New ALRC references

The focus of the Australian Law Reform Commission's work into 2001 has been set, with three new law reform projects announced in February by federal Attorney-General, the Hon Daryl Williams AM QC MP.

The new references involve a review of the *Marine Insurance Act 1909* (Cth), a review of the *Judiciary Act 1903* (Cth), and an inquiry into the use of civil and administrative penalties by federal agencies.

Marine insurance

The Marine Insurance Act 1909 (Cth) is virtually identical to the *Marine Insurance Act 1906* (UK), which was a codification of centuries of English common law. The Australian legislation has not been substantially amended since its enactment.

This is particularly evident in some of the language used in the Act, which reflects a much earlier era:

> *'... touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people.'*

In 1982, the ALRC completed a review of the law relating to general insurance contacts (ALRC 20, *Insurance Contracts*). The *Insurance Contracts Act 1984* (Cth) was largely based on the ALRC's recommendations. However, marine insurance historically has been treated as a separate branch of insurance law. Both the ALRC's review and the *Insurance Contracts Act 1984* (Cth) specifically excluded contracts of marine insurance.

In response to concerns that the *Marine Insurance Act 1909* (Cth) may be out of date with commercial realities and that, in particular, the warranty provisions are unduly harsh on the insured, the Attorney-General's Department prepared an issues paper on the Act in 1998. The Attorney-General has now asked the ALRC to undertake a complete review of the Act, taking into consideration the concerns identified by the Department, as well as assessing the Act in accordance with the requirements of the Competition Principles Agreement.

One of the issues the ALRC expects to address in this reference is whether the modern approach to general insurance could be applied to a greater extent to marine insurance. This will involve examination of factors surrounding the marine insurance industry, including the desirability of international uniformity and any resulting disadvantages for the Australian insurance and marine industries.

The ALRC also will look at individual provisions within the Act to consider whether they require modernisation. Possible areas for consideration are the references to steamships and coal, rather than the diesel fuel and turbines of modern ships, and the need to recognise and support electronic contractual arrangements.

In accordance with the Competition Principles Agreement, the ALRC will assess whether the provisions of the Act restrict competition, whether the legislation is in fact necessary, whether the benefits to the community as a whole outweigh the costs, and whether compliance costs and paperwork burdens on business, and in particular small business, are excessive.

The ALRC has been asked to report on this reference by the end of the year.

Review of the Judiciary Act

The *Judiciary Act 1903* (Cth) makes provision for the exercise of the judicial power of the Commonwealth. It sets out the jurisdiction of the High Court of Australia, including its appellate jurisdiction, provisions for bringing suits against the Commonwealth and the states, and issues relating to choice of law. In later years the Act was amended to deal with suits relating to the Northern Territory, appearances of legal practitioners in federal courts, certain rules of procedure of the High Court, and intervention by Attorneys-General in constitutional cases.

The Attorney-General has asked the ALRC to examine whether the Judiciary Act and related Acts continue to provide the most appropriate arrangements for the efficient administration of law and justice in the federal jurisdiction. The need for such a review stems from changed circumstances following self-government in a number of territories, and continuing confusion over the source and extent of Crown immunity and issues relating to choice of law.

As part of the reference the ALRC will examine High Court cases, such as the recent decisions in *Re The Residential Tenancies Tribunal of New South Wales and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410 and *Commonwealth v Mewett* (1997) 191 CLR 471, both of which dealt with issues of federal jurisdiction and Commonwealth immunity. *Mewett* also dealt with choice of law issues. Further to these issues the ALRC is to consider whether Commonwealth legislation should deal in greater detail or differently with the law that is to apply in proceedings involving federal jurisdiction, rather than placing reliance on the various state/territory laws, and to consider whether there should be limitation periods applicable to actions against the Commonwealth. It will also consider the basis on which interest is awarded in relation to judgments against the Commonwealth. The ALRC will in part draw on the work of its 1992 report ALRC 58 *Choice of law*.

Other issues under examination will include provisions providing for removal of causes to the High Court and the remittal of matters by the High Court to other courts and whether the provisions relating to practice and procedure of the High Court would be better placed in another Act.

While the ALRC will consider the most effective arrangements for the conferral of federal jurisdiction, it has been asked not to examine issues of cross-vesting arising from the *Wakim* case – these issues are being considered elsewhere. The terms of reference also exclude the

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tigate whether further information is required and, if necessary, seek the comments of the applicant. This is reinforced by the Practice Directions and the s420A Directions already referred to.

Finally, it is a regrettable fact of life that many, if not most, applicants present their submission and material only at the very last moment. Often this occurs at the hearing itself. As Mr Colborne will know, the RRT is not unique in this experience. But it does make forward planning very difficult. Unlike civil litigation, the RRT is not in a position to set binding deadlines with the sanction of rejection. To lose a civil claim for damages may be one thing, but the stakes before the RRT are too high.

I would be disappointed if your readers gained the impression that the Tribunal had not evolved since its early beginnings. Mr Colborne has given us a valuable insight into the uncertainties that existed then. Your readership, however, is entitled to know that we have moved on since then.

Endnotes

1. Applicant A & Anor v MIEA & Anor (1997) 142 ALR 331, at 367, 374 and 376.

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ALRC from considering federal jurisdiction in relation to criminal matters.

The ALRC has been asked to provide the Attorney-General with a final report by the end of February 2001.

Civil & administrative penalties

Civil penalties are pecuniary sanctions imposed following a civil procedure, usually imposed as a punishment for contravention of a law. Administrative penalty schemes provide an administrative process, such as the issue of an infringement notice by an official, where the official believes that a breach of an offence has occurred. The administrative penalty is an alternative to the prosecution of the offender for a criminal offence, eg on-the-spot traffic fines issued by police officers.

There are increasing numbers of provisions empowering federal agencies to impose civil penalties and administrative penalties. Agencies with such powers include the Australian Customs Service, the Australian Competition and Consumer Commission, the Australian Taxation Office, the Australian Securities and Investments Commission, the Department of Industry, Science and Resources, and the Department of the Environment and Heritage. As alternatives to criminal sanctions, there are both advantages and dangers in using such methods to enforce the law.

The ALRC has been asked to review the laws of the Commonwealth relating to the imposition of administrative and civil penalties. As part of the reference the ALRC will consider the advantages and disadvantages of a uniform system of administrative and civil penalties and the need for clear and consistent principles to underpin such systems. The ALRC also will consider any appropriate limitations on powers to impose and pursue administrative and civil penalties, including the need for principles to guide determination of penalties or setting maximum penalties. The effect of insolvency upon a liability to pay a penalty also will be examined.

The reference will involve consideration of the relationship between civil and criminal penalties and the importance of maintaining an effective and efficient criminal justice system, including Australia's obligations under international law and Australia's commitment to human rights and civil liberties. There will be consultation with all federal agencies having responsibility in relation to the administration of laws that currently include, or that may appropriately include, a regime for imposing administrative and civil penalties.

The ALRC is required to complete this reference by March 2002.

For further information on any of these references, please contact the ALRC.

We welcome registrations of interest in the inquiries, and submissions on any relevant matter.