a body corporate and the maximum fine in PtV should be \$1m for a body corporate and \$200000 for a person other than a body corporate (para 10.43).

46. Monetary penalties provided for in the TPA, both civil and criminal, should be prescribed in terms of penalty units (para 10.46).

## **Chapter 11 - Administrative powers**

47. The TPA should be amended to

- require the TPC to establish and maintain a register open to all members of the public
- require that all undertakings entered into under s 87B be lodged on the public register within 28 days of being settled
- allow terms of an undertaking that are confidential to be withheld from registration provided the register notes that a term has been withheld and the grounds on which it is confidential
- provide that a term may be confidential if it contains information that is commercial-in-confidence or consists of personal details of an individual not involved in the contravention of the TPA or if disclosure of the information would be against the public interest or harm national security (para 11.6).

48. The TPA should be amended to provide that

- a court may require a person who has been brought before the court for breaching a s87B undertaking to lodge a security bond and
- if that person is brought before the court for a subsequent breach of the undertaking, the court may order the forfeiture of all or part of the security bond (para 11.9).

49. Section 87B of the TPA should be amended to provide that, in deciding whether to accept an undertaking, the TPC must consider what steps the person offering the undertaking has taken to ensure that a relevant contravention will not occur again (para 11.10).

50. Section 87B of the TPA should be amended to provide that, when deciding whether to accept an undertaking, the TPC should be required to consider, where relevant, what steps have been taken to ensure that the issue of compensation is dealt with (para 11.11).

51. The TPA should be amended to require the TPC to include in its annual report information on the use of its formal administrative powers and a general summary of the types of complaints it receives and how it deals with them (para 11.16).

52. The TPA should be amended to give the TPC power to give to a private litigant information the TPC has obtained from an investigation involving its powers under s 155 if it is satisfied that the person is carrying on, or contemplating in good faith, a proceeding in respect of a contravention of the TPA to which the information is relevant (para 11.23).

53. The TPA should be amended to provide that the court may order a person who is found to have contravened the TPA to pay the reasonable investigation costs of the TPC, as determined by the court (para 11.24).

54. The TPA should be amended to provide that the TPC is able to seek a declaration from the Federal Court under s 163A (para 11.27).

55. The TPA should be amended to

- enable the TPC to require a person who makes a statement promoting, or apparently intending to promote, the supply of goods or services to provide the TPC, within the period specified in the notice, with proof of any claim or representation made in the statement
- provide that it is an offence if the person served with the notice fails to respond to the notice within the specified time
- enable the TPC, if it considers that the evidence provided by the person served with the notice is insufficient to support the claim or representation, to issue a notice under s 155(1) to that person or to authorise entry of that person's premises under s 155(2), notwithstanding that the TPC may not have a reasonable belief that the claim or representation is false or misleading
- provide that a person may not refuse to answer a 'substantiation' notice on the ground that the information provided may incriminate him or her
- provide that the use of the information obtained by the TPC as a result of issuing a notice is subject to limitations the same as those imposed by s 155(7) (para 11.31).

## **Chapter 12 - Issues related to court procedures**

56. Section 83 of the TPA should be amended to allow a finding of fact by a court or tribunal in any proceedings against a person under the TPA to be used as evidence of that fact in subsequent proceedings against the same person under the TPA, except where the subsequent proceedings are for the imposition of a penalty (para 12.23).

57. The TPA should be amended to enable the TPC to seek discovery, inspection and interrogatories in proceedings seeking the imposition of a civil penalty against a corporation (para 12.28).

# 1. Introduction

## The reference

1.1 On 17 December 1992 the then federal Attorney-General, Mr Michael Duffy MP, asked the Australian Law Reform Commission (the Commission) to review issues relating to compliance with the consumer protection provisions of the *Trade Practices Act 1974* (Cth) (TPA).<sup>1</sup> The terms of reference are set out at the front of this report.

## The scope of the review

1.2 The terms of reference direct the Commission to examine ways of ensuring compliance with the consumer protection provisions of the Act and whether the TPA adequately provides for redress for those that suffer loss or damage as a result of a contravention of those provisions of the Act. The terms of reference also direct the Commission to consider the kinds of sanctions and penalties that should be available in respect of contraventions of the Act. The discussion of these issues in this report relates primarily to Pt V. However, as the terms of reference ask the Commission to consider whether any of the recommendations it makes in relation to contraventions of Pt V ought to be applied to Pt IV (restrictive trade practices provisions) or Pt IVA (unconscionable conduct provisions) of the Act, the report comments on Pt IV and IVA where appropriate.

## TPA generally effective

1.3 The Commission's work throughout this reference, particularly its consultations, has convinced it that, generally, the TPA is working well. A number of submissions expressed the view that the TPA is, overall, effective in achieving its objectives of eliminating restrictive trade practices and unfair market practices.

[A]ny review of the TPA ought to commence with the recognition that by and large it has been a great success . . . What has evolved is an internally consistent and principled body of law.<sup>2</sup>

Nevertheless, there are impediments to the Trade Practices Commission (TPC) and people affected by contraventions of the TPA getting appropriate redress under the Act.<sup>3</sup> These include a lack of understanding by consumers and business of their rights and obligations under the TPA, inappropriate court procedures and the limitations, in some cases, of monetary penalties. The TPC has pointed out that the means available to consumers, businesses and the government to deal with certain instances of non-compliance with the TPA are inadequate.<sup>4</sup> In particular, it has expressed concern at the lack of innovative responses by the courts to contraventions of the TPA.

If, after nearly 20 years this has not occurred, then it is time to incorporate into the Act specific references to the types of other orders which could be considered appropriate.<sup>5</sup>

The Commission notes that in 1993 the TPA was amended, increasing the penalties for contraventions of the Act and introducing enforceable undertakings.<sup>6</sup> These amendments may address a number of concerns previously expressed about the effectiveness of the TPA. Clearly there is a need to allow time for the effectiveness of these amendments to be assessed. However, they do not deal with all the concerns raised.

## **Access to remedies a key issue**

1.4 The TPA is a vital piece of economic legislation. Private enforcement is likely to be the most effective way of enforcing the Act and is essential to its success.

The direct self-interest of individuals often has more powerful effect in ensuring compliance with the law than the less direct concern of a public enforcement authority for the public good.<sup>7</sup>

The Commission's terms of reference recognise the importance of access to quick, cost effective and fair remedies in the event of a contravention of the TPA. However, as a number of submissions have emphasised, there are difficulties accessing remedies under the Act. This seriously weakens its effectiveness for consumers.<sup>8</sup>

The Committee's view is that, for many consumers, difficulties with enforcement of the Trade Practices Act are principally difficulties of access to the remedies already available under the Act, having regard to the costs and delays of enforcing consumer rights through superior courts.<sup>9</sup>

Lack of access to remedies under the TPA has been a matter of concern for some time.

One of the main obstacles preventing consumers from enforcing their rights under the Act is the high cost of litigation.<sup>10</sup>

A report commissioned by the National Consumer Affairs Advisory Council (NCAAC)<sup>11</sup> in 1988 concluded that the issue of cost was the most significant in inhibiting enforcement of Pt V of the TPA.<sup>12</sup> Lack of access to remedies is not only a problem for individual consumers. It is also a problem for business, particularly small business, which frequently needs the protection offered by the TPA to consumers. One small business noted in its submission to the Commission:

[f]rom this company's experiences, unless access to the legal remedies available in the TPA is facilitated for small businesses, compliance will continue to be problematical.<sup>13</sup>

In this report the Commission identifies initiatives which are designed to increase the accessibility of remedies and make the TPA more effective in protecting consumers and promoting fair markets. The Commission is aware that lack of access, particularly as a result of cost, is an issue in all areas of law, not only trade practices. It is a particular problem for the TPA, however, because its effectiveness relies significantly on private enforcement. Independently of this reference, in October 1993 the federal Attorney-General, Mr Michael Lavarch MP, and the federal Minister for Justice, Mr Duncan Kerr MP, established the Access to Justice Advisory Committee (AJAC), chaired by Ronald Sackville QC, to report on ways to improve access to the legal system. This report refers to the AJAC Report,<sup>14</sup> released on 23 May 1994, where appropriate.

## **Hilmer report**

1.5 The Commission consulted with the Independent Committee of Inquiry into National Competition Policy, chaired by Professor Frederick Hilmer (Hilmer Committee).<sup>15</sup> The Hilmer Committee reported in August 1993.<sup>16</sup> It recommended the establishment of an Australian Competition Commission (ACC)<sup>17</sup> which would assume the administrative responsibilities currently allocated to the TPC and the Prices Surveillance Authority. At its meeting in Hobart on 25 February 1994 the Council of Australian Governments (COAG) agreed to the formation of an ACC. In August it will consider legislation to establish the ACC.<sup>18</sup> A decision has yet to be made whether the ACC will have administrative responsibility for the consumer protection provisions of the TPA.



## **The Commission's work**

### ***Discussion paper 56***

1.6 In December 1993 the Commission produced a discussion paper (DP 56). The paper made a number of proposals and raised a range of issues dealing with measures to improve access to the legal system for those who suffer loss as a result of a contravention of the TPA and to increase the range of sanctions available in respect of contraventions of the Act. The discussion paper invited submissions on these proposals and issues. The Commission received over 50 written submissions. A list of submissions is provided in Appendix A.

### ***Consultations***

1.7 ***Honorary consultants.*** In accordance with the Commission's long standing practice, honorary consultants from business organisations, consumer groups, the judiciary, the legal profession (including the Law Council's Trade Practices and Consumer Affairs Committees), academics, government departments and statutory authorities were appointed to assist with this inquiry. The honorary consultants are listed at the beginning of this report. The Commission acknowledges with appreciation the contribution they have made. They have provided valuable comment on various draft proposals and attended several lengthy meetings.

1.8 ***Consultation with business and consumer groups.*** In addition to its honorary consultants, the Commission advertised nationally consultations with business and consumer groups. It conducted meetings in Brisbane, Perth, Melbourne and Sydney with a number of organisations, including the Business Forum on Consumer Issues, the Business Council of Australia, the Retailers' Council of Australia, the Australian Finance Conference (AFC) and the Australian Bankers' Association (ABA). The Commission also consulted with the Australian Federation of Consumer Organisations (AFCO), the Legal Aid Commission of New South Wales and consumer credit legal centres.

## **This report**

1.9 This report sets out the Commission's final views on the proposals and issues contained in the discussion paper following consideration of submissions and points raised in consultations. The Commission's recommendations include measures to ensure that those who suffer loss or damage as a result of a contravention of the Act receive appropriate compensation, to encourage compliance and to provide improved access to remedies. It also recommends changes to the penalty regime in Pt V. A list of the Commission's recommendations is provided at page xv. The recommendations in this report will need to be considered by governments irrespective of any changes to the allocation of administrative responsibility for the consumer protection provisions of the TPA.

## **Reform not costless**

1.10 The Commission received some criticism that its discussion paper did not contain a cost/benefit study of the proposals it contained.<sup>19</sup> The Commission has, in the preparation of this report, kept in mind the need to ensure that the recommendations it makes are cost effective. It is aware that seemingly minor changes to business regulations can, in some cases, impose significant additional costs on business. It also recognises that cost/benefit analysis of social regulation involves more than the observable financial cost

on individuals. The recommendations contained in this report do not impose significant additional requirements on businesses in their daily operations although the Commission recognises that changes to any regulations that apply to business may involve additional costs such as staff training. The Commission's recommendations should have no major cost impact on companies that comply with the TPA. Companies that contravene the TPA, however, may find themselves facing additional costs as the result of more effective and more accessible remedies for consumers and the TPC. The Commission considers that the social benefit of these changes exceeds their social cost.

## 2. National framework for consumer protection

### Introduction

2.1 Consumers in Australia are protected through a mixture of federal, State and Territory legislation and industry self-regulation. While the main focus of consumer protection is to improve the position of consumers in their dealings in the market place, legislation that promotes fair trading practices also improves the competitive position of manufacturers and suppliers. Consumers also benefit from the prevention of anti-competitive conduct as a more competitive and efficient economy results in better quality goods and services, lower prices and increased innovation. This chapter provides an overview of the key elements of consumer protection in Australia's federal system.

### Federal legislation

#### *Trade Practices Act 1974 (Cth)*

2.2 **TPA the principal legislation.** The principal source of consumer protection at the federal level is the TPA. It contains a number of provisions to protect consumers.<sup>20</sup> They deal with unconscionable conduct,<sup>21</sup> unfair practices,<sup>22</sup> product safety and product information,<sup>23</sup> conditions and warranties in consumer transactions,<sup>24</sup> manufacturer's liability<sup>25</sup> and product liability.<sup>26</sup> The TPA also regulates restrictive trade practices by prohibiting certain anti-competitive conduct.<sup>27</sup>

2.3 **Administration of the TPA.** The TPA is administered by the TPC.<sup>28</sup> The TPC's functions fall into three broad categories - ensuring compliance with the TPA, developing initiatives to improve market conduct and providing education and information. Securing compliance with the TPA involves a range of activities including responding to consumer complaints and enquiries, observing market conduct, undertaking market studies and research, encouraging corporate compliance programs and promoting the development of codes of conduct. The TPC also enforces the TPA by issuing warnings, negotiating enforceable undertakings and seeking civil penalties for contraventions of Pt IV of the Act. Prosecutions under Pt V of the Act are undertaken by the Commonwealth Director of Public Prosecutions (DPP) instructed by the TPC. The TPC also deals with applications for authorisations to allow conduct which would otherwise be prohibited by Pt IV of the Act.

2.4 **Responses to contraventions of the TPA.** Many contraventions of the TPA may be resolved by negotiation between the party responsible for the conduct and the TPC or a party affected by the conduct. In some cases a private complaint may be taken up by the TPC which may make further inquiries and seek to resolve the matter by agreement or litigation. The TPA provides a number of statutory responses for contraventions of the provisions of Pt V Division 1 that may be obtained in the courts.<sup>29</sup> These responses include

- the imposition of a fine up to \$200 000 for corporations and \$40 000 for individuals<sup>30</sup>
- an injunction<sup>31</sup>
- damages for those who suffer loss or damage as a result of conduct which contravenes Pt V<sup>32</sup>

- corrective advertising<sup>33</sup>
- ancillary orders<sup>34</sup>
- an order freezing a respondent's assets.<sup>35</sup>

Private litigants and the Minister may also apply to the Federal Court for declarations and orders in the nature of prohibition, certiorari and mandamus in relation to matters under the TPA.<sup>36</sup> Consumers have a statutory right to rescind a contract for the supply of goods where the supplier has breached a condition implied under Pt V Division 2.<sup>37</sup> Since January 1993 the TPC has been able to accept a written undertaking given by a person in connection with a matter in relation to which the TPC has a power or function under the TPA and to enforce that undertaking in the court.<sup>38</sup>

**2.5 Public and private enforcement of the TPA.** Most provisions of the TPA may be enforced by the TPC or by private litigants.<sup>39</sup> The TPC may seek the imposition of a fine or civil penalty or apply for any remedy under the TPA except damages under s 82. It may seek ancillary orders under s 87 on behalf of one or more persons who have suffered, or are likely to suffer, loss or damage by the conduct of the respondent.<sup>40</sup> In most cases the remedies available to a private litigant are the same as those available to the TPC or the Minister. However, a private litigant cannot prosecute without the written consent of the Minister or his or her delegate, cannot seek to freeze a respondent's assets under s 87A and cannot seek an order for corrective advertising.

**2.6 Enforcement in the Federal Court and State and Territory Supreme Courts.** While proceedings to enforce Pts IVA, V and VA of the TPA are usually taken in the Federal Court, they may also be taken in State and Territory courts under the cross-vesting rules.<sup>41</sup> Having jurisdiction under the TPA does not, however, enable a State or Territory court to grant a remedy other than one of a kind that the court can grant under the law of that State or Territory.<sup>42</sup> With the exception of actions for damages, most litigation under the TPA occurs in the Federal Court or the Supreme Court of the relevant State or Territory. Prosecutions for offences under the TPA must be conducted in the Federal Court.<sup>43</sup>

### ***Other legislation***

2.7 In addition to the TPA, there is federal legislation giving consumers protection in certain industries such as insurance,<sup>44</sup> superannuation<sup>45</sup> and telecommunications<sup>46</sup> and in relation to certain products like therapeutic goods.<sup>47</sup> In many cases this legislation also provides specific remedies and enforcement mechanisms. For example, the Superannuation Complaints Tribunal established under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) deals with disputes between consumers and those who administer superannuation funds. Austel may receive, investigate and take such action as may be appropriate in relation to consumer complaints concerning telecommunication services under the *Telecommunications Act 1989* (Cth).

## **State and Territory legislation**

### ***Fair Trading Acts***

2.8 **Introduction.** All States and Territories have enacted fair trading legislation.<sup>48</sup> The core provisions of the fair trading legislation in each State and Territory mirror the consumer protection provisions of the TPA. None of the fair trading Acts deals with restrictive trade practices. While each State and Territory

Act has its own idiosyncrasies, consumer protection laws in Australia are substantially uniform. The most significant differences between the TPA and State and Territory legislation are that the latter

- extend consumer protection provisions to the conduct of natural persons and other non-corporate suppliers of goods and services which are generally outside the jurisdiction of the TPA
- do not include the implied conditions and warranties set out in Division 2 of PtV of the TPA, the provisions concerning manufacturer's liability contained in Division 2A of Pt V<sup>49</sup> or the provisions relating to product liability in Pt VA.

**2.9 Responses to contraventions of fair trading legislation.** The State and Territory fair trading Acts offer a similar range of responses to contraventions as the TPA, including prosecutions, injunctions, damages, disclosure of information to particular persons or to the public, corrective advertising, ancillary orders and orders freezing a respondent's assets. The remedies available under the fair trading legislation in each State and Territory are set out in Appendix B.

**2.10 Public and private enforcement of fair trading legislation.** These remedies may be enforced by the Commissioner or Director for Consumer Affairs in the relevant State or Territory or by private litigants.

- **Commissioner or Director for Consumer Affairs.** Each State and Territory has a Commissioner or Director for Consumer Affairs who is responsible for the administration and enforcement of fair trading legislation.<sup>50</sup> Like the TPC, the Commissioner or Director is able to prosecute, apply for any remedy under the fair trading legislation except for damages and seek ancillary orders on behalf of one or more persons who have suffered, or are likely to suffer, loss or damage by the conduct of the respondent. The Commissioners and Directors also have a central role in receiving and dealing with consumer complaints.<sup>51</sup> Depending on the circumstances of each case, the Commissioner or Director may
  - advise and assist the consumer in relation to the complaint
  - help the consumer and supplier resolve their dispute by conciliation
  - formally investigate the complaint
  - take such enforcement action, including a prosecution or civil proceedings, as he or she considers necessary.

In NSW the Commissioner is able to grant legal assistance to consumers in certain cases.<sup>52</sup>

- **Private litigants.** Private litigants may seek damages, injunctions or ancillary relief under the fair trading legislation. They cannot seek orders freezing a respondent's assets or requiring disclosure or corrective advertising. With the exception of NSW, each State and Territory allows a private litigant to prosecute either as of right<sup>53</sup> or with the consent of the Commissioner or Director.<sup>54</sup>

**2.11 FTA remedies in lower courts.** Unlike the TPA, the fair trading legislation in many States and Territories specifically gives lower courts the power to make ancillary orders and to grant injunctive and other relief.<sup>55</sup> For example, injunctions and ancillary orders may be obtained under the relevant fair trading

legislation in the County Court of Victoria,<sup>56</sup> the Magistrates Court of the ACT<sup>57</sup> and the District Courts of WA,<sup>58</sup> Queensland<sup>59</sup> and SA.<sup>60</sup> Damages may be sought in any State or Territory court subject to the local jurisdictional limitations on the amount of the claim and the type of property involved. Prosecutions under fair trading legislation may be conducted as summary or indictable proceedings at the discretion of the prosecuting authority. In practice it appears that most offences are dealt with in summary proceedings before a lower court. By conferring certain remedies on lower courts, the fair trading legislation helps litigants avoid the complexity and expense involved in proceedings in superior courts.

### ***Other State and Territory legislation***

2.12 In each State and Territory, the common law and a wide variety of statutes provide protection to consumers in addition to the Fair Trading Acts. Generally these laws take the following forms:

- prescription of standards of goods and services to be provided to consumers
- prohibition or regulation of undesirable practices
- prescription of terms to be implied into contracts with consumers
- establishment of bodies to receive complaints from consumers, to investigate those complaints and to take action (including, if necessary, court action) to rectify any justified complaints
- establishment of machinery to promote the education of consumers
- licensing and continuing regulation of persons permitted to supply certain types of goods and services to consumers.

Accordingly, there are laws for particular types of goods,<sup>61</sup> types of transaction<sup>62</sup> and classes of service.<sup>63</sup>

### ***Consumer claims tribunals and small claims courts***

2.13 An important consumer protection mechanism in each State and Territory is the consumer claims tribunal or small claims court.<sup>64</sup> These generally provide a quick, effective and relatively cheap alternative to litigation for small claims under the relevant fair trading laws or other legislation. The tribunals and courts can only deal with issues concerning goods and services to the value of \$5000, except in NSW where the Consumer Claims Tribunal has a monetary jurisdiction of \$10000 for consumer matters.<sup>65</sup> The main features of these tribunals and small claims courts are an emphasis on conciliation or settlement of disputes, informal hearings where technical rules of evidence do not apply, limited rights to legal representation, limited rights of appeal from decisions of the tribunal or court and no, or only a limited, right to recover costs from the other party to the dispute. There are some differences between the remedies available in each tribunal and court. Orders for damages, performance of work and return of goods are available in all States and Territories. Other orders include relief from payment of money,<sup>66</sup> replacement of goods<sup>67</sup> and the supply of services.<sup>68</sup> Where a dispute cannot be settled, the tribunal or court determines it in accordance with the general law. In Queensland and NSW, however, the final order may be tempered by the tribunal's statutory obligation only to make orders that are fair and equitable to all the parties to the dispute.<sup>69</sup>

## **Liaison between the TPC and State and Territory agencies**

2.14 There is formal and informal liaison between federal, State and Territory consumer protection agencies. The Standing Committee of Offices of Consumer Affairs (SCOCA)<sup>70</sup> meets regularly to promote coordination of the activities of consumer affairs agencies. The FBCA convenes SCOCA meetings and provides secretariat services. A bulletin keeps SCOCA members informed of important agency issues between meetings and minimises duplication of work. The Consumer Affairs and Fair Trading Agencies Network (CAFTAN) consists of representatives from the enforcement and compliance areas of federal, State and Territory consumer affairs agencies. CAFTAN issues bulletins between meetings to keep agencies informed of investigations and enforcement action being taken by each agency and of convicted offenders who may move interstate.

## **Non-legislative consumer protection: industry self-regulation**

2.15 In recent years various sectors of industry and commerce have recognised the need for efficient and effective mechanisms for responding to customer needs. One such mechanism is codes of conduct such as the Supermarket Scanning Code, Electronic Funds Transfer Code, Australian Pharmaceutical Manufacturers Association Code and the Advertising Code. These codes set out the respective rights and obligations of consumers and traders and provide a process for the investigation and resolution of complaints and, where a complaint is proved, the imposition of appropriate sanctions.<sup>71</sup> Another mechanism is industry-based dispute resolution schemes which are able to investigate and resolve complaints quickly and efficiently.<sup>72</sup> Recent examples include the Australian Banking Industry Ombudsman, Telecommunications Industry Ombudsman, General Insurance Review Panel and the Life Insurance Complaints Board.<sup>73</sup> These schemes deal with a significant number of complaints each year.<sup>74</sup> Some individual companies have also established their own schemes for resolving consumer complaints.<sup>75</sup> To ensure the long term viability and worth of industry-based consumer complaint schemes, AJAC has recommended that the Commonwealth, after consultation with industry, consumer groups and the public, prescribe minimum standards of independence, procedural fairness, accessibility, accountability and efficiency.<sup>76</sup> The Commission endorses this recommendation. While industry-based mechanisms are a useful adjunct to consumer protection laws they should not be seen as a complete alternative to statutory safeguards.

## **Need for a national scheme of consumer protection laws?**

### *The issue*

2.16 In DP 56 the Commission invited comment on whether a national scheme of consumer protection laws should replace the current mixture of federal, State and Territory laws.<sup>77</sup> A national scheme would have a number of advantages. It would

- recognise that Australia is a single market that is too small to justify the expense of local variations in consumer protection laws
- be easier to educate consumers and traders and overcome the confusion created under the current system
- eliminate the jurisdictional problems associated with cross-border conduct

- facilitate co-operation among fair trading agencies and
- ensure that all consumers have the same rights and remedies, and that all traders are subject to the same obligations, wherever in Australia they may be.

Responses to this issue indicated widespread support for a national scheme.<sup>78</sup> However, it was not seen as urgent given the degree of uniformity under the current legislative framework and the complexity of introducing a new regime. Some responses stated that many of the advantages of a national scheme of consumer protection laws could be achieved through further development of the existing combination of federal, State and Territory laws.<sup>79</sup>

### ***The Commission's view***

2.17 In most areas where there is need for national uniformity, the eventual outcome should be a national scheme of laws that does not depend on the continued efforts of the federal, State and Territory governments to maintain consistency and uniformity. There are various ways a national scheme of laws for consumer protection could be achieved. The Commonwealth and States could agree that the Commonwealth would have primary responsibility for policy development and the operation of laws governing consumer protection.<sup>80</sup> Alternatively, all States and Territories could apply the law of an agreed jurisdiction to their State or Territory, with changes to the 'template' legislation requiring the agreement of the relevant Ministers.<sup>81</sup> Clearly, the development of a national scheme of consumer protection laws would require considerable consultation between the Commonwealth, the States and the Territories and is not something that can be implemented in the short term. Nevertheless, the Commission considers that a national scheme of laws that would provide and maintain a consistent standard of consumer protection throughout Australia should be developed. The Commission ***recommends*** that the development of a national scheme of consumer protection laws be commenced by the Ministerial Council on Consumer Affairs. In the interim, the Commission urges all State and Territory governments to ensure that their fair trading legislation remains consistent with Pt V of the TPA. In particular, it urges all State and Territory governments to amend their fair trading legislation to reflect the provisions of the TPA Pt V Divisions 2 and 2A.<sup>82</sup>

### **User-friendly trade practices legislation**

2.18 The TPA has been amended a number of times since 1974. It can be difficult to use and to understand. Parts of the TPA reflect different drafting styles and lack consistency.<sup>83</sup> Legislation should be structured in a way that makes it easy to use and should be written in clear language that is easy to understand. All provisions should be written in the same style. The Commission ***recommends*** that the issues of language and structure be included in the Ministerial Council on Consumer Affairs' consideration of a national scheme of consumer protection laws.



## 3. Encouraging compliance with the TPA

### Introduction

3.1 Consultations on DP 56 revealed concern on the part of the business community that the Commission had placed too much emphasis on enforcement of the TPA after a contravention had occurred. It considered that DP 56 paid too little attention to the need to encourage and facilitate compliance and gave insufficient acknowledgment to the efforts of many businesses to ensure that they comply with the TPA. The Commission accepts that securing compliance with the TPA requires more than simply enforcing the Act. Voluntary compliance is an important consideration in assessing the degree to which the Act is complied with and the adequacy of enforcement measures. This chapter considers the issue of voluntary compliance with the TPA. It considers whether the Act needs to be amended to make promotion of compliance with the TPA a specific function of the TPC. It also discusses measures by which the TPC can encourage compliance with the TPA, including

- promoting the development and implementation by business of compliance programs
- promoting the development and use of industry-wide codes of conduct.

Finally, the chapter considers whether codes of conduct should be enforceable and whether compliance programs should be required in certain circumstances.

### Voluntary compliance with the TPA

#### *Variable level of compliance*

3.2 There is widespread recognition in the business community that compliance with the TPA is not only required, but desirable.

[T]he overwhelming proportion of all businesses have a complete respect for a balanced regulatory regime and have stated philosophies that their staff must comply with both the spirit and the letter of the law.<sup>84</sup>

The Commission's consultations with a variety of industry groups confirmed that responsible business operators seek to ensure that their businesses comply with the TPA.<sup>85</sup> They consider that the Act provides a standard for the way they conduct their commercial operations. Representatives of the banking and finance sectors, in particular, emphasised the resources devoted by businesses in those areas to ensuring compliance with the Act. However, there are instances where corporations have not placed the same emphasis on compliance with the Act. For example, in *TPC v CSR Ltd* French J observed that in *CSR*

[T]here was little convincing evidence of a corporate culture seriously committed to the need to comply with the requirements of the Act.<sup>86</sup>

The Commission is also aware that there are particular types of conduct regulated by the TPA where compliance is low. For example, the TPC described its limited success in generating a culture of compliance in relation to pyramid selling, telemarketing operations and 'get-rich-quick' schemes.<sup>87</sup>

### ***Benefits of compliance***

3.3 As business groups acknowledge, and various commentators have pointed out, voluntary compliance with the TPA can generate significant benefits.<sup>88</sup> Encouraging voluntary compliance within an organisation can involve disseminating a positive, law-abiding corporate ethos throughout the organisation, creating an atmosphere that discourages employees from contravening the TPA and other laws. Voluntary compliance with the TPA is consistent with the responsibilities now placed on directors for corporate governance.<sup>89</sup> Organisations that encourage voluntary compliance reduce the risk of incurring the significant costs that can arise from unlawful conduct. These costs include the cost of an investigation by the TPC, the cost of negotiating a settlement with the TPC and the cost of defending court action taken by the TPC or private litigants. In addition, the courts have indicated that they will treat more favourably a company that has genuinely attempted to comply with the TPA.<sup>90</sup> There are also less obvious financial benefits in complying with the TPA. Complying organisations are able to be more productive because they do not have to divert the attention of directors, managers and other senior level employees from profit making activity to deal with the legal consequences of non-compliance. Compliance is not costless, however. Creating a culture of compliance within an organisation may require significant expenditure on the development of training systems and compliance programs. A compliance program may force the organisation to make changes to otherwise profitable business practices or generate evidence which, in the event of a prosecution for a contravention of the Act, may harm the organisation. On balance, however, the benefits of compliance outweigh the costs. As well as being the right thing to do, encouraging adherence to the law and promoting ethical behaviour can enhance an organisation's financial position.

### ***The role of the TPC in ensuring and encouraging compliance***

3.4 The TPC can encourage compliance in two significant ways: by promoting the use of compliance programs and encouraging the development of codes of conduct. These are discussed further in this chapter. It has been suggested to the Commission that the TPC would be assisted in this if its functions, including that of promoting and encouraging compliance, were set out in the TPA.

[T]he TPA does not explicitly reflect the diversity of the work actually undertaken by the TPC. The failure of the TPA to specify that the development of guidelines and codes of conduct is a function of the TPC has allowed some industry advocates to, in our submission inappropriately, criticise the TPC.<sup>91</sup>

The Commission considers that to provide a charter for the TPC and to state the functions of the TPC in the Act would help clarify the role of the TPC. It ***recommends*** that s 28 of the TPA be amended to state that the role of the TPC is to promote a competitive and fair market environment in Australia and to include a non-exhaustive list of the functions of the TPC. That list should include

- enforcement of the TPA
- encouragement and development of corporate compliance programs
- development of codes of conduct.

## **Compliance programs**

### ***The role of compliance programs***

3.5 Compliance programs are mechanisms for ensuring that the requirements of the law are met. In the context of the TPA they are an important part of the voluntary efforts by business to ensure compliance with the Act. An effective compliance program will usually have the following essential features

- commitment by senior management to the program
- a comprehensive and continuing education strategy that has in-built evaluation systems
- procedures for
  - identifying and preventing possible contraventions of the TPA
  - upholding accountability for compliance functions and for non-compliant conduct
  - dealing with contraventions if they occur
  - handling consumer and other complaints
  - responding to inquiries from the TPC
  - reviewing or auditing the compliance mechanisms regularly to ensure that they are working.

Compliance programs are often developed by industry associations or individual companies with the assistance of the TPC. The TPC has used a range of publications to help businesses develop and implement compliance programs.<sup>92</sup> A company that does not have a compliance program may be required to implement one under supervision by the TPC as part of an undertaking entered with the TPC<sup>93</sup> or if ordered by the Court.<sup>94</sup>

### ***Recognition and promotion of compliance***

3.6 DP 56 noted that the TPC recognises the important role compliance programs can play in enhancing the level of compliance with the Act.<sup>95</sup> The development of compliance programs is an important element of the TPC's strategy to secure compliance with the TPA.<sup>96</sup> It also uses integrated compliance strategies designed to be responsive to the structure of particular industries. They involve a step-by-step approach which may include identifying a problem area, preparing an industry guideline setting out what may amount to a contravention of the TPA and advising industry on how to comply with the Act, promoting the guideline by targeting relevant industry groups and giving follow up seminars, monitoring the market to check the level of compliance and taking appropriate enforcement action if the Act is contravened. Despite this effort, some business representatives consider that the TPC should focus more on compliance.

Not nearly enough emphasis has been placed on compliance programs by regulatory agencies. . . [B]usiness believes that the regulatory agencies, in not emphasising the 'compliance' role, are diminishing what is probably the most important element of their activity in securing the cooperation of the business sector.<sup>97</sup>

The level of recognition by the TPC of business' compliance efforts emerged during the Commission's consultations as a key concern of business groups. A number of organisations suggested that their efforts to

ensure compliance with the TPA received insufficient recognition by the TPC, particularly when the TPC was considering whether to take court action in relation to an alleged contravention of the Act.<sup>98</sup> The Commission acknowledges the significant efforts made by the majority of businesses to comply with the TPA. These efforts should be encouraged and acknowledged as much as possible by the TPC. However, the Commission also recognises that the TPC has a statutory obligation to enforce the Act. This obligation may, on occasions, involve taking court action against an organisation notwithstanding that it may have devoted resources to developing and implementing a compliance program. For instance, the compliance program may have been incomplete or flawed in some material way.

## **Codes of conduct**

### ***Introduction***

3.7 The members of an industry and its clients will often benefit from more specific regulation than that provided by the TPA and other fair trading legislation. For example, additional regulation may be appropriate where

- in spite of legal requirements and competitive market forces, information provided to consumers is inadequate to assist informed choice
- establishing industry practices and standards would enhance productive efficiency, customer protection and compliance with the TPA and other fair trading legislation
- the basic fair trading laws in some segment of the market require fleshing out with complementary guidelines and rules to add certainty and sharpen competition
- an emerging industry or product has problems which require responses more specific than those under the TPA and other fair trading legislation.<sup>99</sup>

This additional regulation need not be in the form of legislation. Co-regulation has considerable potential as an alternative to further government regulation. Codes of conduct developed by an industry with the assistance of government and other groups, such as consumers, are a form of co-regulation. They embody mutual obligations by competing players in a market. Codes alone cannot prevent all market failure or consumer complaints. However, they can play a role in addressing these problems if there is both an incentive and a commitment to making a code work. Most codes are voluntary arrangements, with enforcement being a matter for the industry body responsible for their administration. This section of the report considers whether the effectiveness of codes could be enhanced by the availability of public and private enforcement mechanisms in certain situations.

### ***The advantages and disadvantages of codes of conduct***

3.8 ***Advantages.*** Effective co-regulation through codes of conduct has a number of benefits that other forms of regulation do not.

- They may provide a more cost effective alternative to government regulation.
- They can be more industry specific than government regulation.

- An industry with some form of 'ownership' of a code will often be more committed to making it work.
- Addressing systemic complaints about an industry in a code can act as a form of industry quality control.
- An effective code may improve an industry's image.
- Codes can be more flexible than legislation and more readily changed to reflect the dynamics of the market place.
- Appropriately designed and administered industry codes can give the public access to a quick, informal means of complaint handling and redress.<sup>100</sup>

The development and existence of codes of conduct can also lead to improved compliance with the TPA and other fair trading legislation by increasing industry awareness of its obligations under those laws.

3.9 *Disadvantages.* Codes of conduct are not appropriate in all situations.

- A code may contain anti-competitive practices which do not serve the interests of consumers.
- A code may be inadequately enforced if an industry is unwilling to discipline itself, or is biased in its administration of the code.
- Voluntary codes may be unsuitable where industry-wide compliance is required but not all industry participants have adopted the code.
- There may be no meaningful consumer input into the formulation of codes if there is an imbalance in bargaining power and knowledge between the industry and consumers.
- The informal drafting and language of codes can make contraventions difficult to prove.
- Codes are vulnerable to competitive pressures which force the players in a market to cut corners and evade their obligations under the code.

### ***The TPC and codes of conduct***

3.10 *Current situation.* The TPC performs two roles in relation to codes of conduct. Its major role over the years has been to authorise industry codes which would otherwise be prohibited under Pt IV of the TPA.<sup>101</sup> In such cases the TPC has a statutory duty to assess whether the public benefit of a code submitted for authorisation outweighs any detrimental effects on competition. More recently, the TPC has become involved in developing codes of conduct. The TPC will help an industry formulate a code of conduct where it is satisfied that the code will provide cost-effective and industry-wide fair trading outcomes and that the industry concerned has the capacity to regulate its own affairs.<sup>102</sup> In some cases the TPC will do more than simply help to establish a code. It may send a representative to observe and advise meetings of the committee or body administering the code.<sup>103</sup> It is often prepared to advise on, and participate in, evaluation of a code's performance. The TPC is currently working with the Ministerial Council on

Consumer Affairs to prepare a guide to codes which will set out the minimum features needed to ensure that a code is workable, credible and effective in its operation and that it encourages competition. The TPC expects its involvement in the development of individual codes to decline once the guide is completed.<sup>104</sup>

3.11 ***The appropriate role of the TPC.*** In DP 56 the Commission invited comment on what role, if any, the TPC should play in developing codes of conduct.<sup>105</sup> Almost all responses argued that the TPC should have some involvement in the development of codes given its experience and its ability to provide a broad overview.<sup>106</sup> Most submissions considered it appropriate for the TPC to provide guidance and other assistance when invited to do so by an industry body trying to establish a code.<sup>107</sup> There was little support for the TPC initiating codes or helping to administer them. Too close an association with the development and administration of codes may affect the TPC's ability to act as an independent and impartial watchdog. The Commission considers that the TPC should be able to conduct research and provide general guidance in relation to the development and administration of codes.<sup>108</sup> Industry bodies should be free to approach the TPC for such advice and other assistance as the body and TPC consider necessary and appropriate.

### ***Enforcing codes of conduct***

3.12 ***Current situation.*** In most cases a code of conduct is enforced by the industry association responsible for developing the code. There is usually no provision for public or private enforcement of a code. At present, the TPC has no direct role in the enforcement of codes. Where a code is linked to a TPC authorisation, however, there is an implicit sanction that a breach of the code could lead to the authorisation being revoked. However, as this sanction affects the entire industry, it is not an effective mechanism for dealing with the occasional contravener. The TPC may also be able to ensure that a trader complies with a code by making compliance a term of an undertaking enforceable under the TPA s 87B.<sup>109</sup>

3.13 ***Possible reforms.*** In DP 56 the Commission identified a number of options for enforcing codes.<sup>110</sup>

- ***Prescribing codes of conduct as regulations.*** The TPA could enable certain codes to be enforced by prescribing them as regulations. This process is available under fair trading legislation in NSW, WA, SA, NT and the ACT<sup>111</sup> but has rarely been used. Only five codes have been prescribed since the legislation commenced.<sup>112</sup> The provisions have been criticised on a number of grounds including the following:
  - the informal language and drafting of codes means the codes lack clarity and therefore enforceability
  - the enforcement procedure is weak and relatively cumbersome
  - prescribed codes are only subject to public enforcement.<sup>113</sup>
- ***Administrative enforcement.*** The TPC could be given power to issue an administrative order that a trader abide by a code approved by the TPC under the authorisation process. Such a power would have to be subject to notice provisions, rights of appeal and other natural justice requirements. An order could be accompanied by publicity which would, by providing information of a trader's conduct to consumers and the wider community, act as an additional deterrent. Failure by a trader to comply with an administrative order would be a contravention of the TPA and could also be made an offence. This option would not enable private enforcement of codes and may suffer the same problems identified in relation to cease and desist orders.<sup>114</sup>

- **Codes as contractual terms.** The TPA could be amended to make it a statutory implied term in all contracts between a trader and a consumer that the trader will comply with all relevant industry codes. However, it is likely that this approach would encounter the same problems as those which arise in relation to the other terms implied by the TPA. The code could not be publicly enforced, only contractual remedies would be available and the lack of consumer awareness of implied terms and codes and the cost of litigation may undermine its effectiveness.<sup>115</sup>
- **Using codes to define unconscionable conduct.** The TPA prohibits a trader supplying goods or services to a consumer from engaging in conduct that is, in all the circumstances, unconscionable.<sup>116</sup> The non-exhaustive list of matters to which a court may have regard when determining whether a trader has engaged in unconscionable conduct could be extended so as to include breach of a relevant industry code. Such an amendment would permit both public and private enforcement of codes and allow consumers to seek any of the statutory remedies available under the TPA.<sup>117</sup> This approach would not, however, make non-compliance with a code unlawful. The court would have to be satisfied that the conduct was, in all the circumstances, unconscionable. Moreover, a trader found to have engaged in unconscionable conduct cannot be subjected to a penalty.<sup>118</sup>

3.14 **Limited support for enforceable codes.** Almost all responses to these options agreed that, as compliance with a code is likely to be greater where an industry 'owns' the code and is committed to making it work, it is preferable that codes be voluntary and self-enforcing.<sup>119</sup> Accordingly, a number of submissions opposed the introduction of any mechanism for directly enforcing codes.<sup>120</sup> Other submissions considered that there will be situations where an enforceable code is necessary.<sup>121</sup> The TPC considered that a mandatory code should only be used where

- the code is intended to operate instead of government regulation following repeal of legislation or as an alternative to proposals for government regulation
- the voluntary code is delivering unsatisfactory outcomes or there is inadequate coverage of relevant participants under the voluntary scheme
- there is a need for industry specific regulation to address demonstrated market failure which is resulting in significant consumer detriment.<sup>122</sup>

Of those who supported enforceable codes, most favoured using the mechanism available under the fair trading legislation in NSW and WA with modifications to ensure that codes are clearly drafted, are subject to a relatively quick and effective enforcement procedure with appropriate remedies and sanctions and can be enforced by the TPC and private litigants.<sup>123</sup>

3.15 **The Commission's view.** The Commission considers that codes of conduct are most effective where there is both an incentive and a commitment to make a code work. If a code does not address the market failure or consumer concerns it was designed to deal with, the industry association responsible for the code should be encouraged to make the necessary changes. Where such changes are not possible or prove ineffective, the Commission is of the view that if enforcement is necessary then government regulation rather than a mandatory code is the appropriate response. The regulation should be developed in consultation with the industry association, consumers and other interested parties and may be tailored to

the special needs of the industry or business. Accordingly, the Commission does not make any recommendation on the enforceability of codes of conduct.

### ***Codes and contraventions of the TPA***

3.16 In DP 56 the Commission proposed that, while compliance with a code should not provide a defence to a contravention of the TPA, it should be taken into account by a court when determining a penalty.<sup>124</sup> There was general support for the view that compliance with a code should not be a defence,<sup>125</sup> although some considered that compliance with a mandatory code or a code that has otherwise been sanctioned by the TPC should provide a defence.<sup>126</sup> There was also general support for requiring the courts to take compliance with a code into account when determining a penalty.<sup>127</sup> The Commission, however, considers that to require courts to take compliance with a code into account when determining a penalty would only be appropriate if all codes promoted fair trading. Some industry agreements described as 'codes of conduct' are in fact anti-competitive and compliance with them should not be encouraged. Furthermore, as there is no settled definition of what constitutes a code, it can be difficult to determine whether a code exists. It can also be difficult to determine whether the terms of a code have been complied with. In these circumstances the Commission considers that the courts should not be required to consider compliance with a code when imposing a penalty. The court will, of course, have a discretion to consider whether compliance with a code is relevant to penalty.

## **The TPC's education and information role**

### ***Information and education to secure compliance***

3.17 The TPC considers that one of its important objectives is to 'secure compliance with the TPA and its aims by informing the community at large about the Act and its specific implications for business and consumers'.<sup>128</sup> Accordingly, the TPC gives high priority to education and dissemination of information, both to improve public awareness of the Act and to underpin its other activities. Section 28 lists the functions of the TPC in relation to dissemination of information, law reform and research. They include reporting to the Minister, when asked, on laws relating to protecting consumers, conducting research on matters that affect consumers and guiding consumers as to their rights and obligations under laws designed to protect consumer interests. Some of its education and information projects include

- developing and disseminating a 'generic' compliance package, *Best and Fairest*, which companies can use as a basis for developing and implementing their own staff education strategies
- participating in a wide variety of public forums
- bi-monthly publication of *Bulletin*<sup>129</sup> and *Fair Trading*<sup>130</sup>
- assisting businesses to develop compliance education programs for their staff
- preparing guidelines on various aspects of the TPA, for example, misleading environmental marketing claims, codes of conduct and s 87B undertakings
- making submissions to public inquiries
- organising seminars.



The Commission considers that the TPC's work in these areas contributes significantly to community and business understanding of the TPA and thus to the generally high level of compliance with it. It encourages the TPC to continue with these projects.

### ***Amendment of s 28***

3.18 Section 28 confers on the TPC various functions in respect of laws that are 'designed to protect the interests of consumers' and matters that 'affect the interests of consumers'. It is often alleged that this wording enables the TPC to perform these functions only in respect of Pt V of the Act because that Part is entitled 'Consumer Protection'. The Commission does not consider that s 28 is so limited. All provisions of the TPA affect the interests of consumers or provide protection for consumers; it just happens that Pt V does so more directly than Pt IV or Pt IVA. DP 56 proposed that the TPC's functions set out in s 28 should also apply in respect of Pt IV and Pt IVA and that the Act should be amended to make this clear.<sup>131</sup> Most submissions supported this proposal.<sup>132</sup> The Commission ***recommends*** that s 28 of the TPA be amended to make it clear that the TPC may exercise the functions listed in that section in respect of all provisions of the TPA.

### **Access to government contracts**

3.19 In DP 56 the Commission asked whether limiting access to government contracts by corporations and persons who have contravened the TPA and by making the grant of government tenders or licences conditional on the existence of a compliance program would enhance compliance with the TPA.<sup>133</sup> There was little support for using government purchasing and licensing policies for this purpose. Most responses opposed the suggestion that a company or individual who has contravened the TPA within a specified period should be excluded from consideration for a government contract.<sup>134</sup> Such a prohibition would effectively be an arbitrary penalty affecting only those who rely on government work, potentially give rise to anti-competitive behaviour when there are few companies which perform the work and could ultimately be to the Commonwealth's detriment by limiting its ability to choose the best tender. There was also substantial opposition to the proposal to require tenderers to reveal contraventions of the TPA which have occurred within a specified period before the tender.<sup>135</sup> A number of submissions argued that requiring a tenderer for a government contract or an applicant for a licence to show that adequate TPA compliance measures are in place would only add to the complexity and cost of the tendering and licensing processes without any overall improvement in compliance.<sup>136</sup> The TPC considered that compliance measures should not be mandatory in these situations unless there is a demonstrated compliance problem in the industry or business.<sup>137</sup> In light of these responses, the Commission makes no recommendation to limit access to government contracts by corporations and persons who have contravened the TPA or to make the grant of government tenders or licences conditional on the existence of a compliance program.

## 4. Responding to contraventions

### Introduction

4.1 This chapter discusses the objectives of the TPA, the composition of the TPC and the purposes that can be achieved by responding to contraventions. It describes the role of private litigants, the court and the TPC in helping to ensure that those objectives and purposes are met.

### Objectives of the TPA

4.2 The TPA does not state its objectives. The TPC considers them to be

- to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and services and
- to safeguard the position of consumers in their dealings with producers and sellers.<sup>138</sup>

The Commission agrees with this assessment. It was suggested in consultations that the objectives of the TPA should be stated in a preamble to the Act.<sup>139</sup> The Commission agrees that doing this would provide a framework for developing the role of the TPC. The Commission *recommends* that the TPA be amended to include a preamble or other provision stating: The objective of this Act is to promote a competitive and fair market environment in Australia.

### Composition of the TPC

4.3 The TPA provides that a person must have knowledge of, or experience in, industry, commerce, economics, law or public administration to be appointed a member of the TPC.<sup>140</sup> It makes no mention of knowledge of, or experience in, consumer protection issues. One submission suggested that the attention paid to the consumer protection and fair trading aspects of the TPC's work at any particular time has varied depending on the composition of the Commission. It suggested that this fluctuation could be reduced if experience in consumer issues qualified a person for appointment to the TPC.<sup>141</sup> The Commission supports the suggestion and *recommends* that s7 of the TPA be amended to provide that knowledge of, or experience in, consumer protection and fair trading may qualify a person for appointment as a member of the TPC.

### A range of measures

4.4 It has been argued that a regulator will be most effective and best able to secure compliance with the law if it has at its disposal a range of responses of varying severity and if it adopts a 'pyramid of enforcement' approach to regulation.<sup>142</sup> At the base of the 'pyramid' are informal administrative responses, such as warning letters designed to coax compliance with the law. If these measures fail to secure compliance, the regulator may escalate its response and seek civil remedies, such as damages or injunctions, or even the imposition of civil penalties. If further escalation is considered necessary, criminal penalties may be sought. The regulator's low-scale responses are likely to succeed precisely because it has the capacity to escalate its response. Furthermore, the stronger the sanctions at the apex of the 'pyramid', the more likely it is that regulation will occur at the base of the 'pyramid'.<sup>143</sup> The 'pyramid of enforcement'

approach is said to have several advantages. First, a strategy of regulation based on punishment is expensive and regulators typically have limited resources for prosecutions. Second, a strategy consisting only of criminal punishment will undermine the goodwill of those subject to regulation and may foster a subculture of resistance. Adopting the 'pyramid' approach allows the cheapest method of securing compliance to be adopted in each case. Third, the less severe the response used by the regulator to secure compliance, the more likely it is that compliance will be internalised by those subject to regulation. This approach of securing cooperation by threats to escalate the regulator's response has its opponents. The DPP, for example, questions whether

it is a role of the criminal law to reinforce the process of negotiation and settlement. There should be no suggestion that the threat of criminal prosecution may be used to ensure that corporations negotiate and settle, thereby buying their way out of a criminal prosecution.<sup>144</sup>

The 'pyramid of enforcement' approach to regulation is not, however, intended to facilitate plea bargaining. It is designed to maximise the effectiveness of the range of responses available to a regulator. The recommendations in this report flow from an acceptance by the Commission that use of a 'pyramid of enforcement' approach by the TPC is likely to be effective and efficient.

## **The role of the court**

### ***Introduction***

4.5 Ideally, litigation should be used sparingly and only when less expensive and less formal avenues of response have been exhausted, or at least been considered and found to be unsuitable or inappropriate. The following paragraphs consider what can be achieved by court responses and what the role of the court should be in serving the objectives and purposes of the Act in the event that litigation is the chosen response.

### ***Court responses to contraventions***

4.6 Courts have no investigative or initiating role. They respond to contraventions of the TPA only when an alleged contravention is brought before them, generally by either an individual or corporation that has suffered loss or damage as a result of the alleged contravention or the TPC. Where a contravention is proved, the Act authorises a court to make certain orders including injunctions,<sup>145</sup> orders for corrective advertising,<sup>146</sup> orders imposing penalties<sup>147</sup> and orders to compensate persons who have suffered loss or damage because of the contravention.<sup>148</sup>

### ***Proposal: court orders to achieve certain purposes***

4.7 Action to enforce the TPA will be most effective and efficient if there is a clear understanding of the purposes to be achieved by it. The objectives of the TPA suggest that action taken in response to an alleged contravention should be designed to serve one or more of the following purposes

- to compensate a person who has suffered loss or damage as a result of the contravention of the Act
- to undo the effects of the contravention
- to prevent a future contravention of the Act, both immediately and in the longer term, and

- to provide deterrence and, as a secondary or incidental outcome, retribution.

Most responses to contraventions, whether they involve the court or not, will have as a purpose the prevention of further contraventions. Many are also likely to seek compensation for persons who have suffered loss or damage as a result of the contravention. Undoing the effects of a contravention may be achieved indirectly by orders made primarily for another purpose, such as compensation. Although orders made for the first three purposes may also have a deterrent effect, this will be secondary to their main purpose. Orders that punish are the primary method of achieving the purpose of deterrence. These orders may also have a retributive element but retribution should not be the principal purpose of punishment. Not all of these four purposes will be relevant in each case. For example, if no damage or loss is caused by a contravention, the response will not need to serve the purpose of compensation. If litigation is private, it is most unlikely that punishment will be sought.<sup>149</sup> DP56 proposed that the TPA should make it clear that where the court has found a contravention it may make orders for one or more of these purposes.<sup>150</sup>

### ***Responses and recommendation***

4.8 Some submissions considered such an amendment to be unnecessary.<sup>151</sup> However, many supported it.<sup>152</sup> The TPC suggested that there should be an additional dot point: promoting and encouraging community-wide compliance.<sup>153</sup> The Commission considers that the objectives of the Act would be likely to be better served if the TPA stated what the purposes of orders made by the court should be. It **recommends** that the TPA be amended to make it clear that where the court has found a contravention of the Act it may make orders for one or more of the following purposes:

- to compensate a person who has suffered loss or damage as a result of the contravention
- to undo the effects of the contravention
- 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 TPA
- to provide deterrence and, as a secondary or incidental outcome, retribution.

### ***Which purposes is an order intended to serve?***

4.9 DP56 also proposed that the court should make clear which purpose it intends a particular order, or a particular part of an order, to serve.<sup>154</sup> The Commission considered that this would make clear the court's intention in imposing a particular order and enable accurate comparisons between different orders. Comparability was seen by the Commission as a prerequisite to fair and consistent responses by courts to contraventions of the Act. Several submissions opposed the suggestion on the grounds that it may create new avenues of appeal and loss of faith in the courts.<sup>155</sup> It was also seen as unduly interfering in the exercise of judicial discretion.<sup>156</sup> The Commission no longer considers that requiring the court to specify what purpose it intends a particular order to serve and the priority of orders would necessarily be worthwhile or practical. Accordingly, it makes no recommendation on this issue.

### ***Making orders to serve all relevant purposes***

4.10 ***Current situation.*** Australian courts operate on an adversarial, rather than an inquisitorial, model. In an adversarial system, the parties to a proceeding present their respective viewpoints while the judge acts

as an impartial umpire. In an inquisitorial system, the court takes the initiative in conducting the case and plays an active role in leading the investigations and examining the evidence. The adversarial system does not prohibit a court from making orders in addition to those sought<sup>157</sup> but generally the response a court makes to a contravention is largely determined by the way in which the case is presented and by the orders sought. Some courts have express authorisation to make whatever orders they consider appropriate.<sup>158</sup>

4.11 **Issue: making unrequested orders.** DP56 asked whether, as a way of ensuring that orders to serve all relevant purposes are made, courts dealing with trade practices matters should be encouraged or required, on their own initiative,

- to make orders that will serve a purpose the court considers ought be served, even if no request has been made for orders to serve that purpose, and
- to make orders that were not sought but that will serve a purpose the court has been requested to make orders in respect of.<sup>159</sup>

It suggested that this could be achieved by requiring courts to consider, in each case, whether the orders sought address the relevant purposes and, if not, to initiate appropriate additional orders.

4.12 **Responses.** One submission considered that courts should be required to look beyond the orders sought.<sup>160</sup> The TPC considered that the TPA should specifically empower and encourage courts to make orders to serve all relevant purposes.

Successful eradication of compliance problems will be achieved only: if the Courts have increased flexibility in how they respond to intransigent compliance problems; and excuses for inadequate enforcement responses based on institutional procedure and form are eliminated. . . [F]or Court orders to be fully utilised, how it considers each purpose for relevance to the circumstances of each case should not be an accident determined by how the submissions on penalty and orders are presented.<sup>161</sup>

One submission considered that the judiciary has a responsibility to look at broader, public issues and the TPC has a role to remind the judiciary of this obligation.<sup>162</sup> Other submissions favoured the courts being able to make unrequested orders, if they consider them appropriate and provided the parties are given an opportunity to comment before the court makes the order, but did not favour a requirement to do so.<sup>163</sup> A minority opposed the courts having power to make unrequested orders.<sup>164</sup>

4.13 **The Commission's view.** There is nothing to prevent a court making an unrequested order if it considers it appropriate to do so. The requirements of natural justice would demand, however, that it advise the parties involved and afford them an opportunity to be heard before making orders of its own motion. Judges have an obligation to draw apparently illegal conduct in matters before them to the attention of the executive branch of government.<sup>165</sup> The Commission does not consider, however, that courts should be required to consider the full range of purposes that could be achieved each time a contravention of the TPA is brought before them. Courts may not be in a position to determine that orders beyond those sought should be imposed because courts in Australia do not have an investigative role. The role of protecting the public interest should fall principally to the TPC.<sup>166</sup>

### ***Orders made for different purposes***

4.14 The Commission sought comment on whether the TPA should provide that, in imposing an order that is to serve a particular purpose, the court should not, unless there are unusual circumstances, be constrained by an order made for another purpose. It considered that, while orders intended to serve the same purpose should not be made independently of each other, an order that is made for one purpose should not restrict or prevent the making of an order that is designed to serve a different purpose.<sup>167</sup> Some submissions supported the suggestion.<sup>168</sup> Generally, however, there was little support for the proposal. Most considered that the courts should have maximum flexibility in making orders and that to separate purposes as suggested was unnecessarily rigid, unreasonable and would achieve nothing.<sup>169</sup> The Commission does not consider it necessary or beneficial to restrict the court in imposing orders.

### ***Statutory guidance for making orders***

4.15 **Proposal: guidelines for all orders.** Depending on the purpose for which an order is made, different factors will be relevant. At present, the TPA only provides guidance on the factors that should be taken into account in making an order in relation to civil penalties.<sup>170</sup> The Commission suggested in DP56 that statutory guidance should be provided for the making of all orders, whether or not they impose a penalty.<sup>171</sup> It also sought comment on whether guidance should be provided as to when a particular type of order is appropriate and whether examples should be given of the kinds of orders that may be appropriate in particular circumstances.<sup>172</sup> While not binding on the court, such examples may encourage both litigants and courts to consider a wider range of more novel or unusual orders as appropriate responses to contraventions.

4.16 **Responses.** A number of submissions supported the proposal, some on the proviso that the guidelines were not exhaustive.<sup>173</sup> Factors suggested for inclusion in the guidelines include the degree of detriment suffered by the consumer as a result of the conduct, the benefit to the trader resulting from the contravention, the period of time over which the conduct continued, whether the conduct or similar conduct by the alleged offender has been the subject of previous caution or prosecution by consumer affairs agencies and any public interest factor.<sup>174</sup> In contrast, many other submissions considered that there is no need for such guidance and that it would provide little, if any, benefit.<sup>175</sup>

The general principles are not in substantial dispute and have been worked out in cases under the TPA and by analogy from other areas of the law. I don't think statutory guidelines would serve any use.<sup>176</sup>

One submission considered that guidelines would amount to 'an emasculation of the judges' role'.<sup>177</sup> Another considered the second reading speech to be the most appropriate place for any guidelines.<sup>178</sup> Some submissions favoured including in the TPA examples of different orders.<sup>179</sup> The TPC considered that

the inclusion of a non-exhaustive list of possible orders would provide the necessary impetus to litigants and their counsel to apply for, and for the Court to make, orders that are more likely to have a positive impact.<sup>180</sup>

Other submissions disagreed.<sup>181</sup>

4.17 **The Commission's view.** The Commission does not consider that there is a need for the TPA to contain factors to be considered whenever a court makes an order in respect of a contravention of the Act. This is not to say that there are no situations in which guidance should be provided. However, in those situations, for example, when the court imposes a penalty, the Act should provide guidance specific to that situation.<sup>182</sup> It is important that both litigants and the courts adopt an expansive view of what orders can be sought and made.<sup>183</sup> The Commission does not, however, consider that including in the TPA examples of

orders that may be sought is the most effective way of encouraging such a view. The Commission considers that the TPC may more effectively achieve this. The TPC already has a commitment to educational programs and to providing information to both consumers and business.<sup>184</sup> The Commission considers that it would be beneficial if the TPC expanded its information and education role to publish a document describing various orders that may be appropriate in different situations. Examples of possible orders could include:

- providing advice or training to consumers and/or staff
- replacing or substituting products previously supplied
- modifying business practices to enhance compliance
- providing specified information to a specified government agency and/or allowing inspection of premises, facilities, products and services by a specified government agency for a specified period of time in order to aid the monitoring of compliance.<sup>185</sup>

The Commission *recommends* that the TPC should expand its education and information role by preparing and making publicly available a document describing various orders that could be sought in different specified and illustrated situations.

## **Private litigants**

4.18 Persons who have suffered loss or damage as a result of a contravention will usually seek compensation and, depending on the circumstances of the case, an injunction preventing the contravention from continuing. Questions arise about the extent to which a private litigant can or should be obliged to have regard to, or spend money pursuing, purposes that may serve the public interest but have little if anything to do with his or her private interests. There is also a question whether private litigants should be enabled to seek all orders. For example, they cannot currently prosecute<sup>186</sup> or seek corrective advertising orders and ancillary orders under s87 must compensate the litigant or prevent or reduce the loss or damage suffered or likely to be suffered by that person. In DP56 the Commission asked whether anything could or should be done to encourage or require private litigants to give consideration to, and take action in respect of, all relevant purposes when instigating legal proceedings.<sup>187</sup> The overwhelming view of submissions was that it would be inappropriate to require private litigants to seek orders beyond those that serve their own interests.<sup>188</sup>

Generally speaking, it is inappropriate that private litigants be involved in seeking to prevent future contraventions of the Act, and more particularly, to provide deterrence or retribution. First, private litigants will generally not have the resources to enable them to fully investigate all the matters relevant to appropriately framing preventative or deterrent orders. Secondly, they do not have available to them the specific powers given to the [TPC] to investigate the affairs of the respondent. Thirdly, there is no financial incentive for a private litigant to go to the expense of making such investigations and occupying court time with seeking such remedies . . . [I]f they do so, it is likely that they will do so poorly . . . [I]t is desirable that there be consistency in the enforcement of the Act particularly for the purposes of prevention and deterrents [sic]. To this end . . . it is desirable that these functions are left primarily, if not exclusively, to the [TPC] and the [DPP].<sup>189</sup>

The Commission agrees. Private litigants should not be required to pursue purposes that are not directly and immediately relevant to their own individual grievance.

## **TPC's role in ensuring that orders to serve all relevant purposes are sought**

### *The issue*

4.19 If neither the courts nor private litigants are to be required to ensure that orders to serve all relevant purposes are made,<sup>190</sup> it is all the more important to consider whether the TPC or other government agencies should have a role in ensuring that such orders are sought. A private litigant will, in most cases, be interested only in compensation. The DPP is predominantly interested in punishment. The TPC is more likely, however, to consider the full range of purposes. Currently, however, there is no obligation on the TPC when it initiates litigation to seek orders that will serve all relevant purposes. Nor is it required to monitor private litigation to see whether all appropriate orders are sought and, if they are not, to intervene. DP56 asked whether the TPC, the DPP or any other government agency could or should play a role in ensuring that in any court proceedings in respect of a contravention of the TPA, whether commenced by it or by someone else, orders are requested that will serve all of the purposes that are relevant in the circumstances.<sup>191</sup>

### *Submissions*

4.20 Several submissions considered that

the [TPC] should have the role of ensuring that in any proceedings involving a contravention of the Act, orders should be requested to fulfil all relevant purposes of the Act.<sup>192</sup>

The TPC considered that

[i]t would not be unreasonable, nor unduly onerous that the TPC, the DPP or any other government agency be required to consider, in Court proceedings in respect of a contravention of the TPA commenced by that agency, requesting orders that will serve all of the purposes that are relevant in the circumstances.<sup>193</sup>

The Attorney-General's Department agreed but preferred 'appropriate' to 'relevant' on the basis that some purposes may be relevant but not appropriate.<sup>194</sup> A number of submissions suggested that, if necessary, the TPC should be able to intervene in proceedings commenced by private litigants in order to further the objectives of the Act.<sup>195</sup>

In light of the strong public policy purposes underlying the TPA and the fact that most of the legal actions taken under the Act are by private litigants, the TPC should have a general right to intervene in proceedings commenced by private litigants to assist the court in relation to the purposes of the Act.<sup>196</sup>

Other submissions did not support a right of intervention for the TPC.<sup>197</sup>

Intervention by the TPC in private litigation offends the right of litigators to manage their affairs as they see fit. The possibility of intervention may make private litigants wary of taking actions under the TPA, rather than encourage it.<sup>198</sup>

The TPC favours being given standing as of right in proceedings under the TPA. It considers that this would

eliminate the necessity for costly and time consuming preliminary proceedings on the infrequent occasions on which the TPC may wish to intervene in a private action.<sup>199</sup>



However, it does not consider that the TPC should be required to maintain a 'watching brief' over TPA litigation if that were to involve noting, and considering whether it should intervene in, all private litigation because 'this would divert considerable resources away from enforcement and other activities that would more efficiently contribute towards the TPC fulfilling its corporate mission'.<sup>200</sup>

### ***Recommendation***

4.21 ***Intervention by the TPC.*** Although the outcome of litigation, particularly public interest litigation, often affects interests of persons other than the parties to the litigation, those interests are likely to be ignored by the parties. The Commission considers that the TPC should be able to intervene in private litigation under the TPA.<sup>201</sup> Other federal agencies are able to intervene in relevant private litigation.<sup>202</sup> The functions of the Human Rights and Equal Opportunity Commission (HREOC), for example, include to intervene in proceedings that involve human rights issues where HREOC considers it appropriate to do so.<sup>203</sup> HREOC must have the leave of the court hearing the proceedings to intervene and may be made subject to conditions, for example, in relation to costs. The Commission considers this to be a suitable model for intervention by the TPC. The Commission ***recommends*** that the TPA should be amended to provide that, where the TPC considers it appropriate to do so, the TPC may, with the leave of the court and subject to any conditions imposed by the court, intervene in proceedings brought under the TPA.

4.22 ***TPC to consider requesting orders to serve all relevant purposes.*** The Commission agrees with the TPC that it would be reasonable to require the TPC, when commencing proceedings relating to a contravention of the TPA, to consider all orders that would be necessary to serve the purposes that are relevant in the circumstances. It ***recommends*** that the TPA be amended accordingly. The Commission does not, however, consider that such a requirement should be imposed on the DPP. Unlike the TPC, the DPP does not have prime responsibility for the enforcement and administration of the TPA. The TPC will need to arrange with the DPP or the Australian Government Solicitor, where necessary, for the appropriate orders to be sought and those bodies should be responsive to the TPC's instructions.

## **Purposes to be served by the TPC's administrative responses to contraventions of the TPA**

4.23 Administrative action is perhaps the principal way in which the TPC responds to contraventions of the TPA.<sup>204</sup> It is important that it is undertaken to serve the objectives of the Act. DP56 proposed that the TPA should make it clear that administrative action undertaken by the TPC should be taken to achieve one or more of the following purposes:

- to compensate those who have suffered loss or damage as a result of the contravention of the Act
- to undo the effects of the contravention and
- to prevent future contravention of the Act.<sup>205</sup>

This proposal was generally supported in submissions.<sup>206</sup> The Commission considers that the TPA should state clearly what the purposes of administrative action should be. The Commission ***recommends*** that the TPA should be amended to make it clear that administrative action undertaken by the TPC should be taken to achieve one or more of the following purposes:

- to compensate those who have suffered loss or damage as a result of the contravention
- to undo the effects of the contravention, both immediately and in the longer term, and to promote and encourage community-wide compliance with the TPA and
- to prevent future contravention of the Act.

## 5. Access and cost issues

### Introduction

5.1 Private litigation has always been a vital element in the enforcement of the TPA.<sup>207</sup> However, there are a number of barriers which impede and often prevent private enforcement, especially for individual consumers and small businesses. The principal factors that will determine whether consumers or small businesses are able to enforce the TPA are knowledge of their rights under the Act and the cost and accessibility of enforcement mechanisms. Responses to DP 56 confirmed this.<sup>208</sup> This chapter identifies some of the barriers to private enforcement of the TPA and examines ways in which they may be reduced.

### Barriers to private enforcement of the TPA

#### *Ignorance*

5.2 A fundamental obstacle to private enforcement of the TPA is the lack of knowledge and understanding by consumers and business operators of their rights under Pts IVA and V of the TPA and how they may be enforced.<sup>209</sup> Anecdotal evidence suggests that many lawyers know little about the consumer protection provisions or believe that they are complex and subject to a number of jurisdictional barriers.<sup>210</sup> If people and their legal advisers are unaware of the provisions of the TPA there is little likelihood that they will be enforced through private action.

#### *Inappropriate forums*

5.3 If a dispute is not resolved by negotiation between the parties, use of an industry-based complaints mechanism or intervention by the TPC, the aggrieved party will usually have to commence proceedings in a court or tribunal. Proceedings under the TPA tend to be in the Federal Court or the Supreme Court of a State or Territory.<sup>211</sup> These superior courts are expensive and operate under often complex procedural rules. While proceedings before a lower court will generally be cheaper, they can still involve considerable expense and procedural complexity.<sup>212</sup> Litigation is an expensive, time-consuming and frequently inaccessible way to resolve disputes arising under the TPA. The consumer claims tribunals and small claims courts in each State and Territory are generally a quick, effective and relatively cheap alternative to litigation for small claims under State and Territory fair trading legislation or the TPA.<sup>213</sup> However, these tribunals have relatively low monetary jurisdictions,<sup>214</sup> often cannot be used by businesses<sup>215</sup> and generally lack the expertise to determine complex questions of law or fact.

#### *Cost and complexity*

5.4 The complexity and expense of litigation is a major deterrent to consumers and businesses taking action under the TPA. This is especially so where the monetary value of the goods or services involved is relatively small. The costs that arise in enforcing the TPA include the cost of investigating a contravention, fees for legal advice and representation and court charges if litigation is commenced. The complex procedural and evidential rules used by the courts add to the cost. The financial barriers to consumers are exaggerated by the effect on the cost of legal services of the tax deductibility of legal costs incurred by businesses.<sup>216</sup>

### ***Costs rules***

5.5 The current costs rules also discourage private enforcement of the TPA. Few consumers or businesses can afford to take the risk of an adverse costs order if the proceedings are unsuccessful. Where the action is successful, the costs that can be recovered are usually much lower than the actual solicitor-client costs incurred in conducting the litigation as they are calculated on a party-party basis and take little or no account of any investigation costs.<sup>217</sup> These problems can be particularly severe where an applicant is seeking injunctive or ancillary relief rather than an award of damages that may help to offset the cost of the litigation. While this issue is not unique to trade practices litigation, the Commission's inquiries have shown that the costs rules are of particular concern to consumers who cannot afford to enforce their rights.<sup>218</sup>

### ***Lack of legal and financial assistance***

5.6 There is little legal or financial assistance for private litigants who want to enforce their rights under the TPA but cannot afford to do so. The legal aid commissions in each State and Territory provide assistance to consumers who satisfy the relevant means and merit tests.<sup>219</sup> However, the stringent nature of these tests and the limited resources of the legal aid commissions mean relatively few grants are made for trade practices matters. The commissions do not make grants of legal aid to businesses. Under the TPA the Attorney-General may grant financial or legal assistance to a party for proceedings under Pt VA, PtVI or s 163A before the TPC, the Trade Practices Tribunal (TPT) or the Federal Court where it is reasonable to do so and a refusal would cause the party hardship, but such grants are rare.<sup>220</sup> AJAC has recommended to the federal Government that it should establish a fund to provide legal assistance for test cases in the interests of disadvantaged groups and for large scale litigation involving many parties in different jurisdictions.<sup>221</sup> Such a fund would provide assistance in appropriate trade practices cases. The Commission endorses the establishment of this fund.

### ***Particular barriers for business***

5.7 Business operators, especially small businesses, seeking remedies under the TPA, either as consumers of goods or services provided by other businesses or as competitors protecting their commercial interests, often encounter problems in addition to those outlined above. These include the lack of jurisdiction of any court other than the Federal Court to deal with matters under Part IV of the TPA,<sup>222</sup> the absence of a right to contribution and indemnity,<sup>223</sup> the Federal Court Rule that requires that a corporation be legally represented unless the Court orders otherwise<sup>224</sup> and the need to lodge security for damages when seeking an injunction. In its submission to the National Competition Policy Review (the Hilmer inquiry), the Small Business Coalition argued that the TPC should play a bigger role in helping small businesses to enforce the TPA.

## **Information and education**

5.8 Increasing awareness of the consumer protection provisions of the TPA and other fair trading legislation can help ensure that dealings between consumers and traders are in accordance with the law and that, when a contravention occurs, the affected party can assert his or her rights. This produces better business practices and helps avoid the cost and inconvenience which disputes cause for both parties. The TPC, FBCA and State and Territory fair trading agencies already produce materials setting out the rights and obligations imposed by fair trading legislation.<sup>225</sup> The peak bodies for consumers, businesses and the legal profession also have an important role in preparing and distributing material on consumer protection

to, and organising training for, their members. Another mechanism for increasing business awareness of the law and encouraging dissemination of information to consumers is codes of conduct.<sup>226</sup>

## **Alternatives to litigation in the Federal Court**

### ***Introduction***

5.9 Private enforcement of the TPA is not limited to litigation in the Federal Court. This section of the report looks briefly at a number of existing alternative forums such as lower courts, tribunals and industry-based dispute resolution.

### ***Lower courts***

5.10 Many lower courts already have power to grant a wide range of relief in disputes under the TPA or State or Territory fair trading legislation.<sup>227</sup> However, trade practices cases are rarely brought in these courts. It is not clear whether this is because people are unaware that these courts have these powers or because they are concerned that lower courts lack the necessary expertise to deal with trade practices matters. The Commission considers that federal, State and Territory fair trading agencies, the courts and the legal profession's peak bodies should promote the fact that fair trading litigation can be conducted in most lower courts. Lower courts are less intimidating to most consumers and small businesses, usually hear matters in less time, are widely dispersed geographically and are less costly than superior courts.<sup>228</sup> The Commission is confident that, if required to, these courts would quickly acquire the necessary expertise to deal with trade practices matters, especially in light of the considerable body of law on the TPA developed by the Federal Court. The Commission also considers that the governments of those States and Territories where lower courts do not have power to grant a wide range of relief in fair trading matters should be encouraged to give their lower courts the necessary power.<sup>229</sup>

### ***Tribunals***

5.11 Tribunals can be a quick and economical alternative to courts as they tend to have less formal procedures and need not be bound by the rules of evidence. The existing State and Territory consumer claims tribunals and small claims courts have an important role in the resolution of minor consumer complaints. However, their low monetary jurisdiction and lack of legal expertise mean they are not an appropriate forum for the resolution of disputes involving substantial amounts of money or complex issues. This is especially true where the determination of an issue may clarify the law and promote compliance across the community.<sup>230</sup> In DP56 the Commission invited comment on whether a federal tribunal should be established which would be able to determine claims under the TPA by consumers and business, have a substantial monetary jurisdiction, not be bound by the rules of evidence, be able to set its own procedures and have power to make orders similar to those which the Federal Court can make under the TPA.<sup>231</sup> Most responses to this issue did not see any need for a federal tribunal at this time.<sup>232</sup> Some submissions, however, supported the establishment of a federal tribunal to deal with claims by consumers.<sup>233</sup> PIAC and AFCO argued that the Commonwealth should explore the feasibility of establishing consumer dispute resolution centres with a monetary jurisdiction of at least \$50 000, a two-tiered approach of conciliation and determination with determination as a last resort and the ability to register determinations in the Federal Court for enforcement purposes.<sup>234</sup> The Commission considers that the creation of a federal tribunal to deal with trade practices matters should be considered in the context of developing a national scheme of consumer protection laws.<sup>235</sup> Accordingly, it does not make any recommendation for the introduction of a federal tribunal at this stage.

### ***Industry-based schemes***

5.12 Many industries and individual businesses have established dispute resolution schemes capable of resolving complaints in a quick and inexpensive manner while preserving the consumer's right to use the court system if not satisfied with the result.<sup>236</sup> Examples of these schemes include the Banking Industry Ombudsman, Telecommunications Industry Ombudsman, General Insurance Claims Review Panel, Life Insurance Complaints Board, State Insurance Office of Victoria Consumer Appeals Centre and the NRMA's insurance complaints system.

### ***Mediation and arbitration***

5.13 **Mediation.** Mediation involves a trained mediator helping the parties to a dispute to reach agreement by assisting them to identify the issues in dispute and to develop a mutually acceptable solution. Mediators do not adjudicate, arbitrate or conciliate. Mediation can be a quick and inexpensive mechanism for resolving disputes as it can help parties avoid litigation or expedite settlement if litigation has commenced. Most small claims courts and tribunals use mediation as the initial step when dealing with complaints. Mediation is also available through community justice centres and private dispute resolution services and as an annex to civil proceedings in most courts.

5.14 **Arbitration.** Arbitration usually involves a person hearing the evidence of each party to the dispute and making a determination. In most cases the parties agree in advance to be bound by the arbitrator's decision. Arbitration hearings are generally quicker and cheaper than litigation as they are not subject to the same procedural and evidential rules. It is available as an annex to civil proceedings in most courts and through private dispute resolution services. It is also used in a number of industry-based complaints systems.<sup>237</sup>

## **Representative actions**

### ***Introduction***

5.15 Representative actions are a procedural mechanism allowing one person to take legal action on behalf of a number of people who are affected by a common problem.<sup>238</sup> They allow people who have been wronged to enforce their rights as a group in a fair, efficient and economical fashion. Representative actions remove many of the financial barriers which ordinary people face when seeking to enforce their legal rights, give the courts a more efficient process for dealing with cases involving large numbers of people and help to ensure that laws are enforced more efficiently and more often.

### ***Representative actions under the TPA***

5.16 **Current position.** Where the TPC or the Attorney-General has brought a prosecution under s 79 or proceedings for an injunction under s 80 for conduct in contravention of Pt IVA or Pt V, the TPC may bring a representative proceeding on behalf of persons who have suffered, or are likely to suffer, loss or damage by that conduct, and who have consented to the TPC bringing the action on their behalf.<sup>239</sup> The remedies are subject to the TPC establishing the contravention. Section 87(1B) has quite a narrow application as

- it can only be used by the TPC, not private litigants
- it is only available where there has been a contravention of Pt IVA or Pt V, but not of Pt IV

- it is only available where the TPC has commenced proceedings under s 79 or s 80
- the success of the representative action depends upon success in the primary action, which means that, where the primary action is a prosecution under s79, the more stringent criminal standard of proof is effectively transposed onto the application under s 87(1B), to which the civil standard normally applies
- the 'opt in' requirements, whereby the TPC must identify and obtain the consent of the persons affected or likely to be affected by the conduct in question, are administratively difficult and expensive and mean that some people may miss out on the benefit of the proceedings.

5.17 **Responses to DP 56.** In DP 56 the Commission proposed that s 87(1B) be repealed.<sup>240</sup> This proposal was made in conjunction with another proposal designed to ensure that the TPC could bring representative proceedings under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act).<sup>241</sup> A number of submissions argued against this proposal.<sup>242</sup> The TPC considered that there are important cost and strategic advantages in being able to use s 87(1B) such as the ability to 'close-off' the class under the opt-in requirement and the ability to take action on behalf of fewer than seven people.<sup>243</sup> In its view, s 87(1B) actions complement those available under the Federal Court Act.<sup>244</sup> It nevertheless suggested that the effectiveness of s 87(1B) could be enhanced by allowing the TPC to bring a representative action under s 87(1B)

- without first having to commence proceedings under s 79 or s 80, which may be either inappropriate or irrelevant to the circumstances of the case
- in response to contravention of any provision of the TPA for which the TPC has an enforcement role.<sup>245</sup>

5.18 **The Commission's view.** The Commission accepts that there will be cases where it is more appropriate, for reasons of cost and efficiency, for the TPC to bring a representative action under s87(1B) of the TPA than under the Federal Court Act. These cases include those involving fewer than seven people and those where the effect of the contravention is different for each individual.<sup>246</sup> It would be a backward step to remove the section and thereby limit the ability of the TPC to assist people who suffer loss or damage as a result of a contravention of the TPA to obtain compensation or ancillary relief. The Commission also considers that the current limitations on the use of s 87(1B) are unnecessary and should be removed. Accordingly, the Commission **recommends** that s 87(1B) of the TPA be amended to

- remove the restriction that a representative action may only be brought where the TPC has brought a prosecution under s 79 or proceedings for an injunction under s 80
- allow a representative action to be brought for a contravention of any provision of the TPA in relation to which the TPC has an enforcement role.<sup>247</sup>

### ***Representative actions under the Federal Court of Australia Act 1976 (Cth)***

5.19 **Current position.** A representative proceeding under Pt IVA of the Federal Court Act can be commenced if there are seven or more persons with claims against the same person, the claims are all 'in

respect of, or arise out of, the same, similar or related circumstances' and the claims give rise to at least one substantial common issue of law or fact.<sup>248</sup> The proceedings can be commenced by one or more members of the group on behalf of the others<sup>249</sup> and it does not matter that the relief sought for each person represented is not the same.<sup>250</sup> The consent of a person to be a member of the group is generally not required, but a group member may, by a date fixed by the Court, 'opt out' of the proceedings by filing a written notice pursuant to the Federal Court Rules.<sup>251</sup> The court has comprehensive powers to determine issues and to make orders,<sup>252</sup> and express provision is made to preserve the ability of the court to make orders pursuant to s 87 of the TPA in relation to claims brought using the provisions of Pt VI of the TPA where it is appropriate to do so.<sup>253</sup>

**5.20 Suggested reforms.** In DP 56 the Commission invited comment on whether PtIVA of the Federal Court Act needs to be amended to make it clear that the TPC is able to bring representative actions for contraventions of any provision of the TPA.<sup>254</sup> There was general support for the removal of any barriers that may impede the TPC's use of PtIVA.<sup>255</sup> Under the Federal Court Act the TPC can seek relief different from that sought on behalf of the persons it represents.<sup>256</sup> However, a fundamental question exists as to whether the TPC has a 'claim' within PtIVA such that it has standing to bring a representative proceeding.<sup>257</sup> A similar issue arises for organisations which may wish to bring representative proceedings on behalf of aggrieved consumers or businesses. The Court has not yet been required to give detailed consideration to what constitutes a 'claim' for the purposes of PtIVA. In *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd & Ors*<sup>258</sup> the Court held that PtIVA may be used provided the claim of the representative party is substantially the same as that of the group members. It is only if the claims are 'incompatible' so as to lead to conflict between the representative party's interest and the interests of the group members that the Court would conclude that representative proceedings are inappropriate.

**5.21 The Commission's view.** The Commission considers that the TPC's access to representative proceedings under Pt IVA of the Federal Court Act should be clarified. The Commission **recommends** that the TPA be amended to give the TPC standing to bring representative proceedings under Pt IVA of the Federal Court Act on behalf of persons who suffer loss or damage from a contravention of the TPA regardless of whether the TPC has a claim in its own right. The Commission also considers that there is merit in ensuring that Pt IVA proceedings may be commenced by peak consumer or business organisations on behalf of aggrieved consumers or businesses.

## **Changing the costs rules**

### ***Current position***

**5.22 Liability for costs in Federal Court proceedings.** The TPA provides that the Governor-General may make regulations prescribing 'matters for and in relation to the costs, if any, that may be awarded by the Court in proceedings before the Court under this Act'.<sup>259</sup> No regulations have been made under this provision. Accordingly, costs in proceedings under the TPA in the Federal Court are determined in accordance with the Federal Court Act and the Federal Court Rules. The Court has an unfettered discretion to award costs in all proceedings before it other than proceedings in respect of which any other Act provides that costs shall not be awarded.<sup>260</sup> While the Court's discretion is absolute, it must be exercised judicially, and not capriciously or arbitrarily. The Court will usually require the unsuccessful party to proceedings to pay all or part of the other party's costs.<sup>261</sup> The Federal Court Rules provide that, unless the Court orders otherwise, an order that costs be paid to a party entitles that party to taxed costs,<sup>262</sup> which are calculated according to a scale specifying the maximum fee which may be recovered for each item approved by the taxing officer.<sup>263</sup>



5.23 **Limiting or removing liability for costs.** The Court, arguably, has the power under its general discretion to limit liability for costs or to grant immunity against an adverse costs order.<sup>264</sup> Since the start of 1993, the Court has been able to specify, by order made at a directions hearing, the maximum costs that may be recovered on a party-party basis.<sup>265</sup> It is not yet clear how the Court will apply this Rule, but it has the potential to limit, and possibly even to prevent, an adverse costs order.

5.24 **Legal and financial assistance under the TPA.** There are no restrictions on the form of legal or financial assistance which the Attorney-General may grant under the TPA.<sup>266</sup> It is therefore possible for the Attorney-General to give an undertaking to indemnify an applicant for an adverse costs order.<sup>267</sup> However, given that there is no specific budget allocation for grants under the TPA<sup>268</sup> and that the approval, amount and conditions of these grants are discretionary, they are not an effective response to the general problems raised by the current costs rules.

### **Options for reform**

5.25 **General review of the costs rules.** The AJAC Report noted that the costs indemnity rule acts as a barrier to justice and recommended that the Attorney-General refer to the Commission the task of investigating the advantages and disadvantages of the rule.<sup>269</sup> In May 1994 the Attorney-General announced that he will be giving the Commission a reference on the costs indemnity rule.<sup>270</sup> In light of this new reference, the Commission does not make any recommendations on the costs issues raised in DP 56. Nevertheless, the Commission's provisional view on the issues and responses to them is set out below.

5.26 **Immunity against costs in public interest cases.** While the Federal Court could grant immunity against costs in public interest cases under its general discretion, it has tended to take the view that a party should not be deprived of its right to seek costs if successful merely because the litigation may be in the public interest.<sup>271</sup> In DP 56 the Commission invited comment on whether the Federal Court should, at the start of proceedings, be able to grant a plaintiff immunity against an award of costs in litigation which the Court determines is in the public interest.<sup>272</sup> There was strong opposition to this suggestion.<sup>273</sup> Opponents argued that such an immunity might be abused<sup>274</sup> and that it would be unjust and unreasonable for a party who is innocent of any contravention of the TPA to be required to bear a greater burden than the rest of the community simply because a matter is in the public interest.<sup>275</sup> While the Commission is satisfied that safeguards could be introduced to prevent an immunity being abused, it accepts that it is unreasonable to deprive an innocent party of its right to costs merely because the litigation was in the public interest. Accordingly, the Commission does not support an immunity against costs in public interest cases.

5.27 **Immunity against costs for designated organisations.** In DP 56 the Commission indicated that it did not support any amendment to the TPA that would allow particular non-government organisations to bring actions under the TPA with immunity against an award of costs on the basis that their activities are in the public interest.<sup>276</sup> Almost all the responses to this issue agreed with the Commission's view.<sup>277</sup> The Commission considers that such an immunity would be unjust to respondents who are not proven to have contravened the TPA. In any event, litigation is not in the public interest merely because it is brought by an organisation established to pursue causes which may be generally regarded as in the public interest. Accordingly, the Commission does not consider that the TPA should give any organisation general immunity against adverse costs orders.

5.28 ***Each party to bear its own costs.*** An alternative to establishing a system for granting immunity against costs to plaintiffs in public interest cases is to provide that, in every case under the TPA, each party must bear its own costs unless there are exceptional circumstances. In 1988 NCAAC recommended that provision be made in the Trade Practices Regulations that each party must pay its own costs in actions taken under Pt V of the TPA, with a discretion given to the court to depart from this basic rule in exceptional circumstances.<sup>278</sup> This issue was raised in DP 56.<sup>279</sup> There was substantial opposition to this suggestion on the grounds that the current costs rules are adequate and that the risk of an adverse costs order acts as a major deterrent to trivial or vexatious litigation.<sup>280</sup> The TPC and the Legal Aid Commission of NSW argued that such a rule may actually disadvantage consumers by removing their ability to obtain the assistance of legal representatives prepared to act on the basis that their costs will only be satisfied if the litigation succeeds.<sup>281</sup> One submission pointed out that the rule could be used by wealthy corporations or individuals to oppress small businesses or individual consumers by commencing litigation which is expensive for the respondent to defend.<sup>282</sup> In light of the above, the Commission considers that there should be no provision that each party to an action under the TPA must pay its own costs unless there are special circumstances.

5.29 ***Recovery of 'solicitor-client' or 'indemnity' costs.*** At present, the Federal Court may, pursuant to its discretion under s 43, award costs on a 'solicitor-client' or 'indemnity' basis.<sup>283</sup> In practice, however, the Court has only been prepared to award solicitor-client costs where there is some special or unusual feature in the case to justify the court exercising its discretion in that way.<sup>284</sup> In *Tobacco Institute of Australia v AFCO* Justice Hill specifically rejected the notion of awarding costs on an indemnity basis merely because the subject matter of the litigation might be of interest to the public.<sup>285</sup> In DP 56 the Commission invited comment on whether there are circumstances, for example where litigation is in the public interest, in which the Federal Court should normally order the defendant to pay the plaintiff's solicitor-client costs.<sup>286</sup> There was little support for requiring the Court to award solicitor-client costs in public interest cases, with many submissions maintaining that the current discretion of the Court is sufficient.<sup>287</sup> Some submissions argued that the Court should be able to exercise its discretion in favour of ordering the payment of the applicant's solicitor-client costs if it is satisfied the litigation is in the public interest.<sup>288</sup> The Commission considers that solicitor-client costs should not be awarded simply because the litigation raises issues of interest to the public. However, the Commission considers that the range of factors which the Court may take into account when deciding whether to award an amount above party-party costs should be expanded. Litigation which has a public element, such as the resolution of an important legal question or an issue that is relevant to the community as a whole, should not be discouraged. Whether a case was in the public interest is an appropriate matter for a court to consider when determining the question of costs. Accordingly, the Commission considers that the TPA should be amended, or Trade Practices Regulations introduced, to provide that, when deciding whether to award more than party-party costs to an applicant, the court may take into account whether the litigation was in the public interest.

5.30 ***Recovery of plaintiff's investigation costs.*** Investigation costs<sup>289</sup> incurred by private plaintiffs may only be recovered if the work is necessary and proper for the attainment of justice in the proceedings.<sup>290</sup> As the amount recoverable may only be a small proportion of the total costs of investigation, investigation costs may prevent private enforcement actions. In DP 56 the Commission asked whether the TPA should provide that the Court's discretion to award costs ought to include the power to order the payment of all or part of a party's reasonable investigation costs.<sup>291</sup> Most responses opposed this suggestion given the difficulties of identifying what costs should be included, determining whether they were reasonable and preventing parties agreeing to unreasonable settlements under threat of a substantial investigation bill.<sup>292</sup> The Commission accepts that these difficulties would be hard to avoid in the context of private litigation

and, therefore, makes no recommendation on the matter. It should be noted, however, that if the Commission's views on costs in such cases are adopted it will be possible for the Court to specify that additional investigation costs can be recovered by the successful applicant in public interest cases.<sup>293</sup>

## 6. Post sale consumer protection

### Introduction

6.1 Divisions 2 and 2A of Pt V of the TPA are designed to protect consumers against defective goods and services.<sup>294</sup> Division 2 implies certain non-excludable conditions and warranties into most contracts for the supply of goods and services to consumers.<sup>295</sup> These provisions are enforced under the law of contract.<sup>296</sup> In addition, where a supplier of goods has breached a condition implied under Pt V Division 2, the consumer may rescind the contract for the goods and recover any money paid pursuant to the contract by either serving a notice on, or returning the goods to, the supplier with details of the breach.<sup>297</sup> Division 2A imposes certain obligations on manufacturers and importers of goods supplied to consumers.<sup>298</sup> A breach of Division 2A is a breach of a statutory duty which allows a consumer and his or her successors in title to recover compensation for loss or damage.

### Problems with Divisions 2 and 2A of Pt V

#### *Lack of awareness and enforcement*

6.2 The main problems with enforcement of Divisions 2 and 2A are the lack of consumer awareness of the provisions, the cost of litigation and the lack of any facility for public enforcement. In 1989 the TPC released a report on consumer awareness of, and reliance on, Divisions 2 and 2A.<sup>299</sup> The report noted that consumer awareness of rights under Divisions 2 and 2A was universally low, the use of the Divisions in litigation was minimal (with the vast majority of cases being in small claims tribunals) and the effect of the Divisions in resolving disputes without litigation depended critically on the level of trader awareness and compliance.<sup>300</sup> In most cases consumers lack the expertise, resources and confidence to enforce their rights under Divisions 2 and 2A. In a report to the Standing Committee of Consumer Affairs Ministers, the FBCA noted that the provisions of Divisions 2 and 2A are not understood or used by consumers and traders and do not facilitate the resolution of disputes by negotiation.<sup>301</sup> These problems are accentuated by the lack of uniformity between the TPA and the relevant State and Territory legislation.

#### *Division 2 and the law of contract*

6.3 A number of problems arise because the enforcement of Division 2 is contract based. Contract law alone is an inadequate basis for consumer protection because

- the situation where parties enjoy substantially equal economic strength and knowledge, upon which contract law is premised, rarely arises in consumer transactions
- privity of contract means that a contravention of any of the implied conditions or warranties can only be enforced by the consumer
- the artificial distinction between conditions and warranties tends to limit the types of remedies available<sup>302</sup>
- in many cases contractual remedies do not adequately facilitate the resolution of disputes by negotiation.<sup>303</sup>

## Possible solutions

### *Public enforcement and enforcement by third parties*

6.4 **Public enforcement.** The resources and expertise of the TPC mean that, in many cases, it is better equipped than individual consumers or their representatives to investigate and take action in relation to contraventions of the warranty provisions. This is especially so where many consumers are affected by the conduct of only a few traders. In DP 56 the Commission sought comment on whether the TPC should be able to enforce Divisions 2 and 2A either on behalf of consumers who have suffered harm or on its own initiative.<sup>304</sup> There was substantial support for the TPC being able to bring enforcement actions on behalf of consumers, particularly by means of representative actions.<sup>305</sup> The conceptual problems presented by having contractual terms enforced by a public agency have been acknowledged by the FBCA<sup>306</sup> and the TPC.<sup>307</sup> In particular, provision would have to be made to ensure that the TPC could bring a representative action even though it was not seeking any orders or other relief itself.<sup>308</sup> Most responses opposed making a contravention of a condition or warranty a breach of the TPA so as to allow the TPC to enforce Divisions 2 and 2A on its own initiative.<sup>309</sup>

6.5 **Enforcement by third parties.** The Commission also invited comment on whether a third party, being a person who is neither a party to a contract between a trader and consumer nor the consumer's successor in title, should have standing to commence proceedings under the general law in relation to Divisions 2 and 2A.<sup>310</sup> Some submissions considered that there could be advantages in allowing a consumer organisation, for example, to seek an injunction to prevent a supplier from continuing to supply goods that are not of merchantable quality or from continuing to use a contract which purports to exclude the application of Divisions 2 and 2A.<sup>311</sup> However, a majority of responses did not consider that 'independent' third parties should be able to enforce the warranty provisions.<sup>312</sup> There was general support for enabling a consumer's successors in title to enforce Division 2, although an analysis by the FBCA shows that such an amendment would be of limited benefit to most successors in title.<sup>313</sup>

### *Enhancing the remedies*

6.6 The remedies currently available for breaches of Divisions 2 and 2A have been criticised as often being inadequate.<sup>314</sup> In DP 56 the Commission asked whether the remedies should be improved.<sup>315</sup> While a few responses supported a range of remedies similar to those available under s 80 and 87 of the TPA,<sup>316</sup> many argued that it would be sufficient if the current range of remedies was enhanced by introducing a right to a replacement good or service.<sup>317</sup> Providing a replacement would benefit both consumers and suppliers. The FBCA has noted that

while monetary remedies in the form of a refund or damages are important elements in a post-sale consumer protection regime, consumers are often more interested in getting what they want when they want it rather than receiving compensation for not getting what they want. In this context, the remedy of replacement is of crucial importance to achieving both consumer satisfaction and self-executing legislation . . . The availability of replacement as a remedy should add nothing to the liability of suppliers and manufacturers as a whole, as it simply provides for a different form of redress. In fact, replacement could prove to be a more cost effective remedy for the supplier as he or she keeps the profit margin rather than returning the full price, and may also keep a satisfied customer . . . It should also be borne in mind that where customers can get what they want, either through refund or replacement, it is likely that there will be little incentive to seek damages as a remedy.<sup>318</sup>

Section 75A could be enhanced by making replacement of goods available as an alternative to a refund of the purchase money.

### ***An integrated statutory scheme***

6.7 The Ministerial Council on Consumer Affairs is currently examining a number of options to improve post sale consumer protection. One option is to replace Divisions 2 and 2A and s 75A with an integrated statutory scheme developed by the FBCA. The scheme would

- apply to all consumer transactions as defined in s 4B
- cover the contracting consumer and all successors in title
- enable a consumer to obtain relief from either the manufacturer or supplier of goods in the event of an 'unsatisfactory bargain'<sup>319</sup>
- where the breach concerns goods, limit the remedies to repair, replacement or refund (the choice being with the supplier) plus the cost of obtaining relief (there would be no awards of damages)
- integrate contracts for the supply of services into the statutory scheme so that a consumer could obtain relief for an 'unsatisfactory service'<sup>320</sup>
- where the breach concerns services, provide remedies that would allow either a refund of monies already paid under the contract (less any amount deductible on a quantum meruit basis) or allow the consumer to have the service completed by a provider of his or her choice at the reasonable expense of the original service provider at the choice of the consumer plus the cost of obtaining relief
- establish rights under the scheme in addition to existing common law and statutory rights
- give the TPC the right to take representative actions on behalf of consumers in post sale matters.

Such a scheme addresses all the concerns about the current provisions for post sale consumer protection in the TPA. In its report to the Consumer Affairs Ministers, the FBCA expressed the view that the integrated scheme would substantially enhance consumer protection.<sup>321</sup> The TPC supports the scheme subject to several modifications, including allowing consumers to seek damages in some cases.<sup>322</sup>

### ***Lemon laws***

6.8 'Lemon laws' are laws which allow the buyer of goods with major irremediable defects (a 'lemon') to compel the seller or manufacturer of the goods to take them back and to refund the purchase money or replace the goods, provided the seller or manufacturer has had a reasonable opportunity to repair the defect. While these laws have been widely adopted in the United States,<sup>323</sup> they have not been used in Australia.<sup>324</sup> DP 56 asked whether the TPA should include a lemon law.<sup>325</sup> Responses to this issue indicated little support for amending the TPA to include a US-type lemon law.<sup>326</sup>

## **The Commission's view**

6.9 The Commission is of the view that the integrated statutory scheme currently being considered by the Ministerial Council on Consumer Affairs is the most appropriate solution to the problems associated with Divisions 2 and 2A. The question whether damages should be available under the scheme requires further consideration. At this stage the Commission agrees with the TPC that there may be situations where damages are the only appropriate remedy.<sup>327</sup> The scheme should be adopted by all State and Territory governments to ensure national uniformity.<sup>328</sup> As the integrated scheme may take some time to develop, the Commission considers that Division 2 should be enhanced immediately by allowing consumers the right to seek a replacement. Accordingly, it *recommends* that s 75A be amended to include a right to a replacement. The choice between a refund and replacement, subject to the availability of the type of good originally purchased, should be made by the consumer.

## 7. Compensating persons who suffer loss or damage

### Introduction

7.1 This chapter deals with issues that may affect the ability of people to obtain compensation under the TPA. The Commission considers that enabling persons who have suffered loss or damage as a result of a contravention of the TPA to be compensated for that loss is perhaps the most important objective of action to enforce the Act.

### Priority of compensation

#### *Court to give compensation priority*

7.2 **Proposal.** A court will sometimes be in a position to consider making several orders, one of which is an order for compensation. This situation may arise if damages are sought under s 87(1A) in penalty proceedings in which the defendant is found to have contravened the Act or if an individual defendant is convicted for an offence against the TPA and sentenced under certain provisions of the *Crimes Act 1914* (Cth).<sup>329</sup> Courts always consider the financial circumstances of the defendant when making orders. DP56 raised the issue of what effect, if any, the court's awareness of a contravener's limited financial resources should have on the court's orders. In criminal trials in South Australia, if a court proposes to make an order for compensation and to impose a fine or make any other order for the payment of a pecuniary sum and considers that the defendant has insufficient means to pay both, the court must give preference to compensation.<sup>330</sup> The Commission proposed that the TPA should be amended to provide that, if a court proposes to make an order for compensation and to impose a fine or make any other order for the payment of a pecuniary sum and it considers that the person has insufficient means to pay both, the court must give preference to compensation.<sup>331</sup>

7.3 **Submissions.** This proposal received almost unanimous support.<sup>332</sup> Not all submissions agreed, however, that compensation should always take priority over other orders.

The extent to which compensation should take priority over penalty will be dependent upon the specific circumstances of each case and there may be instances where prohibition and penalty by reason of its public interest quality outweighs the need to compensate an individual applicant. . . [A] discretion is favoured.<sup>333</sup>

7.4 **Recommendation.** The Commission does not consider that requiring the court to give priority to compensation would render ineffective orders made for other purposes such as prevention and deterrence. Even if the court orders a contravener to pay less money to consolidated revenue than it otherwise would so as to enable the contravener to remain in business, the contravener will still suffer a financial detriment and the stigma of a conviction and fine or exposure to a civil penalty. It will also have experienced the inconvenience and expense of litigation. The TPA should direct the court to give priority to compensation over other orders requiring the payment of money<sup>334</sup> and enable the court to make enquiries about whether compensation is relevant in a particular case before proceeding to make orders. This will increase the likelihood that compensation will be ordered where appropriate. The Commission **recommends** that the TPA be amended to provide:

- where a court considers it appropriate to make an order for compensation and to impose a fine or make any other order for the payment of a pecuniary sum and it appears to the court that the



defendant has insufficient means to pay both, notwithstanding anything in s16A of the *Crimes Act 1914* (Cth) the court must give preference to compensation<sup>335</sup>

- before imposing a fine or making any other order for the payment of a pecuniary sum, the court may adjourn consideration of the matter to enable enquiries to be made to ascertain the identity of any victim of the contravention and the extent of the victim's loss or damage
- the court may give directions as to the manner in which, and by whom, the enquiries should be made.

Several submissions interpreted the proposal in DP56 as giving priority to a compensation order if the defendant becomes insolvent or bankrupt.<sup>336</sup> The phrase 'give preference to' is not intended to rewrite the law of insolvency. It is merely intended that the court should, if necessary, reduce the penalty or other order for payment of a pecuniary sum to a level at which the defendant should, on the information before the court, be able to satisfy both the compensation order and the penalty or other order.

### ***Priority of compensation order on insolvency or bankruptcy***

**7.5 Proposal.** The Commission considered separately the situation where the defendant cannot satisfy an order for compensation and asked whether orders for compensation made pursuant to the TPA should be given priority in winding up or bankruptcy proceedings and, if so, whether they should only be given priority in relation to other orders for the payment of money made pursuant to the TPA<sup>337</sup> or in relation to all debts.<sup>338</sup> At present, the priorities of creditors of an insolvent company are governed by the Corporations Law.<sup>339</sup> The order of payment of debts of a bankrupt is governed by the *Bankruptcy Act 1966* (Cth).<sup>340</sup> Fines imposed in respect of an offence are not admissible to proof against an insolvent company<sup>341</sup> or a bankrupt individual.<sup>342</sup>

**7.6 Responses.** A considerable number of submissions could see no reason why compensation orders made under the TPA should be accorded priority over other debts.<sup>343</sup> The TPC favoured amending the Corporations Law and the *Bankruptcy Act 1966* (Cth) to give TPA compensation orders priority over other orders imposed under the TPA that required the payment of money but not over other debts. It considered this would 'maximise the chances of those who had suffered harm as a result of a contravention receiving at least some compensation and encourage the Court to consider making orders other than those imposing monetary penalties for the purposes of compliance and punishment'.<sup>344</sup> Several submissions indicated support for the notion that TPA compensation orders should be given some sort of priority but did not specify over what debts and in what circumstances.<sup>345</sup>

**7.7 The Commission's view.** The Commission does not consider that there is justification for giving compensation orders made under the TPA priority over other debts owed by insolvent corporations or bankrupt individuals, whether they arose under the TPA or not. The Commonwealth's policy on priority of debts is not to make exceptions to the general rule that debts of bankrupts and insolvents rank equally, except in very limited circumstances.<sup>346</sup> The Commission does not recommend any changes to either the Corporations Law or the *Bankruptcy Act 1966* (Cth) in respect of the priority of payment of debts. The Commission's recommendation in para 7.4 gives compensation priority when orders are being made, rather than at the time they are enforced. It may even help persons who are ordered to pay compensation under the TPA avoid becoming insolvent or bankrupt.

## **Limitation period for claiming damages**

### ***Three years from accrual of cause of action***

7.8 The TPA provides that action for recovery of loss or damage caused by a contravention of Pt IV or Pt V of the TPA may be commenced at any time within three years after the date on which the cause of action accrued.<sup>347</sup> A cause of action accrues when actual loss or damage is suffered, not when the contravention occurs or when there is merely a potentiality of loss or damage.<sup>348</sup> The court has no discretion to extend that time limit.<sup>349</sup> State limitation statutes enable courts to extend the limitation period for various causes of action.<sup>350</sup> They also provide guidance as to what factors the court should take into account in determining whether to extend the limitation period.

### ***Proposal - discretion to extend time***

7.9 In most cases three years will be adequate time for a consumer to seek redress. It may be considered, however, that in some instances, for example, if a plaintiff does not become aware that he or she has suffered damage until after the limitation period has expired, an injustice may result.<sup>351</sup> The Commission proposed in DP56 that the court should be given a discretion to extend the limitation period if it considers that in all the circumstances it is appropriate to do so.<sup>352</sup> It also asked whether the court should be restricted in how long an extension of the limitation period it is able to grant and whether the TPA should list factors to be taken into account by the court when exercising its discretion to grant an extension of time.<sup>353</sup>

### ***Submissions***

7.10 ***Giving courts discretion to extend the time limit.*** A number of submissions considered three years to be sufficient time and opposed the Commission's proposal on several grounds, notably that

- business cannot reasonably be conducted where there is unknown liability for an unknown period of time
- most plaintiffs would also have a common law cause of action where extensions of time are already available
- it will upset the current balance between competing policy and social issues<sup>354</sup>
- plaintiffs in situations such as that provided as an example in DP56 would be covered by Pt VA and, therefore, not be at risk of suffering an injustice by virtue of the current limitation period.<sup>355</sup>

Many submissions supported the proposal.<sup>356</sup> Others agreed that an amendment is warranted but considered that it would be preferable to change the point at which the limitation period commences. Suggestions as to the appropriate point included the time of the contravention<sup>357</sup> and the time when a person becomes aware that he or she has suffered loss or damage, even if damage has in fact been suffered earlier.<sup>358</sup> The TPC preferred such an amendment to an amendment giving the court a discretion to extend the period, because it would 'provide an increased level of certainty to all parties without removing the incentive to avoid undue delay in commencing proceedings'.<sup>359</sup> It considered that the Commission's proposal treats 'long gestation' cases as an aberration 'which unfortunately they are not'.

7.11 ***Restricting the courts' discretion.*** A few submissions favoured restricting the possible extension period.

[We do] not support an open ended limitation period. The interests of justice require a finite maximum limitation period, beyond which a court would have no discretion. . . [T]his period should be six years from the date the cause of action accrued. This period is consistent with the limitation period in tort and contract.<sup>360</sup>

Most submissions, however, did not favour any restriction.<sup>361</sup>

If the purpose of conferring on the Court a power to extend time is to ensure (as far as is reasonably practicable) that injustice is avoided, there is little point in imposing a restriction in the length of the period for which an extension may be granted. Any such maximum period would necessarily be arbitrary, and potentially produce similar injustice to that sought to be overcome by Proposal 3.2.<sup>362</sup>

**7.12 *Criteria for extension.*** Some submissions considered that providing factors to be considered by the court when exercising its discretion to grant an extension would provide greater certainty, assist both the court and private litigants and avoid vexatious applications for extensions.<sup>363</sup> Others considered that there is a sufficient body of law to assist a court in determining what factors are relevant and that the circumstances of each case will vary so greatly that a list of factors would not be helpful.<sup>364</sup>

### ***Recommendation***

**7.13 *Allow courts to extend the limitation period.*** Problems associated with a strict three year limitation period include:

- aggrieved persons are discouraged from using alternative dispute resolution mechanisms because they must decide quickly whether to initiate court action
- the TPC's ability to seek orders for compensation on behalf of those who have suffered harm from a contravention is limited
- the ability of disadvantaged persons to initiate actions which rely on a prior finding of fact by the court in matters brought by the TPC<sup>365</sup> is limited
- there are significant categories of contraventions where a three year period is seriously inadequate.<sup>366</sup>

Something needs to be done. The Commission does not favour extending the limitation period beyond three years. The three year limit provides adequate preparation time while at the same time providing an incentive to both the litigant and his or her solicitor to act without unnecessary delay. Nor does the Commission favour amending the TPA to change the point at which the limitation period commences. There is considerable case law on when a cause of action accrues and when damage has actually been suffered. It is clear that the answers to such questions will depend on the circumstances of each case and courts have indicated a willingness to interpret the law in the plaintiff's favour.<sup>367</sup> The Commission is not convinced that certainty would necessarily be achieved if time ran from when the person 'became aware, or ought reasonably have become aware, of the loss'. There will inevitably be cases in which that issue is in dispute. The Commission considers that cases in which it is unclear when the cause of action accrued or where the application of a three year time limit would give rise to an injustice would best be dealt with by allowing the person to seek permission to commence an action after the three year limitation period has

expired. The Commission *recommends* that s 82(2) of the TPA be amended to allow the court to extend the period in which a claim for damages can be commenced if the court considers it appropriate to do so.

**7.14 *No need for criteria or restriction on extension.*** The Commission does not consider there is a need to restrict the court in the length of extension it may grant.<sup>368</sup> The circumstances of each case will vary so much that to do so may defeat the purpose of allowing the court a discretion. Nor does it consider it necessary to specify in the TPA factors the court must consider in exercising its discretion to extend the time limit. Courts will develop criteria to assist them in exercising their discretion, as they have in other areas. In the administrative decisions review area, for example, in which a wide range of cases is dealt with, the courts have determined that certain factors are relevant to the exercise of discretion to grant an extension of time where the *Administrative Decisions (Judicial Review) Act 1977* (Cth) gives unfettered discretion.<sup>369</sup>

### **Section 87(1A)**

**7.15 *Proposal.*** The court may, on the application of a person who has suffered, or is likely to suffer, loss or damage as a result of conduct that is in breach of Pt IVA or Pt V, make appropriate orders to compensate the person for the loss or damage.<sup>370</sup> If the conduct contravenes Pt IVA,<sup>371</sup> an application under s 87(1A) may be commenced within two years after the day on which the cause of action accrued.<sup>372</sup> In any other case, an application under s 87(1A) may be commenced within three years after the day on which the cause of action accrued.<sup>373</sup> The reason for this difference in limitation period is not apparent. In DP56 the Commission proposed that the time limit for an application under s 87(1A) be three years in all cases.<sup>374</sup>

**7.16 *Responses and recommendation.*** Almost all submissions supported this proposal.<sup>375</sup> No explanation was offered for the difference in time limit for actions relating to Pt IVA and other actions. In the absence of such explanation, consistency should be provided, both within s 87(1A) and between s 87(1A) and s 82. Accordingly, the Commission *recommends* that s 87(1CA) of the TPA be amended to provide that the time limit for any application under s 87(1A) is three years and that the court has a discretion to extend that time if the court considers it appropriate to do so.

## **Assessment of damages**

### ***How are damages assessed?***

**7.17** A person who suffers loss or damage as a result of conduct that contravenes Pt IV or Pt V of the TPA may recover damages from the person who contravened the Act or from anyone involved in the contravention.<sup>376</sup> The TPA does not prescribe how damages are to be assessed. The courts often look to the common law for guidance but they are not bound by it.

. . . [W]hilst common law rules as to the measure of damages in tort may, in appropriate circumstances, provide a useful guide, no justification exists for confining the damages which are recoverable under ss 82 and 87 of the Act by reference to common law tests. . . . It seems plain that the statutory right to damages now under consideration serves a wider purpose and is intended to have broader ambit than the common law actions of tort or negligent misstatement. There is no indication of a legislative intention that the relevant common law rules should first be discovered, the reasons that led to their development understood, and then that they should be adopted or adapted consistently with the policy of the Act, before the court performs its duty of assessing the amount to which applicants are entitled under the Act.<sup>377</sup>

Nevertheless, damages awarded under s 82 for breaches of Pt V have generally been assessed on the same basis as damages in tort.

The courts are not bound to make a definitive choice between the [contracts and torts] measures of damages so that one applies to all contraventions to the exclusion of the other. However, there is much to be said for the view that the measure of damages in tort is appropriate in most, if not all, Pt V cases, especially those involving misleading or deceptive conduct and the making of false statements.<sup>378</sup>

This involves comparing what the position of the person was, or would have been, had the contravention not happened, with what it was because of the contravention.<sup>379</sup>

### ***Concern about Gates case***

7.18 DP56 noted concerns about some decisions in which damages have been assessed on a tortious basis, in particular *Gates v The City Mutual Life Assurance Society Ltd*<sup>380</sup> (*Gates*). In that case the claimant was misled about the coverage of an insurance policy. He had been told that the policy would cover him if he became disabled from engaging in his usual occupation. In fact it only covered him if he became totally disabled for work. No evidence was presented to show that the plaintiff would have taken out a total disability policy with another insurance company had he been aware of the misrepresentation before he entered the policy. The High Court held that the insurance company was not obliged to make the payments that had been represented at the time the claimant took out the policy as being payable. In the Court's view, Mr Gates needed to show that, but for his reliance on the misrepresentation, he could and would have entered into policies of insurance containing a disability clause of the kind represented.<sup>381</sup>

Neither the fact that the representation induces entry into a contract nor the fact that it is a statement of benefits to which the plaintiff will be entitled under that contract is enough to justify compensation for expectation loss.<sup>382</sup>

It is alleged by critics that this puts the insured in an impossible position.

In circumstances akin to those of [*Gates*] case, the strange conclusion follows that, in order to establish significant damages under the [TPA], one has to prove that, if the true position were known, alternative arrangements would have been sought. This involves a singular difficulty in that, in fact, the true position is not known. If this is so, the question of going elsewhere for coverage simply does not arise. The requirements of the court thus involve the establishment of a non-considered hypothetical.<sup>383</sup>

DP56 asked whether there is a need to amend the TPA to overcome the precedent set by *Gates* and, if so, what the amendment should be.<sup>384</sup>

### ***Responses to DP56***

7.19 Submissions and consultations revealed major differences of opinion as to whether the decision in *Gates* gives rise to a need for legislative amendment. Some people consider that, on the evidence, the decision in *Gates* was understandable and correct and that there is no need for legislative change.<sup>385</sup> Others, however, are strongly of the view that the decision in *Gates* resulted in a serious injustice.<sup>386</sup> They say that, in the absence of any guarantee of an opportunity for the High Court to review the decision soon, the situation must be addressed by legislative amendment to avoid further injustice.

[I]t is very widely felt that the decision was unjust. . . [T]his is for two reasons: (a) the court completely failed to see that the overall purpose of the Act is to protect consumers and that their decision had precisely the opposite effect, in that it does nothing to discourage such blatant breaches of the Act; (b) *Gates*, it is widely felt, DID suffer a 'loss' as a result of [the insurance agent's] actions, and it is only the astonishing narrowness of a then hostile High Court which failed to see that. . . I strongly believe that the Act should be amended to make clear that plaintiffs in *Gates*' position should recover.<sup>387</sup>

### ***The Commission's view***

7.20 ***Since Gates***. Courts have, since *Gates*, confirmed that the assessment of damages under s 82 is not confined to analogy with the common law.<sup>388</sup>

[I]n construing s 82, it is appropriate to bear in mind such matters as the scope and purpose of the Pts IV and V of the TP Act . . . [C]ommon law analogies will not necessarily offer sufficient guidance, particularly where, as is the case with the TP Act, the statute evinces an intention to supplement the common law or, further, to travel into new fields.<sup>389</sup>

There have also been cases in which plaintiffs have successfully claimed damages that took account of what had been misrepresented to them.<sup>390</sup> Nevertheless, the Commission agrees that *Gates* does appear to have had a restrictive effect in some cases. For example, in *Zoneff v Elcom Credit Union Ltd* at first instance, Hill J said

This result is one that may be thought to be unfair and contrary to the policy underlying the Act. Here the respondent has engaged in conduct likely to mislead or deceive and the applicant has not obtained the insurance that was represented to him. He has been seriously injured in circumstances in which had he obtained the policy represented, he would have obtained the benefits. Yet the result of applying the measure of damages in tort rather than in contract to a statutory cause of action is to leave him without a satisfactory remedy. That is the consequence, on the present facts, of *Gates* case and it is not for a judge at first instance to question the correctness of that decision. Any remedial action must be a matter for the legislature or for the High Court.<sup>391</sup>

7.21 ***The TPA should be amended***. The Commission considers that despite the ability of a court to assess damages under s 82 in whatever manner it considers appropriate to give full effect to the legislation and despite the fact that many courts have done so since *Gates*, there may be some members of the judiciary and some legal practitioners who feel constrained by the decision in *Gates*. It considers that the TPA should be amended to remove any such perceived constraints and resolve uncertainty. It is important, however, that the amendment not impinge on the discretion of the court to assess damages under the TPA in a manner appropriate in the particular circumstances. The Commission examined several possible amendments that were unsatisfactory because of their prescriptive nature and because they may have had unforeseen and unintended consequences. The Commission ***recommends*** that the TPA be amended to provide that a court shall assess damages under s 82 in a way that is reasonable and appropriate in the circumstances and shall not be constrained by the common law principles of the law of contracts and torts. The explanatory memorandum and the second reading speech should explain that the purpose of the amendment is to ensure that courts do not feel bound to assess damages in accordance with common law principles and are free, in situations like those in *Gates* and *Zoneff*, to exercise their discretion to fulfil the purpose and objectives of the Act.<sup>392</sup>

### ***Contribution and indemnity***

7.22 ***Not provided for in the TPA***. There is no express provision in the TPA which enables the court to apportion responsibility for loss or damage between respondents and between a respondent and a third party and make orders for contribution or indemnity. This compares with s74H of the TPA which gives the seller of defective goods an express right of indemnity for his liability to compensate a consumer for damages for breach of conditions and warranties implied into the contract of sale by Pt V Division 2 against the manufacturer of those goods. The power in s 23 of the Federal Court Act to 'make orders of such kinds . . . as the Court thinks appropriate' does not extend to making orders for contribution or indemnity in the absence of any other source of power to do so.<sup>393</sup> A court may, however, be able to

entertain proceedings seeking orders of contribution based upon rights at common law or in equity arising out of a co-ordinate liability imposed upon the parties by the Act.<sup>394</sup>

7.23 ***Issue raised with the Commission.*** This issue was not mentioned in DP56 but was raised in consultations.<sup>395</sup> The inability to order contribution or indemnity can result in an inefficient use of court resources, because all matters arising out of a single contravention cannot be resolved in a single proceeding, and may result in inconsistent findings of fact on the same subject in different cases by different courts.<sup>396</sup> Several jurisdictions have enacted legislation to provide expressly for contribution between tortfeasors.<sup>397</sup> It is not certain, however, that such legislation would facilitate contribution in TPA cases.<sup>398</sup> The Commission considers that this uncertainty should be removed. A person against whom an award of damages is made in respect of a contravention of the TPA should be able to recover contribution or indemnity from others whose conduct has been a cause of the plaintiff's loss or damage. The Commission ***recommends*** that the TPA be amended to provide expressly that courts may make orders for contribution and indemnity and that contribution and indemnity may be claimed in the proceedings in which the plaintiff claims damages from the respondent.

## **Damages against individuals 'involved in a contravention'**

### ***Concern raised in several submissions***

7.24 Damages may be claimed under s 82 against a person involved in a contravention. Section 75B defines a person involved in a contravention to include a person who has aided, abetted, counselled or procured the contravention or who has been in any way, directly or indirectly, knowingly concerned in the contravention. It is not clear what Parliament intended when it inserted s 75B in the TPA in 1977. The High Court has held that s75B requires that there be knowledge of the essential matters which make up the contravention, whether or not the defendant knows that those matters amount to a contravention.<sup>399</sup> It has been suggested to the Commission that the interpretation given s75B by the High Court is inappropriate in the civil context of a claim for damages and that, to ensure that the corporate form is not abused so as to undermine the policy objective of providing compensation, the TPA should be amended to enable recovery of damages against directors and others involved even if they did not have knowledge of the contravention.<sup>400</sup>

### ***The Commission's view***

7.25 The Full Federal Court in *Yorke v Lucas* noted that

it should be assumed that the legislature, in adopting a provision in the terms of s75, was aware of the judicial interpretation of similar provisions in so far as they imported a requirement of actual or constructive notice of the relevant facts. No doubt, it was within the constitutional competence of Parliament to render an accessory liable without need to establish any such knowledge.<sup>401</sup>

The Commission agrees that it was well within Parliament's ability to provide for individuals to be liable to damages for contraventions in which they were involved, without their involvement having to be proved on a criminal basis. While an amendment to this effect would make it easier for those who have suffered loss to recover damages, that benefit does not outweigh the undesirability of imposing liability on individuals regardless of their knowledge. The Commission does not consider that an amendment is justified.

## **Damages for contravention of Pt IVA**

### ***No damages available***

7.26 Pt IVA prohibits unconscionable conduct.<sup>402</sup> Damages for such conduct are not recoverable under s 82. They are, however, recoverable under s 87. It seems the reason s 82 was not extended to contraventions of s52A (the precursor of s51AB) when it was introduced in 1986 was the 'general nature of the prohibition'.<sup>403</sup> DP56 sought comment on whether damages should be available under s 82 for a contravention of Pt IVA.

### ***Responses to DP56***

7.27 Responses to this issue were mixed. Some expressed doubt about whether damages should be available under s 82 for a contravention of Pt IVA.

[T]he question of damages for contravention of Part IVA needs further thought. 'Unconscionable conduct' involves some fairly subjective content and perhaps sometimes an application of retrospective morality. It may be sufficient to have power to set aside transactions etc without imposing the liability for damages on respondents.<sup>404</sup>

Others opposed the extension of s 82 on grounds including that such relief is not recoverable at common law in relation to conduct which might be held to breach s51AA and that changes should not be made in respect of s51AA until it has been given a chance to work.<sup>405</sup> In contrast, many submissions could see no reason why damages should not be available for contraventions of Pt IVA, just as they are for contraventions of Pt V.

Damages will often be the most cost effective remedy and therefore should be available to a plaintiff as a matter of course.<sup>406</sup>

There is no rational basis for providing that damages are recoverable under s 82 in respect of breaches of Pt V but not Pt IVA.<sup>407</sup>

### ***The Commission's view***

7.28 The Commission acknowledges that s51AA was not intended to extend the concept of unconscionability beyond its meaning at common law. This does not mean, however, that the remedies available at common law in response to unconscionable conduct should not be expanded. The Commission is not convinced that the alleged uncertainties relating to the prohibitions in Pt IVA are such that it would be unfair to make damages available in respect of them. In any case, compensation may already be awarded under s 87 for a contravention of a provision of Pt IVA. The Commission **recommends** that s 82 of the TPA be amended to allow recovery of damages under that section for a contravention of a provision of Pt IVA.

## **Preventing the dissipation of assets**

7.29 Mareva injunctions<sup>408</sup> and s 87A of the TPA allow the court to prevent the removal or dissipation of assets of a person who is alleged to have contravened the TPA where that would defeat the enforcement of the applicant's primary judgment. Section 87A orders are directed against persons other than the person alleged to have contravened the Act, for example, persons indebted to, or holding money or property on behalf of, the alleged contravener.<sup>409</sup> Mareva injunctions can be made against the alleged contravener or against persons holding money or property on behalf of that person.<sup>410</sup> DP 56 asked whether the provisions of s 87A of the TPA and the availability of Mareva injunctions are adequate to prevent the dissipation of



the assets of an alleged contravener before judgment is entered.<sup>411</sup> All responses to this issue considered that the current law is adequate. The TPC expressed concern, however, that in many cases the penalty for breaching a s 87A order is insignificant when compared to the potential liability for fines or damages.<sup>412</sup> It noted that non-compliance with a Mareva injunction may result in a criminal conviction for contempt of court and the possibility of imprisonment and suggested that the penalty for breaching a s 87A order should be increased to be 'substantially the same as those for non-compliance with a general injunction made pursuant to the Court's inherent power to grant injunctions'. In the absence of evidence that s 87A orders are proving ineffective because of the nature and size of the penalty prescribed and because such orders are imposed on persons other than the person alleged to have contravened the TPA, the Commission is not convinced that there is any need to amend s 87A.

## **Punitive or multiple damages**

### ***Introduction***

7.30 Punitive or exemplary damages are damages that exceed the actual damage suffered as a result of a contravention of the law. They are designed to punish the wrongdoer, rather than provide compensation. Multiple damages, where the amount the defendant is ordered to pay is a multiple of the damage suffered by the plaintiff, are a form of punitive damages. While multiple damages are not available in Australia, courts may award punitive or exemplary damages in certain civil proceedings where the defendant's conduct shows a 'conscious and contumelious disregard of the plaintiff's rights'.<sup>413</sup> They are not available in proceedings under s 82 of the TPA because that provision only confers a right to compensation for loss suffered and exemplary damages are more than compensation.<sup>414</sup>

### ***Punitive or multiple damages should not be made available under the TPA***

7.31 DP 56 noted the suggestion that punitive or multiple damages should be available in Australia to provide an incentive to private enforcement by helping to defray the cost of litigation. The Commission did not agree with that suggestion and proposed that punitive or multiple damages should not be available to applicants in proceedings under the TPA.<sup>415</sup> With few exceptions,<sup>416</sup> submissions agreed. Punitive or multiple damages should not be available for contraventions of the TPA because

- they can provide a windfall to a plaintiff not matched by the deterrent effect
- they can be an incentive to frivolous or speculative actions
- recovery of multiple damages may still not exceed the risk and cost of litigation where the actual damages are very low
- the possibility that they may be awarded in separate actions involving the same contravention could result in multiple punishment being inflicted for a single wrongful act
- there is no justification for imposing a sanction, in the form of exemplary damages, on one person in order to deter other persons from acting in a particular way.<sup>417</sup>

Many of these concerns are supported by critics of treble damages available under the antitrust laws in the USA.<sup>418</sup> The Commission has heard nothing to persuade it to alter its view that punitive damages, whether

in the form of exemplary damages or multiple damages, should not be made available in respect of contraventions of the TPA. Contraventions of the TPA should only be punished under the relevant penalty provisions enforced by accountable public enforcement bodies.

## 8. Undoing the effects of, and preventing further, contraventions

### Introduction

8.1 Two of the purposes that may be served by action to enforce the TPA are to undo the effects of a contravention, so far as is possible, and to prevent further contraventions. In many cases, undoing the effects of a contravention will be achieved largely by compensating persons who have suffered loss or damage as a result of the contravention. In other cases, an order to pay compensation will not necessarily remove all the benefits gained by the contravener or overcome distortions in the market caused by a contravention. This chapter considers other orders that could undo the effects of a contravention. Orders that will prevent further contraventions will often take the form of an injunction. This chapter considers whether the effectiveness of injunctions can be improved. It also considers other orders that may prevent further contraventions.

### Removing the benefits of a contravention

#### *DP proposal - recovering the profits of a contravention*

8.2 Courts often take the profit of a contravention into account when determining a penalty. For example, a monetary penalty may be increased by a sum representing the profit made from the contravention. In DP56 the Commission suggested that, rather than confiscating the profits of a contravention indirectly, it would be preferable to recover them directly. It proposed that the TPA be amended to provide that the court may make an order recovering the profits of a contravention of the Act, whether civil or criminal.<sup>419</sup> The proposal was based loosely on the *Proceeds of Crime Act 1987* (Cth) which is designed to deprive persons of the benefits derived from committing offences against the laws of the Commonwealth or Territories and to provide for the forfeiture of property used in the commission of such offences.<sup>420</sup>

#### *Responses*

8.3 Many submissions supported the proposal.<sup>421</sup> A number, however, expressed grave concerns about its practicality, in particular the difficulty of determining precisely the profits made from a contravention.<sup>422</sup>

On balance, the TPC believes that the arguments supporting the recovery of profits from contraventions of the TPA are outweighed by the practical difficulties of identification and measurement that would be required for a fair, systematic and comprehensive application of profit recovery.<sup>423</sup>

#### *Recommendation*

8.4 The Commission acknowledges the likely difficulties in accurately calculating the profit made from contraventions occurring in a commercial environment and which are often just one component of otherwise lawful business activities. It agrees that the difficulties are probably so great that they would outweigh the benefits of a scheme to confiscate the profits of contraventions of the TPA. Nevertheless, the Commission considers it important that there be an express mechanism in the TPA which takes into account the principle that profits made from contraventions should be removed wherever possible. The practice of courts taking into account the estimated profits of a contravention when imposing a penalty should be formalised. The Commission *recommends* that the TPA be amended to require the court to take

into consideration the estimated profits of a contravention when imposing a penalty, civil or criminal.<sup>424</sup> Taking the profits into account should not, however, enable a court to impose a penalty that exceeds the prescribed maximum penalty. If the court has precise details of the profit made from a contravention, it may increase a monetary penalty by that amount or increase a non-monetary penalty proportionally. If the court does not have detailed information on the profits, if any, that were made by the contravener as a result of the contravention, it should, on the basis of submissions from the parties, estimate the profits made and increase the penalty accordingly.

## **Section 80A orders**

### ***Only available for Pt V***

8.5 If a contravention of the TPA has caused a distortion in the market,<sup>425</sup> it is necessary to redress the distortion to unwind the effects of the contravention. Corrective advertising is one way in which distortions may be addressed. Section 80A allows a court, on the application of the Minister or the TPC, to order a person who has contravened the TPA to disclose to the public information specified in the order and to publish an advertisement in terms specified by the court. Such orders could be used to serve, or to help to serve, the purpose of undoing the effects of a contravention. However, orders under s 80A can only be made for contraventions of Pt V.

### ***Proposal***

8.6 In DP56 the Commission proposed that the TPA should be amended to make s 80A orders available for contraventions of Pt IV and IVA as well as of PtV.<sup>426</sup> Although a similar order could be made for a contravention of PtIV or PtIVA by way of an injunction under s 80,<sup>427</sup> the Commission suggested that in the interest of certainty and of encouraging the use of such orders express provision should be made in s 80A.

### ***Recommendation***

8.7 Almost all submissions supported this proposal. A few did not.<sup>428</sup>

Courts have ample power to make such orders as they consider just and appropriate in the circumstances. The specific power to order corrective advertising under the current provisions of the TPA does not need to be extended and significant caution should be applied in giving these orders. It is quite evident in relation to the financial system and the share market generally that adverse publicity has a significant and long standing effect and market regulation in this area is appropriate.<sup>429</sup>

It is precisely because of the effectiveness of such orders that the Commission considers that the TPC and the Minister should be able to seek them for contraventions of PtIV and Pt IVA. In the view of one submission

[a] sign reading BLOGGS MOTORS - NOW IN OUR SEVENTH PROSECUTION would, in appropriate cases, accomplish more than all the TPC guidelines ever published.<sup>430</sup>

The usual level of general publicity surrounding TPA court cases is no substitute for advertising directed specifically at the target audience. The TPC has found corrective advertising to be a very powerful tool that can be particularly effective

- where there is a large number of affected parties
- where it is impractical or impossible to contact all of the affected parties

- where the contravention consisted of well established conduct over a significant period of time
- where many of the affected parties may not realise that they have suffered harm as the result of a contravention of the TPA and
- where the TPC wants to send a public message to others contravening the law in a similar way.<sup>431</sup>

These situations are not confined to Pt V. The TPC has used corrective advertising in eight of the 22 s 87B undertakings settled to date. Some relate to contraventions of Pt IV. The TPC has strongly endorsed the availability and use of corrective advertising.

In the TPC's experience the imposition of such terms has been a very cost effective and efficient method of correcting perceptions of consumers and businesses, and alerting them to new, corrected market conditions. In practice it has not proved difficult to arrive at a reasonable and effective specification of corrective advertising.<sup>432</sup>

The Commission *recommends* that s 80A of the TPA be amended to make corrective advertising orders available for contraventions of Pt IV and IVA, as well as for Pt V.<sup>433</sup>

## Divestiture

8.8 Another way of undoing the effects of a contravention of the TPA is divestiture. Divestiture orders are currently only available in respect of a contravention of s 50.<sup>434</sup> The court may make directions for the disposal of shares or assets acquired in contravention of the prohibition against acquisitions that substantially lessen competition in a market. DP56 noted that several committees had, in recent years, considered whether divestiture orders should be available other than in a merger or acquisition context and had recommended against such extension.<sup>435</sup> The Commission expressed support for that view. Nevertheless, in light of its position that one of the purposes that should be served by responses to a contravention of the TPA is undoing the effects of a contravention, the Commission sought comment on whether the court should be able to make a divestiture order for a contravention of the TPA other than a contravention of s 50.<sup>436</sup> Submissions almost unanimously opposed any extension of the divestiture power in the TPA.<sup>437</sup> The Commission agrees and does not make any recommendation on this issue.

## Injunctions

### *Injunctions in more general terms*

8.9 Injunctions are the principal way by which further, or continuing, contraventions of the TPA can be prevented.<sup>438</sup> The Federal Court may grant an injunction in whatever terms it considers appropriate in respect of conduct that contravenes or would contravene provisions of Pt IV, IVA or V.<sup>439</sup> The Court has consistently held that a final injunction should not be expressed in terms that are too broad.

A final injunction should bear upon the case alleged and proved against the defendant, and should indicate that conduct which is enjoined or commanded to be performed so that the defendant knows what is expected of him as a matter of fact.<sup>440</sup>

In consultations prior to the publication of DP56, concern was expressed to the Commission that in some cases the court's reluctance to grant injunctions in terms broader than are needed to cover the exact facts of

the case before the court reduces the effectiveness of injunctions as remedies. The Commission sought comment on whether the TPA should be amended to provide specifically for injunctions in more general terms.<sup>441</sup>

### ***Responses***

8.10 Some submissions opposed such a provision, mainly on the basis of concern about the difficulties of complying with an injunction that is not adequately specific, especially in light of the serious consequences of failing to comply with an injunction.<sup>442</sup> Others considered that the courts are already able to grant injunctions in terms that go beyond the circumstances of the case before the court.<sup>443</sup> The TPC expressed concern at the apparent reluctance of the courts to grant injunctions in broader terms.

What is required are injunctions which are wide enough to identify the essential characteristics of the conduct in question (as distinct from the elements of the particular offence or the same facts as the particular offence) with certainty and specificity, so as to restrain the party from conduct which has the same essential characteristics. The TPC's concern with the required degree of specificity is that the resulting injunctions are likely to be inadequate in terms of securing comprehensive compliance by the respondent.<sup>444</sup>

The TPC suggested that, if a business the subject of an injunction trades nationally, the injunction should apply nationally, irrespective of whether the conduct constituting a contravention was confined to one State. If it trades in a range of goods, the injunction should apply to its entire product range, even if the contravention involved only one product. The Commission appreciates the TPC's concerns about the reduced effectiveness of narrowly constructed injunctions. However, it sees difficulty in framing an amendment to overcome what may be merely an inability to persuade the court that an injunction in broader terms is necessary to provide an effective remedy. The Commission considers that the degree to which an injunction extends to conduct beyond that which was involved in the case in question should be left to the discretion of the court. It would, however, encourage judges to take a broad view of the purposes to be served by injunctions and, where appropriate, to grant injunctions in terms sufficiently wide to meet the concerns expressed by the TPC, provided the respondent is given clear notice of the conduct prohibited.

### ***Ability to improve internal controls***

8.11 In many cases, contraventions of the TPA by corporations arise from defective internal controls. Unless these defects are rectified, further contraventions are likely to occur. An injunction against a corporation whose contravention is due to poor or non-existent compliance programs and internal controls is, therefore, likely to be far more effective if it addresses those deficiencies. This view was supported in several submissions.

Either conditionally or explicitly there should be power to order alterations to internal controls which have manifestly and repeatedly failed.<sup>445</sup>

While there may be no impediment to a court granting an injunction with terms that require a reassessment or revision of a corporation's internal compliance controls, such orders have not, to the Commission's knowledge, been made. The Commission considers that these orders would be extremely effective in preventing future contraventions of the Act. It notes that undertakings entered under s 87B have included terms requiring changes to compliance mechanisms and staff education about responsibilities under the TPA.<sup>446</sup> The Commission ***recommends*** that s 80 of the TPA be amended to make it clear that reassessment or revision of a corporation's internal compliance controls may be required as a term of injunctive relief.<sup>447</sup>

## **Prohibiting individuals from managing any corporation**

### ***Preventing further contraventions by individuals***

8.12 Banning or disqualifying individuals from participating in the management of any corporation for a specified time may reduce the likelihood of further contraventions by individuals who have contravened the TPA. The Corporations Law provides in certain circumstances for the court, on the application of the ASC, to make orders prohibiting an individual from managing a corporation.<sup>448</sup> Such orders can only be made if the person has repeatedly breached the Corporations Law.<sup>449</sup> The Corporations Law also provides that a person who has been convicted of an offence under s1317FA is prohibited from managing a corporation within five years after the conviction.<sup>450</sup> A person who contravenes a civil penalty provision may be ordered not to manage a corporation for a time specified in the order.<sup>451</sup> DP56 asked whether it would be appropriate to introduce similar banning orders as an enforcement measure for contraventions of the TPA.<sup>452</sup> It described two ways in which this could be done. First, the coverage of s 230 of the Corporations Law could be extended to specified repeated or serious contraventions of the TPA. Second, specific provision could be made in the TPA for the court to make an order prohibiting a person who has contravened the TPA from managing a corporation. The Commission also asked whether provision should be made for prohibiting an individual from managing any corporation for a specified time if the corporation for which the individual is, or was at the relevant time, an officer has contravened the TPA.<sup>453</sup>

### ***Submissions***

8.13 While some submissions considered that an individual should not be prohibited from managing a corporation because he or she has contravened the TPA,<sup>454</sup> most supported the suggestion in principle. There were, however, differences of opinion about the details. Some considered it inappropriate to ban a person in response to a strict liability contravention.<sup>455</sup> Some thought a prohibition should only be imposed in cases of very serious and repeated contraventions.<sup>456</sup> During consultations it was suggested that prohibiting a person from 'carrying on a business'<sup>457</sup> would be more effective than prohibiting him or her from 'managing a corporation' because it would also prevent the person from carrying on business as an individual or in a partnership. Some submissions considered that if there were to be a prohibition power it should be provided for in the TPA.<sup>458</sup> Others considered that 'statutory provisions governing the qualifications of directors should only be dealt with in the Corporations Law'.<sup>459</sup> The TPC considered that a court should only be able to prohibit persons from participating in the management of a corporation 'in the capacity of a corporate office holder'.<sup>460</sup> Many submissions strongly rejected the suggestion that the court should be able to prohibit an individual from managing a corporation if the corporation for which the individual is an officer has contravened the TPA.<sup>461</sup>

### ***Recommendation***

8.14 The Commission considers that prohibiting individuals who have contravened the TPA from managing any corporation for a specified period is one, if not the best, way of preventing further contraventions of the TPA. While a prohibition will undoubtedly be a penalty for the individual concerned, the principal consideration in making a prohibition order should be whether it is likely to prevent further contraventions of the TPA. The Commission considers that provision should be made for the Federal Court to prohibit a person who has been found, in a prosecution or a civil penalty proceeding, to have contravened the TPA from managing any corporation for a period specified by the Court.<sup>462</sup> The Commission acknowledges that such a prohibition will not prevent an individual from carrying on business as an individual or in a partnership but the Commonwealth's constitutional limits prevent it from

prohibiting a wider range of activities.<sup>463</sup> Prohibition orders could be provided for either in the TPA or in the Corporations Law. If provision were made in the TPA, the Corporations Law would also have to be amended to ensure that disqualification orders made under the TPA were placed on the ASC Register of Disqualified Company Directors and Other Officers.<sup>464</sup> Providing for them in the Corporations Law has the advantage that it makes it easier for directors to establish the full range of responsibilities and possible penalties applying to them as directors. If provision is made in the Corporations Law an amendment to s 230 seems more appropriate than an amendment to s 229. The Commission does not consider that a contravention of the TPA should result in automatic disqualification. The Commission *recommends* that s 230 of the Corporations Law be amended to enable the Federal Court, on application by the TPC, to prohibit a person who has been found, in a prosecution or a civil penalty proceeding, to have contravened the TPA from managing a corporation for such period as is specified in the order. Compliance with, and enforcement of, such an order would be the responsibility of the ASC. Disqualifying a person from managing a corporation may be an appropriate order in contexts other than trade practices, for example, in the area of environmental protection. The Attorney-General may wish to consider, in consultation with his Ministerial colleagues, whether orders prohibiting persons from managing a corporation should be provided for in respect of contraventions of legislation other than the Corporations Law and the TPA.



## 9. Penalty regime for Pt V

### Introduction

9.1 Seeking the imposition of a penalty is perhaps the most serious response the TPC can make to a contravention of the TPA.<sup>465</sup> With the exception of s 52, contravention of a provision of Pt V is an offence.<sup>466</sup> The main issue of penalisation under Pt V which requires consideration is not whether a reliance on the criminal law should be abandoned but whether the range of possible responses to contraventions should be extended to include civil penalties. By contrast, contraventions of Pt IV of the TPA are not offences but are subject to civil penalties.<sup>467</sup> Civil penalties are penalties imposed in respect of a contravention that has been proved on the balance of probabilities, not on the criminal standard of beyond reasonable doubt. This chapter discusses the penalty regime in Pt V and recommends changes to it. It also considers whether the recommended regime should also apply in Pt IV or in Pt IVA.

### DP 56 proposal - introduce civil penalties to Pt V

#### *Proposed penalty regime*

9.2 DP56 proposed for Pt V a penalty regime in which civil penalties would be available in addition to criminal penalties.<sup>468</sup> Under the proposal, if a person contravened a provision of Pt V he or she would be liable to a civil penalty. If, however, the conduct was engaged in knowingly, intentionally or recklessly and with an intention to cause significant loss or detriment (economic or otherwise) to another, or with knowledge of the likelihood of causing such loss or detriment, the person would be liable to criminal prosecution. These elements would distinguish conduct that is criminal from other conduct that, while also prohibited, carries a civil penalty. The intention of the Commission in making this proposal was to increase the range of responses available to the TPC to deal with a contravention of the Act and to reserve the criminal law for instances where the contravener knowingly engaged in the prohibited conduct.

#### *Modification of Corporations Law Pt 9.4B*

9.3 The proposal was a modification of the model provided by the Corporations Law Pt 9.4B. Under that Part, a civil penalty may be imposed on a director if the court is satisfied that the director contravened a civil penalty provision and the contravention is 'serious'. The court may prohibit the person from managing a corporation for a time specified in the order or require the person to pay a monetary penalty of up to \$200000 or both.<sup>469</sup> A contravention constitutes an offence if the conduct was engaged in

- knowingly, intentionally or recklessly and
- dishonestly and intending to gain an advantage or intending to deceive or defraud someone.<sup>470</sup>

An offence against s 1317FA is punishable by a term of imprisonment of up to five years or a fine of up to \$200 000 or both.<sup>471</sup> A person convicted of an offence under s 1317FA is prohibited from managing a corporation within five years after the conviction unless leave is obtained from a relevant court.<sup>472</sup>

## **Response to proposal**

### ***Range of responses***

9.4 Responses to this proposal were mixed. Most fell into one of three groups: support for the proposed approach but disapproval of the suggested criminal criteria, preference for Pt V remaining entirely criminal, or preference for Pt V to be decriminalised (at least in respect of corporations) and made subject to civil penalties, like Pt IV.

### ***Little opposition to civil penalties as an enforcement mechanism***

9.5 Three submissions opposed the concept of civil penalties.<sup>473</sup>

[X] opposes any extension of the concept of imposing penalties without criminal standard of proof. [X] believes the reason usually given, namely removal of the stigma of criminality, is not the real reason at all. . . [T]he real agenda is to make it easier to obtain convictions for what are in fact criminal offences. . . [T]his is a serious erosion of the rights of individuals and should not be taken any further. If anything, it should be reversed.<sup>474</sup>

The Commission rejects this criticism as it applies to its proposal. The proposal draws a clear distinction between conduct that is criminal and conduct that is not. Criminal penalties apply to criminal conduct; civil penalties apply only to conduct that is not criminal. Some submissions expressed a preference for civil penalties over criminal penalties, particularly for corporate wrongdoers and where imprisonment is not available as a criminal penalty.<sup>475</sup> Several submissions expressly rejected the notion that imposing civil penalties on individuals is contrary to the requirement of the International Covenant on Civil and Political Rights (ICCPR) article 26 to accord equal protection of the law to all persons.<sup>476</sup>

Given that different rationales and mental states attract the criminal or civil penalty and that everyone is subjected to the same regime there is no violation of the principle of equality. The Human Rights Committee has said that the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.<sup>477</sup>

Civil penalties have become a broadly accepted feature of the Australian legal system.<sup>478</sup>

### ***Support for the proposed approach***

9.6 A number of submissions supported the Commission's proposal to introduce civil penalties to Pt V while retaining criminal liability.<sup>479</sup> The TPC considers the proposal would improve its enforcement capacity.

[T]he TPA should encourage and provide for the widest range of responses to contraventions of the Act. Such a regime must provide for an escalation of action by the TPC and orders by the Court in response to the more serious and/or recurrent contraventions. If both criminal and civil liability were applicable to the provisions of Part V, the TPC sees the best use of criminal liability as a component in a hierarchy of responses.<sup>480</sup>

### ***Criticism of proposed approach***

9.7 Other submissions did not agree with the proposed approach under which conduct may be subject to a civil or criminal penalty depending on the state of mind of the person engaging in the conduct.<sup>481</sup> The DPP opposed the Commission's proposal and criticised the Corporations Law Pt 9.4B. It claimed that the effect of Pt 9.4B has been 'to render some criminal prosecutions virtually impossible due to the confusion surrounding the relevant fault element'. It expressed doubt that any offences would be prosecuted under

this approach.<sup>482</sup> The Attorney-General's Department did not favour the introduction of civil penalty provisions similar to those in Pt 9.4B because it would

give the appearance of providing adequately for criminal prosecution in appropriate cases, but in fact, facilitate the 'civilisation' of white collar crime, without an open and deliberate decision to do so by:

- giving the regulator an unsupervised, easy option to avoid difficult and expensive investigations and prosecutions, by electing the civil penalty route;
- providing a complete statutory bar to prosecution once civil penalty proceedings have commenced . . .
- providing juries with an alternative verdict option which is likely to [result in unsuccessful prosecutions].<sup>483</sup>

The Department considered that applying a 'grafted on' fault element to several contraventions may, because of ambiguity about the fault element relevant to the elements of a particular contravention, make prosecutions more problematic than if each offence provision was separately drafted. In disagreeing with the Commission's proposed approach, the Department distinguished the Corporations Law on the ground that 'special circumstances' apply in that context.

### ***Criticism of proposed criminal criteria***

9.8 Many submissions favoured both civil and criminal penalties in PtV in principle but disagreed with the particular criteria proposed in DP56. The TPC criticised the suggestion that intention to cause significant loss or detriment and knowledge of the likelihood of causing such loss or detriment should be indicators of criminal conduct because they are 'part and parcel of vigorous competition'. Both the TPC and the DPP considered the term 'significant loss or detriment' to be 'too vague and difficult to define to the degree necessary for potential transgressors to determine accurately the threshold between civil and criminal liability'.<sup>484</sup> The DPP considered that offenders would commonly be inadvertent to the detriment to others and intend only to gain an advantage for themselves or the corporation.<sup>485</sup> The Attorney-General's Department favoured the approach adopted in the Corporations Law Pt 9.4B under which dishonest intent must be proved in addition to knowledge or reckless indifference.

This need to prove a dishonest intent is especially important where criminal liability is overlaid on provisions which impose civil penalties on the basis of strict liability.<sup>486</sup>

The Attorney-General's submission did not define or clarify what is meant by 'dishonesty'.<sup>487</sup> The Young Lawyers Business Law Committee considered that reckless conduct should not constitute criminal conduct.<sup>488</sup>

### ***Some submissions suggested decriminalising Pt V***

9.9 Some submissions suggested that, rather than have civil and criminal penalties in Pt V as proposed by the Commission, it would be better to decriminalise PtV, at least for corporate contraveners.<sup>489</sup> They were sceptical about whether a criminal conviction, which is more difficult to obtain, has any greater impact on a corporation than a civil penalty, particularly in view of the fact that a corporation cannot be imprisoned.<sup>490</sup> In contrast, a number of submissions considered that a criminal conviction carries a greater stigma than a civil penalty and therefore has greater deterrent value.<sup>491</sup>

## **Recommendation: civil and criminal penalties in Pt V**

### ***Criminal offences should remain in Pt V***

9.10 The Commission is persuaded that a criminal conviction is likely to have a greater deterrent effect than a civil penalty, for corporations and individuals. Consultations revealed that many corporations and individuals are more fearful of criminal conviction than of liability to a civil penalty, even if the civil penalty is greater in monetary terms than the criminal penalty.<sup>492</sup> Criminal law has a legitimate role in denouncing and penalising unacceptable behaviour. It also forms part of the background to the process of negotiation and settlement and the entry by corporate contraveners into undertakings to improve their compliance controls.<sup>493</sup> The Commission is satisfied that criminal liability is an effective deterrent and an appropriate sanction for contraventions under Pt V that involve the requisite mental state. It **recommends** that criminal penalties be retained in PtV, for both individuals and corporations, but that criminal liability should depend on proof of a particular advertent mental state. There should be no strict criminal liability under Pt V.<sup>494</sup> Restricting criminal liability to advertent conduct adheres to principle.

### ***Civil penalties should be introduced to Pt V***

9.11 Although there is an important role for the criminal law in Pt V of the TPA, the Commission considers that it has been over-emphasised and overused in this context. Not all contraventions of Pt V warrant treatment as offences, most certainly not as strict liability offences. The Commission **recommends** that civil penalties should be made available in Divisions 1 and 1A of Pt V, in addition to the regime of criminal penalties. This recommendation does not apply to s 52, contravention of which is not subject to penalty. As well as narrowing the application of the criminal law, and thereby increasing its impact, introducing civil penalties to Pt V will increase the range of responses available to the TPC and thereby improve its ability to enforce the TPA. In terms of the 'pyramid of enforcement' model,<sup>495</sup> criminal liability should form the peak of the pyramid - the most serious and therefore the least used enforcement response.

### ***Criminal criteria***

9.12 While the Commission agrees with submissions that the criteria proposed in DP56 need to be refined,<sup>496</sup> it remains of the view that the feature that should distinguish criminal conduct from conduct that is subject to a civil penalty should be a 'guilty mind' in the sense of intention, knowledge or advertence. This approach is consistent with the traditional criminal law which requires the prosecution to prove subjective blameworthiness on the part of the defendant. At present criminal liability under PtV is not confined to intentional or advertent wrongdoing. Pt V offences impose strict liability.<sup>497</sup> It is not necessary to prove a particular mental state. No other way of distinguishing criminal conduct from conduct that should only be liable to a civil remedy or civil penalty was suggested in submissions. A number expressly rejected the notion that the 'seriousness' of the conduct (however defined) should distinguish criminal conduct from that liable to a civil penalty.<sup>498</sup> In the Commission's view, a 'guilty mind' is present if the conduct in question was engaged in knowingly, intentionally or recklessly. There is no apparent need for any additional criteria. This view is consistent with the principles of fault adopted by the Criminal Law Officers Committee of the Standing Committee of Attorneys-General (CLOC) in its report *General Principles of Criminal Responsibility*.<sup>499</sup> The Commission **recommends** that, if each element of the prohibited conduct is present, the contravener should be liable to a civil penalty, subject to the operation of statutory defences. If each substantive element<sup>500</sup> is engaged in knowingly, intentionally or recklessly, the conduct should constitute an offence.

### ***Application of the recommended approach to provisions of Pt V***

9.13 **An example.** Because knowledge or recklessness is required for each substantive element of the conduct, the substantive elements of a prohibition must be identified. Because the elements of each provision are different, this approach requires careful analysis of each provision of Pt V. The Commission's terms of reference for this project do not require draft legislation and the report does not contain draft legislation. Nevertheless, it is important that the approach recommended by the Commission be exemplified so as to make clear what is intended. Take the offence now defined under s 53(b). Section 53(b) provides that a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services falsely represent that goods are new. The elements of this offence are

- a corporation in trade or commerce
- a connection with the supply or possible supply of goods or services or a connection with the promotion by any means of the supply or use of goods or services
- a representation that goods are new and
- falsity of that representation.

Proof of those elements would give rise to liability to a civil penalty subject to operation of defences under s 85.<sup>501</sup> The standard of proof would be the civil standard of proof, subject to the *Briginshaw* principle.<sup>502</sup> Under the approach recommended by the Commission, criminal liability requires a 'guilty mind' in relation to each substantive element of the prohibition. The 'trade or commerce' element is not a substantive element because it is included only to bring the prohibition within the constitutional power of the Commonwealth.<sup>503</sup> If the defendant

- knowingly or recklessly supplied or promoted goods or services
- knowingly or recklessly represented that the goods were new and
- knew that the representation was false or was reckless as to the falsity of the representation

the defendant would be criminally liable.

9.14 **Pt V needs to be redrafted.** The terminology and phraseology used in Pt V provisions vary considerably. Because of this drafting diversity, it is not possible for a single clause to reflect the recommended approach. The provisions should be redrafted in light of the approach the Commission has recommended. In the process, the terminology could be standardised, resulting in a more easily understood Part.<sup>504</sup>

9.15 **Defences.** Some sections in Pt V provide specific defences.<sup>505</sup> Section 85 provides several general defences. It is a defence, for example, if the defendant establishes that the contravention was due to a reasonable mistake or an accident or that the defendant took reasonable precautions and exercised due

diligence to avoid the contravention. It is necessary to consider in the criminal context and in the civil penalty context whether the existing specific defences and/or the existing general defences should apply. As a general principle, a defence with an objective test of liability<sup>506</sup> will be relevant in the civil context but not in the criminal context because, under the Commission's recommended approach, criminal liability will require a subjective form of blameworthiness, for example, knowledge or recklessness. In the example used above (s 53(b)), a corporation will be criminally liable if it knowingly or recklessly supplied or promoted goods or services and knowingly or recklessly represented that the goods were new and knew that the representation was false or was reckless as to the falsity of the representation. The defences provided by s 85 are redundant. Proof of knowledge or recklessness in respect of the substantive elements of the prohibited conduct will inculpate the defendant whereas lack of knowledge or recklessness will itself mean an acquittal. In the context of civil penalties under the Commission's recommended approach, however, no mental element is required and the defences in s 85 should apply to avoid absolute liability.<sup>507</sup> When Pt V is redrafted it should be made clear that defences or reasonable mistake or reasonable reliance on information supplied by another<sup>508</sup> relate to civil penalty proceedings.

### ***Relationship between criminal prosecution and civil penalty proceedings***

**9.16 Corporations Law model.** Under the Corporations Law Pt 9.4B, an application for a civil penalty precludes commencement of a prosecution.<sup>509</sup> Criminal proceedings do not prevent an application for a civil penalty but that application will be stayed for the duration of the prosecution. If the final result of the criminal proceedings, including appeals, is a conviction or an acquittal,<sup>510</sup> an application for a civil penalty cannot be made and an application that was stayed will be dismissed.<sup>511</sup> If the court is not satisfied that the person has committed an offence but is satisfied beyond reasonable doubt that the person committed the contravention, the court may make a declaration that the person has contravened the civil penalty provision. Application for a civil penalty can then be made on the basis of that declaration.<sup>512</sup>

**9.17 Proposal and responses.** DP56 proposed that these features be incorporated in the penalty regime proposed for Pt V of the TPA.<sup>513</sup> Several submissions disagreed that criminal proceedings should be prevented if civil penalty proceedings have commenced. The Attorney-General's Department expressed concern that

conduct which is essentially criminal, and should be subject to criminal sanctions, escapes prosecution because civil penalty proceedings were instituted at a stage before full investigation of possible criminal offences had taken place or because evidence required for criminal prosecution emerged only after the civil penalty proceedings had been commenced.<sup>514</sup>

The DPP considered the bar to be unnecessary.

In some cases it will be appropriate to commence civil action which can be stayed if criminal proceedings are commenced then recommenced if the criminal prosecution is unsuccessful.<sup>515</sup>

The Attorney-General's Department opposed a jury being able to reach an alternative verdict, that is, to declare that a contravention had occurred even though an offence was not proved.

[An alternative verdict provision] gives a jury an easy option, short of acquittal, which allows it to avoid the often difficult task of reaching unanimity on the mental element . . . [It] also increases the complexity of the judge's instructions to the jury . . . it will be necessary to instruct the jury on what the difference is between the mental element for the criminal offence and that for the civil penalty, which could be extremely difficult for the judge and confusing for the jury.<sup>516</sup>

9.18 **Recommendation.** The Commission agrees that commencement of civil penalty proceedings should not prevent a prosecution being commenced.<sup>517</sup> If the civil penalty proceedings have been finalised, however, regardless of whether a penalty was imposed, it would be unfair to allow criminal proceedings to commence. The Commission does not agree with the DPP that, if civil penalty proceedings are stayed when a prosecution is commenced, it should be possible to continue the civil penalty proceedings if the prosecution is unsuccessful. If the defendant is acquitted, that should be the end of the matter.<sup>518</sup> The Commission considers, however, that provision should be made for the Court, if it is not satisfied beyond reasonable doubt that an offence has been committed, to declare that it is satisfied on the balance of probabilities that a person has contravened the provision and for an application for a civil penalty to be made on the basis of that declaration. This will not place the person in a position of 'double jeopardy' because the matter will not be re-heard. The Commission does not consider that the alleged difficulties of alternative verdicts in jury trials referred to by the Attorney-General's Department exist in the TPA, principally because prosecutions occur in the Federal Court<sup>519</sup> and trials invariably take place before a judge alone. The Commission **recommends** that, if civil penalties are introduced to Pt V as recommended by the Commission, the TPA should provide that

- (vii) if civil penalty proceedings in respect of particular conduct have been completed, no criminal proceedings may be commenced in respect of that conduct.
- (viii) if criminal proceedings in respect of particular conduct have been completed, no civil penalty proceedings may be commenced in respect of that conduct (see, however, (vi)).
- (ix) if civil penalty proceedings have been commenced but not completed, criminal proceedings may be commenced. The civil penalty proceedings shall be permanently stayed unless the criminal proceedings are withdrawn before completion.
- (x) if a prosecution has been commenced in respect of particular conduct civil penalty proceedings may not be commenced.
- (xi) if in criminal proceedings the Court is not satisfied beyond reasonable doubt that an offence has been committed but it is satisfied on the balance of probabilities that a person has contravened a civil penalty provision, the Court may make a declaration to that effect.
- (xii) if the Court makes a declaration that a provision of Pt V has been contravened, an application for imposition of a civil penalty may be made to the Court on the basis of that declaration.

***Recommended approach applies to corporations and individuals***

9.19 **Liability as principal.** With the exception of s 55, all provisions in Divisions 1 and 1A of Pt V are expressly defined in terms of corporate principal offenders. Under the Commission's recommendation, corporations would be subject, as principals, to both criminal liability and civil penalties. Under the extended operation of the TPA provided by s6 individuals may also be liable as principals for contravention of the Act.<sup>520</sup> Accordingly, an individual may be subject, as principal, to criminal liability or to a civil penalty. As with corporations, the nature of the liability would depend on the individual's state of mind at the time of the contravention. The Commission does not see any reason for exempting individuals

from liability to civil penalties.<sup>521</sup> They are, in any case, already exposed to civil penalties under Pt IV by reason of s 6.

9.20 **Accessorial liability.** Individuals may be held liable to penalties under the TPA other than as a principal. Section 76 provides that a civil penalty may be imposed on a person who has, for example, aided and abetted a contravention of Pt IV or been knowingly concerned in the contravention.<sup>522</sup> Section 79 provides that a person who aids and abets a person to contravene a provision of Pt V or is knowingly concerned in a contravention of Pt V is guilty of an offence. Under the Commission's recommended regime, if the TPC initiates proceedings, civil or criminal, against a corporation for contravening a provision of Pt V and it considers that an individual was an accessory to the contravention,<sup>523</sup> it would be for the TPC to decide, on the merits of the case and independently of its decision to initiate a particular type of proceeding against the corporation, whether criminal or civil penalty proceedings should be taken against that individual. The Commission envisages that if the corporation were prosecuted, then usually an accessory would also be prosecuted. Likewise, if a civil penalty were sought against the corporation, a civil penalty, if any, would usually also be sought against an accessory. To clarify that there is no restriction on the type of proceeding the TPC may take against an accessory when it takes penalty proceedings against the corporation, the Commission **recommends** that the TPA provide that the TPC may initiate civil penalty proceedings against an accessory, even if the corporation is prosecuted in respect of the same conduct, and that an accessory may be prosecuted even if civil penalty proceedings are taken against the corporation.

## **Civil penalty proceedings or a criminal prosecution?**

### ***Commonwealth's prosecution policy***

9.21 Prosecutions under the TPA are carried out by the DPP. Civil proceedings are undertaken by the TPC with assistance from the Australian Government Solicitor. The Commonwealth's prosecution policy states that if, as a result of an investigation, an offence appears to have been committed 'the established practice . . . is for a brief of evidence to be forwarded to the DPP where it will be examined to determine whether a prosecution should be instituted and, if so, on what charge or charges'.<sup>524</sup> Further, if an investigation has disclosed sufficient evidence for prosecution but the department or agency concerned considers that the public interest does not require prosecution, or requires some action other than prosecution, the DPP should still be consulted in any matter which involves alleged offences of 'real gravity'.<sup>525</sup> The decision whether to institute criminal proceedings is to be made in the light of 'the availability and efficacy of any alternatives to prosecution'.<sup>526</sup> Generally, however, the more serious the contravention, the more likely it will be that 'prosecution action is the appropriate response'.<sup>527</sup>

### ***Discussion in DP56***

9.22 In DP56 the Commission asked whether, in instances where either a criminal prosecution or civil penalty proceedings could be initiated in respect of an alleged contravention, the TPC should generally take proceedings for the imposition of a civil penalty if it seeks the imposition of punishment.<sup>528</sup> The Commission considered that civil penalty proceedings would provide more effective and efficient enforcement of the Act, given the lower standard of proof and the (generally) lower costs of, and shorter time for, civil proceedings. DP56 also asked whether the Commonwealth's prosecution policy would provide the most effective way of determining whether criminal prosecutions or civil penalty proceedings ought to be taken in situations in which there is a choice.<sup>529</sup>



### ***Responses and the Commission's view***

9.23 ***Requiring the TPC to prefer civil penalties.*** Most submissions rejected the notion that the TPC should be directed to prefer civil penalty proceedings over prosecutions, taking the view that the action to be taken in a particular instance should be a matter for the TPC.<sup>530</sup> The DPP suggested that civil proceedings will not always be less costly or more expeditious than criminal proceedings. The Commission concedes that it would be inappropriate to direct the TPC to prefer one type of proceedings over another. The TPC will make decisions about what action to take in response to a contravention in light of the available evidence, the circumstances of the contravention, the Commonwealth's prosecution policy and the TPC's enforcement strategy.

9.24 ***Prosecution policy.*** It is difficult to predict how the Commonwealth's prosecution policy will work in practice in respect of the decision whether to commence civil penalty proceedings or to refer the matter to the DPP. The Commission's recommendation that commencement of civil penalty proceedings should not bar later criminal prosecutions<sup>531</sup> should to some extent allay the concern expressed in one submission that there is no requirement in the Commonwealth's prosecution policy for consultation with the DPP prior to the commencement of proceedings for a civil penalty.<sup>532</sup> The Commission considers that if its recommendation to introduce civil penalties to Pt V is implemented the effect on the Commonwealth's prosecution policy and the relationship between the TPC and the DPP should be for those agencies to determine. In the absence of any changes to the Commonwealth's prosecution policy, however, it would seem that if the TPC had evidence that a contravention had been engaged in knowingly, intentionally or recklessly it would be obliged to discuss the matter with the DPP but not otherwise.<sup>533</sup> If the policy gives rise to difficulties that either agency considers warrants a change to the Commonwealth's prosecution policy, that agency should approach the Government on the matter.

## **Contraventions of Pt IV**

### ***Current situation***

9.25 The TPA provides for the imposition of civil penalties for contraventions of Pt IV of the Act. While the standard of proof is technically the civil standard of balance of probabilities, in practice it is likely to be somewhat higher because of the size of the penalties involved.<sup>534</sup>

### ***DP56 and responses***

9.26 This reference is primarily about Pt V. Nevertheless, the Commission's terms of reference ask it to report whether any of the recommendations it makes on the consumer protection provisions of the Act ought to be applied to contraventions of Pt IV. DP56 asked whether the approach proposed in relation to Pt V ought to be applied to Pt IV.<sup>535</sup> Responses to this question were mixed. Some submissions supported the extension to Pt IV of the Commission's proposal that prohibited conduct engaged in knowingly, intentionally or recklessly should be a criminal offence.<sup>536</sup> Most, however, opposed applying this approach to Pt IV: some disliked the approach itself; others considered that contraventions of Pt IV should not be criminalised.<sup>537</sup>

The Business Forum is opposed to the imposition of criminal liability for contraventions of Pt IV. . . [G]iven the high level of penalties under the [TPA] . . . and given that proceedings can be commenced both against corporations and individuals . . . it seems unnecessary that criminal sanctions be contemplated for restrictive trade practices offences. . . [T]he criminalisation of Part IV of the [TPA] may well have the effect of lessening competition. . . [C]ompanies may be restrained in pro-competitive conduct as they have real fear of

possibly breaching the abuse of market power provision (section 46) which could only serve to bring about less competitive behaviour in the market place.<sup>538</sup>

The TPC considers that the maximum penalty of \$10m signals to business and the community at large that contraventions of Pt IV are regarded very seriously, without criminal liability being imposed.

It would be premature to introduce criminal liability at this stage as the new maximum should have a chance to be tested before any changes are made to Pt IV.<sup>539</sup>

### ***The Commission's view - no criminalisation of Pt IV***

9.27 The Commission has carefully considered the implications of any recommendation that would involve criminalising provisions of Pt IV, even if only in circumstances in which they were contravened with a 'guilty mind'. It does not recommend that the approach it favours for Pt V, that is, both civil and criminal sanctions, be applied to Pt IV. Similar considerations arise in relation to Pt IV but the possible introduction of criminal liability for violations of that Part is a complex matter and involves issues beyond the scope of the present reference. The prospect of criminalisation requires a detailed appraisal of the implications for competition law policy. This inquiry is not in a position to discuss that issue in the co-ordinated way that would be essential for any cogent recommendations to be made.

## **Contraventions of Pt IVA**

### ***Unconscionable conduct***

9.28 Pt IVA prohibits unconscionable conduct in trade or commerce. Section 51AB<sup>540</sup> prohibits a corporation from engaging in unconscionable conduct in connection with the supply or possible supply of goods or services to a person. It is intended to protect consumers against unconscionable conduct by a corporation. Section 51AA prohibits a corporation from engaging in conduct that is unconscionable 'within the meaning of the unwritten law . . . of the States or Territories'.<sup>541</sup> The intention of Parliament in enacting this provision was to make remedies under the TPA available for unconscionable conduct in a commercial transaction and to make possible the involvement of the TPC in such a case.<sup>542</sup> It was not to extend the existing equitable principles of unconscionable conduct.<sup>543</sup>

### ***DP 56 discussion and responses***

9.29 A contravention of Pt IVA is neither an offence nor subject to a civil penalty. Because the Commission's terms of reference require it to consider whether the recommendations it makes on Pt V ought to be applied to contraventions of Pt IVA, DP 56 asked whether the model proposed for imposing criminal liability or a civil penalty<sup>544</sup> should also apply to Pt IVA.<sup>545</sup> A number of submissions considered that contravention of a provision of Pt IVA should be liable to a civil penalty.<sup>546</sup>

Part IVA is, for this purpose, no different from other parts of the Act and where a contravention of the Act would otherwise be sufficient to justify the imposition of a civil penalty Part IVA should not be treated any differently.<sup>547</sup>

The TPC considers that

[e]ffective deterrence will be created by providing the TPC with a comprehensive enforcement role in respect of Part IVA. [This] would include the ability to commence penalty proceedings . . . The ability of agencies and industry organisations to educate and inform business on how to avoid and correct unconscionable conduct will be greatly enhanced if contraventions of Part IVA were subject to penalty provisions. Unfortunately nothing focuses the managerial mind on preventative and remedial behaviour more than the threat of penalty.<sup>548</sup>

The majority of submissions commenting on this issue disagreed. They considered either that the concept of unconscionability is too vague and uncertain to be made subject to a penalty or that no compelling reason had been given for imposing liability to a penalty.<sup>549</sup> One considered the concept of unconscionability too vague for a corporate diligence program to be designed to avoid liability to a penalty.<sup>550</sup>

### ***The Commission's view***

9.30 The Commission does not consider that a contravention of Pt IVA should be subject to penalty, civil or criminal. The provisions of Pt IVA, like s 52 in Pt V, contain general prohibitions. It is inappropriate to penalise conduct that is not clearly in breach of a prohibition. Also, s 51AA is new and has not yet been interpreted by the courts. Until the scope of the prohibition is clarified by the courts, consideration of whether a contravention should be penalised should be deferred.

## **Principles of corporate responsibility**

### ***Current rules***

9.31 Whether an individual did a certain act and what his or her state of mind was are usually straightforward matters to ascertain compared with determining whether a corporation did something and whether it did so knowingly. It is necessary to attribute to the corporation the conduct and state of mind of natural persons such as its officers and employees. The TPA contains rules by which both the conduct (*actus reus*) and the state of mind (*mens rea*) of the directors, employees and agents of a corporation are attributed to the corporation. To establish the state of mind of a corporation, it is sufficient to show that a director, servant or agent of the corporation who engaged in the relevant conduct within the scope of his or her actual or apparent authority had that state of mind.<sup>551</sup> Conduct engaged in by a director, servant or agent of the corporation within the scope of the person's actual or apparent authority or by any other person at the direction of a director, servant or agent, where giving the direction was within the scope of the authority of the director, servant or agent, is deemed to have been engaged in by the corporation.<sup>552</sup>

### ***Recent proposals to improve principles of corporate responsibility***

9.32 ***Criminal Law Officers Committee***. The attribution rules provided for in the TPA extend the scope of corporate responsibility beyond that of the narrow common law attribution rules.<sup>553</sup> Several recent reports have considered the basis of corporate criminal responsibility. CLOC reported in December 1992 on what general principles ought to apply in relation to criminal offences.<sup>554</sup> The CLOC proposal attributes the physical element of an offence to a corporation if the relevant act or omission was done by a servant, agent, employee or officer acting in the scope of his or her employment or authority. If intention or knowledge is an element of the offence, that element is present if the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence. Several means of proving this are provided for, including

- that the board of directors or a high managerial agent of the body corporate did or authorised the act (but there is a due diligence defence)
- that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the contravention

- that the body corporate failed to create and maintain a corporate culture that required compliance.<sup>555</sup>

This proposal tries to reflect the basic principle that a corporate defendant is not to be held criminally responsible for conduct unless the corporation, as a corporation, was blameworthy.

9.33 **Recent ALRC recommendations.** The Commission has essentially adopted the same approach as that taken in the CLOC proposals in several recent reports.<sup>556</sup> There are differences, however, between the Commission's recommendations and those of the CLOC. The Commission recommended that

- if a director, servant or agent of a body corporate acting within his or her actual or apparent authority acted only for his or her own interest and the body corporate did not benefit, that act should not be attributed to the corporation<sup>557</sup>
- a body corporate have a defence if it had taken all reasonable precautions, and had exercised due diligence, to prevent its officers, including directors and employees, and its agents from doing the act.<sup>558</sup>

ALRC 65 recommended that that defence should be negated if the person who did the act believed on reasonable grounds that reporting the matter to the board of directors or in accordance with the body corporate's reporting system would not have led to the body corporate taking effective measures to prevent the offence or would have led to the person being prejudiced.<sup>559</sup>

#### ***DP56 proposal and responses***

9.34 In DP56 the Commission asked whether the rules in the TPA s 84 for attributing criminal liability to corporations should be replaced by the CLOC proposals governing corporate criminal responsibility or by the CLOC proposals with modifications suggested by the Commission in recent reports.<sup>560</sup> It also sought comment on whether the proposed attribution rules should apply where a corporation's state of mind is relevant to liability for a civil penalty.<sup>561</sup> Some submissions opposed introducing the CLOC proposal to s 84.<sup>562</sup> Others, including the DPP and the TPC, favoured introducing to the TPA the CLOC proposals for attributing criminal liability.<sup>563</sup>

[E]xplicit recognition that evidence that a corporate culture existed within the body corporate which directed, encouraged, tolerated or led to the contravention, or that the body corporate failed to create and maintain a corporate culture that required compliance, go [sic] to prove that the corporation authorised or permitted the offence is a positive development which will encourage effective corporate compliance.<sup>564</sup>

The DPP did not support the first of the Commission's suggested modifications of the CLOC proposal, on the basis that it would require an examination of the motive for the act and would be difficult to prove.<sup>565</sup> One submission opposed the third suggested modification on the ground that a corporation should not lose its defence merely because an officer held a mistaken belief that reporting the matter would not have led to the body corporate taking effective measures to prevent the offence or would have led to the person being prejudiced.<sup>566</sup> Some submissions supported all of the Commission's suggested modifications.<sup>567</sup> The TPC considered that the third modification would remove the benefits of sham compliance programs.<sup>568</sup> A number of submissions favoured applying the CLOC attribution rules in the context of civil penalties, wherever a corporation's state of mind is relevant.<sup>569</sup> Others did not.<sup>570</sup>

## ***Recommendation***

9.35 The CLOC proposals are intended to apply as a matter of general principle in Australian criminal laws. A Bill to implement the proposals is currently being drafted. The Commission ***recommends*** that the TPA s 84 be amended, in so far as it attributes criminal liability to a corporation, to reflect the CLOC principles. The Commission invites the Attorney-General's Department to reconsider the Commission's twice-recommended modifications but does not recommend that they be incorporated into the TPA unless they are incorporated in the Bill to implement the CLOC proposals. Section 84(1) should not, however, be amended in relation to civil penalties or civil remedies. Vicarious liability is less objectionable in the civil context than in relation to criminal liability. It is also common in the civil context.<sup>571</sup>

### ***Vicarious liability of non-corporate employers***

9.36 ***DP56***. Section 84 makes an individual vicariously liable for certain conduct engaged in by his or her employees or agents for the purpose of Pt IVA and Pt V. It imposes strict liability on an employer for the mental state or conduct of a servant or agent acting within the scope of his or her employment or authority.<sup>572</sup> The Commission proposed in DP56 that s 84 be amended to conform to the general principle that criminal responsibility requires personal fault, that is, that an employer should only be criminally liable if he or she is blameworthy.<sup>573</sup> Although several submissions opposed this proposal,<sup>574</sup> most submissions expressed support.<sup>575</sup> The Commission also sought comment on whether s 84(3) should be amended in respect of non-corporate employers' liability for civil penalties.<sup>576</sup> Some submissions considered it should;<sup>577</sup> others did not.<sup>578</sup>

9.37 ***The Commission's view***. The Commission considers that the general principle that criminal responsibility requires blameworthiness<sup>579</sup> should also apply to non-corporate employers. This principle requires that employers not be held criminally liable for the conduct of their employees in the absence of personal fault. The Commission ***recommends*** that the TPA s 84(3) be amended to reflect the general principle that criminal responsibility requires intention or advertence.<sup>580</sup> In proceedings for civil penalties and civil remedies, however, vicarious liability is not inappropriate. It is unnecessary to amend the attribution rules for the purpose of civil proceedings.

### ***Limitation periods for penalty proceedings***

#### ***Commencing a prosecution***

9.38 ***DP 56***. The TPA provides that a prosecution for contravention of the Act may be commenced within three years after the commission of the offence.<sup>581</sup> This differs from the limitation periods that apply to prosecutions under the *Crimes Act 1914* (Cth). In that Act a distinction is drawn between offences that can be prosecuted at any time and less serious offences that can only be prosecuted within one year of being committed.<sup>582</sup> DP56 asked whether there are contraventions of the TPA for which a prosecution should be able to be commenced at any time rather than the current three years.<sup>583</sup>

9.39 ***Responses and the Commission's view***. The DPP considers that a prosecution for a contravention of the TPA should be able to be commenced at any time.

Limitation periods do not permit account to be taken of the circumstances of the particular case. The time between the commission of an offence and the authorities being in a position to institute the prosecution may not present any prejudice to the offender, or any prejudice which does exist may be minimal and outweighed

by other factors in favour of a prosecution proceeding. In addition, some offences are of a type that are not likely to be detected at the time the offence is committed. Fraud offences are often of this type.<sup>584</sup>

No other submissions, including that of the TPC, revealed any dissatisfaction with the current prosecution time limit of three years. The Commission notes that the ASC is seeking removal of the current five year statutory limit on prosecutions under the Corporations Law.<sup>585</sup> The Commission does not consider that cases involving contraventions of Pt V of the TPA are so complex as to require a prosecution time limit greater than three years. In addition, it considers that prosecutions taken closer to the time of the contravention have a greater effect on the defendant (and other persons who may be engaging in similar conduct) and are more likely to succeed, largely because they avoid the problem of stale evidence. The Commission does not recommend any change to the current prosecution time limit of three years.

### ***Commencing a civil penalty proceeding***

9.40 ***DP 56 proposal and responses.*** The time limit for commencing proceedings seeking the imposition of a civil penalty in respect of a breach of Pt IV of the TPA is six years.<sup>586</sup> The time for seeking a civil penalty order under the Corporations Law Pt 9.4B is also six years.<sup>587</sup> DP56 suggested that the time limit for proceedings seeking the imposition of civil penalties should be the same as for prosecutions under the TPA, that is, three years.<sup>588</sup> The DP also sought comment on whether there are any contraventions for which proceedings seeking the imposition of a civil penalty should be able to be commenced at any time.<sup>589</sup> Given the Commission's recommendation that civil penalties should be available in Pt V as well as in Pt IV,<sup>590</sup> that issue would be relevant to both Parts. Many submissions agreed with the proposal to reduce the time limit for civil penalties.<sup>591</sup> The TPC, however, was most concerned about this suggestion's implications for PtIV proceedings. It pointed out that investigations of contraventions requiring proof of the effect of conduct on competition, the definition of relevant markets and the existence, nature and extent of conspiracies are complex and difficult. They often involve interstate inquiries, large numbers of statements, multiple interviews and the collection and verification of supporting business documentation and expert evidence. It also noted that investigations and the institution of proceedings can be delayed significantly by potential respondents challenging the administrative actions of the TPC.<sup>592</sup> The TPC considers that any reduction in the limitation period will seriously affect its ability to investigate alleged contraventions of Pt IV adequately.<sup>593</sup>

9.41 ***Recommendation.*** The Commission is persuaded by the TPC's strong concerns about the implications of the proposal for Pt IV proceedings. It ***recommends*** that the time limit for bringing proceedings under Pt IV for the imposition of a civil penalty should remain six years. Cases involving contravention of Pt V, however, tend not to be as complicated as those under Pt IV. They do not involve proof of the existence of a relevant market, contraventions generally come to light earlier than do contraventions of Pt IV, what must be proved is simpler than in PtIV and, generally, fewer witnesses are required. There is no reason why the time for instituting civil penalty proceedings in Pt V should be longer than the time for initiating a prosecution in Pt V. The Commission ***recommends*** that, if civil penalties are introduced into Pt V, the time within which civil penalty proceedings under PtV must be commenced should be three years.

## **Section 77 - imposing civil penalties**

### ***Current drafting uncertainty***

9.42 Section 77 provides that the Minister or the TPC may 'institute a proceeding . . . for the recovery . . . of a pecuniary penalty referred to in s76' within six years after the contravention. While this wording is generally interpreted as providing for proceedings seeking the *imposition* of a pecuniary penalty,<sup>594</sup> an

alternative interpretation is that it relates to proceedings to recover an unpaid pecuniary penalty imposed under s 76. On the latter interpretation, s 77 is the civil penalty equivalent of s79A which provides for the 'enforcement and recovery of certain [unpaid] fines'. The Commission proposed in DP56 that s77 be amended so that it clearly relates to the imposition of a civil penalty.<sup>595</sup> Nearly all submissions that commented on this issue supported the proposal.<sup>596</sup>

### ***Recommendation***

9.43 The Commission *recommends* that, for the sake of clarity, s77 be amended so that it provides for the *imposition* of a penalty. If, as a result of the Commission's recommendations, civil penalties other than monetary penalties are made available under Pt IV, s 77 will need to be further amended as it currently refers only to 'pecuniary penalties'.

## 10. Penalties for contravening the TPA

### Introduction

10.1 Currently, the TPA provides only for monetary penalties.<sup>597</sup> In DP 56 the Commission queried whether the purposes of the TPA could be achieved more effectively if a wider range of penalties was available.<sup>598</sup> It suggested additional penalties including corporate probation, corporate community service orders and adverse publicity orders. This chapter considers what penalties should be available, the size of penalties and the guidance, if any, that should be provided to the court when imposing penalties.

### Penalties for contravening Pt V: corporate offenders

#### *Only monetary penalties available*

10.2 The only form of punishment that can currently be imposed on a corporation that has contravened Pt V of the TPA is a monetary penalty.<sup>599</sup> It has been argued by many commentators that monetary penalties are not always the most effective way of penalising corporations and that a range of options should be available to the courts.<sup>600</sup>

[M]onetary exaction is an inept means of punishment in many ways, including its inability to pinch directly on the managerial nerves of corporate governance, and its proneness to inflict overspills on innocent workers, shareholders and consumers. . . [C]orporations conceivably can be punished otherwise than by means of fines and the more promising possible additional forms of sanction - stock dilution (equity fines), probation and punitive injunctions, publicity orders, and community service orders - seem capable of overcoming the worst limitations of monetary punishment.<sup>601</sup>

#### *Limitations of monetary penalties*

10.3 The more significant limitations of monetary penalties as a sanction against corporations may be summarised as follows.

- No matter how large, monetary penalties do not necessarily result in corporate offenders responding by taking internal disciplinary action against those responsible. The cheapest and least embarrassing response may be simply to write a cheque. There are some incentives not to undertake disciplinary action against employees responsible for the contravention. They include disruption from normal activities, embarrassment for those exercising managerial control, encouragement for whistle-blowers and the risk of generating civil litigation against the company or its officers.
- Monetary penalties do not ensure that corporate offenders revise their internal controls where such revision is necessary to guard against repetition of the contravention.
- Monetary penalties tend to convey the impression that offences are purchasable commodities whereas the conventional understanding of serious offences is that they are unacceptable even if an offender is fully prepared to pay for them in cash.<sup>602</sup>
- Monetary penalties have an indirect effect on managers and other personnel in a position to control corporate behaviour but they may have adverse spillover effects on shareholders, workers, consumers and other bystanders.



- The level of monetary penalty required to reflect the gravity of an offence may exceed the capacity of a corporation to pay. In that event, the sentencing court has the unpalatable options of imposing a low monetary penalty (or a time payment plan that depreciates the gravity of the offence) or a commensurate and immediately payable fine that will send the company into liquidation.
- Monetary penalties are prone to evasion through the use of incorporated subsidiaries and other avoidance techniques such as asset-stripping. Safeguarding payment of a monetary penalty by means of a charge upon property that passes into the hands of subsequent parties is an imperfect solution because the impact may be borne not by the offender but by others who were not implicated in the offence.

### ***Wider range of penalties needed***

10.4 Penalties other than monetary penalties are able, in many circumstances, to avoid these limitations. The monetary penalty will, and should, continue to play a useful and major role as a sanction against corporations that contravene the TPA. The existing range of sanctions is, however, clearly inadequate. 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, for example, persistent misleading advertisements despite warnings from the TPC or where a culture of non-compliance has pervaded a corporation. DP 56 raised for discussion a number of different penalties. Each is discussed in detail in the following paragraphs.<sup>603</sup> Generally, submissions and consultations supported the proposal to increase the range of penalties available to a court when considering the penalty to impose for a contravention of the TPA.<sup>604</sup>

The TPC believes that the widest range of sanctions should be available as both criminal and civil penalties. The type of sanction used in each case should be determined by the circumstances of the contravention and the prospects of the success of various orders available . . . The detail of particular orders will be determined, in part by how serious the contravention is, and the criminal/civil status should be one indicator of the degree of 'seriousness'.<sup>605</sup>

If a range of sanctions is available, a court should be able to impose a number of sanctions in whatever combination it considers appropriate, taking into account the overall penalty impact imposed.

### ***Corporate probation***

10.5 ***What is it?*** Although probation and similar supervisory orders are generally thought of in the context of individual offenders, they could, if suitably modified, also apply to corporations that have contravened the law. Probation or supervisory orders are court orders that impose controls over aspects of conduct.<sup>606</sup> They may, for example, involve a corporation making an internal investigation of the contravention, taking appropriate disciplinary proceedings and filing with the court a detailed and satisfactory compliance report.<sup>607</sup> Alternatively, they may require a corporation's internal control methods to be revised, with court scrutiny. The focus would be on a corporate defendant's compliance procedures and enforced self-regulation, not receivership or official management. These orders could play a significant role in achieving changes in corporate conduct and hence preventing repetition of contraventions. They would also have a deterrent impact.

10.6 **Corporate probation under the US Sentencing Guidelines.** Corporate probation is not a novel concept. Under the United States Federal Sentencing Guidelines, issued by the US Sentencing Commission and binding on Federal Courts, probation must be imposed on corporate felons if any one of the following conditions applies:

- it is necessary to secure the payment of restitution or a fine
- the organisation does not have a compliance and detection program<sup>608</sup>
- the organisation engaged in similar misconduct within the previous five years
- it is necessary to ensure that the organisation will make changes to reduce the likelihood of future criminal conduct.<sup>609</sup>

Under probation orders courts monitor convicted corporations and require them to develop internal programs to prevent and detect misconduct.<sup>610</sup> Conditions imposed by courts include a requirement that a defendant reconsider and, where necessary, reform its corporate structure and decision making. The guidelines provide a strong incentive for corporations to have effective programs for compliance with the law and the detection of contraventions. Where compliance by a corporate defendant with probationary conditions needs to be supervised or verified, one useful mechanism is reliance on a special officer of the court (for example, a suitably qualified person from the legal, accounting or business consulting profession) at the cost of the defendant. This approach has been recommended by the American Bar Association.<sup>611</sup>

10.7 **DP 56.** The Commission sought comment on whether corporate probation should be provided for in the TPA.<sup>612</sup> Most submissions that addressed this issue favoured the introduction of corporate probation orders.<sup>613</sup> A common view amongst opponents of the concept was that probation orders would be too costly and would intrude too much on the internal operations of a corporation.

The idea of corporate probation is very worrying. Markets work by creating a framework of incentives to which individuals and corporations respond. The detailed oversight of anyone's behaviour is only to be undertaken in very extreme circumstances.<sup>614</sup>

10.8 **Precedent in s 87B undertakings.** The types of tasks the Commission envisages that a court would require of a corporation under the terms of a corporate probation order are already apparent in the requirements that have been imposed on corporations pursuant to enforceable undertakings entered into under s 87B.<sup>615</sup> Section 87B undertakings have included, for example, terms requiring the corporation

- to establish a corporate compliance program for employees and directors designed to ensure their awareness of the responsibilities and obligations under the TPA
- to establish an education and training program within the corporation's operations, designed to ensure awareness among its directors, servants and agents of the corporation's responsibilities and obligations under the TPA
- to establish an advertising approval committee consisting of the corporate solicitor and senior management to be responsible for vetting all major advertising campaigns undertaken by the corporation

- to appoint an independent person or body, agreed to by the TPC, to audit the implementation of the undertakings and to report in writing to the TPC within X months of the signing of the undertaking.<sup>616</sup>

Given that such requirements are increasingly agreed to as a term of an enforceable undertaking under s 87B, there seems no reason why a court should not be empowered to impose them as a condition of corporate probation.

**10.9 Recommendation: corporation probation should be available.** The Commission sees considerable advantages in corporate probation.

- It is flexible and can be crafted to suit the individual circumstances of each case.
- It is likely to promote individual accountability for corporate contraventions because it is more directly targeted towards the staff involved.
- It is likely to induce organisational change which may avoid a repetition of the conduct in question.
- It can impose necessary standards of compliance on a contravening subsidiary corporation whereas it may be difficult to impose a severe cash penalty on a subsidiary with few liquid assets.
- It avoids the problem sometimes encountered with monetary penalties of a small sum being inadequate to deter repetition but a larger and more appropriate sum being beyond the financial means of the corporation.<sup>617</sup>

The Commission considers that it is possible to devise supervisory orders that avoid subjecting corporations to unnecessarily intrusive forms of control and to build safeguards into the legislation authorising the use of probation. The costs of administering and supervising corporate probation need not be excessive and will, in any case, be paid by the corporation. Conditions a court might consider imposing under a corporate probation order include:

- the corporation is to develop and submit to the court a program to prevent and detect contraventions of the TPA, including a schedule for implementation
- upon approval by the court of a program to prevent and detect contraventions of the TPA, the corporation is to notify its employees and shareholders that it has contravened the TPA and advise them of the steps it has taken to avoid repetition
- the corporation is to make periodic reports to the court or the independent representative appointed by the court<sup>618</sup> regarding the corporation's progress in implementing the compliance program
- the corporation is to submit to a reasonable number of regular and unannounced examinations of its books and records at appropriate business premises by the independent representative and to inquiries made of knowledgeable individuals within the corporation.

The court should be able to impose whatever conditions are reasonably related to the nature and circumstances of the contravention or the history and characteristics of the organisation and are necessary to achieve the purposes of deterrence and preventing future contraventions. To make the availability of probation orders clear and well defined, and to provide a constant reminder to courts that they are available, the Commission *recommends* that the TPA be amended to provide expressly for corporate probation and for the types of probationary conditions indicated above.<sup>619</sup> The Commission does not consider that there is a need either to place any limitation on when the court may make a probation order or to require a probation order in particular circumstances.<sup>620</sup> Courts should have discretion, as with other sanctions, as to whether and in what form it will impose corporate probation.

10.10 *Supervision of corporate probation.* Depending on the terms of the order, the court may be able to supervise a probation order. If it cannot, it should appoint a person, for example an independent accountant or solicitor, as an independent representative of the court to supervise compliance with the probation order.<sup>621</sup> If this happens, the fees of that person would be payable by the corporation. A corporate probation order should be discharged upon proof by the contravener of satisfactory compliance. Certification by the directors of the corporation that the probation order has been complied with would usually be sufficient proof, provided it becomes a statutory offence to provide false certification in such a case.

10.11 *Maximum corporate probation.* Unlike a monetary penalty, costing corporate probation would be a difficult exercise. Accordingly, it is inappropriate to prescribe in the TPA the maximum financial cost of probation that can be imposed on a corporation. Instead, the maximum corporate probation should be determined in accordance with the principle that punishment should be proportional to the contravention.<sup>622</sup> The Commission considers, however, that the maximum duration of a corporate probation order should be prescribed and that it should be three years. If court administrative costs involved in corporate probation are higher than those for other sanctions, the extra costs should be borne by the corporation and taken into account by the court in determining the total impact of the probation order. Because corporate probation is a form of punishment, the costs of complying with an order would not be tax-deductible. Because it is a new form of penalty, however, the Commissioner of Taxation may wish to make a ruling to ensure that this is so.

10.12 *Requirements imposed on specific positions within the corporation.* A corporate probation order should, ideally, require that certain tasks be performed or supervised and monitored by the directors. The court should not, however, impose orders on named individuals unless they are party to the proceedings. Specific requirements should be imposed only on persons holding the office of director.

10.13 *Sanctions for non-compliance with probation order.* To maintain the integrity of corporate probation as a practical sentencing option, the court must be able to deal adequately with a failure to comply with a probation order.<sup>623</sup> If a corporation fails to comply with a probation order, the court should be able to

- (i) continue or extend the corporate probation with or without imposing additional requirements or
- (ii) revoke the order and re-sentence the corporation taking into account the extent, if any, to which the corporation complied with the probation order before default occurred.

If a director knowingly fails to comply with the terms of the probation order to which his or her directorship is subject, the director should be guilty of an offence. If a director fails to comply with those terms without knowing that they had been imposed on his or her directorship, the director should be liable to a civil penalty, subject to the defences of reasonable care and reasonable excuse.

### ***Community service orders***

10.14 ***What are they?*** Like probation orders, community service orders are generally thought of in the context of penalising an individual. There is no reason, however, why they could not, if constructed appropriately, provide a useful way of penalising a corporation. Depending on the terms of the order, it may also serve the purpose of reducing the likelihood of future contravention and providing a form of compensation. A corporate community service order would involve the court ordering the contravener to undertake a project of community service. Already, projects that provide a community service have been required under the terms of an enforceable undertaking entered into under s 87B.<sup>624</sup> In the area of environmental protection, at least one judge has criticised the lack of sentencing options and called for community service orders to be available for both individuals and companies.<sup>625</sup>

10.15 ***Issue raised in DP 56.*** DP 56 discussed the advantages and disadvantages of community service orders. A community service order could have several advantages over monetary penalties. They include

- enabling the court to order the performance of a socially useful program adapted to the expertise of the particular corporate offender
- being more likely to have a deterrent impact on a corporation
- assisting in projecting corporate offences as anti-social
- reducing the problem of the penalty falling on the shareholders and, possibly, consumers through increased prices due to monetary penalties on the corporation, instead of on the corporation's management
- avoiding the so-called 'deterrence trap'<sup>626</sup>

Possible disadvantages of community service orders include

- the inability to ensure that improved internal controls are put in place
- the danger that corporate resources might be channelled into 'pet charity programs' (this could be avoided by requiring that community service projects bear a reasonable relationship to the contravention in issue)
- the risk of corporate cheating by falsifying compliance reports, recycling projects already completed in the normal course of business or enlisting second or third-rate personnel for the project (adequate supervision could conceivably avoid or minimise these difficulties).

DP 56 proposed that the TPA should provide expressly that the court may make a community service order against a corporation that has contravened the Act.<sup>627</sup>

10.16 **Responses to proposal.** Several submissions rejected outright and without explanation the notion of corporate community service orders.<sup>628</sup> Other submissions acknowledged the theoretical benefits of community service orders but considered that those benefits would be outweighed by the practical difficulties of supervising and costing such orders.<sup>629</sup> They expressed concern about the costs of establishing a federal administrative scheme to supervise corporate community service orders which may provide no return to the Commonwealth on a cost-benefit basis. In contrast, many submissions supported the introduction of corporate community service orders.<sup>630</sup>

10.17 **Recommendation: community service orders should be available for corporations.** The Commission considers that community service orders should be available for corporations, as they are for individuals. Not all corporate contraveners would be suitable subjects for a community service order. Only those with the facilities, skills and resources to perform a service that will benefit the community should be considered for a such an order. The Commission acknowledges concerns about the details of how such orders will operate in practice but considers that these difficulties can be overcome or avoided. It does not envisage the establishment of a federal scheme to administer and supervise corporate community service orders.<sup>631</sup> Detailed models for community service orders have already been devised.<sup>632</sup> The Commission has taken them into account in determining that corporate community service orders should have the following features.

- Community service orders should be available at the discretion of the court. They should not be compulsory in any circumstances. Nor should they require the consent of the contravening corporation or persons nominated by the corporation to undertake the project of community service. The choice of punishment should not be at the option of the contravener. However, co-operation should be fully encouraged. If, after finding that a corporation has contravened the TPA, the court decides that a community service order would be the appropriate penalty option in the circumstances, it should indicate this to the corporation and ask it to prepare a report on a community service project it could perform in lieu of, or in addition to, a monetary penalty. Giving the corporation this opportunity aims to foster co-operation and corporate self-regulation as far as possible. If the contravener does not propose a project, or the court rejects its proposal, the court should specify the project to be undertaken or impose a different type of penalty.
- Community service projects should be required to bear a reasonable relationship to the contravention. This requirement is necessary to prevent community service orders being used to promote 'pet charities'.<sup>633</sup> In determining the nature of a community service the court should be required to consider what, if any, damage was suffered by the community as a whole as a result of the contravention, and to require a reasonable relationship between the community service project and the nature of the damage.
- Community service orders will in most cases require more supervision than, for example, a monetary penalty. If more supervision is required than could be performed by the court, the court should appoint a person to be an independent representative of the court. This representative could, for example, be a lawyer, accountant, auditor, receiver or other appropriately qualified person.<sup>634</sup> He or she would supervise compliance with the project and, if necessary, prepare reports on a proposed project. The fees of such a person would be payable by the contravener. The court should be able to

require an independent representative to prepare pre-service reports or post-service reports. It should also be able to require the directors of the corporation to certify that the community service project has in fact been performed. It should be a statutory offence to provide false certification.

- The maximum limits of the costs (in terms of material, equipment and labour) under a community service order should be determined on the basis of the principle of reasonable proportionality.<sup>635</sup> The maximum time within which the order must be complied with should also be specified. The Commission suggests a maximum of six months as a general rule, extendable to three years where the size or complexity of the project so requires. Because community service orders are a form of punishment, the costs of complying with an order would not be tax-deductible. Because they are a new form of penalty, however, the Commissioner of Taxation may wish to make a ruling to ensure that this is so.
- A court may wish to impose, as part of a community service order, specific requirements on the directors of the corporation. It should not, however, impose orders on named individuals unless they are party to the proceedings. There is no objection, however, to imposing specific responsibilities on persons holding office as a director.
- A community service order should be discharged upon proof by the contravener of satisfactory compliance. If the corporation fails to comply with any requirement imposed by a community service order, the court should be able to
  - (i) continue or extend the sentence of community service and require additional pre-service or compliance reports or
  - (ii) revoke the order and re-sentence the corporation taking into account the extent, if any, to which the corporation complied with the community service order before default occurred.

If a director knowingly fails to comply with the terms of the community service order to which his or her directorship is subject, the director should be guilty of an offence. If a director fails to comply with those terms without knowing that they had been imposed on his or her directorship, the director should be liable to a civil penalty, subject to the defences of reasonable care and reasonable excuse.

The Commission *recommends* that the TPA be amended to provide expressly for corporate community service orders.<sup>636</sup> These orders should be available at the discretion of the court and the project specified in the order should bear a reasonable relationship to the contravention.

### ***Adverse publicity orders***

10.18 ***Adverse publicity orders***. DP 56 proposed that the TPA should provide expressly for adverse publicity orders to be made for punitive purposes against corporations that had contravened the Act.<sup>637</sup> An adverse publicity order would require a corporation to publicise the fact that it has breached the TPA and the details of what it has been ordered to do. When imposing probation on corporations under the organisational sentencing guidelines, United States courts may require an organisation, at its expense and in the format and media specified by the court, to publicise the nature of the punishment imposed and the

steps that will be taken to prevent the recurrence of similar offences.<sup>638</sup> DP 56 noted that the TPA s 80A already authorises the court to make an order requiring a wrongdoer to disclose to the public, in a way set out in the order, information specified in the order or to publish advertisements in accordance with the terms of the order. The type of order most commonly made under this provision seems to be for corrective advertising, that is, an order designed to undo the effects of a contravention. Punitive orders cannot lawfully be made under s 80A.

10.19 **Advantages and disadvantages.** DP 56 noted the advantages and disadvantages of an adverse publicity order. Possible advantages include the following.

- It would avoid the deterrence trap already referred to.<sup>639</sup>
- It directly targets corporate prestige and hence a non-financial value in corporate decision making.
- It is well-tailored to the objective of expressing community disapproval for serious corporate contraventions.
- It can put some pressure on a corporation for reform of internal procedures by directing explicit attention in the order itself to the types of steps which a corporation could take or has taken to achieve such reform.
- 'Overspills' could be avoided by designing an adverse publicity order in such a way as to have primary impact on managers rather than on the shareholders and employees of a company.
- It can also be effective against complex corporate structures because its effects inevitably transcend the particular corporation in issue and affect a parent or holding company.

A possible disadvantage of adverse publicity orders is uncertainty of impact. It may not be easy to assess the impact of publicity on a corporation. However, the actual impact of fines and other sanctions can be just as hard to assess.<sup>640</sup>

10.20 **Submissions.** A few submissions opposed the proposal, on the basis either that no additional sanctions are needed or that the courts are unlikely to be in the best position to assess the wide ramifications of such an order, for example, the public perception that the corporation is a 'bad' corporation.<sup>641</sup> However, a large majority of submissions commenting on this issue favoured the court being able to impose an adverse publicity order.<sup>642</sup> One emphasised that the threat of such orders would deter corporations from contravening the TPA because they would fear loss of business resulting from an adverse publicity order.<sup>643</sup>

10.21 **Recommendation: adverse publicity orders should be available.** The Commission is persuaded that adverse publicity can have a significant impact and deterrent effect on a corporation. Consequently, adverse publicity orders would be a useful addition to the court's penalty options. In some cases, an adverse publicity order may be the most suitable penalty. The Commission considers that the court should be able to make an adverse publicity order against a corporation in respect of a contravention of a provision of Pt V of the TPA. It **recommends** that s 80A be amended to provide that an adverse publicity order may be imposed where a corporation is found to have contravened the Act and the court wishes to impose a penalty.<sup>644</sup> Whether a particular order made under s 80A is punitive or remedial will depend on



the circumstances of the case. While the precise and full extent of the impact of an adverse publicity order may be very difficult to predict, there may nonetheless be instances in which the court considers such an order to be the most effective in the circumstances. The 'size' of an adverse publicity order, both in terms of the direct costs of complying with the order and the impact of the adverse publicity, should be determined in accordance with the principle that punishment should be proportional to the contravention.<sup>645</sup>

### ***Punitive injunctions***

10.22 ***Enhanced form of corporate probation.*** The punitive injunction is a variant of the civil mandatory injunction and corporate probation.<sup>646</sup> Mandatory injunctions have often been used in the US in the context of civil rights litigation to require education boards, prisons and other institutions to modify their conduct to comply with individual rights under the Constitution. The mandatory injunction has also been invoked frequently by the US Securities and Exchange Commission as a weapon against corporate malpractice. In the context of the TPA, a punitive injunction could be regarded as a distinctive and enhanced form of corporate probation which is overtly punitive and yet also promotes compliance with the TPA by impelling and monitoring the adequacy of internal corporate control systems. A punitive injunction would require a corporate defendant not only to revamp its internal controls but to do so in some punitively demanding way. Instead of requiring a defendant merely to remedy defective internal controls, it would be possible to require that the injunctive order be performed within a shorter time-frame than would be allowed in the context of a remedial injunction and that the remedial steps required be undertaken by a special task force including executive directors and senior management.

10.23 ***DP 56 proposal and submissions.*** DP 56 asked whether punitive injunctions should be available in the TPA.<sup>647</sup> The key potential advantage of the punitive injunction would be the ability to punish egregious wrongdoing more severely and emphatically than corporate probation or fines allow. The main possible disadvantage would be the difficulty or novelty of specifying the punitive element which goes beyond the limits of civil injunctions or corporate probation. Submissions did not articulate support for punitive injunctions but only one raised any detailed point of opposition to them.

[X] submits that [punitive injunctions] could potentially work gross injustices. . . [T]he remedy of injunction has historically been one to maintain the status quo and, as such, is not, and has never been, regarded as punitive in nature. The very concept of a 'punitive injunction' suggests the making of an order which goes beyond that strictly necessary to avoid the wrong which would otherwise continue to occur. This role is inappropriate for an injunction.<sup>648</sup>

10.24 ***The Commission's view.*** The Commission does not accept that injunctions must necessarily be used only in a remedial capacity. The concept of the punitive injunction is not intended to introduce punishment in cases where a remedial injunction is sufficient. The point is to provide a constructive method of punishment in cases where punishment for a serious contravention is warranted. Nevertheless, while it is clear that, because corporations are not natural persons and cannot, therefore, be imprisoned, alternative sanctions are needed, the Commission is not convinced of the need to introduce punitive injunctions under the TPA at this stage. Corporate probation will achieve much the same impact as punitive injunctions. If corporate probation and community service orders are introduced under the TPA, their usage and impact should be monitored. If, after a reasonable period of time, they are considered to be inadequate or ineffective, further consideration should be given to providing for punitive injunctions.

### ***Equity fines***

10.25 ***DP discussion and responses.*** Another alternative to a monetary penalty discussed in DP 56 is an equity fine which operates through stock dilution.<sup>649</sup>

[W]hen very severe fines need to be imposed on the corporation, they should be imposed not in cash, but in the securities of the corporation. The convicted corporation should be required to authorise and issue such number of shares to the state's crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity. The fund should then be able to liquidate the securities in whatever manner maximises its return.<sup>650</sup>

The main advantages of such a sanction are said to be:

- it could be refined so that a statutory list of appropriate beneficiaries could be developed
- it avoids the problem of a monetary penalty exceeding the liquid assets available to the corporation
- the impact falls largely on shareholders rather than on consumers or employees.

There could also be disadvantages.

- Targeting shareholders does not necessarily affect those with managerial control. Nevertheless, shareholders are more likely than consumers or employees to be able to influence those who have managerial control and decision-making powers.
- Equity fines would not overcome the more significant disadvantages of monetary penalties: the inability to address non-financial values in corporate decision-making; the inability to make individuals within the organisation more accountable; and the inability to ensure appropriate corporate reforms to avoid repetitions of the relevant offences.

10.26 ***Submissions.*** Several submissions opposed the introduction of equity fines. It was suggested that they could potentially have a drastic impact on the corporation, significant implications for takeovers<sup>651</sup> and compliance with the requirements of the Corporations Law and could be unfair to shareholders.<sup>652</sup>

10.27 ***The Commission's view - no equity fines.*** The Commission is not satisfied that the possible benefits of equity fines outweigh the possible disadvantages. In light of the other penalties recommended by the Commission, the need to introduce equity fines to expand the range of available penalties decreases. The Commission does not recommend that equity fines be made available as penalties under the TPA.

### ***Civil penalties for corporations in Pt V***

10.28 In light of the Commission's recommendation that civil penalties be introduced to PtV, the issue arises of what form of penalties should be available as civil penalties in Pt V. The only civil penalty currently provided for in the TPA is a monetary penalty.<sup>653</sup> Monetary penalties have many limitations.<sup>654</sup> DP 56 asked whether penalties other than monetary penalties should be available as civil penalties.<sup>655</sup> The majority of submissions that addressed this issue favoured widening the range of penalties available as civil penalties and leaving the choice of the most appropriate penalty in a particular case to the discretion of the court.<sup>656</sup>

There does not appear to be any reason why the range of civil penalty sanctions should not be as wide as the range of sentencing options, imprisonment excepted.<sup>657</sup>

A few submissions disagreed.<sup>658</sup> The Commission recommends in this chapter that the range of sanctions for punishing corporations found to have committed an offence against the TPA should be increased.<sup>659</sup> It sees no reason why the range of civil penalties should not be similarly expanded. The maximum civil penalty should, however, be less than the maximum criminal penalty.<sup>660</sup> The Commission *recommends* that whatever range of penalties is available against a corporation convicted of an offence against Pt V of the TPA should be made available as civil penalties under Pt V of the TPA.<sup>661</sup> When used as a civil penalty, however, corporate probation orders should be called 'corporate supervisory orders' to distinguish them from criminal probation.

### ***Implication for other federal legislation of extended range of penalties in the TPA***

10.29 The Commission recommends in the preceding paragraphs that several additional penalties be available for corporations in respect of contraventions of the TPA: corporate probation, community service orders and adverse publicity orders. There seems no reason why such orders would not also be appropriate in respect of contraventions of other federal legislation.<sup>662</sup> The Commission suggests that consideration be given to making these penalties more widely available.

## **Penalties for contravening Pt V: individual offenders**

### ***Community service orders and probation available***

10.30 Community service orders and probation are familiar sentencing options for individuals convicted of offences. Community service orders have a strong deterrent potential and, by reason of the personal impact on the offender's spare time, are difficult to nullify by monetary or other forms of indemnification. Probation can impose demands which cannot easily be nullified by the corporation.<sup>663</sup> Probation and community service orders are not provided for in the TPA. A court sentencing an individual for an offence against Pt V of the TPA may impose such orders by virtue of the *Crimes Act 1914* (Cth). Section 20AB allows a federal court to impose a community service order in respect of a federal offence if the State or Territory in which the court is sitting provides for such orders. Sections 19B and 20 allow the court to release on probation an individual who has contravened a federal law.

### ***Imprisonment***

10.31 Although imprisonment is available as a punishment in other federal Acts, it was removed as a general sentencing option for contraventions of the TPA in 1977.<sup>664</sup> DP 56 asked whether imprisonment should be reintroduced as a sanction for any offences against the TPA.<sup>665</sup> A minority of respondents considered that there is no reason in principle why imprisonment should not be available in the TPA.<sup>666</sup> PIAC and AFCO expressed the view that

serious contraventions of the TPA by individuals, either directly or because they are knowingly concerned with a contravention by a corporation, should give rise to the risk of imprisonment. Many provisions of the TPA are analogous to obtaining benefits by fraud and ought to be treated as such.<sup>667</sup>

Most respondents to this issue, however, could see no justification for reintroducing imprisonment as a sanction under the TPA.<sup>668</sup> The Commission indicated in DP 56 that it does not favour the reintroduction of imprisonment as a sentencing option under the TPA. It remains of this view. Provided that a range of

other sanctions is available against individual defendants and provided further that sanctions specifically designed to monitor conduct within corporations are available (for example corporate probation) there is no compelling need to resort to the extreme sanction of imprisonment. In cases involving serious fraud or obtaining by deception it is probable that the offenders could be charged with indictable offences under the general criminal law which, upon conviction after trial by jury, could result in imprisonment. The Commission does not recommend that imprisonment be reintroduced as a sanction under the TPA.

### ***Adverse publicity orders***

10.32 The Commission recommends that s 80A should be amended to provide that an adverse publicity order may be imposed where a corporation is found to have contravened a provision of Pt V.<sup>669</sup> It sees no reason why a court should not also be able to make such an order against individuals. The Commission **recommends** that the TPA s 80A be amended to provide that adverse publicity orders may be made against individuals who have contravened Pt V of the TPA.

### ***Civil penalties against individuals in Pt V***

10.33 The Commission has recommended that civil penalties be introduced to Pt V.<sup>670</sup> The Commission has also recommended that the range of civil penalties available against corporations that have contravened a provision of Pt V should be increased.<sup>671</sup> For the same reasons, the Commission **recommends** that the range of civil penalties available against individuals who have contravened Pt V include probation, community service orders and adverse publicity orders. When imposed as a civil penalty, however, probation should be referred to as a 'supervisory order' to distinguish it from criminal probation.<sup>672</sup>

### ***Ensuring that the individual bears the burden of his or her penalty***

10.34 The most effective way of ensuring that an individual upon whom a penalty is imposed bears the burden of that penalty is to impose a penalty that cannot be paid, reimbursed or off-set by the corporation or any other person. Such orders were discussed above. In most cases, however, the penalty will be a monetary penalty. The impact of a monetary penalty, and its deterrent effect, will be small or non-existent if the individual is reimbursed by the corporation by which he or she is engaged. The Corporations Law prohibits a company from indemnifying an officer of the company against a liability incurred by the person as an officer or from exempting an officer from such a liability. It does not prevent a company from indemnifying its officers in respect of liability to persons other than the company, provided the liability does not arise out of conduct involving a lack of good faith.<sup>673</sup> This does not prohibit the indemnification of officers against penalties which do not relate to conduct involving a lack of good faith.

[S]ection 241 will be insufficient to exclude the reimbursement by the company of monetary penalties imposed on officers under the TPA in all cases.<sup>674</sup>

It appears that the common law prohibits indemnification against criminal and civil penalties on the ground of public policy, regardless of whether a lack of good faith is involved.<sup>675</sup> In the interest of certainty and in order to signal to corporations and officers that indemnifying officers and other persons implicated in contraventions against penalties is prohibited, the Commission **recommends** that s 241 of the Corporations Law be amended to prohibit corporations from indemnifying their officers, employees or agents or any other person implicated in a contravention against criminal or civil penalties imposed upon the officers, employees or agents or other person.

## Penalties for contravening Pt IV

10.35 The Commission's terms of reference ask it to report whether any of the recommendations it makes in relation to contraventions of Pt V ought to be applied in relation to contraventions of Pt IV. Accordingly, the Commission has considered whether the range of penalties that can be imposed as civil penalties in Pt IV should be widened beyond monetary penalties. In 1989 the Griffiths Committee recommended that the courts be provided with broader powers in relation to the range and level of penalties which may be imposed for Pt IV contraventions.<sup>676</sup> The level of penalties was increased in 1992 but the range was not. The Commission's suggestion in DP 56 that the range of civil penalties be as wide as the range of criminal penalties received general support.<sup>677</sup> The Commission considers that the wider the range of penalties available to the court, the better equipped the court will be to make orders that will serve the purposes of the TPA effectively. It **recommends** that the same range of sanctions that is available against a corporation or individual convicted of an offence against the TPA be available as civil penalties for contraventions of Pt IV of the TPA. Corporate probation, community service orders and adverse publicity orders should be made available, against corporations and individuals, in respect of contraventions of Pt IV. When used as a civil penalty, however, corporate probation orders should be called 'corporate supervisory orders' to distinguish them from criminal probation.

## Determining the penalty

### *Current situation*

10.36 If a penalty is imposed upon conviction, Pt 1B of the *Crimes Act 1914* (Cth) will apply. Section 16A(2) lists various factors that the court must take into account, to the extent that they are known and relevant. They include the nature and circumstances of the offence, the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence, any loss or damage resulting from the offence and the deterrent effect of the penalty. The TPA provides no guidance for a court imposing a sentence for an offence against the TPA. It does, however, provide guidance for a court imposing a civil penalty under Pt IV. It provides that the court is to impose an appropriate penalty

having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the court in proceedings under this Part to have engaged in any similar conduct.<sup>678</sup>

DP 56 proposed that the TPA should provide guidelines for courts imposing a penalty, civil or criminal, for a contravention of the TPA and asked what the guidelines should be.<sup>679</sup> The discussion paper noted that in the United States complex sentencing guidelines are provided for individuals and organisations.<sup>680</sup>

### *Mixed response to proposal*

10.37 Many submissions opposed the proposal, on the grounds that it would intrude too much on judicial discretion and that it is unnecessary.<sup>681</sup>

General guidelines provide no benefit and narrower guidelines or prescriptions such as those in the US sentencing provisions may produce effects opposite to that intended. Subsection 16A(2) of the *Crimes Act 1914* is an attempt to codify the common law. In this regard, it is unsuccessful, providing as it does a list of broad subject headings under which the court can consider the circumstances of the case and the offender. The courts are able to arrive at equivalent findings without the benefit of the subsection.<sup>682</sup>

Others supported the introduction of penalty guidelines, some subject to the proviso that they are non-exhaustive.<sup>683</sup> One submission suggested that the TPA should require the court to take into account the existence or absence of effective compliance programs in determining the penalty for contraventions of the Act.<sup>684</sup>

### ***Commission's approach and recommendation***

10.38 The Commission is convinced that detailed guidelines, such as the US Sentencing Guidelines, are unnecessarily complicated and inflexible. Even the degree of guidance provided in the *Crimes Act 1914* (Cth) s 16A is unnecessary in the context of the TPA. The Commission does, nevertheless, favour some guidance, which should apply in the context of both civil and criminal penalties. It considers that the minimal guidance provided in s 76,<sup>685</sup> modified slightly, would be adequate. Factors additional to those in s 76 that the court should be required to take into account are:

- (if the contravener is a corporation) whether a revision of the contravener's compliance controls is necessary and the extent to which defective internal controls have been revised in light of the lessons learned from the circumstances in which the contravention occurred
- how much, if any, profit was made as a result of the contravention<sup>686</sup>
- whether the contravener continued the relevant conduct notwithstanding a written request from the TPC to discontinue it.

It is in the interest of encouraging the courts to focus on a corporation's internal controls and compliance mechanisms and programs that the first factor should be included. Section 76 only applies to civil penalties, and only in Pt IV. Rather than amending s 76 and introducing a new provision to deal with Pt V, the Commission **recommends** that the TPA be amended to delete from s 76 the reference to relevant factors to be considered by the court. A new provision should be created to require the court, when determining a sentence or a civil penalty, to have regard to the relevant factors currently listed in s 76 and the three additional factors listed above.

### ***When to use a non-monetary penalty***

10.39 DP 56 asked whether the TPA should provide examples of instances in which it may be appropriate to impose a penalty other than a monetary penalty.<sup>687</sup> The Commission see no benefit in this suggestion. The circumstances of individual cases vary so much that examples would not necessarily be relevant. The appropriateness of a particular penalty will have to be determined by the court on a case-by-case basis.

### ***Pre-penalty report by corporations***

10.40 The Commission considers that in many cases the court would be greatly assisted in its task of determining a penalty if it had detailed information from the contravening corporation about what it has done, if anything, since the contravention to improve its compliance mechanisms. No doubt a corporation that had made improvements would seek to inform the court of this before the court imposed a penalty. Enabling the court to require a corporation to prepare a written report would, however, emphasise the importance of compliance measures and provide a formal way for the court to obtain detailed information prior to imposing a penalty. The Commission **recommends** that the TPA be amended to provide that the court may require a corporation that has contravened the Act to provide to the court, prior to the court assessing the need for or the amount or nature of a penalty, a report detailing what steps have been taken

by the corporation since the contravention to improve the corporation's internal controls and to discipline the persons implicated in the contravention.

## **The size of monetary penalties in Pt V**

### ***Maximum penalty for whole of Pt V***

10.41 The maximum monetary penalty for a breach of any provision of Pt V<sup>688</sup> is \$200000 for a body corporate and \$40000 for a person other than a body corporate.<sup>689</sup> In DP 56 the Commission suggested that a maximum penalty should be determined for each provision so that Parliament could indicate the relative gravity of each provision.<sup>690</sup> A number of submissions opposed this suggestion on the basis that it would be unduly complex to prescribe maximum penalties for each provision, that the education role of the TPC would become more complex and that the relative seriousness of contraventions is best determined by the court.<sup>691</sup> The Commission agrees that the benefits of the suggested approach would be outweighed by the complexity of the task. The varying circumstances in which contraventions occur can mean that the relative seriousness of contraventions of different provisions fluctuates. Provided the maximum penalty for Pt V is set at a level which enables the most serious contravention to be dealt with adequately, courts can adjust the penalty for serious cases as they see fit. There is no need to amend the TPA to provide an individual maximum penalty for each provision.

### ***What should the maximum monetary penalty be?***

10.42 ***Consistency with other federal legislation.*** The Commission's terms of reference direct it to consider what levels of penalties are appropriate to reflect the community's disapproval of actions that constitute contraventions. Ideally, the penalty that can be imposed for particular conduct under a federal Act should be broadly similar, both in nature and in size, to the penalty available for similar conduct under other federal legislation. Comparisons, however, are difficult. For example, the penalty under the TPA for offences involving false or misleading representations or conduct is a fine of \$200 000 for a body corporate and \$40 000 for a person other than a body corporate.<sup>692</sup> In contrast, the maximum penalty for making a false representation to the Commonwealth with a view to obtaining money or other benefits is imprisonment for two years or a fine of \$12 000 or both for an individual and \$60000 for a corporation.<sup>693</sup> The Commission considers that little guidance as to appropriate levels of penalty for contravention of the TPA is provided by looking at other federal Acts because there does not seem to be a consistent federal approach to penalties. Further inquiry into the issue of consistency is needed, but such an inquiry lies beyond the scope of the Commission's present reference.

10.43 ***Relative size of civil and criminal monetary penalties in Pt V.*** Under the Commission's recommendation in para 9.11, there would be both civil and criminal penalties available in Pt V. A contravener would only be liable to a criminal penalty, however, if the contravention was engaged in with a 'guilty mind'. Because of the additional blameworthiness of a contravener convicted of an offence, it is logical that the maximum criminal penalty in Pt V should be higher than the maximum civil penalty in Pt V. This view was supported in several submissions.<sup>694</sup> If the maximum civil penalty in Pt V is to be distinguished from, and lower than, the maximum criminal penalty in Pt V, either the maximum criminal penalty will have to be higher than it is now or the maximum civil penalty will have to be lower than the current maximum criminal penalty. At least one submission expressed the view that contraventions of Pt V are as reprehensible as contraventions of Pt IV and, therefore, the maximum penalties should be as high: \$10m for corporations; \$500000 for individuals.<sup>695</sup> The TPC considers the penalty levels in Pt V to be

'seriously deficient' and suggested that they be increased to \$1m for a body corporate and \$200000 for an individual.<sup>696</sup> The Commission does not consider it necessary to increase the penalties in Pt V to the levels in Pt IV. The nature of the contraventions are different and it is unlikely that contraventions of Pt V would be conducted on a scale that would require a penalty of the size provided for in PtIV. It does, however, consider that the maximum criminal penalties for Pt V should be increased. The Commission **recommends** that the maximum civil penalty in PtV be \$200000 for a body corporate and \$40000 for a person other than a body corporate and that the maximum fine in Pt V be \$1m for a body corporate and \$200000 for a person other than a body corporate.

## **Size of monetary penalties in Pt IV**

10.44 The maximum monetary penalty for a contravention of Pt IV is \$10m for a body corporate and \$500000 for a person other than a body corporate.<sup>697</sup> These maximums were increased from \$250000 and \$50000 respectively in December 1992. A number of submissions strongly opposed any increase in the maximum penalty for contravention of Pt IV. One considered that

the current limits for Pt IV are quite unrealistic and should be reduced to 10% of the present figure.<sup>698</sup>

The Commission is not persuaded that the current maximums are too high, given that they must cater for the most serious contravention of any provision of Pt IV.<sup>699</sup> Nor does it consider that there is any need to alter the maximum penalties in PtIV.

## **Size of non-monetary penalties**

10.45 The Commission's recommendations for a wider range of penalties, civil and criminal, under Pt IV and Pt V of the TPA raise the issue of what should be the 'maximum' non-monetary penalty that can be imposed. The Commission has dealt with this issue in respect of each of the additional non-monetary penalties it has recommended.<sup>700</sup> Generally, the 'size' of the non-monetary penalty should be reasonably proportionate to the contravention. The maximum will be whatever is reasonably proportionate to the worst instance of the conduct in question. For some types of penalty,<sup>701</sup> the Commission has recommended that the maximum duration of the penalty be prescribed. If several types of penalty are imposed in respect of a single contravention, the total amount of the penalties should not exceed the level reasonably proportionate to the contravention.

## **System of penalty units**

10.46 Penalties authorised by Parliament must maintain their impact and deterrent value. This requires that they keep pace with inflation. A commonly used mechanism for this purpose is a system of penalty units. Instead of prescribing a penalty in absolute monetary terms, the legislation expresses the penalty in terms of a number of penalty units. The value of a single penalty unit can be increased in line with inflation.<sup>702</sup> The *Crimes Act 1914* (Cth), which prescribes monetary penalties in terms of penalty units, provides for the conversion to penalty units of monetary penalties expressed in dollar amounts in federal laws.<sup>703</sup> DP 56 suggested that monetary penalties provided for in the TPA, both civil and criminal, should be prescribed in terms of penalty units. Few submissions that commented on the issue opposed the Commission's proposal. The Attorney-General's Department supported the proposal, saying that it was in keeping with the Commonwealth's criminal law policy.<sup>704</sup> The Commission **recommends** that monetary penalties provided for in the TPA, both civil and criminal, be prescribed in terms of penalty units.



# 11. Administrative powers

## Introduction

11.1 Administrative enforcement is carried out without the involvement of the courts. Over the last twenty years it has become an important part of the activities of regulatory bodies in Australia and overseas.<sup>705</sup> The TPC considers administrative resolutions to be an important part of its 'integrated strategies approach' which seeks, instead of merely resolving the problems of an individual case, to address the underlying market causes of the complaint.

The overriding principle followed when seeking to resolve a complaint is to select the course of action most likely to achieve the desired marketplace outcome and lasting compliance with the Act.<sup>706</sup>

The TPC resolves substantially more cases through administrative action than it does by taking action in the courts. It is therefore important to ensure that the TPC is provided with appropriate administrative powers and that there are proper checks on the exercise of those powers. This will help to ensure that the TPC is able to make a timely and effective response to an alleged contravention. This chapter looks at whether the TPC's administrative powers need to be amended.

## Current administrative enforcement of the TPA

### *Negotiation*

11.2 When the TPC becomes aware of an alleged contravention of the TPA it is often able to achieve an acceptable resolution of the matter by discussion and negotiation with the alleged contravener. This is the most informal type of enforcement action and, ideally, the best because it is inexpensive and quick.

### *Statutory powers*

11.3 The TPC has power to investigate complaints and alleged breaches of the TPA and to take appropriate administrative or court action. The administrative enforcement mechanisms used by the TPC range from simple resolution, where the matter is resolved by informing the parties of their rights and obligations under the TPA, to formal undertakings under s 87B of the TPA which are enforceable in the courts. Administrative decisions by the TPC are subject to review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or the TPA.<sup>707</sup> The TPC also has administrative powers to grant and revoke authorisations and notifications. These powers are subject to review by the Trade Practices Tribunal.

## Enforceable undertakings: s 87B

### *Section 87B undertakings*

11.4 In January 1993 amendments to the TPA came into force enabling the court to enforce undertakings given to the TPC by a person in connection with a matter in relation to which the TPC has a power or function under the TPA.<sup>708</sup> The ability to accept undertakings that are enforceable provides the TPC with greater flexibility in dealing with a breach of the TPA while ensuring greater compliance. Another

advantage is that both the TPC and the person giving the undertaking are able to avoid the costs of litigation.

### ***Use and administration of s 87B undertakings***

11.5 The TPC's *Guideline on administrative resolution* (TPC Guideline)<sup>709</sup> sets out its policy on the use of s 87B undertakings and the way s 87B will be administered. Under the guideline, the TPC will not use s 87B unless it considers it has sufficient evidence to prove a contravention of the TPA. The guideline sets out the factors the TPC will consider when deciding whether to accept an undertaking and the elements that an undertaking might contain. It also states that undertakings and associated reports will be placed on a public register unless there are compelling reasons to treat all or part of these documents as confidential. Over 20 s 87B undertakings have been accepted by the TPC.<sup>710</sup>

### ***Concerns about s 87B undertakings***

11.6 ***Public register for s 87B undertakings.*** Public scrutiny of undertakings is vital to their integrity and to ensure that the TPC uses them appropriately. Although the TPC has established a public register of s 87B undertakings under its administrative guidelines, providing a statutory basis for the register would ensure that the TPC maintains the register and ensure that persons entering an undertaking are aware of its public nature. A statutory register would, however, need to make appropriate provision for the suppression of confidential material. The Commission ***recommends*** that the TPA be amended to

- require the TPC to establish and maintain a register open to all members of the public
- require that all undertakings entered into under s 87B be lodged on the public register within 28 days of being settled<sup>711</sup>
- allow terms of an undertaking that are confidential to be withheld from registration provided the register notes that a term has been withheld and the grounds on which it is confidential
- provide that a term may be confidential if it contains information that is commercial-in-confidence or consists of personal details of an individual not involved in the contravention of the TPA or if disclosure of the information would be against the public interest or harm national security.

11.7 ***Restricting s 87B undertakings.*** In DP 56 the Commission invited comment on whether the kinds of undertakings that can be given under s 87B should be restricted and, if so, in what way.<sup>712</sup> Some submissions suggested that there should be restrictions on the types of undertakings, the negotiations and procedures the TPC can use to obtain them and the manner in which they can be enforced.<sup>713</sup> However, most responses agreed that nothing should be done that would impede the ability of s 87B undertakings to address the particular needs and circumstances of each contravention.<sup>714</sup> The Commission does not consider that there is any need to restrict the undertakings that can be given under s 87B.

11.8 ***External scrutiny of s 87B undertakings.*** There is a general recognition of the need for safeguards against the TPC using enforceable undertakings to impose conditions that are unfair or unreasonable or that would never be imposed by a court if the matter proceeded to a hearing.<sup>715</sup> There is already provision for external scrutiny of completed undertakings through the public register maintained by the TPC<sup>716</sup> and by the Federal Court through the enforcement procedures under s 87B(3).<sup>717</sup> The terms of an undertaking may also be withdrawn or varied with the consent of the TPC.<sup>718</sup> Nevertheless, in consultations with the

Commission the BFCI suggested that before an undertaking is finalised it should be reviewed by an independent body to ensure that its terms are fair and reasonable.<sup>719</sup> In the absence of any evidence that parties need additional protection or that the power has been abused, the Commission is not satisfied that such scrutiny is necessary. Section 87B undertakings are entered voluntarily after negotiation and the TPC is committed to ensuring that undertakings are fair and clear and are not obtained unfairly.<sup>720</sup>

### ***Security bond for a breach of a s 87B undertaking***

11.9 In DP 56 the Commission raised the issue of whether the sanctions for a breach of a s 87B undertaking are adequate.<sup>721</sup> Responses to this issue indicated general satisfaction with the sanctions for a breach of an undertaking currently available under s 87B(4).<sup>722</sup> Some submissions noted that many people would be less willing to enter undertakings if the sanctions for non-compliance were to parallel those for contraventions of Pt IV or Pt V.<sup>723</sup> The Commission is satisfied that there is no need to extend those sanctions to breaches of s 87B undertakings. However, it considers the power of the court to direct a person who has contravened a term of an undertaking to comply with that term could be enhanced by allowing the court, where it considers it necessary, to require that person to lodge a security bond. The bond would be held by the court for a period specified in the order up to a maximum period prescribed in the TPA. If there was no further contravention of the undertaking in the period set by the court the bond would be returned to the person. However, if there was further contravention the court could confiscate all or part of the bond. The Commission **recommends** that the TPA be amended to provide that

- a court may require a person who has been brought before the court for breaching a s 87B undertaking to lodge a security bond and
- if that person is brought before the court for a subsequent breach of the undertaking, the court may order the forfeiture of all or part of the security bond.

### ***Future compliance and compensation***

11.10 ***Future compliance.*** When pursuing a complaint, the TPC seeks to ensure that steps are taken to prevent further contraventions.<sup>724</sup> In DP 56 the Commission invited comment on whether the TPC should be required to consider the issue of future compliance before accepting an undertaking.<sup>725</sup> Most responses agreed that a commitment to future compliance is an important factor when deciding whether an undertaking should be accepted. However, some of them considered it unnecessary for the TPC to be formally required to have regard to it.<sup>726</sup> The TPC argued that making consideration of future compliance a formal requirement of the negotiating process would encourage parties to support the introduction of training programs for management and staff and other preventive mechanisms.<sup>727</sup> The Commission is of the view that, when considering whether to accept an undertaking, the TPC should be required to consider what steps the person has taken to ensure that a further contravention will not occur. The Commission **recommends** that the TPA s 87B be amended to provide that, in deciding whether to accept an undertaking, the TPC must consider what steps the person offering the undertaking has taken to ensure that a relevant contravention will not occur again.

11.11 ***Compensation.*** Submissions revealed less support for the introduction of a statutory requirement for the TPC to have regard to the issue of compensation when accepting an undertaking.<sup>728</sup> Some responses expressed concern that as compensation is not always relevant or appropriate to the resolution of contraventions of the TPA the TPC should not be required to have regard to it.<sup>729</sup> This concern can be

addressed by requiring the TPC to have regard to the issue of compensation only when it is relevant. Compensation will be relevant whenever information in the possession of the TPC raises a likelihood that consumers or businesses may have suffered loss or damage. The Commission considers that compensation is the most important part of enforcement action.<sup>730</sup> Formally requiring the TPC to have regard to compensation, where relevant, will encourage parties to address the question of compensation when drafting an undertaking. It will ensure that the TPC does not, without good cause, accept undertakings that may adversely affect subsequent claims for compensation. The Commission *recommends* that the TPA s 7B be amended to provide that, when deciding whether to accept an undertaking, the TPC be required to consider, where relevant, what steps have been taken to ensure that the issue of compensation is dealt with.

## **Cease and desist orders**

### ***Introduction***

11.12 In DP 56 the Commission invited comment on whether the TPC should be given power to make cease and desist orders.<sup>731</sup> In general terms, a cease and desist order would be a formal, administrative injunction to cease conduct allegedly in contravention of the TPA. Failure to comply with the order would be punishable by the Federal Court. Compensation may be payable if failure to comply with the order caused loss or damage. The exercise of any power to issue such orders would have to comply with the principles of natural justice and be subject to administrative and judicial review.

### ***Arguments for the TPC having power to issue cease and desist orders***

11.13 The power to make cease and desist orders is said to have a number of advantages over other administrative and judicial enforcement tools. While not supporting such a power at this stage, the TPC noted that

[a] cease and desist power could play a dual role in the TPC's compliance activities by first, providing it with a power to direct transgressors to comply, and secondly, enabling it to require compliance in appropriate cases without resorting to the cost, formality and time delays of the court system.<sup>732</sup>

The TPC considered that a cease and desist power would be a useful enforcement tool where court action is not appropriate, such as minor infringements of the TPA or where the conduct does not involve substantial collective detriment.<sup>733</sup> Other advantages of the power are that it is a quicker, less formal and more cost effective enforcement mechanism than litigation, that it is a direct response to conduct where the TPC's warning letters are ignored and that it would be especially useful in situations where the TPC must act quickly to curtail or halt breaches of the TPA.<sup>734</sup>

### ***Arguments against the TPC having power to issue cease and desist orders***

11.14 The majority of responses considered it was inappropriate or unnecessary for the TPC to be given a cease and desist power. They presented a number of arguments against such a power.

- The availability of judicial injunctions on short notice and the existence of s 87B undertakings make a cease and desist power unnecessary.<sup>735</sup>
- As cease and desist orders do not relieve the TPC of the onus of proof, the time and resources required to obtain the necessary evidence will be the same whether the TPC issues a cease and desist order or applies for a judicial injunction.<sup>736</sup>

- The requirements of natural justice, particularly that interested parties have a reasonable opportunity to give evidence and make submissions to the TPC before it issues a cease and desist order, mean that the time taken to issue such orders may actually be longer than the time it takes to obtain an urgent injunction from the Federal Court (which can, if necessary, be obtained in less than 48 hours).<sup>737</sup> The experience of agencies both in Australia and overseas is that the demands of natural justice can mean lengthy delays before a cease and desist order takes effect.<sup>738</sup>
- If, as envisaged by the TPC,<sup>739</sup> a cease and desist order would be operative from its date of issue with the transgressing party having a right to petition the TPC or seek review from the TPT or Federal Court, then the TPC may be liable to compensate the party for any damages caused by the order if it is subsequently shown to be invalid.<sup>740</sup>
- A cease and desist order will only be as effective as the transgressing party allows it to be. Where a party refuses to comply with an order the dispute will end up before a court, either by an application for review by the party or enforcement proceedings brought by the TPC. As litigation will only be avoided where the transgressing party agrees to cease the prohibited conduct, cease and desist orders may add little to the current enforcement tools of requests by the TPC to cease the conduct, s 87B undertakings and judicial injunctions.

Concerns that a cease and desist power may make the TPC subject to a greater level of administrative review than it is at present and that the power would have to be drafted in such a way that it could not be considered a judicial power, and therefore invalid under the Constitution, were not considered by submissions to be major disadvantages.<sup>741</sup>

#### ***The Commission's view - no cease and desist orders***

11.15 The Commission considers that cease and desist orders are not as quick and efficient an enforcement mechanism as their supporters argue. The models used in the United States and available under various Australian legislation indicate that the requirements of natural justice and judicial review can make issuing cease and desist orders a lengthy process. More importantly, the Commission is satisfied that the TPC already has a number of enforcement tools, such as urgent judicial injunctions and enforceable undertakings,<sup>742</sup> which allow it to respond quickly and effectively to contraventions of the TPA. The fact that a person ignored a request by the TPC to stop the conduct voluntarily should be a factor considered by the court when determining the penalty for a contravention.<sup>743</sup> The Commission does not consider that there is a need for the TPC to be given power to make cease and desist orders at this stage.

### **Parliamentary oversight of administrative measures - annual report**

11.16 Submissions revealed widespread support for the proposal that the TPC should include in its annual report details of its use of administrative powers.<sup>744</sup> The TPC expressed the view that it should only be required to provide details of the use of its formal administrative powers such as s 87B undertakings, because to give details of every decision it makes would be an 'administrative nightmare'.<sup>745</sup> The Commission accepts that the level of accountability should be realistic. The Commission **recommends** that the TPA be amended to require the TPC to include in its annual report information on the use of its formal administrative powers and a general summary of the types of complaints it receives and how it deals with them.

## Investigative powers

### *The TPC's investigative powers under s 155 and 156 of the TPA*

11.17 Sections 155 and 156, together with ancillary provisions, are designed to enable the TPC to carry out its functions with respect to the detection and prosecution of contraventions of the TPA. Section 155 gives the TPC power to require a person it believes is capable of providing information, documents or evidence relating to a contravention of the TPA to furnish information, produce documents or give evidence. It also allows an officer authorised by the TPC to enter any premises and inspect any documents in the possession or under the control of a person who the TPC believes has engaged in conduct that may constitute a contravention of the TPA. Section 156 allows the TPC to inspect, copy and take extracts from any documents it obtains pursuant to a s 155 notice. Over the last 20 years various principles have emerged as a result of numerous challenges to s 155 notices. These principles deal with such matters as the time a notice can be issued, its form and the duties it imposes.

### *Improving the TPC's investigative powers*

11.18 *The issues.* In DP 56 the Commission invited comment on whether the TPC's investigative powers needed to be improved and, if so, what improvements were necessary.<sup>746</sup> In particular, the Commission asked whether

- the TPC's powers should be expanded in line with the powers of other major regulatory agencies
- the TPC should be able to use its powers under s 155 in the context of prosecutions
- the restriction on s 155 that requires the TPC to have reason to believe that a person is capable of providing information should be removed
- s 155 should continue to be limited to providing access to information that relates to a matter that constitutes, or may constitute, a contravention of the TPA.

The Commission also asked whether the TPC should be able to obtain access to places and documents of a third person (such as an accountant) pursuant to a search warrant issued by a judicial officer who is satisfied that the person may have information relating to a possible contravention of the TPA.<sup>747</sup> This would overcome the current anomaly whereby the TPC can issue a notice to a third party requiring it to produce documents or be examined but cannot gain access to the premises of a third party who may have relevant information.

11.19 *Responses.* While some submissions favoured an expansion of the TPC's powers to match those of other regulatory bodies such as the ASC,<sup>748</sup> the TPC and a number of other respondents argued that such reforms are unnecessary.<sup>749</sup> A view emerged from submissions and consultations conducted by the Commission that, although the current powers may be dated, the law concerning s 155 is settled and generally operates quite well. While technical (and frequently unmeritorious) challenges to s 155 notices can frustrate investigations and cause delays, they are often inevitable where the potential fines, civil penalties or damages are significant. The Attorney-General's Department noted that these delays may be more related to the need to streamline court procedures than any deficiencies in the provisions of s 155.<sup>750</sup>

11.20 **The Commission's view.** Identifying the investigative powers an agency needs to perform its functions is a complex task. The detailed provisions which set out the investigative powers (and the limitations on their use) of modern regulatory bodies such as the ASC and Austel can be contrasted with the brevity of those in the TPA.<sup>751</sup> While a comprehensive review of the TPC's powers may be desirable, at this stage the Commission makes no recommendations in relation to the TPC's investigative powers.

#### ***False or misleading statements to the TPC***

11.21 In DP 56 the Commission noted that the TPA does not prohibit a person from making false or misleading statements to the TPC other than in the process of complying with a s 155 notice.<sup>752</sup> It invited comment on whether a general prohibition against giving the TPC false and misleading information is needed.<sup>753</sup> Although many responses supported a prohibition,<sup>754</sup> the Commission is not satisfied that such a change is appropriate. A blanket prohibition may deter people from providing information to the TPC voluntarily. Moreover, the use of the prohibition in other legislation like the *Taxation Administration Act 1953* (Cth) and the *Australian Securities Commission Act 1989* (Cth) is directly related to information that must be provided to the relevant agency (such as annual returns, applications and other reports). As the TPA does not contain any mandatory reporting provisions of this kind a general prohibition against false and misleading statements is not necessary. The Commission does not recommend any amendment to the TPA to prohibit in all circumstances the making of a false or misleading statement to the TPC.

#### ***Providing information to a private litigant***

11.22 **Responses to DP 56.** At present the TPC will only release information on a specific matter if it has received a request under the *Freedom of Information Act 1982* (Cth) or been served with a subpoena. In DP 56 the Commission asked whether the TPC should be expressly empowered to give to a private litigant information obtained from an investigation involving its powers under s 155.<sup>755</sup> Such a power could be modelled on the ASC's power to give a copy of a record of examination obtained in the course of an investigation to another person's lawyer if it is satisfied that the person is carrying on, or contemplating in good faith, a proceeding in respect of the matter to which the examination relates.<sup>756</sup> Responses to this issue were evenly divided. Many submissions expressed concern that such a power could unduly interfere with privacy, give some litigants an unfair advantage and undermine the safeguards in court rules against fishing expeditions and discovery of privileged information.<sup>757</sup> The TPC opposed the power on the basis that its existence could deter people from volunteering information to the TPC, lead to a drain on TPC resources by having to process requests for information and be used as the basis for challenges to s 155 notices with parties claiming the notice was only being used to obtain information for a third party.<sup>758</sup> In contrast, a number of responses indicated that a power to release information to private litigants, if subject to safeguards, would be of great assistance in private actions and an effective use of the TPC's resources by reducing the need for it to commence or intervene in proceedings.<sup>759</sup>

11.23 **The Commission's view.** The Commission considers that, given the important role of private litigation in the enforcement of the TPA, a power similar to that of the ASC should be available to the TPC. Allowing the TPC, in appropriate cases, to provide litigants with information, documents or other evidence it has obtained would be an effective use of its resources. It would assist private litigants and reduce the need for the TPC to commence litigation itself or to intervene in proceedings.

- Privacy only relates to personal information affecting individuals and can be protected by the use of guidelines and by the TPC imposing conditions on the release of information. The ASC policy

statement on confidentiality sets out the practices the ASC must follow when disclosing information obtained by the exercise of its compulsory powers. The statement provides that a person who may be affected by the release of information should be given the opportunity to test whether the preconditions for release are satisfied, object to the scope of the release and argue that conditions be imposed.<sup>760</sup>

- There is little risk of fishing expeditions as the TPC must be satisfied that the information relates to proceedings commenced or contemplated by the private litigant before it can release it. From the perspective of litigants, the release of information by the TPC under this power would be more analogous to the release of information pursuant to a subpoena than to discovering documents.
- While administration of the power may require some additional resources, these could be minimised through the use of appropriate guidelines and procedures and should be offset by savings arising from not having to institute or intervene in as many court proceedings.
- The TPC already has comprehensive procedures for the use of s 155 to minimise the likelihood of challenges to its exercise. The introduction of this power should not alter the current situation.

The Commission **recommends** that the TPA be amended to give the TPC power to give to a private litigant information the TPC has obtained from an investigation involving its powers under s 155 if it is satisfied that the person is carrying on, or contemplating in good faith, a proceeding in respect of a contravention of the TPA to which the information is relevant.

#### ***Recovery of the TPC's investigation costs***

11.24 At present, in most cases only a small proportion of the total investigation costs incurred by the TPC can be recovered under the Federal Court Rules.<sup>761</sup> To be recoverable, the costs must be for work which is necessary or useful to the conduct of the proceedings. In DP 56 the Commission invited comment on whether the TPA should be amended to provide that the court may order a person who is found to have contravened the TPA to pay the TPC's reasonable investigation costs.<sup>762</sup> It is already a common term of settlements involving the TPC that the contravening party will pay the TPC's investigation costs. There was significant support for allowing the TPC to recover its investigation costs, with most respondents confident that any potential for abuse or injustice would be avoided by leaving it to the court to decide whether investigation costs should be awarded and, if so, the amount.<sup>763</sup> Those who opposed the suggestion did so on the grounds that it would be inappropriate as the TPC is funded from the public purse and that a corporation which was unaware of an investigation may be liable for costs incurred by the TPC over which it had no control.<sup>764</sup> The Commission considers that the TPC should be able to recover its reasonable investigation costs. There is no reason why the public purse should have to bear the full cost of investigating companies which contravene the TPA. The court has considerable expertise in determining whether or not costs are reasonable. The Commission would expect the Court to consider when deciding what investigation costs are recoverable whether a person was given an opportunity to cooperate with the TPC. Enhancing the ability of the TPC to recover reasonable investigation costs will put it in a similar position to other regulators such as the ASC. The Commission **recommends** that the TPA be amended to provide that the court may order a person who is found to have breached the TPA to pay the reasonable investigation costs of the TPC, as determined by the court.



## Revocation of authorisations

11.25 The TPC has power to authorise certain types of conduct which would otherwise be prohibited under Pt IV of the TPA.<sup>765</sup> It may revoke an authorisation if, after considering submissions by the person to whom the authorisation was given and any other interested parties, it is satisfied that

- the authorisation was granted on the basis of materially false or misleading information
- a condition attaching to the authorisation has not been complied with or
- there has been a material change in circumstances since the authorisation was granted.<sup>766</sup>

In DP 56 the Commission noted a number of concerns about the revocation power and invited comment on whether it should be amended.<sup>767</sup> Most responses considered that there is no need for any change.<sup>768</sup> In the absence of evidence in support of any change, the Commission makes no recommendation to amend the power to revoke authorisations.

## Declarations under the TPA

### *The current situation*

11.26 The TPA provides that a person, other than the TPC, may apply to the Federal Court for a declaration on the operation or effect of any provision of the TPA or on the validity of any act or thing done, or proposed to be done or purporting to have been done, under the TPA.<sup>769</sup> Although the TPC is not entitled to apply for a declaration under s 163A,<sup>770</sup> it may intervene in proceedings brought by another person under s 163A(1)(a) and in proceedings involving a matter arising under PtIV.<sup>771</sup> It is not clear why the TPC is precluded from seeking declarations under the TPA in its own right.

### *Amending the TPA*

11.27 Submissions revealed overwhelming support for the Commission's proposal in DP 56 that the TPA be amended to allow the TPC to apply for declarations under s 163A.<sup>772</sup> There is no reason why the TPC should not be able to apply under s 163A for a declaration on the operation or effect of the Act and on the validity of things done or proposed to be done under the Act. Declarations are a relatively quick, inexpensive and efficient enforcement tool that can help avoid or minimise protracted litigation by providing binding, authoritative statements of the law as it applies to the parties. Accordingly, the Commission *recommends* that the TPA be amended to provide that the TPC is able to seek a declaration from the Federal Court under s 163A.

## Substantiation of representations

### *Introduction*

11.28 The onus of proving that a representation is false or misleading lies with the TPC or a consumer.<sup>773</sup> In some cases, discharging this onus can be so difficult that enforcement actions under the TPA are frustrated. The TPC says that this difficulty arises where

- obtaining the necessary evidence is impossible or involves substantial expense and resources

- the evidence is in the possession of the representor or the representor is uniquely placed to obtain that proof by virtue of particular knowledge or facilities
- the representation is about features or characteristics of goods or services that are significant in terms of consumers' purchasing decisions
- the representations are positive (rather than representations by silence or omission).<sup>774</sup>

Examples of this type of representation include representations about country of origin, environmental impact, product composition and 'two price' advertising. In DP 56 the Commission identified two ways in which this problem could be addressed by requiring a corporation which makes a representation to substantiate it.<sup>775</sup> These options and the responses to them are discussed below.

### ***Amending s 51A of the TPA***

11.29 Section 51A(1) deems a representation as to a future matter (including the doing of, or the refusing to do, any act) misleading, unless the corporation has reasonable grounds for making it. The onus of proving reasonable grounds rests with the corporation making the statement.<sup>776</sup> DP 56 asked whether s 51A should be amended to apply to any representation. The TPC's preferred approach is to amend s 51A so that, where a corporation makes a positive representation about any of the attributes addressed in s 53 and the corporation does not have reasonable grounds for making the representation, the representation should be taken to be false.<sup>777</sup> As an alternative, the TPC suggested that s 51A should be amended so that, where a corporation makes a positive statement about the country of origin, environmental impact, product composition or 'two price' advertising and the corporation does not have reasonable grounds for making the representation, the representation should be taken to be false.<sup>778</sup> Changes to s 51A would assist private litigants as well as the TPC. There was little support for this option.<sup>779</sup> Many responses argued that extending s 51A is unnecessary and would place an oppressive burden on corporations.<sup>780</sup>

### ***An administrative power to require substantiation***

11.30 The second option suggested by the Commission was to give the TPC an administrative power to require a person to substantiate his or her representation, with a refusal or failure to do so being a contravention of the TPA.<sup>781</sup> While this suggestion received some support,<sup>782</sup> many responses considered such a power to be oppressive or unnecessary given the TPC's powers under s 155.<sup>783</sup> The BFCI considered that the Advertising Council already provides a sufficient check against false or misleading advertisements and so there is no need for the TPC to become involved. A number of submissions argued that if the TPC is given a power to require substantiation it should be subject to the same safeguards as apply to s 155.<sup>784</sup> The TPC noted that the utility of a substantiation power would be severely reduced if the threshold of belief required before the power could be used did not reflect the fact that insufficient evidence is available to evaluate the representation properly.<sup>785</sup>

### ***The Commission's view***

11.31 The Commission is satisfied that there are situations where contraventions of the TPA cannot be proven because of the difficulty and expense associated with obtaining the necessary evidence. In such cases the procedures currently available to the TPC and bodies like the Advertising Council are often inadequate as potential complainants are unable to show that a complaint is warranted. At this stage, the Commission prefers the second option. An administrative power is less disruptive and allows for the quick resolution of a matter without recourse to litigation. It would complement the TPC's powers under s 155 by

allowing it to require a person to substantiate promotional material in situations where insufficient evidence is available for it to evaluate the representation so as to be able to form the reasonable belief needed for an investigation under s 155. It is true that an administrative power will not assist private litigants. However, as an enhanced s 51A could only be used after proceedings have been commenced it would be of limited assistance to a party who is unable to ascertain whether there is sufficient evidence to warrant litigation under the TPA. The Commission *recommends* that the TPA be amended to

- enable the TPC to require a person who makes a statement promoting, or apparently intending to promote, the supply of goods or services to provide the TPC, within the period specified in the notice, with proof of any claim or representation made in the statement
- provide that it is an offence if the person served with the notice fails to respond to the notice within the specified time
- enable the TPC, if it considers that the evidence provided by the person served with the notice is insufficient to support the claim or representation, to issue a notice under s 155(1) to that person or to authorise entry of that person's premises under s 155(2), notwithstanding that the TPC may not have a reasonable belief that the claim or representation is false or misleading
- provide that a person may not refuse to answer a 'substantiation' notice on the ground that the information provided may incriminate him or her
- provide that the use of the information obtained by the TPC as a result of issuing a notice is subject to limitations the same as those imposed by s 155(7).

It should not be an offence if the person served with the notice fails to provide sufficient evidence to support the claim or representation.

## 12. Issues related to court procedure

### Introduction

12.1 The courts perform a central role in both the public and private enforcement of the TPA. However, the structure and procedures of the courts are not always appropriate to the particular issues that arise in trade practices litigation, such as economic and market issues. Problems relating to the admissibility of economic evidence and the expertise of the courts to determine complex economic issues arise mainly in proceedings concerning Pt IV of the TPA. Nevertheless, the rules of evidence and procedure can affect the time and costs incurred by the parties and the court when dealing with alleged contraventions of Pt V. This chapter examines some of these rules and identifies possible reforms.

### The admissibility of economic evidence

#### *Introduction*

12.2 In DP 56 the Commission examined the current laws relating to the admissibility of expert economic evidence and survey evidence<sup>786</sup> and asked whether the problems it identified would be substantially resolved by the proposed provisions of the Evidence Bill 1991.<sup>787</sup> The 1991 Bill lapsed in early 1993 when Parliament was prorogued. Its provisions have been substantially retained in the Evidence Bill 1993 (Cth) (the Bill).

#### *Expert economic evidence*

12.3 **General rules.** The Bill preserves the common law opinion rule and its exceptions.<sup>788</sup> While evidence of an opinion is generally inadmissible, a suitably qualified expert may state his or her opinion on matters within his or her field of expertise,<sup>789</sup> provided the opinion is relevant and is not mere speculation. In trade practices cases, economists should continue to be accepted as experts for the purpose of giving expert opinion evidence.

12.4 **The factual basis rule.** Under the factual basis rule, expert opinion testimony is only admissible if it is based on admitted evidence. In practice, the rule has led to the requirement that theory may only be applied to explicitly assumed facts.<sup>790</sup> While there is some uncertainty about the extent to which the rule applies in Australia,<sup>791</sup> the Federal Court's decision in *Arnotts Ltd and others v TPC*<sup>792</sup> (*Arnotts*) has been criticised for applying the factual basis rule in such a way as to prevent the admission of economic evidence at all.<sup>793</sup> The Bill and recent changes to the Federal Court Rules attempt to address this concern.

- **Evidence Bill 1993 (Cth).** The Bill does not contain provisions that create or abolish a factual basis rule of admissibility. However, it does provide that the court can provisionally admit evidence the relevance of which is yet to be demonstrated.<sup>794</sup> In relation to the factual basis rule, cl 66(1) will allow a court to admit expert opinion evidence, notwithstanding that the factual bases of that opinion have not been established, provided the court is satisfied that it is reasonably open, or will be reasonably open after further evidence is admitted, to make the findings of fact upon which the opinion is based. To the extent that it is inconsistent with the Bill, the factual basis rule will no longer apply. This means expert evidence which is relevant will be admissible and any failure to prove the opinion's factual basis will only go to its weight.

- **Federal Court Rules.** The Federal Court Rules have recently been amended to provide that on a directions hearing the Court may, in proceedings in which a party seeks to rely on the opinion of an expert, direct that all or part of such opinion be received by way of submission in such manner and form as the Court thinks fit, whether or not the opinion would be admissible as evidence.<sup>795</sup> This Rule will allow parties to place the arguments of economists before the Court, even though they may not comply strictly with the rules of evidence.

A number of submissions indicated that these provisions should substantially resolve the problem which currently exists in relation to the factual basis rule.<sup>796</sup> The LCA considered that the changes might not go far enough as they continue to rely on a discretion which the court has in the past been reluctant to exercise in favour of economic evidence.<sup>797</sup>

12.5 **The ultimate issue rule.** This rule applies to all witnesses but is most often invoked in connection with expert opinion. It states that testimony may not be given upon the ultimate issue.<sup>798</sup> In trade practices cases, the Federal Court has discouraged the practice whereby parties seek to adduce the expert opinion of economists on ultimate issues of fact, such as the definition of a particular market.<sup>799</sup> The recent changes to the Federal Court Rules will allow the court to receive opinion evidence notwithstanding that the opinion relates to an ultimate issue.<sup>800</sup> Under the Bill, opinion evidence will not be inadmissible merely because it is about a fact in dispute or an ultimate issue.<sup>801</sup> Submissions on this issue agreed that the Rules and the Bill will substantially overcome the problems caused by the ultimate issue rule.<sup>802</sup>

### **Survey evidence**

12.6 **Recent developments.** Until quite recently, evidence of market and other surveys could not be admitted as it contravened the rule against hearsay.<sup>803</sup> However, the Federal Court in *Arnotts* and *Interlego AG v Croner Trading Pty Ltd*<sup>804</sup> (*Interlego*) has indicated that, where a market survey may cast light on relevant issues, a report of a satisfactorily conducted survey can be admitted into evidence pursuant to the Federal Court Rules.<sup>805</sup> Under the Bill, relevant survey evidence will, in most cases, be admissible in civil proceedings as an exception to the rule against hearsay.<sup>806</sup> Concerns about the form and conduct of the survey will generally go to the weight of the survey evidence rather than its admissibility, although it will be possible for a survey which has not been conducted satisfactorily to be excluded on the ground that its probative value is substantially outweighed by the danger that it might be unfairly prejudicial, misleading or confusing or cause or result in undue waste of time.<sup>807</sup>

12.7 **Responses to the issue in DP 56.** A number of submissions considered that the decision in *Arnotts* and the provisions in the Rules and the Bill will overcome many of the problems associated with survey evidence.<sup>808</sup> However, Professor Aronson considered that the Federal Court should be given an express power to receive and act upon survey evidence which is relevant and sufficiently probative, notwithstanding the hearsay and opinion rules. He suggested that a new Rule setting out the procedures for proposing, designing, administering and assessing the results of surveys should be introduced to help the court exercise its discretion in relation to survey evidence.<sup>809</sup>

12.8 **The Commission's view.** The Commission accepts that the Evidence Bill 1993 (Cth) and the recent changes to the Federal Court Rules will substantially overcome the problems concerning the admissibility of survey evidence. It acknowledges that much will depend on how litigants and the courts use the new procedures and rules. The issue may have to be reviewed after these rules have been operating for a while.

It also accepts that the surest way to avoid admissibility and other problems in relation to survey evidence is to have the form and conduct of a proposed survey agreed by the parties or settled by the court in a directions hearing.<sup>810</sup> In April 1994 the Federal Court issued a practice note setting out the procedure to be followed when a party seeks to conduct a survey.<sup>811</sup> The procedure is intended to help the parties agree to the form and conduct of a survey and to ensure the matter is raised with the Court at a directions hearing once agreement is reached. The Commission supports the use of directions hearings to settle the form and conduct of a proposed survey so that time and resources are not wasted on a survey that is unacceptable to the other parties or, more importantly, to the court.

## **Determining complex economic issues**

### ***Introduction***

12.9 In DP 56 the Commission examined ways to improve the Federal Court's handling of complex economic issues such as market definition, levels of market power and the degree of substitutionability between products. The following paragraphs look at whether concerns that the Court lacks the necessary expertise to determine such issues can be addressed by better use of existing mechanisms or by the introduction of new measures.

### ***Current mechanisms***

12.10 There are a number of mechanisms which the Federal Court may use to assist with the resolution of complex economic issues. These include

- appointing a court expert on its own motion or on application by a party or the Registrar<sup>812</sup>
- giving directions on the conduct of proceedings<sup>813</sup>
- referring proceedings or any part of them to a mediator or arbitrator with the consent of the parties.<sup>814</sup>

In practice, the power to appoint a court expert or to refer a matter to arbitration is rarely used. Courts have tended to be reluctant to act against the wishes of the parties to the proceedings who will usually not consent to the use of a court expert or court-based arbitration because of the additional cost and a preference to use experts or arbitration processes of their own choice. In contrast, the power to give directions has enormous potential and in recent cases the Federal Court has shown a greater willingness to take control of the conduct of proceedings.<sup>815</sup> The Court may use the power to direct that no more than a specified number of expert witnesses be called, that the reports of experts be exchanged or that the parties attend a conference before a judge or registrar to ensure that the issues in dispute have been identified and to consider the most economic and efficient means of conducting the proceedings.<sup>816</sup> The Court can use its directions power to establish specific procedures for dealing with the expert evidence to be adduced by each party in particular proceedings.<sup>817</sup> The directions power can also be used to assist parties desiring to gather survey evidence by giving directions as to the methodology of, and questions to be used in, the survey.<sup>818</sup> The Commission is of the view that the increasing use by the Court of its power to make directions should be encouraged.

### ***New mechanisms for dealing with complex economic issues***

12.11 ***Specialist panels.*** In DP 56 the Commission invited comment on whether the Federal Court should be able to refer pricing matters and other economic issues to a specialist panel for either a recommendation on, or a final determination of, the issues.<sup>819</sup> Most submissions did not support the introduction of such a panel.<sup>820</sup> Referrals to a specialist panel could increase the cost and length of proceedings (including the risk of interlocutory applications and appeals in the Federal Court) and give rise to constitutional problems with the performance of federal judicial functions by a non-judicial body.<sup>821</sup> They may be inappropriate where the decisions may have serious consequences, such as the imposition of penalties.<sup>822</sup> The Commission is not satisfied that it is either necessary or appropriate to refer issues to a specialist panel for determination.

12.12 ***Use of referees without the consent of the parties.*** DP 56 also raised the possibility of the Federal Court being given powers similar to those of the NSW Supreme Court in relation to appointing referees and referring issues to them even without the consent of the parties.<sup>823</sup> Under its Rules, the NSW Supreme Court has a general discretion to appoint referees and to refer to them either the whole of the proceedings or any questions to which they give rise.<sup>824</sup> This discretion may be exercised whenever the interests of justice make it appropriate, and the Court may appoint a referee against the wishes of the parties. There were few submissions on this issue. The LCA said that such a power would be rarely used and that parties would generally oppose a referral given that economic issues are often fundamental to Pt IV disputes and there is often a diversity of opinion among economic experts on any question.<sup>825</sup> The Commission considers that giving the Federal Court power to appoint a referee would add little to the powers already available to it.

12.13 ***Appointment of judges.*** Federal judicial power can only be exercised by courts composed of judges appointed in accordance with Chapter III of the Constitution. At present, a person cannot be appointed a judge of the Federal Court unless he or she is or has been a judge or has been enrolled as a legal practitioner for not less than five years.<sup>826</sup> Submissions revealed little support for allowing persons qualified by knowledge or experience in industry, commerce, economics or accountancy but not qualified in law to be appointed as members of the Federal Court.<sup>827</sup> Furthermore, the appointment of non-lawyers to the Court was not considered to be a practical or effective solution to the problems currently experienced in respect of complex economic issues. Submissions argued that these issues can be more appropriately dealt with by the better use of the existing rules regarding court experts and the handling of expert evidence.<sup>828</sup> The Commission considers that judges of the Federal Court should have to be legally qualified but that it is desirable that they also have broad knowledge and experience beyond the law. It notes the current inquiry by the federal Attorney-General into the criteria and procedure for judicial appointments, which is expected to report later this year.<sup>829</sup>

12.14 ***Special divisions.*** In DP 56 the Commission invited comment on whether special divisions of the Federal Court should be established to deal with actions under Pt IV and Pt V of the TPA respectively.<sup>830</sup> The LCA and Young Lawyers supported the establishment of a special division for Pt IV matters on the basis that they often involve complex economic issues that are better dealt with by judges who have developed considerable expertise in the area.<sup>831</sup> However, most responses to this issue did not support the creation of specialist divisions.<sup>832</sup> The TPC argued that the experience and expertise gained by judges in non-TPA commercial cases are essential to their effective consideration of issues raised in proceedings brought under the TPA and that the existing system for allocating judges to particular matters seems to be

working well.<sup>833</sup> The Commission is not convinced of the need for, or utility of, creating specialist divisions to deal with matters under Pt IV or Pt V of the TPA.

## **Evidence of prior findings**

### ***Section 83 of the TPA***

12.15 In some cases, the expense and delay of having to resolve complex issues in trade practices litigation may be avoided by allowing the findings of a court or tribunal in relation to those issues to be admitted into evidence. The TPA already provides for the admission of prior findings of fact in certain circumstances. Section 83 provides that

in a proceeding against a person under s 82 or in an application under s87(1A) for an order against a person, a finding of any fact by a Court made in proceedings under s 77, 80, 80A or 81, or for an offence against s 79, in which that person has been found to have contravened, or to have been involved in a contravention of, a provision of Part IV, IVA or V is prima facie evidence of that fact and the finding may be proved by production of a document under the seal of the Court from which the finding appears.

### ***Evidence Bill 1993***

12.16 Section 83 of the TPA is inconsistent with Part 3.5 of the Evidence Bill 1993 (Cth) which provides that, as a general rule, evidence of a decision or a finding of fact in a proceeding is not admissible to prove the existence of a fact that was in issue in those proceedings.<sup>834</sup> However, s 83 will prevail over the Bill as the latter does not affect existing federal legislation.<sup>835</sup>

### ***Enhancing s 83***

12.17 ***Introduction.*** In DP 56 the Commission invited comment on whether s 83 should be amended to allow findings of fact by a court or tribunal in any proceedings under the TPA to be used as evidence of those facts in subsequent proceedings under the TPA.<sup>836</sup> The suggested amendment raised a number of issues.

12.18 ***Removing the restrictions.*** Section 83 is subject to two main limitations:

- only findings made in proceedings under s 77, 79, 80, 80A and 81 can be used in subsequent proceedings
- the prior findings are only admissible in proceedings under s 82 or 87(1A) of the TPA.

The suggested amendment, which would allow findings in any proceedings relating to a contravention of the TPA to be admissible in any subsequent proceedings under the TPA, was seen by some respondents as going too far. In particular, there were serious concerns that findings in civil proceedings should not be able to be used as evidence in subsequent proceedings seeking the imposition of a civil or criminal penalty.<sup>837</sup> The TPC proposed that s 83 should be amended to allow findings made in proceedings under s 77, 79, 80, 80A, 81, 82 and 87(1A) to be used in subsequent proceedings under s 80, 80A, 82 and 87(1A).<sup>838</sup> Prior findings would not be admissible in actions for a penalty or a divestiture order given the serious consequences to the party concerned. The Commission agrees that it would be inappropriate for findings made in civil proceedings to be used in subsequent proceedings where a penalty may be imposed.



12.19 **Findings of any court or tribunal.** There was no opposition to extending s83 to include prior findings by tribunals, such as the TPT. Such an amendment would be especially useful in helping a court avoid the need to resolve economic and other issues which may already have been determined by the TPT.

12.20 **Using prior findings in proceedings between different parties.** The TPA provides that a finding of fact in proceedings against a person can only be used in subsequent proceedings if the same person is involved. Under the suggested amendment, a prior finding in proceedings against company A could be used in subsequent proceedings against company B provided it was relevant. The TPC and the Attorney-General's Department argued that this would seriously disadvantage the party against whom such evidence is produced.<sup>839</sup> Under the common law, such evidence would not be admissible on the basis that it would be unjust to bind or prejudice persons with the result of proceedings to which they were not party and in which, therefore, they were not heard.<sup>840</sup> In ALRC 26 the Commission noted that a third party may be ill-equipped to show possible defects in a finding and that this could lead to the finding assuming a virtually conclusive effect if admitted against that person.<sup>841</sup> To some extent, the use of material from prior proceedings between different parties may be possible under the Bill. Exceptions to the rule against hearsay under the Bill will allow evidence given by witness A in proceedings between X and Y to be admitted also in proceedings between W and Z by tendering a transcript of that evidence as hearsay evidence, subject to the need for A to attend to be cross-examined if required.<sup>842</sup> In light of this, the Commission considers there is no need to amend s 83. A finding of fact in proceedings against a person should continue to only be used in subsequent proceedings if the same person is involved.

12.21 **Proving a prior finding of fact.** In ALRC 26 the Commission was concerned at the failure of s 83 to indicate what documents should be admissible to prove a finding of fact.<sup>843</sup> This uncertainty will be largely resolved by the Evidence Bill 1993 (Cth). Under the Bill, evidence of a public document that is a judgment, act or other process of an Australian court or a document lodged with an Australian court, may be adduced by producing a copy that is proved to be an examined copy, purports to be sealed with the seal of that court or purports to be certified as a true copy by a registrar or chief officer of that court.<sup>844</sup>

12.22 **The weight to be given to prior findings.** Prior findings of fact are deemed to be 'prima facie' evidence of that fact.<sup>845</sup> The Commission is of the view that the TPA should not specify the weight to be given to a finding. Nor should it set up a presumption that the finding is correct so as to place a legal onus of disproof upon the party opposing the finding.<sup>846</sup> It considers that

- the use of a presumption that a prior finding is correct unless proven otherwise does not avoid the problem of determining the evidential weight to be given to the finding and makes it harder for the other party to show that the finding is wrong or unhelpful
- a prior finding has substantial evidentiary weight itself and needs no presumption that it was justified
- provisions such as s 83 are designed to assist plaintiffs to fill gaps in evidence but should not encourage them to become complacent about discharging their overall onus to prove their case
- the weight to be accorded to a prior finding can vary greatly and should be left to the court in each case.

## Recommendation

12.23 The Commission *recommends* that s 83 of the TPA be amended to allow a finding of fact by a court or tribunal in any proceedings against a person under the TPA to be used as evidence of that fact in subsequent proceedings against the same person under the TPA, except where the subsequent proceedings are for the imposition of a penalty. The weight to be given to a prior finding should be a matter for the court in the circumstances of the case.

## Discovery in proceedings seeking the imposition of a civil penalty

### *Current position*

12.24 Under the Federal Court Rules, any party may, unless the Court otherwise orders, by notice of discovery filed and served on any other party require that party to give discovery of documents.<sup>847</sup> Once a document is discovered it may be produced for inspection by another party to the proceedings subject to any question of privilege.<sup>848</sup> However, discovery is not available to the TPC in proceedings seeking the imposition of a civil penalty.<sup>849</sup>

It is a well established principle that, where a pecuniary penalty is sought, the ordinary rules of discovery and interrogation do not apply for the reason that it is improper to call upon a defendant to disclose facts which make it liable to the payment of a pecuniary penalty.<sup>850</sup>

In contrast, the TPA requires the TPC to make copies of all relevant documents available to those involved in proceedings where the TPC is seeking the imposition of a civil penalty.<sup>851</sup> The current law puts the TPC at a disadvantage as it must prove its case for a civil penalty without the procedural benefits usually afforded to civil litigants while respondents are able to obtain copies of almost all the material available to the TPC.

### *Recent developments*

12.25 *Federal legislation.* In recent years the Commonwealth has introduced civil penalty regimes into legislation regulating corporations and the superannuation industry.<sup>852</sup> These regimes expressly provide that a court, when hearing and determining an application for a civil penalty, must apply the rules of evidence and procedure that it applies in hearing and determining civil matters.<sup>853</sup> Presumably, this allows the use of discovery and interrogatories in proceedings for the imposition of a civil penalty, subject to any questions of privilege.

12.26 *EPA v Caltex.* In *Environmental Protection Agency v Caltex Refining Co Pty Limited*<sup>854</sup> a majority of the High Court held that a corporation cannot claim privilege against self-incrimination. It considered that the harm to the administration of justice from allowing corporations to claim privilege against self-incrimination outweighed the harm from rejecting the claim. However, for the time being a corporation may still rely on the privilege against self-exposure to a penalty to avoid giving discovery and inspection in proceedings for the imposition of a civil penalty.<sup>855</sup> The Court's decision does not affect the right of individuals to rely on the privileges against self-incrimination and against self-exposure unless a statute or rule of court provides otherwise, either expressly or by necessary implication.

### *Responses to DP 56*

12.27 In DP 56 the Commission asked whether the TPC should be able to obtain discovery and interrogatories when seeking the imposition of a civil penalty.<sup>856</sup> Some responses considered that allowing the TPC to obtain discovery would have the following advantages:

- ease the TPC's burden by ensuring that it enjoyed similar rights as respondents in relation to identifying and inspecting the other party's evidence<sup>857</sup>
- enhance justice by helping to ensure that all relevant evidence is before the court<sup>858</sup>
- reduce the cost of litigation as more issues could be disposed of prior to the substantive hearing<sup>859</sup>
- resolve the anomalous situation whereby the TPC has wide investigation powers prior to litigation but is severely limited once proceedings have commenced.<sup>860</sup>

Other submissions considered there is no need to give the TPC a right of discovery.<sup>861</sup> Some considered that any increase in the availability of discovery should be limited to actions against corporations.<sup>862</sup>

### ***The Commission's view***

12.28 The question whether discovery should be available in proceedings seeking the imposition of civil penalties must be determined in the context of balancing the rights of the respondent, for whom the penalty may be as great a financial burden as a fine imposed upon conviction, against the public interest in the TPC being able to enforce the TPA properly. The Commission considers that allowing the TPC to use discovery and other procedural rules against corporations will enhance the administration of the TPA by encouraging the exchange of information so that all relevant evidence is brought before the court as quickly and efficiently as possible. Such a reform is a logical extension of the decision in *EPA v Caltex* and puts the TPC in a position similar to that of other regulatory bodies which can seek civil penalties. However, the Commission does not consider it appropriate that discovery be available against individuals in civil penalty proceedings. The Commission **recommends** that the TPA be amended to enable the TPC to seek discovery, inspection and interrogatories in proceedings seeking the imposition of a civil penalty against a corporation. The use of discovery, inspection and interrogatories by the TPC would be subject to the control of the Court. In the course of the Commission's inquiries the issue arose whether respondents in civil penalty proceedings should be required to file a defence and participate in other procedures which would help identify the issues in dispute and streamline the conduct of the proceedings. The Commission does not make any recommendation on this issue as it was not raised in DP 56 and has not been the subject of consultations.

## Appendix A: List of submissions

|    |  |                  |
|----|--|------------------|
| 1  | Dr J Hariman   | 6 May 1993       |
| 2  | Justice P Heerey   | 17 December 1993 |
| 3  | H Odijk  | 13 January 1994  |
| 4  | Dr P Williams, University of Melbourne   | 31 January 1994  |
| 5  | Australian Consumers' Association (ACA)  | 24 January 1994  |
| 6  | Associate Professor B Kercher, Macquarie University                                      | 25 January 1994  |
| 7  | Confidential   | 25 January 1994  |
| 8  | Professor J Goldring, University of Wollongong   | 7 February 1994  |
| 9  | Australian Consumers' Council (ACC)  | 8 February 1994  |
| 10 | Dept of Consumer Affairs, Queensland   | 28 February 1994 |
| 11 | K Burnett and M Hyland, University of Western Sydney                                     | 25 February 1994 |
| 12 | Young Lawyers Business Law Committee, The Law Society of New South Wales (Young Lawyers) | 28 February 1994 |
| 13 | Confidential   | 13 May 1994      |
| 14 | Commonwealth Director of Public Prosecutions (DPP)                                       | 25 February 1994 |
| 15 | Associate Professor S Corones, Queensland University of Technology                       | 24 February 1994 |
| 16 | State Chamber of Commerce and Industry, Queensland                                       | 2 March 1994     |
| 17 | J Sheahan, Barrister-at-Law  | 2 March 1994     |
| 18 | Confidential   | 21 March 1994    |
| 19 | RW Gotterson QC  | 2 March 1994     |
| 20 | Legal Aid Commission of New South Wales (LAC (NSW))                                      | 28 February 1994 |
| 21 | Business Forum on Consumer Issues (BFCI)   | 4 March 1994     |
| 22 | Insurance Council of Australia Limited (ICA)   | 16 March 1994    |
| 23 | Ministry of Fair Trading, Western Australia  | 3 March 1994     |
| 24 | Paul M Greenwood & Co  | 10 March 1994    |

|    |   |                  |
|----|---|------------------|
| 25 | Confidential  | 10 March 1994    |
| 26 | Professor M Aronson, University of New South Wales  | 12 March 1994    |
| 27 | B Pentony and B Bondfield, University of Canberra   | 15 March 1994    |
| 28 | Confidential  | 28 February 1994 |
| 29 | Victorian Bar Council   | 9 March 1994     |
| 30 | The Shell Company of Australia Limited (Shell)  | 3 March 1994     |
| 31 | Trade Practices Commission (TPC)  | 7 April 1994     |
| 32 | Public Interest Advocacy Centre and Australian Federation of Consumer Organisations (PIAC/AFCO) | 21 March 1994    |
| 33 | Confidential  | 18 March 1994    |
| 34 | Office of Fair Trading and Business Affairs, Victoria   | 17 March 1994    |
| 35 | Australian Finance Conference (AFC)   | 23 March 1994    |
| 36 | Confidential  | 22 March 1994    |
| 37 | Victorian Employers' Chamber of Commerce and Industry (VECCI)                                   | 29 March 1994    |
| 38 | Gilbert & Tobin, Lawyers  | 30 March 1994    |
| 39 | Trade Practices Committee, Business Law Section, Law Council of Australia (LCA)                 | 27 April 1994    |
| 40 | Clayton Utz   | 5 April 1994     |
| 41 | Attorney-General's Dept (Cth)   | 29 March 1994    |
| 42 | The Treasury (Cth)  | 5 April 1994     |
| 43 | Law Institute of Victoria   | 13 April 1994    |
| 44 | Professor W Pengilly, University of Newcastle   | 5 April 1994     |
| 45 | Office of Consumer Affairs and Fair Trading, Northern Territory                                 | 31 March 1994    |
| 46 | Confidential  | 13 April 1994    |
| 47 | Privacy Branch, Human Rights and Equal Opportunity Commission (HREOC)                           | 14 April 1994    |
| 48 | The Commercial Law Association of Australia Ltd (CLA)   | 18 April 1994    |

|    |   |                  |
|----|---|------------------|
| 49 | Australian Consumers' Association (ACA)               | 22 April 1994    |
| 50 | IBM Australia Limited (IBM)                           | 21 February 1994 |
| 51 | The Law Society of South Australia (Law Society (SA)) | 4 May 1994       |

## Appendix B: Enforcement of consumer protection provisions under the TPA and Fair Trading Acts - Comparative table

| <b>Remedies</b>   | Cth <sup>1</sup> | NSW <sup>2</sup> | Vic <sup>3</sup> | Qld <sup>4</sup> | Tas <sup>5</sup>                  | SA <sup>6</sup>      | WA <sup>7</sup> | NT <sup>8</sup> | ACT <sup>9</sup> |
|---|------------------|------------------|------------------|------------------|-----------------------------------|----------------------|-----------------|-----------------|------------------|
|   |                  |                  |                  |                  |                                   |                      |                 |                 |                  |
| <b>Offences</b> for contravention of consumer protection provisions other than those in relation to misleading or deceptive conduct and unconscionable conduct. | s 79             | s 62             | s 32             | s 92             | No general offences <sup>10</sup> | s 75                 | s 69            | s 88            | s 41             |
| <b>Injunctions</b>  | s 80             | s 65             | s 34(1)          | s 98             | s 34                              | s 84                 | s 74/76         | s 89            | s 44             |
| <b>Corrective advertising</b>   | s 80A            | s 67             | s 35             | s 98             | s 36                              | s 83(2)              | s 75            | s 90            | s 45             |
| <b>Damages</b>  | s 82             | s 68             | s 37             | s 99             | s 37                              | s 84                 | s 79            | s 91            | s 46             |
| <b>Ancillary orders</b>   | s 87             | s 72             | s 41             | s 100            | s 41                              | s 85                 | s 77            | s 95            | s 50             |
| <b>'Freezing' orders</b>  | s 87A            | s 73             | s 35A            | s 102            | s 42                              | N/A                  | s 78            | s 96            | s 51             |
| <b>Representative actions</b>   | s 87(1C)         | s 72(4)          | s 41(3)          | s 100(2)         | s 41(2)                           | s 85(2)              | s 77(2)         | s 95(4)         | s 50(2)          |
| <b>Enforceable undertakings</b>   | s 87B            | N/A              | N/A              | N/A              | N/A                               | s 79-82 (assurances) | N/A             | N/A             | N/A              |
| <b>Penalty notices</b>  | N/A              | s 64             | N/A              | N/A              | N/A                               | N/A                  | s 73            | N/A             | N/A              |

|                                   |     |      |     |     |      |                                  |       |        |        |
|-----------------------------------|-----|------|-----|-----|------|----------------------------------|-------|--------|--------|
| <b>Mandatory codes of conduct</b> | N/A | Pt 7 | N/A | N/A | Pt 4 | Under regs<br>power - s<br>97(2) | Pt IV | Pt XII | Pt III |
|-----------------------------------|-----|------|-----|-----|------|----------------------------------|-------|--------|--------|

- 
- 1 *Trade Practices Act 1974* (Cth).
  - 2 *Fair Trading Act 1987* (NSW).
  - 3 *Fair Trading Act 1985* (Vic).
  - 4 *Fair Trading Act 1989* (Qld).
  - 5 *Fair Trading Act 1990* (Tas).
  - 6 *Fair Trading Act 1987* (SA).
  - 7 *Fair Trading Act 1987* (WA).
  - 8 *Consumer Affairs and Fair Trading Act 1990* (NT).
  - 9 *Fair Trading Act 1992* (ACT).
  - 10 With the exception of the provisions in relation to misleading or deceptive conduct and unconscionable conduct, each consumer protection provision in the Tasmanian Act specifies that its contravention will be an offence.



## Bibliography

AJAC REPORT *see* Australia. Access to Justice Advisory Committee

ALRC *see* Australia. Law Reform Commission

AUSTRALIA. ACCESS TO JUSTICE ADVISORY COMMITTEE *Access to justice: an action plan* AGPS Canberra 1994 (AJAC Report)

AUSTRALIA. ATTORNEY-GENERAL'S DEPARTMENT *Annual Report 1990-91* AGPS Canberra 1991

\_\_\_\_\_ *Annual Report 1991-92* AGPS Canberra 1992

\_\_\_\_\_ *Judicial appointments: procedure and criteria* AGPS Canberra 1993

AUSTRALIA. FEDERAL BUREAU OF CONSUMER AFFAIRS *Post-sale consumer protection: report to the Standing Committee of Consumer Affairs Ministers* FBCA Canberra 1993 (FBCA Report)

AUSTRALIA. LAW REFORM COMMISSION *Collective investments: other people's money* ALRC Sydney 1993 (ALRC65)

\_\_\_\_\_ *Customs and excise* ALRC Sydney 1992 (ALRC 60)

\_\_\_\_\_ *Evidence* AGPS Canberra 1985 (ALRC 26)

\_\_\_\_\_ *General insolvency inquiry* AGPS Canberra 1988 (ALRC 45)

\_\_\_\_\_ *Grouped proceedings in the Federal Court* AGPS Canberra 1988 (ALRC 46)

\_\_\_\_\_ *Product liability* AGPS Canberra 1989 (ALRC 51)

\_\_\_\_\_ *Standing in public interest litigation* AGPS Canberra 1985 (ALRC 27)

\_\_\_\_\_ *Sentencing: penalties* ALRC Sydney 1987 (ALRC DP 30)

AUSTRALIA. NATIONAL CONSUMER AFFAIRS ADVISORY COUNCIL *Consumer redress and Part V of the Trade Practices Act* AGPS Canberra 1988 (NCAAC Report)

AUSTRALIA. PARLIAMENT. HOUSE OF REPRESENTATIVES COMMITTEE ON INDUSTRY SCIENCE AND TECHNOLOGY *Small business in Australia: challenges problems and opportunities* AGPS Canberra 1990

AUSTRALIA. PARLIAMENT. HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS *Mergers, takeovers and monopolies: profiting from competition?* Canberra AGPS 1989 (Griffiths Committee Report)

AUSTRALIA. PARLIAMENT. JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES *Summary of evidence presented to the Committee on the draft Corporate Law Reform Bill 1992* AGPS Canberra 1992

AUSTRALIA. PARLIAMENT. SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS *Mergers, monopolies and acquisitions: adequacy of existing legislative controls* AGPS Canberra 1991 (Cooney Committee Report)

AUSTRALIA. TRADE PRACTICES ACT REVIEW COMMITTEE Report to the Minister for Business and Consumer Affairs AGPS Canberra 1976

AUSTRALIA. TRADE PRACTICES COMMISSION *Annual Report 1991-92* AGPS Canberra 1992

\_\_\_\_\_ *Annual Report 1992-93* AGPS Canberra 1993

\_\_\_\_\_ *Best and fairest: TPA training program* The Commission Canberra 1994

\_\_\_\_\_ *Bulletin* The Commission Canberra 1991-1993

\_\_\_\_\_ Consumer awareness of, and reliance on, Divisions 2 and 2A, Part V, of the Trade Practices Act The Commission Canberra 1990

\_\_\_\_\_ *Fair Trading* The Commission Canberra

\_\_\_\_\_ *Guideline on administrative resolution* The Commission Canberra 1993

\_\_\_\_\_ Misuse of market power - background paper and guideline on s 46 of the Act The Commission Canberra 1990

\_\_\_\_\_ *Priorities for 1992-93* The Commission Canberra 1992

\_\_\_\_\_ Taking Advantage: sale of life insurance to Aboriginal people in remote communities The Commission Canberra 1994

\_\_\_\_\_ TPC Guide to Codes of Conduct: Draft for comment The Commission Canberra 1992

\_\_\_\_\_ Unconscionable conduct and the Trade Practices Act The Commission Canberra 1991

AUSTRALIAN SECURITIES COMMISSION *Policy Statement 78: Confidentiality* ASC Sydney 1994

AUSTRALIAN BANKING INDUSTRY OMBUDSMAN *Annual Report 1992/93* Australian Banking Industry Ombudsman Limited Victoria 1993

- AYRES I & BRAITHWAITE J *Responsive regulation: transcending the deregulation debate* Oxford University Press New York 1992
- BLUNT G et al 'From Arnotts to QIW' *Paper* Law Council Trade Practices Workshop Canberra 16-18 July 1993
- CAMERON A 'The Australian Securities Commission as law enforcer and business facilitator - flip sides of the same coin' *Speech* Monash Law School Foundation Lecture Series Melbourne 12 April 1994
- CAMPBELL J 'Contribution, contributory negligence and section 52 of the *Trade Practices Act* - Part I' (1993) 67 *Australian Law Journal* 87
- \_\_\_\_\_ 'Contribution, contributory negligence and section 52 of the *Trade Practices Act* - Part II' (1993) 67 *Australian Law Journal* 177
- CCH AUSTRALIA *Australian Trade Practices Reporter* CCH Sydney
- COFFEE JR "'No soul to damn: no body to kick": an unscandalized enquiry into the problem of corporate punishment' (1981) 79 *Michigan Law Review* 386
- COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS *Prosecution policy of the Commonwealth* AGPS Canberra 1990
- COMMONWEALTH, STATE & TERRITORY CONSUMER AFFAIRS Agencies *Guide to fair trading codes of conduct: Draft* Trade Practices Commission Canberra 1994
- COONEY COMMITTEE REPORT *see* Australia. Parliament. Senate Standing Committee on Legal and Constitutional Affairs
- COWAN A 'Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines' (1992) 65 *Southern California Law Review* 2387
- CRIMINAL LAW OFFICERS COMMITTEE *see* Standing Committee of Attorneys-General (Australia)
- DEE B 'What are compliance programs and why are they needed' 64 *Bulletin* TPC Canberra 1992
- DUCRET A 'Risk management and the Trade Practices Act 60-61' *Bulletin* TPC Canberra 1991
- ESQUIBEL A 'Protecting competition: the role of compensation and deterrence for improved antitrust enforcement' (1989) 41(1) *Florida Law Review* 153
- EVANS G et al *The Trade Practices Act: proposals for change* Government Printer Canberra 1984
- EVERETT D & RANSOM A *The Fair Trading Acts* Longman Professional Melbourne 1989

FEDERAL COURT OF AUSTRALIA *Practice note 11: Survey evidence* Federal Court Sydney April 1994

FISSE B 'Community service as a sanction against corporations' [1981] *Wisconsin Law Review* 970

\_\_\_\_\_ *Howard's Criminal Law* 5th ed Law Book Company Sydney 1990

\_\_\_\_\_ *Sanctions against corporations: economic efficiency or legal efficacy?* Occasional Paper No 13 Transnational Corporations Research Project University of Sydney 1986

\_\_\_\_\_ 'The criminal liability of directors: honesty and dishonesty in law and corporate law reform' (1992) 3 *Journal of Banking and Finance Law and Practice* 151

\_\_\_\_\_ The punitive injunction as a sanction against corporations Working paper Sydney 1993

FOX B 'The killings of Bobby Veen: the High Court on proportion in sentencing' (1988) 12 *Criminal Law Journal* 339

GARDINI R 'The need to develop a trade practices compliance program' Trade Practices Compliance for Business BLEC Sydney 1993

GENERAL INSURANCE CLAIMS REVIEW PANEL *Annual Report 1993* The Review Panel Melbourne 1993

GRABOSKY P & BRAITHWAITE J *Of manners gentle: enforcement strategies of Australian business regulatory agencies* Oxford University Press Melbourne 1986

GRIFFITHS COMMITTEE REPORT *see* Australia. Parliament. House of Representatives Standing Committee on Legal and Constitutional Affairs

GRUNER R 'To let the punishment fit the organization: sanctioning corporate offenders through corporate probation' (1988) 16 *American Journal of Criminal Law* 1

HEALEY D *Australian Trade Practices Law* 2nd ed CCH Australia Ltd Sydney 1993

HEYDON J *Trade Practices Law* Law Book Company Sydney

HURLEY A 'Section 76 of the *Trade Practices Act*: are pecuniary penalties alone an effective sanction?' (1986) 18(3) *Commercial Law Association of Australia Bulletin* 19

INDEPENDENT COMMITTEE OF INQUIRY INTO COMPETITION POLICY IN AUSTRALIA *National competition policy* Canberra AGPS 1993 (Hilmer Report)

KWONG A A year in Santos litigation under Part IV of the Trade Practices Act Federal Court of Australia Melbourne February 1994

LAVARCH M (Attorney General) *Press Release* 27 May 1994

'Let the charity fit the crime?' *New York Times* 5 April 1978

MARTIN J 'Making the giant competitive rather than crushing - industry perspectives on regulation enforcement' in Grabosky P & Braithwaite J (ed) *Business Regulation and Australia's Future* Australian Institute of Criminology Canberra 1993

MASON S 'Commentary principles, proposals and penalties' (1994) 5 *Current Issues in Criminal Justice* 288

MILLER R *Annotated Trade Practices Act* 14th & 15th eds Law Book Company Sydney 1993 & 1994

MITCHELL COMMITTEE *see* South Australia. Criminal Law and Penal Methods Reform Committee

NCAAC REPORT *see* Australia. National Consumer Affairs Advisory Council

NEW SOUTH WALES. DEPARTMENT OF BUSINESS AND CONSUMER AFFAIRS *Discussion Paper on Industry Co-regulation* Government Printer Sydney 1989

PENGILLEY W 'Open season on misrepresentations?' (1986) 2(5) *Advertising & Marketing Law Bulletin* 80

PRICE D 'Opening Gates: the measure of damages under the *Trade Practices Act*' (1994) 1 *Competition & Consumer Law Journal* 257

ROWAN-ROBINSON J et al 'Crime and regulation' [1988] *Criminal Law Review* 211

SOUTH AUSTRALIA. CRIMINAL LAW AND PENAL METHODS REFORM COMMITTEE *Fourth Report: the substantive criminal law* Government Printer Adelaide 1977 (Mitchell Committee)

STANDING COMMITTEE OF ATTORNEYS-GENERAL (AUSTRALIA). CRIMINAL LAW OFFICERS COMMITTEE *Model Criminal Code: Chapter 2 - General principles of criminal responsibility* (Final Report) AGPS Canberra 1992 (CLOC Report)

TRADE PRACTICES COMMISSION *see* Australia. Trade Practices Commission

UNITED STATES. AMERICAN BAR ASSOCIATION *Standards for Criminal Justice* 2nd ed vol 3 1980

\_\_\_\_\_  
SENTENCING COMMISSION *Sentencing Guidelines* US Sentencing Commission Washington 1987

WEBB D & MOLO S 'Some practical considerations in developing effective compliance programs: a framework for meeting the requirements of the sentencing guidelines' [1993] *Washington University Law Quarterly* 375

WRAY C 'Corporate probation under the new organizational sentencing guidelines' (1992) 101 *Yale Law Journal* 2017

## Table of legislation

|   |                 |
|---|-----------------|
| Acts Interpretation Act 1901 (Cth)              |                 |
| s 15AB  | 4.16, 7.21      |
| Australian Securities Commission Act 1989 (Cth) |                 |
| s 25  | 11.22           |
| Bankruptcy Act 1966 (Cth)                       |                 |
| s 82  | 7.6             |
| Constitution                                    |                 |
| s 51  | 8.14, 9.13      |
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| s 241   | 10.34           |
| s 243   | 8.14            |
| s 553B  | 7.5             |
| s 555   | 7.6             |
| s 556   | 7.6             |
| s 1317EA  | 8.12, 9.3, 9.16 |
| s 1317ED  | 12.25           |
| s 1317FA  | 8.12, 9.3       |
| s 1317FB  | 9.16            |
| s 1317GC  | 9.16, 9.18      |

|   |                             |
|---|-----------------------------|
| s 1330  | 4.21                        |
| Pt 9.4B   | 9.3, 9.7, 9.8, 9.16, 12.25  |
| County Court Act 1958 (Vic)                       |                             |
| s 49  | 5.10                        |
| Crimes Act 1914 (Cth)                             |                             |
| s 4   | 8.2                         |
| s 4AA   | 10.46                       |
| s 4AB   | 10.46                       |
| s 15B   | 9.38                        |
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| s 19B   | 7.2, 10.1, 10.30            |
| s 20  | 7.2, 10.30                  |
| s 20A   | 10.13                       |
| s 20AB  | 7.2, 10.1, 10.30            |
| Criminal Law (Sentencing) Act 1988 (SA)           |                             |
| s 14  | 7.2                         |
| District Court Act 1991 (SA)                      |                             |
| s 30  | 5.10                        |
| District Court Act 1973 (NSW)                     |                             |
| s 46(2)   | 5.10                        |
| s 135   |                             |
| District Court of Western Australia Act 1969 (WA) |                             |
| s 55  | 5.10                        |
| District Courts Act 1976 (Qld)                    |                             |
| s 67  | 5.10                        |
| Evidence Bill 1991 (Cth)                          | 12.2                        |
| Evidence Bill 1993 (Cth)                          | 12.2-12.4, 12.6-12.8, 12.16 |
| Fair Trading Act 1985 (Vic)                       |                             |
| s 34  | 2.11                        |
| s 41  | 2.11                        |
| Fair Trading Act 1987 (NSW)                       |                             |
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| s 12                                      | 2.10       |
| Fair Trading Act 1987 (SA)                |            |
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| Fair Trading Act 1987 (WA)                |            |
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| s 74                                      | 2.11       |
| s 77                                      | 2.11       |
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1 Defined as Pt V of the Act.  
2 Justice P Heerey *Submission 2*. See also Confidential *Submission 36*. The Business Forum on Consumer Issues (BFCI) was of the  
3 view that there were no problems with the TPA and, therefore, the Commission should not have been requested to undertake the  
4 review: BFCI *Submission 21*.  
5 TPC *Submission 31*. See also PIAC/AFCO *Submission 32*.  
6 TPC *Submission 31*. These include so-called 'get-rich-quick' schemes, false billing schemes and pyramid selling.  
7 *ibid*.  
8 *Trade Practices Legislation Amendment Act 1992* (Cth). These amendments are discussed further at para 10.41, 11.4.  
9 J Heydon *Trade Practices Law Vol 2* The Law Book Company Sydney 9241.  
10 See, eg, B Kercher *Submission 6*; K Burnett & M Hyland *Submission 11*; Ministry of Fair Trading (WA) *Submission 23*;  
11 Confidential *Submission 28*; LCA *Submission 39*; Confidential *Submission 46*.  
12 LCA *Submission 39*.  
13 Second reading speech by the then Attorney-General, Mr Lionel Bowen MP, on the Trade Practices Revision Bill 1986 *Hansard* (H  
14 of R) 19 March 1986, 1624.  
15 NCAAC became the Australian Consumers' Council in 1993.  
16 *Consumer redress and Part V of the Trade Practices Act* AGPS Canberra 1988 (NCAAC Report), 34.  
17 Confidential *Submission 28*.  
18 *Access to justice: an action plan* Access to Justice Advisory Committee, Canberra 1994 (AJAC Report).  
19 The other members of the Inquiry were Mr Mark Raynor and Mr Geoffrey Taperell.  
20 Independent Committee of Inquiry *National Competition Policy* AGPS Canberra 1993.  
21 Recommendation 14.5.  
22 COAG *Communique* 25 February 1994, 2.  
23 BFCI *Submission 21*; Shell *Submission 30*.  
24 A person (including a corporation) will be a consumer in relation to particular goods or services if  
25 • the price of the goods or the cost of the services does not exceed \$40 000  
26 • the price or cost exceeds \$40 000 but the goods or services are of a kind ordinarily acquired or purchased for personal,  
27 domestic or household use or consumption or the goods consist of a commercial road vehicle: TPA s 4B.  
28 Pt IVA.  
29 Pt V Div 1.  
30 Pt V Div 1A.  
31 Pt V Div 2.  
32 Pt V Div 2A.  
33 Pt VA.  
34 Pt IV.  
35 Except for Pt V Div 1A which is administered by the Federal Bureau of Consumer Affairs (FBCA) within the Attorney-General's  
36 Department. The FBCA is also responsible for advising the federal government on consumer policy and consumer education and  
37 for monitoring product labelling.  
38 Contraventions of Pt V Div 2 are enforced by consumers under the law of contract. Contraventions of Pt V Div 2A must be  
39 enforced by a consumer or his or her successors in title as a breach of statutory duty: see para 6.1.  
40 s 79. s 52, 65Q and 65R are excluded from the operation of s 79.  
s 80.  
s 82.  
s 80A.  
s 87. The orders that may be made under s 87 include (but are not limited to)  
- an order declaring the whole or any part of a contract void  
- an order varying a contract or arrangement from a date specified by the court  
- an order refusing to enforce any or all of the provisions of a contract  
- an order directing a refund of money or return of property to the person suffering damage  
- an order directing payment of the amount of loss or damage  
- an order directing repair or provision of goods supplied  
- an order directing the supply of services.  
s 87A. This provision is discussed at para 7.29.  
s 163A. This provision is discussed at para 11.26.  
s 75A. This provision is discussed at para 6.1, 6.6.  
s 87B. Enforceable undertakings are discussed at para 11.4.  
There is no public enforcement of Pt V Div 2 & 2A: see para 6.2.  
s 87(1A).

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41 TPA s 86 and the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and parallel State and Territory legislation.  
42 s 86(3).  
43 s 163.  
44 *Insurance Contracts Act 1984* (Cth); *Insurance (Agents and Brokers) Act 1984* (Cth).  
45 *Superannuation (Industry Supervision) Act 1993* (Cth).  
46 *Telecommunications Act 1989* (Cth).  
47 *Therapeutic Goods Act 1988* (Cth).  
48 *Fair Trading Act 1987* (NSW); *Fair Trading Act 1985* (Vic); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1990* (Tas); *Fair*  
*Trading Act 1987* (SA); *Fair Trading Act 1987* (WA); *Consumer Affairs and Fair Trading Act 1990* (NT); *Fair Trading Act 1992*  
*(ACT)*.  
49 Except the *Consumer Affairs and Fair Trading Act 1990* (NT) Pt V Div 2 & 3.  
50 NSW, SA, WA, Qld and the NT each has a Commissioner for Consumer Affairs. Vic, Tas and the ACT each has a Director for  
Consumer Affairs.  
51 In 1992/93 the Commissioners and Directors received the following number of consumer complaints: NSW21 632; Vic 7545; WA  
5113; ACT 849; SA 6508; Tas 1152; Qld 6324.  
52 *Fair Trading Act 1987* (NSW) s 12(1). In 1992/93 the Commissioner received seven applications for assistance of which four were  
approved.  
53 Vic, SA, Tas and NT. As the fair trading legislation in these jurisdictions is silent as to who may bring prosecutions, the general law  
applies and individuals may prosecute.  
54 Qld, WA and the ACT.  
55 Some commentators have argued that, where a lower court has remedial powers conferred by the relevant fair trading legislation,  
that court is also able to use TPA powers of that kind pursuant to referral under s 86 of the TPA: see D Everett & A Ransom *The*  
*Fair Trading Acts* Longman Professional Melbourne 1989, 182.  
56 *Fair Trading Act 1985* (Vic) s 34, 41.  
57 *Fair Trading Act 1992* (ACT) s 5(1), 44, 50.  
58 *Fair Trading Act 1987* (WA) s 74, 77.  
59 *Fair Trading Act 1989* (Qld) s 98, 100, 103(1A). The District Court may only make these orders in the course of proceedings for  
damages or a prosecution. The Queensland Magistrates Court is also empowered to grant certain types of ancillary relief in  
prosecutions: s 103(3).  
60 *Fair Trading Act 1987* (SA) s 83(3), 85. The District Court may only grant an injunction in the course of criminal proceedings: s  
83(3).  
61 eg dairy products under the *Dairy Industry Authority Act 1970* (NSW).  
62 eg the sale of goods (eg *Sale of Goods Act* in each State and Territory); consumer credit (eg *Credit Act* in each State and Territory).  
63 eg motor repairers (eg *Motor Vehicle Repairs Act 1980* (NSW)); builders (eg *Builders Licensing Act 1986* (SA)); real estate agents  
(eg *Estate Agents Act 1980* (Vic)); pawnbrokers (eg *Pawnbrokers Act 1857* (Tas)).  
64 See *Consumer Claims Tribunal Act 1987* (NSW); *Small Claims Tribunals Act 1973* (Vic); *Small Claims Tribunals Act 1973* (Qld);  
*Magistrates Court Act 1991* (SA); *Small Claims Tribunals Act 1974* (WA); *Magistrates Court (Small Claims Division) Act 1989*  
(Tas); *Small Claims Act 1974* (NT); *Small Claims Act 1974* (ACT).  
65 The Consumer Claims Tribunal can deal with building disputes to the value of \$25 000.  
66 All States and Territories except Vic.  
67 NSW, SA, WA, Tas and NT.  
68 NSW only.  
69 *Small Claims Tribunals Act 1973* (Qld) s 10; *Consumer Claims Tribunal Act 1987* (NSW) s 31(1).  
70 Formerly Consumer Affairs Directors Meeting on Agency Cooperation (CADMAC), which was convened by the TPC.  
71 Codes are discussed further at para 3.7.  
72 These schemes are funded by industry members but act independently of them.  
73 The operations of the Australian Banking Industry Ombudsman and the Telecommunications Industry Ombudsman are discussed in  
the AJAC Report: para 12.13-12.36.  
74 In 1992/93 the Australian Banking Industry Ombudsman received 3399 complaints (Australian Banking Industry Ombudsman  
*Annual Report 1992/93* Australian Banking Industry Ombudsman Limited Victoria 1993) and the General Insurance Claims  
Review Panel received 7436 complaints (General Insurance Claims Review Panel *Annual Report 1993* General Insurance Claims  
Review Panel Melbourne 1993).  
75 eg NRMA Customer Relations Department; State Insurance Office of Victoria Consumer Appeals Centre.  
76 AJAC Report, Action 12.1.  
77 Issue 31.  
78 J Goldring *Submission 8*; ACC *Submission 9*; Confidential *Submission 13*; Confidential *Submission 18*; Confidential *Submission*  
*25*; B Pentony & B Bondfield *Submission 27*; Shell *Submission 30*; Confidential *Submission 33*; Attorney-General's Dept  
*Submission 41*; ACA *Submission 49*; Law Society (SA) *Submission 51*.  
79 eg TPC *Submission 31*.

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80 As was done for the purpose of regulating corporations: see the Corporations Law.  
81 eg this model is being used to establish the Australian Financial Institutions Commission (AFIC) as the national regulator of State  
based financial institutions.  
82 See para 6.7, 6.9.  
83 eg over six drafting styles can be found in Pt V Div 1. AJAC has recommended that federal legislation should be updated and  
redrafted in accordance with the new, clearer drafting style currently being developed by the Office of Parliamentary Counsel:  
AJAC Report, Action 21.2.  
84 J Martin 'Making the giant competitive rather than crushing - industry perspectives on regulation enforcement' in P Grabosky & J  
Braithwaite (eds) *Business Regulation and Australia's Future* Australian Institute of Criminology, Canberra 1993, 171.  
85 eg BFCI; ABA; AFC; Shell *Submission 30*.  
86 (1991) ATPR 41-076.  
87 TPC *Submission 31*.  
88 See, eg, R Gardini 'The need to develop a trade practices compliance program' *Trade Practices Compliance for Business* BLEC  
Sydney 1993; D K Webb & S F Molo 'Some practical considerations in developing effective compliance programs: a framework  
for meeting the requirements of the sentencing guidelines' (1993) *Washington University Law Quarterly* 375.  
89 See, eg, Corporations Law Pt 3.2. See also the discussion of responsibility for corporate governance in *AWA Ltd v Daniels* (1992)  
10 ACLC 933.  
90 See, eg, *Eva v Southern Motors Box Hill Pty Ltd* (1977) 30 FLR 213; *TPC v CSR Ltd* (1991) ATPR 41-076.  
91 PIAC/AFCO *Submission 32*.  
92 eg A Ducret 'Risk management and the Trade Practices Act' 60-61 *Bulletin* TPC Canberra 1991; B Dee 'What are compliance  
programs and why are they needed?' 64 *Bulletin* TPC Canberra 1992; *Best and fairest: TPA training program* TPC Canberra 1994.  
93 See para 11.4.  
94 Under a corporate probation or supervision order a court could order a corporation that has contravened the TPA to establish a  
compliance program: see para 10.5. Such an order could also be made under s 80.  
95 Para 8.15.  
96 TPC *Annual Report 1992-93* TPC Canberra 1993, 55; TPC *Priorities for 1992-93* TPC Canberra 1992, 6.  
97 J Martin op cit. See also BFCI *Submission 21*.  
98 eg BFCI; Retailers' Council of Australia; AFC.  
99 Dept of Business & Consumer Affairs (NSW) *Discussion Paper on Industry Co-regulation* NSW Government Printer 1989, 18.  
100 Commonwealth, State and Territory consumer affairs agencies *Guide to fair trading codes of conduct: Draft* TPC Canberra 1994,  
3.  
101 Pt VII Div 1.  
102 TPC *TPC Guide to Codes of Conduct: Draft for comment* TPC Canberra 1992.  
103 eg the TPC has observers on the Supermarket Scanning Code Administration Committee and the Oilcode Administration  
Committee.  
104 TPC *Submission 31*.  
105 Issue 8A.  
106 J Goldring *Submission 8*; ACC *Submission 9*; PIAC/AFCO *Submission 32*; Office of Fair Trading & Business Affairs (Vic)  
*Submission 34*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; Young Lawyers *Submission 12*; LCA *Submission*  
39; ICA *Submission 22*; P Greenwood *Submission 24*; B Pentony & B Bondfield *Submission 27*; VECCI *Submission 37*; Attorney-  
General's Dept *Submission 41*; Treasury *Submission 42*; CLA *Submission 48*; ACA *Submission 49*. Only the BFCI argued that the  
TPC should have no role in the development of codes: *Submission 21*.  
107 Young Lawyers *Submission 12*; LCA *Submission 39*; ICA *Submission 22*; P Greenwood *Submission 24*; B Pentony & B Bondfield  
*Submission 27*; VECCI *Submission 37*; Attorney-General's Dept *Submission 41*; Treasury *Submission 42*; CLA *Submission 48*; Law  
Society (SA) *Submission 51*.  
108 See para 3.4.  
109 This approach can only be used in instances where the TPC is able to obtain the trader's agreement to such a term and the situation  
is one where the TPC has a power or function: TPA s 87B(1).  
110 Para 8.9-8.13.  
111 *Fair Trading Act 1987* (NSW) (NSW Act) Pt 7; *Fair Trading Act 1987* (WA) (WA Act) Pt IV; *Fair Trading Act 1987* (SA) s 97(2),  
(3); *Consumer Affairs and Fair Trading Act 1990* (NT) Pt XII; *Fair Trading Act 1992* (ACT) Pt III. A system for enforceable  
undertakings in relation to toxic chemicals has been proposed in the Toxic Chemicals (Community Right to Know) Bill 1993 [No  
2] (Cth), a private member's Bill introduced in the Senate by Senator Chamarette in September 1993.  
112 The following codes have been prescribed.  
NSW: Caravan and Relocatable Home Park Industry Code of Practice Regulation 1992.  
Education Export (Industry) Code of Practice Regulation 1990.  
Retirement Village Industry Code of Practice Regulations 1989.

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WA: Fair Trading (Retirement Villages Code) Regulations 1992.

SA: Fair Trading (Health and Fitness Industry Code of Practice) Regulation 1992.

113 It should be noted, however, that in NSW a provision for private enforcement of prescribed codes under the NSW Act has been enacted but never proclaimed. s 78A provides that a consumer adversely affected by a contravention of a prescribed code can apply to the Commercial Tribunal for certain relief provided he or she has the consent of the Commissioner for Consumer Affairs: *Fair Trading (Amendment) Act 1990* (NSW) Schedule 1. This provision is being reconsidered in the course of the current review of the NSW Act by the NSW Dept of Consumer Affairs.

114 Cease and desist orders are discussed in ch 11.

115 These issues are discussed in ch 6 in relation to the enforcement of Div 2 & 2A of Pt V.

116 s 51AB(1).

117 Proceedings for relief against unconscionable conduct are limited to injunctions under s 80 and remedial orders (including damages) under s 87.

118 TPA s 76, 79.

119 eg Confidential *Submission 13*; BFCI *Submission 21*; TPC *Submission 31*; PIAC/AFCO *Submission 32*; Confidential *Submission 33*; VECCI *Submission 37*; Attorney-General's Dept *Submission 41*; CLA *Submission 48*.

120 BFCI *Submission 21*; Confidential *Submission 33*; VECCI *Submission 37*; LCA *Submission 39*; Attorney-General's Dept *Submission 41*; CLA *Submission 48*.

121 J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers *Submission 12*; Ministry of Fair Trading (WA) *Submission 23*; TPC *Submission 31*; PIAC/AFCO *Submission 32*; ACA *Submission 49*.

122 TPC *Submission 31*.

123 J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers *Submission 12*; Ministry of Fair Trading (WA) *Submission 23*; PIAC/AFCO *Submission 32*; ACA *Submission 49*.

124 Proposal 8.2.

125 H Odijk *Submission 3*; Dept of Consumer Affairs (Qld) *Submission 10*; Young Lawyers *Submission 12*; B Pentony & B Bondfield *Submission 27*; TPC *Submission 31*; Attorney-General's Dept *Submission 41*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; CLA *Submission 48*; ACA *Submission 49*; Law Society (SA) *Submission 51*.

126 eg AFC *Submission 35*; Confidential *Submission 36*.

127 H Odijk *Submission 3*; Department of Consumer Affairs (Qld) *Submission 10*; Young Lawyers *Submission 12*; B Pentony & B Bondfield *Submission 27*; TPC *Submission 31*; Attorney-General's Dept *Submission 41*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*.

128 TPC *Annual Report 1992-3* TPC Canberra 1993, 73. AJAC has recommended that the Commonwealth adopt a policy that each department must develop and implement strategies to educate the community about legislation within its responsibilities: AJAC Report, Action 2.5.

129 A journal covering developments in trade practices law and the work of the TPC.

130 A newsletter for business.

131 Proposal 8.1.

132 eg B Kercher *Submission 6*; J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers *Submission 12*; P Greenwood *Submission 24*; B Pentony & B Bondfield *Submission 27*; TPC *Submission 31*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; CLA *Submission 48*; ACA *Submission 49*.

133 Issue 8C, 8D, 8E.

134 Confidential *Submission 13*; P Greenwood *Submission 24*; B Pentony & B Bondfield *Submission 27*; TPC *Submission 31*; VECCI *Submission 37*; Attorney-General's Dept *Submission 41*; Treasury *Submission 42*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; CLA *Submission 48*; ACA *Submission 49*; Law Society (SA) *Submission 51*.

135 Confidential *Submission 13*; P Greenwood *Submission 24*; B Pentony & B Bondfield *Submission 27*; TPC *Submission 31*; VECCI *Submission 37*; Attorney-General's Dept *Submission 41*; Treasury *Submission 42*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; CLA *Submission 48*; Law Society (SA) *Submission 51*.

136 Confidential *Submission 13*; TPC *Submission 31*; Attorney-General's Dept *Submission 41*; Treasury *Submission 42*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; CLA *Submission 48*; Law Society (SA) *Submission 51*.

137 TPC *Submission 31*.

138 TPC *Annual Report 1992-93*, xi.

139 PIAC/AFCO *Submission 32*.

140 s 7(3).

141 PIAC/AFCO *Submission 32*.

142 See, eg, I Ayres & J Braithwaite *Responsive regulation: transcending the deregulation debate* Oxford University Press 1992. See also TPC *Submission 31*; ACC *Submission 9*.

143 I Ayres & J Braithwaite *op cit*.

144 DPP *Submission 14*.

145 s 80.

146 s 80A.

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147 Monetary penalties can be imposed in respect of contraventions of Pt IV and of Pt V: s76, 79.  
148 s 82, 87.  
149 Generally, a private litigant may not prosecute or seek a civil penalty, but see s163(4).  
150 Proposal 2.1.  
151 eg Justice P Heerey Submission 2; B Pentony & B Bondfield Submission 27; AFC Submission 35; Confidential Submission 36.  
152 eg Young Lawyers Submission 12; LAC (NSW) Submission 20; Dept of Consumer Affairs (Qld) Submission 10; B Kercher  
Submission 6; J Goldring Submission 8; ACC Submission 9; State Chamber of Commerce and Industry (Qld) Submission 16;  
Office of Fair Trading & Business Affairs (Vic) Submission 34; Office of Consumer Affairs & Fair Trading (NT) Submission 45.  
153 TPC Submission 31.  
154 Proposal 2.1.  
155 eg P Williams Submission 4; B Pentony & B Bondfield Submission 27.  
156 Attorney-General's Dept Submission 41.  
157 See, eg, *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* (1989) 15 ACLR 151 in which the Supreme Court of  
Victoria ordered the plaintiff to provide to the NCSC a summary of the information disclosed in the books it had sought permission  
to inspect and, if requested by the NCSC, to disclose to the NCSC all information discovered as a result of the inspection. The court  
offered to hear argument on whether it should make the additional order as it had not been mentioned during the hearing.  
158 The Federal Court Act 1976 (Cth), eg, provides that the Federal Court may make orders of such kinds as it thinks appropriate: s23.  
This provision does not restrict the Court to orders that have been requested of it.  
159 Issue 2A.  
160 Office of Consumer Affairs (Qld) Submission 10.  
161 TPC Submission 31.  
162 B Kercher Submission 6.  
163 Attorney-General's Dept Submission 41; TPC Submission 31; PIAC/AFCO Submission 32; Young Lawyers Submission 12; P  
Williams Submission 4.  
164 See, eg, Confidential Submission 36.  
165 See *Giorginis v Kastrati* (1988) 49 SASR 371, 376.  
166 See para 4.21, 4.22.  
167 The example given in DP56 involved a court ordering a corporation to pay \$200000 compensation to a person who suffered  
damage as a result of the corporation contravening the TPA and also wishing to punish the corporation with a fine of \$500 000.  
Under this approach, the court should not reduce the fine merely because the corporation has already been ordered to pay \$200 000.  
A penalty order and a compensation order are made for different purposes and should, therefore, be made independently of each  
other. The need for an exception where the court knows that there are insufficient funds to satisfy all orders was acknowledged.  
168 eg Young Lawyers Submission 12; Office of Consumer Affairs & Fair Trading (NT) Submission 45; LAC (NSW) Submission 20.  
169 eg Justice P Heerey Submission 2; P Williams Submission 4; P Greenwood Submission 24; Office of Fair Trading & Business  
Affairs (Vic) Submission 34.  
170 See s76. The Crimes Act 1914 (Cth) Pt 1B guides the court when sentencing a person for an offence against a law of the  
Commonwealth.  
171 Proposal 2.3.  
172 Issue 2F.  
173 eg B Kercher Submission 6; TPC Submission 31.  
174 Dept of Consumer Affairs (Qld) Submission 10.  
175 eg Attorney-General's Dept Submission 41; CLA Submission 48; Confidential Submission 36; AFC Submission 35.  
176 Justice P Heerey Submission 2.  
177 B Pentony & B Bondfield Submission 27.  
178 Confidential Submission 25. Second reading speeches and explanatory memorandums can be used to help interpret legislation: Acts  
Interpretation Act 1901 (Cth) s15AB.  
179 LAC (NSW) Submission 20; Young Lawyers Submission 12; Office of Consumer Affairs & Fair Trading (NT) Submission 45.  
180 TPC Submission 31.  
181 Justice P Heerey Submission 2; Confidential Submission 13; P Greenwood Submission 24; Confidential Submission 25.  
182 See para 10.38.  
183 The AJAC Report notes the role of court charters in providing a 'consumer orientation' for courts: para 15.60, 15.62, 15.70.  
184 See para 3.17. Some TPC publications give examples of outcomes that may provide private litigants with ideas for innovative  
resolutions: see, eg, TPC Taking advantage TPC Canberra 1994.  
185 TPC Submission 31. These orders would be in addition to the orders mentioned in s87(2).  
186 Without the written consent of the Minister: s163.  
187 Issue 2B.

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188 eg Law Society (SA) Submission 51; J Goldring Submission 8; Young Lawyers Submission 12; ICA Submission 22; J Sheahan  
Submission 17.  
189 J Sheahan Submission 17.  
190 See para 4.13, 4.18.  
191 Issue 2C.  
192 ACC Submission 9. See also J Goldring Submission 8.  
193 TPC Submission 31.  
194 Attorney-General's Dept Submission 41.  
195 eg PIAC/ AFCO Submission 32; B Pentony & B Bondfield Submission 27; J Goldring Submission 8; ACC Submission 9.  
196 PIAC/AFCO Submission 32.  
197 P Greenwood Submission 24; ICA Submission 22.  
198 Confidential Submission 13.  
199 TPC Submission 31.  
200 *ibid.*  
201 In its report on standing in public interest litigation the Commission recommended that courts should have a discretion to permit or  
prohibit intervention in public interest litigation, that is, proceedings which are or may be recognised as having a public element:  
ALRC Report No 27 Standing in public interest litigation (ALRC 27) AGPS Canberra 1985 para 48, 302.  
202 eg the ASC may intervene in any proceeding relating to a matter arising under the Corporations Law: Corporations Law s1330.  
Where the ASC intervenes, it is deemed to be a party to the proceedings and has all the rights, duties and liabilities of such a party:  
s1330(2).  
203 Human Rights and Equal Opportunity Commission Act 1986 (Cth) s11(1)(o).  
204 See ch 11 for discussion of the TPC's administrative powers.  
205 Proposal 2.2.  
206 eg B Kercher Submission 6; ACC Submission 9; State Chamber of Commerce & Industry (Qld) Submission 16; Young Lawyers  
Submission 12.  
207 Over 80 % of Pt V cases reported in the ATPR and the TPC *Bulletin* between 1 January 1991 and 31 December 1993 were initiated  
by private litigants. These two sources provide a comprehensive coverage of court cases brought under the TPA.  
208 Justice P Heerey *Submission 2*; B Kercher *Submission 6*; K Burnett & M Hyland *Submission 11*; State Chamber of Commerce &  
Industry (Qld) *Submission 16*; LAC (NSW) *Submission 20*; Ministry of Fair Trading (WA) *Submission 23*; Confidential *Submission*  
*25*; TPC *Submission 31*; PIAC/AFCO *Submission 32*; ACA *Submission 49*.  
209 TPC *Submission 31*; PIAC/AFCO *Submission 32*. See also TPC *Consumer awareness of, and reliance on, Divisions 2 and 2A, Part*  
*V, of the Trade Practices Act* TPC Canberra 1990 and the NCAAC Report.  
210 NCAAC Report, 23; PIAC/AFCO *Submission 32*.  
211 See ch 2.  
212 eg the procedures for civil claims in the Local and District Courts of NSW are almost identical to those for civil claims in the  
Supreme Court.  
213 Consumer claims tribunals and small claims courts are discussed at para 2.13.  
214 All can deal only with issues concerning goods and services to the value of \$5000 except for the NSW Consumer Claims Tribunal  
which has a jurisdiction of \$10 000.  
215 The tribunals in Vic, Qld and WA cannot deal with claims by corporations or by parties who purchase or hire goods or services in  
the course of or for the purpose of trade or business. In NSW, corporations cannot use the Consumer Claims Tribunal although non-  
corporate traders (including partnerships) may do so. In contrast, the small claims procedures in Tas, SA, NT and the ACT are  
available to both consumers and businesses.  
216 PIAC/AFCO *Submission 32*; Confidential *Submission 46*. The tax deductibility of legal costs incurred by businesses effectively  
reduces the real cost of commencing or defending litigation against individuals. It raises the relative cost of legal action to  
individuals. AJAC has recommended that the federal Government should commission a review of the current law and practice  
governing the tax deductibility of legal expenses in litigation: AJAC Report, Action 8.1.  
217 The costs rules are discussed further at para 5.22.  
218 See, eg, TPC *Submission 31*; PIAC/AFCO *Submission 32*; K Burnett & M Hyland *Submission 11*.  
219 eg under its means test, the LAC (NSW) assesses an applicant's weekly disposable income, net liquid assets and ability to pay legal  
costs. It will not grant aid in a civil matter if the applicant has a weekly disposable income of more than \$190. Applicants with a  
weekly disposable income above \$128 may be required to pay a contribution based on their income. The merit test administered by  
the LAC (NSW) asks whether it is reasonable in all the circumstances to grant legal aid. Circumstances to be taken into account  
include the nature and extent of any benefit that may accrue to the applicant if aid is given, any detriment if aid is refused and  
whether the applicant has reasonable prospects of success.  
220 s 170. Between 1 July 1990 and 30 June 1993 only six grants were made under the TPA: Attorney-General's Dept *Annual Report*  
1990-91, 1991-92; Data Analysis Bureau, Attorney-General's Dept.  
221 AJAC Report, Action 9.6.  
222 TPA s 86(2), (4); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 6.



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223 This issue is discussed at para 7.22.  
224 O 9 r 1(3). Confidential *Submission 28*.  
225 AJAC has recommended that the Commonwealth adopt a policy that each department must develop and implement strategies to  
educate the public about legislation within its responsibilities: AJAC Report, Action 2.5.  
226 Codes of conduct are discussed at para 3.7.  
227 Some lower courts have power to grant injunctions and ancillary relief under the TPA or fair trading legislation. eg under the  
*County Court Act 1958* (Vic) s 49 the County Court in Victoria has power to make any order that may be made by the Supreme  
Court of Victoria. Accordingly, the County Court is able to grant injunctions and ancillary relief under the TPA pursuant to TPA s  
86: *Kinna & Anor v National Australia Bank Ltd* (1988) 10 ATPR 40-878. Other lower courts which have expressly been given  
power to make any order that may be made by the relevant Supreme Court include:

- ACT Magistrates Court: Magistrates Court (Civil Jurisdiction) Act 1982 (ACT) s 6(1)
- WA Local Court: Local Courts Act 1904 (WA) s 33; WA District Court: District Court of Western Australia Act 1969 (WA) s  
55
- Tas Magistrates Court: Magistrates Court (Civil Division) Act 1992 (Tas) s 9
- Qld District Court: District Courts Act 1976 (Qld) s 67
- SA Magistrates Court (injunctive relief only): Magistrates Court Act 1991 (SA) s 25; SA District Court (injunctive relief  
only): District Court Act 1991 (SA) s 30
- NSW District Court (injunctive relief and the same orders as may be made by the Supreme Court under the Fair Trading Act  
1987 (NSW)): District Court Act 1973 (NSW) s 46(2), 135.

The powers of lower courts under State and Territory fair trading legislation is discussed at para 2.11.  
228 TPC *Submission 31*.  
229 Courts needing additional powers include the NSW Local Court, Qld Magistrates Court, SA Magistrates Court and District Court,  
NT Magistrates Court, Vic Magistrates Court.  
230 eg the decisions of the Commercial Tribunals in each State have had a significant impact on general compliance with the credit  
laws.  
231 Issue 3L.  
232 Justice P Heerey *Submission 2*; H Odijk *Submission 3*; Confidential *Submission 18*; Confidential *Submission 25*; TPC *Submission*  
*31*; Confidential *Submission 36*; VECCI *Submission 37*; LCA *Submission 39*; CLA *Submission 48*; ACA *Submission 49*; Law  
Society (SA) *Submission 51*.  
233 B Kercher *Submission 6*; Confidential *Submission 7*; B Pentony & B Bondfield *Submission 27*; PIAC/AFCO *Submission 32*.  
234 PIAC/AFCO *Submission 32*.  
235 See para 2.17.  
236 These schemes are discussed at para 2.15.  
237 eg the Director of the State Insurance Office of Victoria Consumer Appeals Centre can, after hearing the evidence of the parties to a  
dispute, make a determination that is final and binding on the Office but not on the consumer. NRMA insurance contracts provide  
for disputes to be arbitrated by an independent barrister.  
238 Representative actions were examined by the Commission in ALRC Report No 46 *Grouped proceedings in the Federal Court*  
AGPS Canberra 1988.  
239 TPA s 87(1B). This provision was included in the TPA in 1986.  
240 Proposal 3.4.  
241 See DP 56 para 3.27.  
242 Confidential *Submission 13*; ICA *Submission 22*; P Greenwood *Submission 24*; TPC *Submission 31*; AFC *Submission 35*;  
Confidential *Submission 33*; Confidential *Submission 36*; LCA *Submission 39*; Attorney-General's Dept *Submission 41*; CLA  
*Submission 48*.  
243 cf Federal Court Act Pt IVA. TPC *Submission 31*. These advantages were also noted by the Attorney-General's Dept: *Submission*  
*41*.  
244 TPC *Submission 31*.  
245 *ibid*.  
246 eg cases involving individually negotiated contracts between a business and consumers can be prohibitively expensive to run as  
representative actions because the damages in respect of each contract must be proved.  
247 This will include contraventions of Pt IV. The desirability of representative actions for contraventions of Div 2 or 2A of Pt V is  
discussed at para 6.4, 6.7.  
248 s 33C(1).  
249 s 33D.  
250 s 33C(2)(a)(iv).  
251 s 33E. Notice must be given to group members of the fact that the proceedings have been commenced and of their right to opt out  
by the relevant date: s 33X(1)(a). The court may dispense with this notice if the relief being sought does not include damages: s

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33X(2). The notice may be given by means of press advertisement, radio or television broadcast or any other means: s 33Y(4). The court may not require notice to be given personally to each group member unless it is satisfied that it is reasonably practicable and not unduly expensive to do so: s 33Y(5).

252 s 33Z, 33ZA.

253 s 33ZH.

254 Issue 3M.

255 Justice P Heerey *Submission 2*; H Odijk *Submission 3*; B Kercher *Submission 6*; J Goldring *Submission 8*; ACC *Submission 9*; LAC (NSW) *Submission 20*; B Pentony & B Bondfield *Submission 27*; TPC *Submission 31*; PIAC/AFCO *Submission 32*; LCA *Submission 39*; Attorney-General's Dept *Submission 41*; ACA *Submission 49*.

256 s 33C(2)(a)(iv).

257 See Attorney-General's Dept *Submission 41*.

258 (1993) ATPR 41-283.

259 s 172(1)(c).

260 Federal Court Act s 43. The Federal Court Rules provide that a party cannot recover costs from any other party except under an order of the Court or pursuant to an agreement between the parties: O 62 r 6.

261 This rule is often referred to as the 'costs indemnity rule'.

262 Federal Court Rules O 62 r 4. Under O 62 r 19 the costs which are allowed on taxation are such costs, charges and expenses as appear to the taxing officer to have been necessary or proper for the attainment of justice or maintaining or defending the rights of a party, but do not include costs that appear to the taxing officer to have been incurred or increased

- through over-caution, negligence or misconduct
- by payment of special fees to counsel or special charges or expenses to witnesses or other persons
- by other unusual expenses.

263 O 62 r 12.

264 The Court may make such an order at any stage of the proceedings or after the proceedings have concluded: O 62 r 3.

265 O 62A r 1. Such an order may be made on the application of a party or on the Court's own motion.

266 s 170(1). See also para 5.6.

267 Most legal aid commissions in Australia have the capacity to grant an indemnity to a legally aided client for any costs awarded against them if unsuccessful. eg *Legal Aid Commission Act 1979* (NSW) s47. The LAC (NSW) and the Law Society (SA) support the granting of such an indemnity in appropriate trade practices cases: LAC (NSW) *Submission 20*; Law Society (SA) *Submission 51*.

268 TPC *Submission 31*.

269 AJAC Report, Action 5.3.

270 Michael Lavarch MP, Attorney-General, press release 26 May 1994.

271 See, eg, *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 16; *Council of the Municipality of Botany & Ors v Secretary, Department of Arts, Sports, the Environment, Tourism and Territories & Ors* (1992) 34 FCR 412.

272 Issue 3N.

273 Justice P Heerey *Submission 2*; P Williams *Submission 4*; Young Lawyers *Submission 12*; Confidential *Submission 13*; J Sheahan *Submission 17*; Confidential *Submission 18*; BFCI *Submission 21*; ICA *Submission 22*; P Greenwood *Submission 24*; Victorian Bar Council *Submission 29*; Shell *Submission 30*; Confidential *Submission 36*; CLA *Submission 48*; Law Society (SA) *Submission 51*.

274 See, eg, BFCI *Submission 21*; ICA *Submission 22*; Confidential *Submission 36*.

275 See, eg, Justice P Heerey *Submission 2*; J Sheahan *Submission 17*; Confidential *Submission 18*; CLA *Submission 48*.

276 Proposal 3.6.

277 Justice P Heerey *Submission 2*; J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers *Submission 12*; Confidential *Submission 13*; Confidential *Submission 18*; P Greenwood *Submission 24*; Confidential *Submission 25*; B Pentony & B Bondfield *Submission 27*; Shell *Submission 30*; Office of Fair Trading & Business Affairs (Vic) *Submission 34*; AFC *Submission 35*; Confidential *Submission 36*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; CLA *Submission 48*.

278 NCAAC Report, 41.

279 Issue 3O.

280 Justice P Heerey *Submission 2*; H Odijk *Submission 3*; P Williams *Submission 4*; Young Lawyers *Submission 12*; Confidential *Submission 13*; J Sheahan *Submission 17*; Confidential *Submission 18*; ICA *Submission 22*; Victorian Bar Council *Submission 29*; Shell *Submission 30*; Confidential *Submission 36*; LCA *Submission 39*; TPC *Submission 31*; CLA *Submission 48*; Law Society (SA) *Submission 51*.

281 LAC (NSW) *Submission 20*; TPC *Submission 31*.

282 J Sheahan *Submission 17*.

283 *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1987) 71 ALR 287. Also note O 62 r 4(2) of the Federal Court Rules which provides that, where the Court orders that costs be paid to any person, it may also order the manner in which the amount of the whole or any part of those costs is to be ascertained.

284 *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1987) 71 ALR 287. These cases have tended to be ones in which it appears to the Court that an action has been commenced or continued where a party, properly

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advised, should have known that he or she had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or clearly established law: *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, 401.

285 (1993) 113 ALR 257, 283. The other members of the Full Federal Court found that the case did not warrant an award of indemnity costs and did not comment on whether public interest could be a ground for such an award. However, at first instance Justice Morling ordered the payment of indemnity costs on the basis that the litigation was in the public interest: *AFCO v Tobacco Institute of Australia* (1991) 100 ALR 568.

286 Issue 3P.

287 P Williams *Submission 4*; Confidential *Submission 18*; Victorian Bar Council *Submission 29*; Shell *Submission 30*; Confidential *Submission 36*; CLA *Submission 48*; Law Society (SA) *Submission 51*.

288 J Goldring *Submission 8*; PIAC/AFCO *Submission 32*. A number of other submissions supported the award of solicitor-client costs in public interest litigation: B Kercher *Submission 6*; ACC *Submission 9*; LAC (NSW) *Submission 20*; ACA *Submission 49*. The TPC supported the introduction of factors which the Court should have regard to when exercising its discretion: TPC *Submission 31*.

289 The cost of work relevant to the legal position of a potential litigant performed prior to the start of proceedings.

290 O 62 r 19. See also *Higgins v Nicol (No 2)* (1972) 21 FLR 34. Recovery of the TPC's investigation costs is discussed at para 11.24.

291 Issue 3Q.

292 J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers *Submission 12*; Confidential *Submission 13*; B Pentony & B Bondfield *Submission 27*; Victorian Bar Council *Submission 29*; Confidential *Submission 30*; TPC *Submission 31*; Confidential *Submission 36*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; CLA *Submission 48*; Law Society (SA) *Submission 51*.

293 See para 5.29.

294 'Consumer' is defined in TPA s 4B. See ch 2 fn 1.

295 eg conditions that goods will be of merchantable quality (s 71(1)) and fit for the purpose for which they are purchased (s 71(2)) and warranties as to quiet enjoyment (s 69 (1)(b)) and that services will be rendered with due care and skill (s 74(1)).

296 See *E v Australian Red Cross Society* (1991) 2 FCR 310, 352.

297 s 75A.

298 eg liability to consumers (and their successors in title) for goods which do not correspond with their description or are of unmerchantable quality.

299 TPC *Consumer awareness of, and reliance on, Divisions 2 and 2A, Part V, of the Trade Practices Act* TPC Canberra 1990.

300 id 3.

301 FBCA *Post-sale consumer protection: report to the Standing Committee of Consumer Affairs Ministers* FBCA Canberra 1993 (FBCA Report) 4. The Standing Committee is now known as the Ministerial Council on Consumer Affairs (MCCA).

302 eg breach of a condition allows a consumer to refuse the goods but breach of warranty only allows a consumer to seek damages for loss suffered.

303 FBCA Report, 37.

304 Issue 3R.

305 J Goldring *Submission 8*; ACC *Submission 9*; LAC (NSW) *Submission 20*; Young Lawyers *Submission 12*; Confidential *Submission 18*; B Pentony & B Bondfield *Submission 27*; Office of Fair Trading & Business Affairs (Vic) *Submission 34*; TPC *Submission 31*; Law Society (SA) *Submission 51*.

306 FBCA Report, 34.

307 TPC *Submission 31*.

308 Representative actions are discussed at para 5.15.

309 J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers *Submission 12*; Shell *Submission 30*; B Pentony & B Bondfield *Submission 27*; Confidential *Submission 25*; P Greenwood *Submission 24*; BFCI *Submission 21*; Law Society (SA) *Submission 51*.

310 Issue 3R.

311 LAC (NSW) *Submission 20*; Office of Fair Trading & Business Affairs (Vic) *Submission 34*; PIAC/AFCO *Submission 32*; TPC *Submission 31*.

312 Young Lawyers *Submission 12*; Confidential *Submission 18*; Shell *Submission 30*; B Pentony & B Bondfield *Submission 27*; Confidential *Submission 25*; P Greenwood *Submission 24*; BFCI *Submission 21*; Law Society (SA) *Submission 51*.

313 FBCA Report, 25.

314 eg FBCA Report, 37.

315 Issue 3S.

316 eg PIAC/AFCO *Submission 32*.

317 LAC (NSW) *Submission 20*; Confidential *Submission 13*; B Pentony & B Bondfield *Submission 27*; PIAC/AFCO *Submission 32*; Attorney-General's Dept *Submission 41*; TPC *Submission 31*.

318 FBCA Report, 26.

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319 Goods would be unsatisfactory if

- they did not correspond with
- a description applied to them
  - a sample provided
  - a representation made concerning them

by the supplier or any previous supplier

- they are not fit for the purpose made known to the supplier or any previous supplier at the time of supply
- the supplier or any previous supplier was not able to pass good title in the goods
- they are not of merchantable or acceptable quality
- they are unsatisfactory for any of the foregoing reasons at a time after they were supplied when it would be reasonable (having regard to their price and all other relevant circumstances) to expect goods of that kind to be satisfactory: FBCA Report, 30.

320 A service would be unsatisfactory if

  - it is not provided with due skill and care
  - it is not fit for a purpose expressly or impliedly made known to the service provider, and the consumer reasonably relied on the skill and judgment of the service provider
  - materials supplied in connection with the service are not reasonably fit for the purpose for which they are supplied: FBCA Report, 32.

321 FBCA Report, 37.

322 TPC *Submission 31*.

323 See DP 56 para 3.46.

324 In 1984 Senator J Haines introduced a private member's Bill in the Senate to amend the TPA by inserting a new provision in Div 2A of Pt V: Trade Practices Amendment Bill 1984 (Cth). The proposed s 74GA allowed the purchaser of a motor vehicle which was subject to an express warranty to obtain a new motor vehicle or a refund from the vehicle manufacturer if

    - on not less than four occasions a particular defect to which the warranty applied was not remedied
    - the vehicle had been out of service for more than 30 days - whether in a continuous period or not - by reason of any defect covered by the warranty.
    - The claim had to be made by the purchaser while the warranty was still in force and within one year from the date on which the vehicle was first supplied to the purchaser. The provision gave the manufacturer and not the consumer the choice of supplying a new vehicle or making a refund. The Bill was not enacted.

325 Issue 3T.

326 Confidential *Submission 13*; Confidential *Submission 18*; BFCI *Submission 21*; P Greenwood *Submission 24*; Confidential *Submission 25*; Shell *Submission 30*; TPC *Submission 31*; VECCI *Submission 37*; Attorney-General's Dept *Submission 41*. cf ACC *Submission 9*; PIAC/AFCO *Submission 31*; ACA *Submission 49*.

327 See TPC *Submission 31*.

328 National laws are discussed at para 2.16.

329 Under s 19B, 20 and 20AB of the *Crimes Act 1914* (Cth) the court may award compensation in addition to imposing a penalty.

330 *Criminal Law (Sentencing) Act 1988* (SA) s 14. The *Sentencing Act 1991* (Vic) s 50(4) makes similar provision: if the court considers that it would be appropriate both to impose a fine and to make a restitution or compensation order but considers that the offender has insufficient means to pay both the court must give preference to restitution or compensation, though it may impose a fine as well.

331 Proposal 3.1.

332 See, eg, CLA *Submission 48*; B Kercher *Submission 6*; J Goldring *Submission 8*; TPC *Submission 31*; Attorney-General's Dept *Submission 41*.

333 Young Lawyers *Submission 12*.

334 The availability of penalties other than monetary penalties (see ch 10) may reduce the significance of the contravener's financial circumstances in some cases.

335 s16A(1) provides that a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

336 Confidential *Submission 18*; AFC *Submission 35*.

337 These other orders would not include fines or penalties in respect of offences because such penalties are generally not provable: see fn 13, 14.

338 Issue 3A.

339 Pt 5.6 Div 6.

340 Pt VI.

341 Corporations Law s553B.

342 *Bankruptcy Act 1966* (Cth) s 82(3). As no mention is made of civil pecuniary penalties, presumably they are admissible to proof and will rank equally with a compensation order. The Corporations Law provides that, except as otherwise provided by the Corporations Law, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to

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meet them in full, they shall be paid proportionately: s 555. s 556 sets out the priority debts and claims. See also *Bankruptcy Act 1966* (Cth) s 82.

343 eg J Sheahan *Submission 17*; Confidential *Submission 18*; Young Lawyers *Submission 12*; VECCI *Submission 37*; Office of  
344 Consumer Affairs & Fair Trading (NT) *Submission 45*; Attorney-General's Dept *Submission 41*.  
345 TPC *Submission 31*. The Office of Fair Trading & Business Affairs (Vic) agreed: *Submission 34*.  
346 eg H Odijk *Submission 3*; J Goldring *Submission 8*; ACC *Submission 9*; LAC (NSW) *Submission 20*.  
The Commission recommended in its insolvency inquiry that, to the maximum extent possible, the principle of equality should be  
maintained by insolvency law: ALRC Report No 45 *General Insolvency Inquiry* (ALRC 45) AGPS Canberra 1988 para 713. Some  
of the Commission's specific recommendations on the priority of debts were adopted by the Commonwealth in the *Corporate Law  
Reform Act 1992* (Cth): see Explanatory Memorandum Corporate Law Reform Bill 1992, para 30.

347 s 82(2).  
348 *Ikin v Same & Lamborghini Tractors of Australia Pty Ltd* (1985) ATPR 40-595.  
349 *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1988) ATPR 40-853 at 49,196.  
350 See, eg, *Limitation of Actions Act 1958* (Vic) Pt II; *Limitation Act 1969* (NSW) Pt 3. *Vink v Schering Pty Ltd* (1991) ATPR 41-064  
held that State limitation statutes do not apply to claims under s 82 of the TPA.

351 This may occur, eg, where a person suffers economic loss as a result of entering a financial arrangement in circumstances that  
involved a contravention of the TPA but does not become aware that he or she has suffered the loss until many years later when, for  
example, he or she tries to withdraw from the arrangement. These cases, described in the TPC's submission as 'long gestation' cases,  
may involve insurance and superannuation products, timeshares, motor vehicles and houses.

352 Proposal 3.2. Such discretion would provide relief in respect of actions by minors which do not have the benefit of State limitation  
statute provisions that extend time for such actions: eg, *Limitation of Actions Act 1936* (SA) s45; *Limitation of Actions Act 1958*  
(Vic) s 23; *Limitation Act 1969* (NSW) s 52.

353 Issue 3B, 3C.  
354 See particularly Clayton Utz *Submission 40*.  
355 DP56 para 3.3 gave the example of a person harmed by a chemical or pharmaceutical but who does not become aware of this until  
more than three years after he or she suffered the harm. Under s75AO a person may commence a liability action against a  
manufacturer of defective goods within three years after the time the person became aware, or ought reasonably to have become  
aware, of the alleged loss, the defect and the identity of the manufacturer. See Clayton Utz *Submission 40*; P Greenwood  
*Submission 24*; Confidential *Submission 36*; ICA *Submission 22*; Confidential *Submission 25*; Shell *Submission 30*; J Sheahan  
*Submission 17*; CLA *Submission 48*.

356 B Kercher *Submission 6*; J Goldring *Submission 8*; ACC *Submission 9*; Confidential *Submission 13*; Confidential *Submission 18*;  
LAC (NSW) *Submission 20*; B Pentony & B Bondfield *Submission 27*; Office of Fair Trading & Business Affairs (Vic) *Submission  
34*; AFC *Submission 35*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*.

357 J Sheahan *Submission 17*.  
358 TPC *Submission 31*; PIAC/AFCO *Submission 32*.  
359 TPC *Submission 31*.

360 Confidential *Submission 33*. See also H Odijk *Submission 3*. J Sheahan suggested that it would be desirable for the 'backstop'  
limitation period to be significantly less than the 10 years in s74J because contraventions of sections 52 and 53 will often involve  
merely oral transactions whereas the manufacture of defective goods will normally have left behind a 'paper trail' which facilitates  
both the proof and the defence of claims under the relevant provisions: *Submission 17*.

361 See, eg, B Pentony & B Bondfield *Submission 27*; LAC (NSW) *Submission 20*; TPC *Submission 31*; Office of Fair Trading &  
Business Affairs (Vic) *Submission 34*.

362 J Sheahan *Submission 17*.  
363 Confidential *Submission 18*; TPC *Submission 31*, Confidential *Submission 33*; Young Lawyers *Submission 12*. One submission  
suggested including as a factor whether the person seeking an extension of time is a respondent seeking to file a cross claim. It  
claimed that this would prevent plaintiffs deliberately delaying initiating proceedings until the time within which the respondent  
could possibly file a cross claim has expired: Gilbert & Tobin *Submission 38*.

364 eg LAC (NSW) *Submission 20*; Confidential *Submission 13*; Justice P Heerey *Submission 2*.  
365 eg under s 83.  
366 See, eg, cases referred to in fn 23.

367 See, eg, *Wardley v WA* (1992) 175 CLR 514; *Qanstruct Pty Ltd & Ors v Bongiorno Ltd & Ors* (1993) 113 ALR 667.

368 In its report on product liability the Commission recommended against a statute of repose: ALRC Report No 51 *Product Liability*  
(ALRC 51) AGPS Canberra 1989 para 9.19.

369 *Hunter Valley Developments Pty Ltd and Others v Minister for Home Affairs and Environment* (1984) 58 ALJ 305. Relevant factors  
include any prejudice to the respondent which may have resulted from the delay, the merits of the substantial application,  
consideration of fairness as between applicants and other persons in like positions and any unsettling of people, other than the  
respondent, or of established practices.

s 87(1A). The court may also make such orders on the application of the TPC: s 87(1B). Representative action by the TPC is discussed at para 5.15.

The unconscionable conduct provisions.

s 87(1CA)(a).

s 87(1CA)(b).

Proposal 3.3.

eg Justice P Heerey *Submission 2*; ACC *Submission 9*; Attorney-General's Dept *Submission 41*; LAC (NSW) *Submission 20*.

TPA s 82. 'Involved in the contravention' is defined in s 75B which is discussed at para 7.24.

*Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213, 2311-3; *Accounting Systems 2000 (Developments) Pty Ltd and another v CCH Australia and another* (1993) 114 ALR 355, 390.

*Gates v The City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 14.

See *O'Brien Glass Industries Ltd v Cool & Sons Pty Ltd* (1983) ATPR 40-376, 44 459.

(1986) 160 CLR 1.

id 13.

id 15.

W Pengilly 'Open season on misrepresentations?' (1986) 2(5) *Advertising & Marketing Law Bulletin* 80.

Issue 3E.

eg LCA *Submission 39*; B Pentony & B Bondfield *Submission 27*; Treasury *Submission 42*; P Greenwood *Submission 24*; Confidential *Submission 13*; J Sheahan *Submission 17*; ICA *Submission 22*; P Williams *Submission 4*; Confidential *Submission 18*.

W Pengilly *Submission 44*; B Kercher *Submission 6*; Attorney-General's Dept *Submission 41*; PIAC/AFCO *Submission 32*; LAC (NSW) *Submission 20*.

B Kercher *Submission 6*.

See, eg, *Holt v Biroka Pty Ltd* (1988) 13 NSWLR 629; *McMahon v Pomeray Pty Ltd* (1991) ATPR 41-125 (Hill J); *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 109 ALR 638. See D Price 'Opening Gates: the measure of damages under the Trade Practices Act' (1994) 1 *Competition & Consumer Law Journal* 257 for a discussion of cases since *Gates* case which demonstrate a move away from the preference expressed in *Gates* for the adoption of the tort measure.

*Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd* (1987) 75 ALR 271, 280.

eg *Warnock v Australia and New Zealand Banking Group Limited* (1989) ATPR 40-928; *Holt v Biroka Pty Ltd* (1988) 13 NSWLR 629 (a case under the *Fair Trading Act 1987* (NSW) s72); *Holloway v Witham* (1990) 21 NSWLR 70 (also under the *Fair Trading Act 1987* (NSW) s72); *Sellars v Adelaide Petroleum NL & Ors*; *Poseidon Ltd v Adelaide Petroleum NL & Ors* (1994) ATPR 41-301; *SWF Hoists and Industrial Equipment Pty Ltd v State Government Insurance Commission* (1990) ATPR 41-045. The *Insurance Contracts Act 1984* (Cth), introduced after *Gates* and in response to ALRC Report No 20 *Insurance contracts* AGPS Canberra 1982, implies into all insurance contracts a requirement to act with the utmost good faith: s13. It may provide redress to persons to whom insurance contracts have been misrepresented.

(1990) 94 ALR 445, 461.

Under the *Acts Interpretation Act 1901* (Cth) s15AB, second reading speeches and explanatory memorandums can be used by the court as an aid to interpreting legislation.

*Thomson Australian Holdings Pty Ltd v TPC* (1981) 148 CLR 150, 161. O 5 r 1(3) of the Federal Court Rules, which provides that a respondent may cross-claim for contribution or indemnity, has been held not to confer a right to sue for contribution and to be merely procedural: *Australia and New Zealand Banking Group Ltd v Turnbull & Partners Ltd* (1992) 106 ALR 115, 126.

*TPC v Manfal Pty Ltd (in liq)* (1992) ATPR 41-160, 40, 181. An example of co-ordinate liability imposed by the Act is if a corporation contravenes the Act and a person is involved in that contravention.

Young Lawyers *Submission 12*.

See J Heydon *Trade Practices Law Vol 2* The Law Book Company Sydney para 18.1735.

eg *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s5(1)(c); *Wrongs Act 1958* (Vic) s23A-B.

The *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), eg, applies only to torts. A breach of s52 is not generally considered to be a tort for the purposes of this Act but see J Campbell 'Contribution, contributory negligence and section 52 of the Trade Practices Act - PartI' (1993) 67 *Australian Law Journal* 87; J Campbell 'Contribution, contributory negligence and section 52 of the Trade Practices Act - PartII' (1993) 67 *Australian Law Journal* 177.

*Yorke v Lucas* (1985) 158 CLR 661. See also *Giorgianni v The Queen* (1985) 156 CLR 473.

See J Goldring *Submission 8*; ACC *Submission 9*.

(1983) 80 FLR 143, 153.

Until January 1993, this prohibition was found in s52A in Pt V.

G Evans et al *The Trade Practices Act: proposals for change* Government Printer Canberra 1984, 17.

Justice P Heerey *Submission 2*.

J Sheahan *Submission 17*; BFCI *Submission 21*; Confidential *Submission 36*; Young Lawyers *Submission 12*.

TPC *Submission 31*.

PIAC/AFCO *Submission 32*.

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408 Mareva injunctions obtained their name from the decision in *Mareva Companiera Naviera SA v International Bulk Carriers SA*  
[1975] 2 Lloyd's Rep 509.  
409 See s 87A(2).  
410 See *Z Ltd v A-Z* [1982] 1 QB 558; *Winter v Marac Australia Ltd* (1986) 6 NSWLR 11; *Bank of Queensland Ltd v Grant* [1984] 1  
411 NSWLR 409.  
412 Issue 3G.  
413 TPC *Submission 31*. The penalty for breaching a s 87A order is \$20000 in the case of a person not being a body corporate and  
\$100000 in the case of a body corporate: s 87A(5).  
414 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 471 (Brennan J).  
415 *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251, 262.  
416 Proposal 3.5.  
417 eg P Williams *Submission 4*.  
418 See ALRC 51 para 8.13. See ALRC Report No 44 *Sentencing* AGPS 1988 (ALRC 44) ch 2 on the subject of making an example of  
a defendant.  
419 See, eg, A K Esquibel 'Protecting competition: the role of compensation and deterrence for improved antitrust enforcement' (1989)  
41 *Florida Law Review* 153.  
419 Proposal 4.1.  
420 s 3. The *Proceeds of Crime Act 1987* (Cth), which applies only in respect of indictable offences, does not apply in respect of  
contraventions of the TPA because they are summary (see *Crimes Act 1914* (Cth) s4G, 4H).  
421 See eg, ACC *Submission 9*; Young Lawyers *Submission 12*; ACA *Submission 49*; PIAC/AFCO *Submission 32*.  
422 See, eg, BFCI *Submission 21*; P Williams *Submission 4*; LCA *Submission 39*; Justice P Heerey *Submission 2*; Confidential  
*Submission 13*; P Greenwood *Submission 24*; Shell *Submission 30*; Confidential *Submission 33* ; Confidential *Submission 36*;  
Attorney-General's Dept *Submission 41*.  
423 TPC *Submission 31*.  
424 See also the recommendation in para 10.38.  
425 eg misleading advertising that distorts consumers' preferences for a product and their beliefs about the quality of competing  
products.  
426 Proposal 4.3.  
427 Which provides that, where the court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or  
would constitute a contravention of Pt IV, IVA or V, the court may grant an injunction in such terms as the court determines to be  
appropriate.  
428 P Greenwood *Submission 24*; CLA *Submission 48*; Confidential *Submission 13*.  
429 Confidential *Submission 13*.  
430 Confidential *Submission 25*. The Commission does not consider that publicity should be ordered before liability is proved.  
431 TPC *Submission 31*.  
432 TPC *Submission 31*.  
433 The Commission also recommends the extension of s 80A to include adverse publicity orders: see para 10.21.  
434 TPA s 81.  
435 House of Representatives Standing Committee on Legal and Constitutional Affairs *Mergers, takeovers and monopolies: profiting  
from competition?* AGPS Canberra 1989 (Griffiths Committee Report); Senate Standing Committee on Legal and Constitutional  
Affairs *Mergers, monopolies & acquisitions. Adequacy of existing legislative controls* AGPS Canberra 1991 (Cooney Committee  
Report) para 5.80; Independent Committee of Inquiry *National Competition Policy* AGPS Canberra 1993 (Hilmer Report) 164.  
436 Issue 4C.  
437 Only three submissions supported extending the divestiture power: Office of Consumer Affairs & Fair Trading (NT) *Submission*  
45; Confidential *Submission 7*; Confidential *Submission 28*.  
438 In most cases any person may apply for an injunction. In respect of a contravention of s50 or s50A, however, only the Minister or  
the TPC is able to seek an injunction: s 80(1A).  
439 s 80.  
440 *Commodore Business Machinery Pty Ltd v TPC* (1990) ATPR 41-019.  
441 Issue 5A.  
442 See, eg, Confidential *Submission 18*; Confidential *Submission 25*; B Pentony & B Bondfield *Submission 27*; Confidential  
*Submission 35*; Attorney-General's Dept *Submission 41*. Failure to comply with an injunction can give rise to contempt  
proceedings.  
443 eg Confidential *Submission 13*; Young Lawyers *Submission 12*. Examples given in the latter submission include *TPC v Bata Shoe  
Company of Australia Pt Ltd* (No 2) (1980) 44 FLR 145 (in which the court restrained the defendant from resale price maintenance  
in respect of 'any retailer', not just the retailer involved in that case, because 'in all the circumstances the public interest requires that  
an injunction be granted in the wider form suggested by counsel for the applicant') and *State Government Insurance Commission v*

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444 *JM Insurance Pty Ltd* (1984) ATPR 40-465 (in which the respondent was restrained from publishing in any media advertisements  
in the form which led to the case or 'in a like form').  
445 TPC *Submission 31*.  
446 B Kercher *Submission 6*. See also TPC *Submission 31*.  
447 See para 10.8 for further details.  
448 See also recommendations in para 10.9, 10.38.  
449 s 230. A person manages a corporation if the person is a director or promoter of, or is in any way (whether directly or indirectly)  
concerned in or takes part in the management of, the corporation: s 91A.  
450 s 230(5) states that a person shall be taken to have breached 'relevant legislation' if the person has contravened a provision of a  
'relevant enactment'. A 'relevant enactment' is defined in s 230(6) to mean the Corporations Law or a previous law corresponding to  
provisions of the Corporations Law.  
451 s 229(3)(d).  
452 s 1317EA(3).  
453 Issue 5C.  
Under the Corporations Law an individual may be prohibited from managing any corporation if the corporation for which the  
individual is, or was at the relevant time, an officer has repeatedly breached the Corporations Law and the individual failed to take  
reasonable steps to prevent the corporation from breaching the Law: s 230(1)(a).  
454 LCA *Submission 39*; Confidential *Submission 35*; Justice P Heerey *Submission 2*; ICA *Submission 22*; Shell *Submission 30*. One  
submission considered that tailor made injunctions are better placed to achieve prevention of further contraventions: Law Institute  
(Vic) *Submission 43*.  
455 See, eg, Confidential *Submission 13*; Attorney-General's Dept *Submission 41*; Young Lawyers *Submission 12*.  
456 Confidential *Submission 33*; Office of Fair Trading & Business Affairs (Vic) *Submission 34*; J Goldring *Submission 8*; ACC  
*Submission 9*; CLA *Submission 48*.  
457 The *Fair Trading Act 1987* (NSW) s65(2) provides for injunctions prohibiting a person from 'carrying on a business' of supplying  
goods or services.  
458 LCA *Submission 39*; B Pentony & B Bondfield *Submission 27*; PIAC/AFCO *Submission 32*.  
459 Attorney-General's Dept *Submission 41*.  
460 TPC *Submission 31*.  
461 See, eg, Confidential *Submission 13*; TPC *Submission 31*; Attorney-General's Dept *Submission 41*.  
462 'Managing a corporation' should have the meaning it has in the Corporations Law: s 91A.  
463 The ability of the Commonwealth to prohibit an individual from managing any corporation lies in its power to make laws with  
respect to corporations: Constitution s 51(xx).  
464 Corporations Law s 243.  
465 People other than the TPC, eg the Secretary to the Department, may also initiate prosecutions: s 163(4).  
466 s 79. In this chapter, 'Pt V' refers only to Div 1 and 1A.  
467 As the only type of penalty currently available under the TPA is a monetary penalty, civil penalties are referred to in the Act as  
'pecuniary penalties'. Because the Commission recommends that a wider range of penalties should be available in the TPA (see para  
10.9, 10.17, 10.21, 10.35), it refers to civil penalties.  
468 Proposal 6.1.  
469 s 1317EA(3).  
470 s 1317FA(1). The *Superannuation Industry (Supervision) Act 1993* (Cth) contains similar provisions: see Pt 21.  
471 Schedule 3.  
472 s 229. See para 8.12 for discussion of prohibiting persons found to have contravened the TPA from managing a corporation.  
473 Law Society (SA) *Submission 51*; Confidential *Submission 36*; Confidential *Submission 13*.  
474 Confidential *Submission 36*.  
475 See further discussion of this view at para 9.9.  
476 The view that civil penalties for individuals is contrary to the ICCPR is held by S Mason: see 'Commentary principles, proposals  
and penalties' (1994) 5(4) *Current Issues in Criminal Justice* 288.  
477 Attorney-General's Dept *Submission 41*. The Department cited *RTZ v The Netherlands* (Communication No 245/1987) which  
involved a complaint that a person had been given different legal treatment because he was subject to military jurisdiction rather  
than civil. The Human Rights Committee found that article 26 had not been violated because there was no discrimination as there  
was no suggestion that all people in the same situation were not being treated the same. See also ACA *Submission 49*; CLA  
*Submission 48*.  
478 They have been in the TPA since it was introduced in 1974.  
479 eg J Goldring *Submission 8*; ACC *Submission 9*; Confidential *Submission 18*; PIAC/AFCO *Submission 32*; ACA *Submission 49*;  
CLA *Submission 48*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*. Not all of these approved the suggested  
criminal criteria - see para 9.8.  
480 TPC *Submission 31*.



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481 See, eg, Attorney-General's Dept *Submission 41*; DPP *Submission 14*; Office of Fair Trading & Business Affairs (Vic) *Submission*  
482 *34*.  
483 DPP *Submission 14*.  
484 Attorney-General's Dept *Submission 41*.  
485 TPC *Submission 31*.  
486 DPP *Submission 14*.  
487 Attorney-General's Dept *Submission 41*. See also Law Society (SA) *Submission 51*.  
The concept of dishonesty in the Corporations Law s 232(2) has been given at least three interpretations: see *Marchesi v Barnes*  
*and Keogh* [1970] VR 434; *Australian Growth Resources Corporation Pty Ltd v van Reesema* (1988) 13 ACLR 261; *Southern*  
*Resources Ltd v Residues Treatment & Trading Co Ltd* (1990) 8 ACLC 1151. It is not clear whether the concept of honesty in the  
Corporations Law is a legal concept which requires definition or a populist concept which is left to the trier of fact to determine and  
apply. For discussion of these issues see B Fisse 'The criminal liability of directors: honesty and dishonesty in law and corporate  
law reform' (1992) 3(3) *Journal of Banking and Finance Law and Practice* 151.  
488 Young Lawyers *Submission 12*.  
489 See, eg, PIAC/AFCO *Submission 32*; ACC *Submission 9*; J Goldring *Submission 8*; Shell *Submission 30*.  
490 eg ACC *Submission 9*; J Goldring *Submission 8*; B Pentony & B Bondfield *Submission 27*.  
491 eg Young Lawyers *Submission 12*; Attorney-General's Dept *Submission 41*; B Kercher *Submission 6*; DPP *Submission 14*; Law  
Society (SA) *Submission 51*.  
492 See recommendation regarding relative size of criminal and civil penalties: para 10.43.  
493 See I Ayres and J Braithwaite *Responsive regulation: transcending the deregulation debate* Oxford University Press 1992; J  
Rowan-Robinson et al 'Crime and regulation' [1988] *Criminal Law Review* 211; PGrabosky & J Braithwaite *Of manners gentle:*  
*enforcement strategies of Australian business regulatory agencies* Oxford University Press 1986. See also discussion at para 4.4.  
494 ie there should be no criminal liability without proof of knowledge, intention or recklessness. See *He Kaw Teh v The Queen* (1985)  
157 CLR 523 and *Howard's Criminal Law* 5th ed The Law Book Company 1990 for discussion of the concept of strict liability.  
495 See para 4.4.  
496 See para 9.8.  
497 Defences to contraventions of Pt V are, however, available under s 85.  
498 eg TPC *Submission 31*; Confidential *Submission 13*.  
499 CLOC *Model Criminal Code: Chapter 2- General principles of criminal responsibility* (Final Report) AGPS Canberra 1992  
(CLOC Report). Negligence is recognised in the CLOC report for exceptional offences where negligence is sufficient.  
500 Some elements will not be substantive - see discussion of 'in trade or commerce' at para 9.13.  
501 See para 9.15 for discussion of defences.  
502 In *Briginshaw v Briginshaw* (1938) 60 CLR 336 the High Court held that in determining whether something is proved on the civil  
standard the court will have regard to the seriousness of the allegation and the gravity of the consequences flowing from a particular  
finding: 362 (Dixon J).  
503 The Constitution s 51(i) authorises the Parliament to make laws with respect to trade and commerce with other countries and among  
the States.  
504 This redraft could be undertaken as part of the review of the Act discussed at para 2.16.  
505 eg s 56(3) which provides a defence specific to the offence of bait advertising.  
506 ie the defence involves reasonableness.  
507 The defences in s 85 should, however, be redrafted to require the body corporate itself to have taken reasonable precautions and to  
excise the problematic concept of 'mistake'. A model can be found in the *Ozone Protection Act 1989* (Cth) s 65. See also fn 107.  
508 TPA s 85(1)(a) and (b).  
509 Even if the proceedings have concluded: s 1317FB.  
510 Or there is a declaration by the Federal Court or a Supreme Court that the person committed the contravention or the court  
prohibited an application being made or the court declared that the evidence in a committal proceeding for the offence could not  
satisfy the court on an application for a civil penalty order that the person committed the contravention: s 1317GC(d)-(h).  
511 s 1317GC.  
512 Corporations Law s 1317GF, 1317GG, 1317GH. Note that if the court is the Federal Court or a Supreme Court an application for a  
civil penalty under s 1317EA(3) must be made in the proceedings in which the declaration is made. A later application for a civil  
penalty is prevented by s 1317GC(f).  
513 See DP 56 para 6.7.  
514 Attorney-General's Dept *Submission 41*.  
515 DPP *Submission 14*.  
516 Attorney-General's Dept *Submission 41*.  
517 Civil proceedings that are not penalty proceedings, eg proceedings seeking an injunction, will not prevent criminal or civil penalty  
proceedings.

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518 This is so under the Corporations Law s 1317GC. The Commission notes that evidence presented to the Joint Statutory Committee on Corporations and Securities on the draft Corporate Law Reform Bill 1992 expressed concern about the proposed s 1317AV which provided that, if criminal proceedings did not result in a conviction, a civil penalty application could be made (or, if it had already been commenced and stayed, proceed). It was suggested that this would place directors in a position of 'double jeopardy': Joint Statutory Committee on Corporations and Securities *Summary of evidence presented to the Committee on the draft Corporate Law Reform Bill 1992* The Committee, Canberra 1992.

519 TPA s 163.

520 See the discussion of s6 by Mason J in *R v Australian Industrial Court; Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR, 235 especially at 244: 'Thus it appears that [s6(2)] is designed to give the provisions of the Act an operation which can be supported not merely by reference to the corporations power but by reference also to the powers contained in ss 51(1) and 122 together with the implied power to regulate the supply of goods or services to the Commonwealth, its authorities and instrumentalities.'

521 See para 9.5.

522 s 78 provides specifically that criminal proceedings do not lie against a person by reason only that the person has, for example, attempted to contravene a provision of Pt IV, has aided or abetted a person to contravene such a provision or has been knowingly concerned in the contravention by a person of a provision of Pt IV. This makes it absolutely clear that s76 is intended to impose civil penalties on individuals other than as principals.

523 As defined in s 76, 79.

524 DPP *Prosecution policy of the Commonwealth* AGPS Canberra 1990 para 3.4.

525 id para 3.7.

526 id para 2.10(j).

527 id para 2.12.

528 Issue 6F.

529 Issue 6G.

530 See, eg, TPC *Submission 31*; W Pengilley *Submission 44*; ACA *Submission 49*.

531 See para 9.19.

532 Attorney-General's Dept *Submission 41*.

533 See para 9.21.

534 *Briginshaw v Briginshaw* (1938) 60 CLR 336; see nf 38.

535 Issue 6L.

536 eg ACA *Submission 49*; Confidential *Submission 28*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*.

537 BFCI *Submission 21*; Treasury *Submission 42*; TPC *Submission 31*; Justice P Heerey *Submission 2*; VECCI *Submission 37*.

538 BFCI *Submission 21*.

539 TPC *Submission 31*. It also noted, however, that 'following the 'Uruguay Round' [of the General Agreement on Tariffs and Trade (GATT)] and with the proposed establishment of the World Trade Organisation, international pressure is likely to increase on countries which are perceived to be lagging in the intensity of competition law enforcement. Consequently, although it would be perhaps premature to introduce criminal liability for contraventions of Pt IV at this time, the subject may well require review within a few years'.

540 Formerly s 52.

541 This provision came into effect on 21 January 1993.

542 The introduction of this provision followed many years of discussion about the merits of extending the TPA to deal with unconscionable conduct in commercial transactions. See Trade Practices Act Review Committee *Report to the Minister for Business and Consumer Affairs* AGPS Canberra, 1976; G Evans et al *Trade Practices Act: proposals for change* Government Printer Canberra 1984; Griffiths Committee Report 1989; TPC *Misuse of market power - background paper and guideline on s 46 of the Act* 1990; House of Representatives Standing Committee on Industry, Science and Technology *Small business in Australia: challenges problems and opportunities* AGPS Canberra 1990; TPC *Unconscionable conduct and the Trade Practices Act* AGPS Canberra 1991; Government response to Griffith Committee Report *Hansard* (H of R) 22 August 1991; Cooney Committee Report 1991.

543 See Explanatory Memorandum para 44.

544 See proposal 6.1.

545 Issue 6K.

546 eg ACC *Submission 9*; TPC *Submission 31*; PIAC/AFCO *Submission 32*.

547 ACC *Submission 9*.

548 TPC *Submission 31*.

549 See, eg, Attorney-General's Dept *Submission 41*; Justice P Heerey *Submission 2*; VECCI *Submission 37*; W Pengilley *Submission 44*.

550 Confidential *Submission 13*.

551 s 84(1). This section only applies to conduct in relation to which s46 and 46A or Pt IVA or Pt V applies.

552 s 84(2).

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553 Under the principle of personal corporate responsibility laid down by the House of Lords the fault element of an offence will only  
be attributed to the company if the relevant knowledge or lack of care was on the part of 'the board of directors, the managing  
director and perhaps other officers of the company at a sufficiently high level to be regarded as 'the directing mind and will' of the  
corporation': *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 171, 173. This principle is ill defined, prone to evasion and does  
not necessarily require *corporate* fault: see *Howard's Criminal Law* 5th ed The Law Book Company 1990, 601.

554 CLOC Report.  
555 id 104.  
556 ALRC Report No 60 *Customs and Excise* ALRC Sydney 1992 (ALRC 60); ALRC Report No 65 *Collective Investments: other  
people's money* ALRC Sydney 1993 (ALRC 65).  
557 ALRC 60 vol II para 9.24; ALRC 65 vol 1 para 15.16, vol 2, 251.  
558 ALRC 60 vol II para 9.25, 9.26; ALRC 65 vol 1 para 15.16, vol 2, 251.  
559 ALRC 65 vol 2, 251.  
560 Issue 6H.  
561 Issue 6I.  
562 eg Justice P Heerey *Submission 2*; Confidential *Submission 13*; Attorney-General's Dept *Submission 41*; P Greenwood *Submission  
24*.  
563 See also B Pentony & B Bondfield *Submission 27*; Shell *Submission 30*.  
564 TPC *Submission 31*.  
565 DPP *Submission 14*.  
566 Confidential *Submission 13*.  
567 eg Young Lawyers *Submission 12*.  
568 TPC *Submission 31*. The DPP also supported this modification but pointed out that it would not be an easy matter to demonstrate  
the 'reasonable relief' without some positive evidence of the corporate culture: *Submission 14*.  
569 eg TPC *Submission 31*; CLA *Submission 48*; Law Society (SA) *Submission 51*.  
570 eg LCA *Submission 39*; Justice P Heerey *Submission 2*.  
571 eg TPA Pt IV where vicarious liability applies. Attribution rules are, however, relevant in the context of civil penalties for the  
purpose of s 85 defences. It is necessary to determine whether the reasonable precautions and due diligence etc of an officer count  
as the body corporate's. s 85 should be redrafted to require the body corporate itself to have taken reasonable precautions and  
exercised due diligence. Rules similar to those recommended by CLOC for corporate liability should be used. For example, the  
reasonable precautions and due diligence of an officer would count as that of the body corporate if, for example, the body corporate  
expressly authorised such precautions or due diligence.  
572 s 84(3), 84(4).  
573 Proposal 6.2.  
574 Justice P Heerey *Submission 2*; TPC *Submission 31*; LCA *Submission 39*; Attorney-General's Dept *Submission 41*.  
575 J Goldring *Submission 8*; Young Lawyers *Submission 12*; Confidential *Submission 18*; Shell *Submission 30*; AFC *Submission 35*;  
Confidential *Submission 36*; CLA *Submission 48*; Law Society (SA) *Submission 51*; Office of Consumer Affairs & Fair Trading  
(NT) *Submission 45*.  
576 Issue 6J.  
577 B Pentony & B Bondfield *Submission 27*; Shell *Submission 30*; Confidential *Submission 36*; CLA *Submission 48*; Law Society  
(SA) *Submission 51*; Confidential *Submission 18*.  
578 Justice P Heerey *Submission 2*; TPC *Submission 31*; LCA *Submission 39*; W Pengilly *Submission 44*; Attorney-General's Dept  
*Submission 41*.  
579 See *He Kaw Teh v The Queen* (1985) 157 CLR 523.  
580 s 84(4) should not be amended. Vicarious liability for the *conduct* of an agent or servant is a minor and readily justified exception  
to the general common law principle that criminal liability requires personal conduct. The key issue is whether liability requires  
personal *fault*.  
581 s 79(6). s 163(5) provides, however, that a prosecution for an offence against s 118, 155 or 155B may be commenced at any time  
after the commission of the offence.  
582 Under s 15B of the *Crimes Act 1914* (Cth), the limitation period varies depending on the maximum penalty that may be imposed  
and whether the defendant is an individual or a corporation. If the defendant is an individual and the maximum penalty that may be  
imposed includes a term of imprisonment of more than 6 months in the case of a first conviction, a prosecution may be commenced  
at any time. In other cases, a prosecution must be commenced within one year after the commission of the offence. If the defendant  
is a corporation and the maximum penalty that may be imposed includes a fine of more than 150 penalty units, a prosecution may  
be commenced at any time. In any other case, a limitation period of one year after the commission of the offence applies.  
583 Issue 6O.  
584 DPP *Submission 14*.

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585 A Cameron 'The Australian Securities Commission as law enforcer and business facilitator - flip sides of the same coin' *Speech*  
Monash Law School Foundation Lecture Series, Melbourne 12 April 1994. Under the Corporations Law s 1316 proceedings for an  
offence may be instituted within five years after the alleged offence was committed or, with the Minister's consent, at any later  
time.

586 s 77(2). See para 9.42 for discussion of an alternative interpretation of s 77.  
587 s 1317EC.  
588 Proposal 6.4.  
589 Issue 6P.  
590 See para 9.11.  
591 eg B Pentony & B Bondfield *Submission 27*; AFC *Submission 35*; Confidential *Submission 18*.  
592 eg litigation against TNT Australia Pty Ltd (G807 of 1992) was significantly delayed by challenges to s 155 notices issued by the  
TPC. In addition to the delay caused by these challenges, the TPC estimates that discovery and other processes associated with the  
challenges consumed more than 1.5 person years of staff resources.

593 Other submissions opposing proposal 6.4 include Justice P Heerey *Submission 2*.  
594 See, eg, D Healey *Australian Trade Practices Law* 2nd ed CCH Australia Ltd 1993, 507; RV Miller *Annotated Trade Practices Act*  
14th ed The Law Book Company Limited 1993, 374; CCH *Australian Trade Practices Reporter* 18-355.  
595 Proposal 6.5.  
596 eg Attorney-General's Dept *Submission 41*; TPC *Submission 31*; Justice P Heerey *Submission 2*.  
597 An individual convicted of an offence under the TPA may be given a community service order under the *Crimes Act 1914* (Cth)  
s20AB or placed on probation under the *Crimes Act 1914* (Cth) s 19B. See further at para 10.30.  
598 See ch 6.  
599 s 79.  
600 eg A Hurley 'Section 76 of the Trade Practices Act: are pecuniary penalties alone an effective sanction?' (1986) 18(3) *Commercial*  
*Law Association of Australia Bulletin* 19; R Gruner 'To let the punishment fit the organization: sanctioning corporate offenders  
through corporate probation' (1988) 16 *American Journal of Criminal Law* 1.  
601 B Fisse *Sanctions against corporations: economic efficiency or legal efficacy?* Occasional Paper No 13, Transnational Corporations  
Research Project, The University of Sydney 1986, 3.  
602 This partly explains the use of imprisonment, community service and other non-monetary sanctions against individual offenders.  
Such penalties are difficult for decision makers to value or write off as a mere cost of doing business.  
603 DP 56 also asked whether forms of penalty other than those discussed in the paper should be made available under the TPA: issue  
6S. No additional forms of penalty were suggested in submissions.  
604 eg TPC *Submission 31*; Dept of Consumer Affairs (Qld) *Submission 10*; J Goldring *Submission 8*; ACC *Submission 9*; ACA  
*Submission 5*.  
605 TPC *Submission 31*.  
606 See generally R Gruner 'To let the punishment fit the organization: sanctioning corporate offenders through corporate probation'  
(1988) 16 *American Journal of Criminal Law* 1.  
607 In ALRC Discussion Paper No 30 *Sentencing: penalties* 1987 (ALRC DP 30) this type of order was referred to as an internal  
discipline order: see para 296. The DP noted that such orders had been advocated by the Mitchell Committee in South Australia:  
Criminal Law and Penal Methods Reform Committee of South Australia *Fourth Report: the Substantive Criminal Law* Government  
Printer, Adelaide 1977, 361-2.  
608 Unless the organisation has less than 50 employees.  
609 US Sentencing Commission *Sentencing Guidelines* Chapter 8 Organisational sentencing ('US Sentencing Guidelines') s 8D1.1(a).  
These guidelines came into effect in 1991. It has been argued that the US Sentencing Guidelines make too much use of probation  
and that they should be amended to limit the use of corporate probation to only the most extraordinary situations: see, eg, C Wray  
'Corporate probation under the new organizational sentencing guidelines' (1992) 101 *The Yale Law Journal* 2017. But see R  
Gruner, *op cit*.  
610 The term of probation must be at least one year but not more than five.  
611 American Bar Association *Standards for Criminal Justice* 2nd ed 1980 vol 3 para 18-2.8 at 181-183.  
612 Issue 5B.  
613 eg TPC *Submission 31*; J Goldring *Submission 8*; ACC *Submission 9*; Dept of Consumer Affairs (Qld) *Submission 10*; Young  
Lawyers *Submission 12*; Confidential *Submission 25*; PIAC/AFCO *Submission 32*; Office of Fair Trading & Business Affairs (Vic)  
*Submission 34*; Attorney-General's Dept *Submission 41*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*.  
614 P Williams *Submission 4*.  
615 See para 11.4 for discussion of enforceable undertakings.  
616 TPC *Submission 31*.  
617 Sometimes referred to as the 'deterrence or retribution trap': see, eg, ALRC DP 30 para 290.  
618 See para 10.10.  
619 As both a criminal penalty (Pt V) and a civil penalty (Pt V and Pt IV): see para 10.28, 10.35.  
620 This contrasts with the US Sentencing Guidelines under which probation must be imposed in certain circumstances: see para 10.6.

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621 A model has been suggested by the American Bar Association: see fn 15.  
622 See *Veen v The Queen [No 2]* (1988) 164 CLR 465. See also R Fox 'The killings of Bobby Veen: the High Court on proportion in  
623 sentencing' (1988) 12 *Criminal Law Journal* 339 for a discussion of the principle of proportionality.  
624 If an individual breaches his or her probation order, the court may continue the order and impose a monetary penalty or revoke the  
order and deal with the person for the contravention in any way in which he or she could have been dealt with had the probation  
order not been made or take no action: *Crimes Act 1914* (Cth) s 20A(5)(b).  
625 eg an enforceable undertaking entered into in March 1993 by a business that had contravened the prohibition against pyramid  
selling (TPA s61) required the business to forward to all participants in the scheme a newsletter (in the form attached to the  
undertaking) with the object of imparting a sufficient understanding of s61 to all participants in the scheme so as to enable them to  
recognise and avoid potential contraventions of s61 before they occur: see *TPC Submission 31*.  
626 *Environmental Protection Authority v Capdate Pty Ltd and Phillips* (1993) 78 LGERA 349 (Stein J).  
627 See para 10.9 for explanation of this term.  
628 Proposal 6.6.  
629 Shell *Submission 30*; Confidential *Submission 13*.  
630 eg DPP *Submission 14*; Confidential *Submission 36*.  
631 eg ACC *Submission 9*; TPC *Submission 31*; ACA *Submission 5*; Dept of Consumer Affairs (Qld) *Submission 10*; Young Lawyers  
*Submission 12*; Office of Fair Trading & Business Affairs (Vic) *Submission 34*; AFC *Submission 35*; Attorney-General's Dept  
*Submission 41*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*.  
632 See discussion of supervision below.  
633 See, eg, B Fisse 'Community service as a sanction against corporations' [1981] *Wisconsin Law Review* 970.  
US examples include *United States v Missouri Valley Construction Co* 741 F.2d 1542 (8th Cir. 1984) in which the company was  
required to contribute to funding a chair in ethics at the local university and *United States v Olin Mathieson* No 78-30, slip op. (D  
Conn 1978) in which the defendant, who had conspired to ship 3200 rifles to South Africa in violation of a trade embargo, was  
fined \$45 000 after the company announced that it had set up a \$500 000 fund 'to promote the general welfare of the greater New  
Haven area with gifts or grants to charitable organisations'. The latter sentence was strongly criticised in an editorial titled 'Let the  
charity fit the crime?': *New York Times* 5 April 1978, 28.  
634 See fn 15, 25.  
635 See fn 26.  
636 As both criminal penalties (Pt V) and civil penalties (Pt V and Pt IV): see para 10.28, 10.35.  
637 Proposal 6.7.  
638 US Sentencing Guidelines s 8D1.4(a). See A Cowan 'Scarlet letters for corporations? Punishment by publicity under the new  
sentencing guidelines' (1992) 65 *Southern California Law Review* 2387.  
639 See para 10.9.  
640 eg a fine may be dismissed by senior management as a mere cost of doing business; alternatively it may spur internal disciplinary  
action against the individuals responsible for the contravention.  
641 Confidential *Submission 18*; P Greenwood *Submission 24*; Shell *Submission 30*; Confidential *Submission 33*.  
642 eg TPC *Submission 31*; AFC *Submission 35*; H Odijk *Submission 3*; J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers  
*Submission 12*; B Kercher *Submission 6*.  
643 Dept of Consumer Affairs (Qld) *Submission 10*.  
644 In Pt IV or Pt V, as a civil penalty or a criminal penalty: see para 10.28, 10.35.  
645 See para 10.11.  
646 B Fisse *The punitive injunction as a sanction against corporations* Working paper Sydney 1993.  
647 Issue 6R.  
648 Confidential *Submission 33*.  
649 Issue 6Q.  
650 J Coffee Jr "'No soul to damn: no body to kick": an unscandalized enquiry into the problem of corporate punishment' (1981) 79  
*Michigan Law Review* 386, 413.  
651 P Williams *Submission 4*.  
652 Young Lawyers *Submission 12*.  
653 In respect of contraventions of Pt IV: s 76. Although the Act does not expressly prohibit the imposition of a penalty in a form other  
than a monetary penalty, it has been interpreted in that way. See, eg, A Hurley, op cit, 21: 'The court has no jurisdiction to order any  
penalty other than a pecuniary penalty under s 76. It can, of course, order an injunction under s 80 but in general this has been  
sought by the TPC in addition to, and not in lieu of, a pecuniary penalty.' In practice courts have only ever imposed monetary  
penalties for contraventions of Pt IV.  
654 See para 10.3.  
655 Issue 6T, 6V.  
656 See, eg, TPC *Submission 31*; DPP *Submission 14*; ACC *Submission 9*.

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657 Office of Fair Trading & Business Affairs (Vic) *Submission 34*.  
658 Shell *Submission 30*; H Odijk *Submission 3*; Confidential *Submission 13*.  
659 See para 10.9, 10.17, 10.21.  
660 See para 10.43.  
661 See recommendation on expansion of civil penalties available under Pt IV: para 10.35.  
662 eg the insider trading provisions of the Corporations Law: Pt 7.11 Div 2A.  
663 eg periodic reporting or personal attendance at supervisory reviews.  
664 It remains a penalty for some contraventions, eg, failing to notify the Minister of a voluntary recall of dangerous goods: s 65R(2).  
665 Issue 6W.  
666 B Pentony & B Bondfield *Submission 27*; DPP *Submission 14*; PIAC/AFCO *Submission 32*.  
667 PIAC/AFCO *Submission 32*.  
668 eg J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers *Submission 12*; P Greenwood *Submission 24*; TPC *Submission 31*;  
Attorney-General's Dept *Submission 41*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*.  
669 See para 10.21.  
670 See para 9.11.  
671 See para 10.9, 10.17, 10.21.  
672 See para 10.28 for a similar suggestion in respect of corporate probation.  
673 Corporations Law s 241. This section was amended by the *Corporate Law Reform Act 1994* (Cth).  
674 Attorney-General's Dept *Submission 41*.  
675 See *Askey v Golden Wine Co Ltd and Ors* [1948] 2 All E R 35; *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd*  
[1915] 1 KB 652; *Hasledine v Hosken* [1933] 1 KB 822; *Burrows v Rhodes* [1899] 1 QB 816.  
676 Griffiths Committee Report recommendation 16.  
677 See para 10.28.  
678 s 76.  
679 Proposal 6.9; issue 6X.  
680 Federal guidelines for sentencing organisations came into effect in the US in 1991. They establish a range within which a court  
must set the fine for federal crimes. First, a base fine is established. This is the greatest of the fine specified in an offence level fine  
table, the pecuniary gain to the organisation from the offence and 20% of the 'defendant's share of the volume of affected  
commerce'. Second, minimum and maximum multipliers (determined by the defendant's culpability score) applied to the base fine  
determine the range of fines available to the court. A defendant's culpability score is based upon a number of aggravating and  
mitigating circumstances set out in the guidelines. eg, the culpability score is increased if an individual within the 'high level  
personnel' of an organisation participated in, condoned or was wilfully ignorant of the offence or if tolerance of the offence by  
'substantial authority personnel' was pervasive throughout the organisation. Wilfully impeding the investigation or encouraging the  
obstruction of justice will also increase the culpability score: US Sentencing Guidelines s 8C2.5(b). Having an effective compliance  
program to prevent and detect contraventions of the law and prompt reporting of the breach to the government can reduce an  
organisation's sentence by three points: s 8C2.5(f). A three point reduction in culpability score would result in a 60% reduction in  
the minimum and maximum fines available: s 8C2.6.  
681 eg DPP *Submission 14*; B Pentony & B Bondfield *Submission 27*; AFC *Submission 35*; Confidential *Submission 36*; Attorney-  
General's Dept *Submission 41*; Treasury *Submission 42*.  
682 DPP *Submission 14*.  
683 TPC *Submission 31*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; Confidential *Submission 18*.  
684 PIAC/AFCO *Submission 32*.  
685 See para 10.36.  
686 See para 8.4 for discussion of this factor.  
687 Issue 6X.  
688 Other than s 52, 65F(9), 65Q and 65R: s 79.  
689 Prior to amendments in December 1992 the maximums were half the present level.  
690 Proposal 6.10.  
691 See, eg, TPC *Submission 31*; Attorney-General's Dept *Submission 41*; Treasury *Submission 42*; Confidential *Submission 36*;  
Confidential *Submission 18*.  
692 s 79.  
693 *Crimes Act 1914* (Cth) s 29B, 4B(2), 4B(3).  
694 eg TPC *Submission 31*; Confidential *Submission 33*.  
695 B Pentony & B Bondfield *Submission 27*.  
696 TPC *Submission 31*.  
697 s 76.  
698 Confidential *Submission 36*.  
699 The Commission notes that in the European Union penalties of up to 10% of the turnover of the offending business in the preceding  
business year may be imposed: EU Council Regulation 17, article 16.

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700 See para 10.11, 10.17, 10.21.  
701 Corporate probation and community service orders.  
702 Unless a contrary intention appears, in a federal law a penalty unit is \$100: *Crimes Act 1914* (Cth) s 4AA.  
703 s 4AB.  
704 Attorney-General's Dept *Submission 41*.  
705 eg the ASC, Austel and HREOC in Australia; the Fair Trade Commissions in the USA and Japan, the European Commission and  
the NZ Commerce Commission. See also para 4.4.  
706 TPC *Guideline on administrative resolution* TPC Canberra 1993.  
707 s 163A.  
708 s 87B.  
709 TPC Canberra 1993.  
710 TPC *Submission 31*.  
711 In practice the TPC is usually able to lodge a s 87B undertaking on the public register within a few days of it being settled.  
712 Issue 7B.  
713 eg Confidential *Submission 33*.  
714 eg Young Lawyers *Submission 12*; S Corones *Submission 15*; TPC *Submission 31*; Law Society (SA) *Submission 51*.  
715 This matter was raised in DP 56: issue 7A.  
716 See para 11.5. The TPC also reports undertakings in its annual report, journal and other publications.  
717 In enforcing s 87B undertakings the court may only make orders it considers appropriate: s 87B(4). Presumably, if the court  
considers it inappropriate to force a person to comply with a term of an undertaking, it will not enforce that term.  
718 s 87B(2). The TPC Guideline states that the TPC will consider requests for variations sympathetically if compliance with an  
undertaking is found to be too difficult or impractical: 8.  
719 It was also suggested that before undertakings are finalised they could be scrutinized by a Federal Court registrar or judge: Law  
Society (SA) *Submission 51*.  
720 TPC Guideline, 8.  
721 Issue 7C.  
722 eg S Corones *Submission 15*; TPC *Submission 31*; Attorney-General's Dept *Submission 41*.  
723 eg Young Lawyers *Submission 12*; Confidential *Submission 33*.  
724 TPC Guideline, 3.  
725 Issue 7D.  
726 eg S Corones *Submission 15*; Attorney-General's Dept *Submission 41*. cf *ACA Submission 49*.  
727 TPC *Submission 31*.  
728 See issue 7E.  
729 eg S Corones *Submission 15*.  
730 See ch 7.  
731 Issue 7F.  
732 TPC *Submission 31*.  
733 See also J Goldring *Submission 8*; ACC *Submission 9*; ACA *Submission 49*.  
734 TPC *Submission 31*.  
735 Confidential *Submission 13*; S Corones *Submission 15*; B Pentony & B Bondfield *Submission 27*; LCA *Submission 39*; Confidential  
*Submission 33*; Attorney-General's Dept *Submission 41*; Treasury *Submission 42*.  
736 This was confirmed by the TPC in its submission: TPC *Submission 31*.  
737 The TPC has confirmed that it can obtain ex parte injunctions at very short notice. In some cases the TPC has been able to obtain ex  
parte injunctions within 26 hours of becoming aware of the conduct in contravention of the Act: TPC *Submission 31*.  
738 eg US Federal Trade Commission, HREOC, ASC and Companies and Securities Panel. PIAC and AFCO note that the requirements  
of natural justice in so far as requiring that a party have an opportunity to be heard would diminish, if not destroy, the advantages of  
expedition associated with cease and desist orders: PIAC/AFCO *Submission 32*.  
739 TPC *Submission 31*.  
740 See J Goldring *Submission 8*; ACC *Submission 9*.  
741 No submissions identified these issues as being of concern. See TPC *Submission 31*.  
742 Enforceable undertakings can be arranged quickly through negotiation between the TPC and the party concerned and often require  
far less investigatory work by the TPC.  
743 See para 10.38.  
744 Proposal 7.1. See, eg, B Kercher *Submission 6*; Young Lawyers *Submission 12*; P Greenwood *Submission 24*; B Pentony & B  
Bondfield *Submission 27*; TPC *Submission 31*; AFC *Submission 35*; LCA *Submission 39*; Attorney-General's Dept *Submission 41*;  
Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; CLA *Submission 48*; ACA *Submission 49*.  
745 TPC *Submission 31*.

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746 Issue 7G.  
747 DP 56 para 7.23.  
748 J Goldring *Submission 8*; ACC *Submission 9*; Dept of Consumer Affairs (Qld) *Submission 10*; Young Lawyers *Submission 12*; S  
749 Corones *Submission 15*; B Pentony & B Bondfield *Submission 27*.  
750 TPC *Submission 31*; Confidential *Submission 13*; BFCI *Submission 21*; ICA *Submission 22*; Confidential *Submission 33*;  
751 Confidential *Submission 36*; VECCI *Submission 37*; Attorney-General's Dept *Submission 41*; Law Society (SA) *Submission 51*.  
752 Attorney-General's Dept *Submission 41*.  
753 eg the ASC Act contains 80 provisions setting out the ASC's powers and the limitations on their use.  
754 s 155(5). The maximum penalty for knowingly furnishing information or giving evidence that is false or misleading is \$10 000 for a  
755 corporation and \$2000 or imprisonment for 12 months for an individual: s 155(6A).  
756 Issue 7H.  
757 eg J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers *Submission 12*; S Corones *Submission 15*; P Greenwood  
758 *Submission 24*; B Pentony & B Bondfield *Submission 27*; Office of Consumer Affairs & Fair Trading (NT) *Submission 45*; ACA  
759 *Submission 49* cf Law Society (SA) *Submission 51*.  
760 Issue 7I.  
761 ASC Act s 25(1). The use of this power is subject to stringent guidelines set out in ASC *Policy Statement No 78: Confidentiality*  
762 (issued 28 February 1994).  
763 eg J Goldring *Submission 8*; ACC *Submission 9*; Confidential *Submission 13*; Confidential *Submission 33*; Law Society (SA)  
764 *Submission 51*.  
765 TPC *Submission 31*.  
766 Young Lawyers *Submission 12*; S Corones *Submission 15*; B Pentony & B Bondfield *Submission 27*.  
767 ASC *Policy Statement 78: Confidentiality* para 32-40. The use of the ASC's powers was considered by the High Court in *Johns v*  
768 *ASC* (1993) 116 ALR 567.  
769 A party can only recover investigation costs incurred prior to the start of proceedings if the work is shown to have been necessary  
770 and proper for the attainment of justice in the proceedings: O 62 r 19. See also *Higgins v Nicol* (No. 2) (1972) 21 FLR 34.  
771 Issue 7J.  
772 H Odijk *Submission 3*; J Goldring *Submission 8*; ACC *Submission 9*; Dept of Consumer Affairs (Qld) *Submission 10*; Young  
773 Lawyers *Submission 12*; B Pentony & B Bondfield *Submission 27*; TPC *Submission 31*; Office of Consumer Affairs & Fair Trading  
774 (NT) *Submission 45*.  
775 Confidential *Submission 13*; Confidential *Submission 33*.  
776 Pt VII Div 1.  
777 s 91(4).  
778 Issue 7K.  
779 eg Confidential *Submission 7*; P Greenwood *Submission 24*; TPC *Submission 31*; Confidential *Submission 36*; LCA *Submission 39*;  
780 Treasury *Submission 42*; CLA *Submission 48*; Law Society (SA) *Submission 51*.  
781 s 163A(1)(a).  
782 s 163A(3).  
783 Other than the resale price maintenance provisions: s 163A(3).  
784 Proposal 7.2. Only one submission opposed this proposal: Law Society (SA) *Submission 51*.  
785 Except where the representation is about a future matter: s 51A.  
786 TPC *Submission 31*.  
787 Issue 9G.  
788 s 51A(2).  
789 TPC *Submission 31*.  
790 *ibid*.  
791 Only the ACA agreed with the TPC that s 51A should be amended: ACA *Submission 49*.  
792 eg Confidential *Submission 18*; Confidential *Submission 33*; Confidential *Submission 36*; Attorney-General's Dept *Submission 41*;  
793 LCA *Submission 39*; Law Institute (Vic) *Submission 43*; Law Society (SA) *Submission 51*.  
794 Such a power could be modelled on the *Fair Trading Act 1987* (SA). Under that Act, the Commissioner for Consumer Affairs has  
795 the power to issue a written notice to a person who publishes or causes to be published a statement promoting, or apparently  
796 intending to promote, the supply of goods or services requiring that person to provide the Commissioner, within the period  
797 specified in the notice, with proof of any claim or representation made in the statement: s 42(1). It is an offence if the person served  
798 with a notice fails to provide proof sufficient to support the claim or representation or fails to provide that proof within the specified  
799 time: s 42(2).  
800 eg ACA *Submission 49*.  
801 eg Confidential *Submission 33*; Confidential *Submission 36*; Attorney-General's Dept *Submission 41*; Law Society (SA) *Submission*  
802 *51*.  
803 Young Lawyers *Submission 12*; Law Institute (Vic) *Submission 43*; LCA *Submission 39*.  
804 TPC *Submission 31*.



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786 Para 9.2-9.6.  
787 Issue 9A.  
788 cl 76-9.  
789 Under the Bill, if a person has specialised knowledge based on his or her training, study or experience, evidence of that person's  
790 opinion will be admissible if it is wholly or substantially based on that knowledge: cl 79.  
By requiring an expert witness to identify the assumptions underlying his or her opinion, the court is able to assess the relevance  
and weight of the opinion, especially if the assumptions made by the witness turn out to be different from the facts ultimately found  
by the court.  
791 See ALRC Report No 26 (Interim) *Evidence* AGPS Canberra 1985 vol 1 para 750, vol 2 para 107-8.  
792 (1990) 97 ALR 555. The Court held that an expert must not express an opinion if to do so would involve unstated assumptions as to  
either disputed facts or propositions of law. This has been taken as applying the rule to the admissibility, rather than to the weight,  
of expert opinion.  
793 G Blunt, P Shafron & B Kenneally *From Arnotts to QIW*, a paper delivered to the Law Council Trade Practices Workshop,  
Canberra, July 1993. The authors argue that in *Arnotts* the exclusion of the expert testimony seems to have created a new limb for  
the factual basis rule that, instead of preventing the giving of opinions without an explicit statement of their factual basis, prevents  
the selection and analysis of factual material. In their view, this new limb operates in tandem with the old one to threaten the  
exclusion of all economic testimony other than the application of theory to the unexplained assumptions about facts.  
794 cl 66(1).  
795 O 10 r 1(2)(j). This Rule commenced on 17 November 1993.  
796 Young Lawyers *Submission 12*; TPC *Submission 31*; CLA *Submission 48*; Law Institute (Vic) *Submission 43*.  
797 LCA *Submission 39*.  
798 While there is no settled definition of what an ultimate issue is, it is often described as an issue which the jury or judge must  
determine.  
799 In *TPC v Australia Meat Holdings* (1988) 83 ALR 299, 316 Wilcox J stated: '... I deprecate the course, taken by AMH, of  
supplying economists proofs of the evidence to be given by other witnesses and eliciting from those economists opinions as to the  
proper conclusion upon the definition of the market. Economists are able to assist the Court in relation to economic principles. But  
once the relevant principles are expounded, their application to the facts is a matter for the Court'. This view was supported by the  
Full Federal Court in *Arnotts*.  
800 O 10 r 1(2)(j).  
801 cl 80(a). Opinion testimony as to ultimate issues may, however, still be precluded where such testimony adds nothing to the  
evidence available to the court.  
802 Young Lawyers *Submission 12*; TPC *Submission 31*; CLA *Submission 48*; Law Institute (Vic) *Submission 43*.  
803 See, eg, *McDonald's System of Australia Pty Ltd v McWilliam's Wines Pty Ltd* (1979-80) 28 ALR 236, 253.  
804 (1991) 102 ALR 379.  
805 O 33 r 3.  
806 Under the exception for first-hand hearsay evidence in civil proceedings, the hearsay rule will not apply to evidence of  
representations made by interviewees, given by interviewers or contained in a document tendered to the Court as evidence: cl 64.  
For this exception to apply  
- the party seeking to rely on the evidence must be able to show that it would not be reasonably practicable or would cause  
undue delay or expense to call each interviewee (cl 64(2))  
- the party seeking to rely on the evidence must give written notice to the other parties of his or her intention to adduce such  
evidence (cl 67(1))  
- the other parties must, having been given notice of the intention to adduce such evidence, consent to its admission or have  
their objection to the evidence being admitted overruled by the Court (cl 67).  
The hearsay rule will not apply to a survey prepared in the ordinary course of running a business under the exception for business  
records: cl 69.  
807 cl 127.  
808 Young Lawyers *Submission 12*; TPC *Submission 31*; CLA *Submission 48*.  
809 M Aronson *Submission 26*.  
810 This approach was recommended by the Federal Court in both *Arnotts* and *Interlego*.  
811 Federal Court of Australia *Practice note 11: Survey evidence* April 1994.  
812 Federal Court Rules O 34 r 1. For the purposes of r 1, an 'expert', in relation to any question, means a person who has such  
knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her  
opinion would be admissible in evidence: O 34 r 2.  
813 O 10.  
814 Federal Court Act s 53A.

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815 See, eg, A Kwong *A year in Santos litigation under Part IV of the Trade Practices Act* Federal Court of Australia Melbourne  
February 1994.

816 O 10 r 2(d), (da), (h), (i).

817 eg all the experts in each field of expertise could be required to meet prior to the hearing and prepare a joint report stating the  
matters upon which they agree and those on which no agreement has been reached. The opinion of each expert on the matters in  
dispute, including the reasons why the expert does not agree with the opinions of the other experts, would be annexed to the report.  
At the hearing, the statements of each expert and the joint report would be admitted into evidence. This procedure has been  
developed by Sir Laurence Street for use in the arbitration hearings he conducts.

818 See para 12.8.

819 Issue 9B.

820 J Goldring *Submission 8*; ACC *Submission 9*; Confidential *Submission 18*; R Gotterson *Submission 19*; TPC *Submission 31*;  
Confidential *Submission 36*; LCA *Submission 39*; Law Society (SA) *Submission 51*. Submissions that supported a limited role for  
panels included Law Institute (Vic) *Submission 43*; CLA *Submission 48*.

821 Constitution Ch III.

822 eg TPC *Submission 31*; LCA *Submission 39*; R Gotterson *Submission 19*.

823 Para 9.11, 9.13.

824 Supreme Court Rules 1970 (NSW) Pt 72. Similar provisions exist in the Supreme Court of Victoria's General Rules of Procedure in  
Civil Proceedings 1986 (O 50) and the Queensland Supreme Court Rules (O 39).

825 LCA *Submission 39*.

826 Federal Court Act s 6(2).

827 J Goldring *Submission 8*; ACC *Submission 9*; Young Lawyers *Submission 12*; Confidential *Submission 18*; Victorian Bar Council  
*Submission 29*; Confidential *Submission 36*; Law Institute (Vic) *Submission 43*; CLA *Submission 48*; Law Society (SA) *Submission*  
*51*. This issue was raised in DP 56: issue 9C. Some submissions argued that non-lawyers could make a worthwhile contribution as  
members of the Court: B Kercher *Submission 6*; TPC *Submission 31*; LCA *Submission 39*.

828 eg R Gotterson *Submission 19*.

829 The inquiry released a discussion paper in 1993: Attorney-General's Dept *Judicial appointments: procedure and criteria* AGPS  
Canberra 1993.

830 Issue 9D.

831 LCA *Submission 39*; Young Lawyer *Submission 12*.

832 J Goldring *Submission 8*; ACC *Submission 9*; Confidential *Submission 18*; TPC *Submission 31*; Law Institute (Vic) *Submission 43*;  
CLA *Submission 48*; Law Society (SA) *Submission 51*.

833 TPC *Submission 31*.

834 cl 91(1). However, in a civil proceeding, cl 91(1) does not prevent the admission or use of evidence that a party, or a person through  
or under whom a party claims, has been convicted of an offence, not being a conviction

- in respect of which a review or appeal (however described) has been instituted but not finally determined
- that has been quashed or set aside
- in respect of which a pardon has been given: cl 92(2).

835 cl 8.

836 Issue 9E.

837 Confidential *Submission 18*; TPC *Submission 31*; Attorney-General's Dept *Submission 41*; LCA *Submission 39*.

838 TPC *Submission 31*.

839 TPC *Submission 31*; Attorney-General's Dept *Submission 41*.

840 *Duchess of Kingston's Case* (1776) 1 East PC 468.

841 Vol 1 para 774.

842 Pt 3.2 Div 2.

843 Vol 2 App C para 152. eg it is not clear whether the reasons for decision would be admissible where the finding of fact does not  
appear in the formal court record.

844 cl 157.

845 TPA s 83.

846 Young Lawyers opposed making prior findings conclusive evidence and supported the introduction of a presumption: *Submission*  
*12*.

847 O 15 r 1.

848 O 15 r 10, 11.

849 See fn 3 in ch 9 for an explanation of 'civil penalty'.

850 *TPC v George Weston Foods Ltd & Ors* (1979) 2 ATPR 40-114.

851 s 157(1). The TPC must make available all documents tending to establish the case of the respondent, which have not been obtained  
from the respondent and which have not been prepared by an officer of, or professional adviser, to the TPC.

852 Corporations Law Pt 9.4B Div 2; *Superannuation Industry (Supervision) Act 1993* (Cth) Pt 21 Div2.

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853 Corporations Law s 1317ED; *Superannuation Industry (Supervision) Act 1993* (Cth) s 199. A similar approach was suggested in a  
green paper released by the federal government in 1984. The paper sought comment on whether the TPA should be amended to  
give the TPC the same rights in proceedings for the recovery of a pecuniary penalty as a party would have in civil proceedings: G  
Evans et al *The Trade Practices Act: proposals for change* AGPS Canberra 1984, 25, 61.  
854 (1994) 118 ALR 392.  
855 The Court did not make a clear decision on whether a corporation can claim the privilege against self-exposure to a penalty.  
Brennan J relied on the different origin of this privilege to recognise that a corporation can claim it. When this decision is combined  
with the views of Dean, Dawson & Gaudron JJ there is majority support for the continued application to corporations of the  
privilege against self-exposure to a civil penalty.  
856 Issue 9F.  
857 Young Lawyers *Submission 12*; TPC *Submission 31*.  
858 TPC *Submission 31*; Law Institute (Vic) *Submission 43*.  
859 TPC *Submission 31*; Law Institute (Vic) *Submission 43*.  
860 Law Institute (Vic) *Submission 43*.  
861 Confidential *Submission 18*; Confidential *Submission 36*; LCA *Submission 39*; Attorney-General's Dept *Submission 41*; CLA  
*Submission 48*; Law Society (SA) *Submission 51*.  
862 Victorian Bar Council *Submission 29*; Law Institute (Vic) *Submission 43*.