

Civil and administrative penalties

under review

A major review of civil and administrative penalties by the Australian Law Reform Commission has the potential to alter the legal landscape for federal agencies and those subject to federal regulation. It is hoped that, as a result of the Commission's final report, effective principles concerning the imposition and application of civil and administrative penalties will be enunciated by Parliament and will apply to all regulators and agencies.

Civil and administrative penalties are common in federal legislation across a broad range of areas. They can be found in corporations law, tax, competition and consumer protection, customs, the environment, civil aviation, nursing homes, social security and broadcasting. Penalties can range from the revocation of a broadcasting licence to a charge for late payment of tax.

The inquiry, referred to the Commission by Attorney-General Daryl Williams, is examining the relationship between criminal, civil and administrative penalties and the principles used in formulating and applying them. A broad definition of penalty has been adopted to include positive and negative sanctions and negotiated agreements, such as enforceable undertakings.

The design of regulatory rules is an important focus of the review. The Law Reform Commission is seeking to develop principles that will become the foundation upon which legislation and agency rules are based. Currently, each regulator has its own 'rules', which can be set down in guidelines, protocols and policy directives. The detail and accessibility of those rules differ and there are few overarching principles.

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The Commission's ultimate aim is to produce a reference for legislators and regulators on policy and practice with respect to the design and enforcement of penalty provisions. This is not to prescribe a uniform or standardised model code but rather to allow informed consideration of the options and some suggestions about agreed best practice.

Continued from page 23

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The Law Reform Commission's work will be of direct relevance to parliamentarians. The principles will also have an educational role for agencies and the public. They will set the direction for compliance action and for negotiation between affected parties.

The Commission has already analysed more than 2,000 penalty provisions in 70 federal statutes. Some 74% of the penalties were criminal sanctions, 18% were administrative penalties and 8% were civil penalties. Although the penalty provisions continue to be skewed towards criminal sanctions, the numbers and variety of civil and administrative sanctions are increasing. Government agencies and regulators favour administrative sanctions as they provide a speedy, low cost and effective compliance outcome. Few of the administrative penalties are disputed before tribunals or courts.

As part of its review, the Law Reform Commission is considering the different practical consequences that can arise from the inclusion of criminal, civil or administrative penalties in legislation. A criminal penalty generally carries a higher burden of proof on the prosecution, imposes greater obligations of fairness and disclosure, and extends the range and severity of sentencing powers. By contrast, civil proceedings, which can be brought by a range of government agencies and regulators, have a variable standard of proof and provide for mutual discovery and pleadings. Administrative penalties, which are imposed by legislation or by a decision of a regulator without the need for court intervention, generally carry a right of review (merits and judicial review).

The type of penalty to be imposed and the method of enforcement are not always readily apparent from legislation. Whilst Parliament may have had one intention in drafting the provisions, the regulator's discretion in enforcing those provisions may result in a blurring of distinctions. The courts may also decide that the operation and features of a penalty provision characterise it in a certain way.

Within its terms of reference, the Law Reform Commission is considering whether the principles relating to criminal liability should apply similarly to liability for administrative and civil penalties. The Commission is also looking at alternate or parallel penalties in respect of the same conduct.

The Law Reform Commission's inquiry raises certain fundamental issues relevant to our justice system. Of particular interest are the protections given to citizens when dealing with government agencies.

Article by Kate Connors and Cathie Warburton, Australian Law Reform Commission Legal Officers working on the inquiry into civil and administrative penalties.

Inquiry program

As part of its broad program of research and consultation the Australian Law Reform Commission is hosting a conference, *Penalties: Policy, Principles and Practice in Government Regulation* from 7 to 9 June 2001 at Dockside, Cockle Bay at Darling Harbour, Sydney. This conference brings together leading Australian and international experts in regulatory theory and practice. Further information about the conference, including the program and registration forms, can be found on the Commission's web site www.alrc.gov.au or by contacting the conference organisers via email: conference@alrc.gov.au

Over the course of its inquiry, the Law Reform Commission will be consulting widely with business, government, lawyers and members of the public. It intends to publish a discussion paper prior to the conference in June 2001 analysing the current penalty arrangements and advancing options for debate and reform. The final report is due to be submitted to the Attorney-General in March 2002. The Commission welcomes submissions on any issues relevant to its review. For further information on the inquiry or the conference, or to register an interest in this inquiry, please contact Kate Connors at the Australian Law Reform Commission, GPO Box 3708, Sydney NSW 1044; email: civiladmin@alrc.gov.au; call: (02) 9284 6305; or fax: (02) 9284 6363.

Reviewing and reforming Australia's laws

There are various means through which Australia's laws are considered and reformed.

Parliamentary committees can review proposed laws (bills) or, as part of more detailed investigations, laws that are already operating. Parliamentary committee inquiries are referred by the relevant House of Parliament (House of Representatives or Senate) or by the relevant portfolio Minister.

The Australian Law Reform Commission also conducts reviews of legal issues, including the operation of existing laws. The Commission's reviews are referred to it by the Federal Attorney-General.