

Submission to WALLIS INQUIRY

prepared by
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Introduction

This submission concerns the law enforcement provisions available to a corporate regulator. The submission seeks to set out some basic principles of law, and comment upon management issues and enforcement practice which could bring efficiencies and savings to the agencies responsible for these issues. It is also possible that the measures outlined will bring a degree of a simplification and a corresponding increased compliance by the business community.

These are three main agencies which fall within any consideration of the material in this submission. These are the Australian Securities Commission (ASC), Australian Competitive Consumer Commission (ACCC) and the Insurance and Superannuation Commission (ISC). The comments to be made will not be in regard to any one of these agencies, but rather will be of generic nature.

Management Issues

Traditionally the responsibilities of public agencies have tended to be organised around subject matter, eg. for companies we have the ASC and its predecessors. In an era of management change toward process analysis it is very pertinent that consideration be given to the traditional approach of organisational arrangements of public agencies.

It tends to be the case that an agency which is based on a subject matter has conflicting management functions. There can be more than one management focus. Usually a combination of these functions are evident: business facilitation, surveillance, investigation and enforcement. These functions tend to pair off into the market function (business facilitation and surveillance) and a law enforcement function (investigation and law enforcement). It is submitted that the two broad functions are inconsistent with each other. Accountability issues and resources issues are confused when they are placed next to each other in the same agency. Query, how does a business facilitation service that should be off budget and based on a user pay regime fit into a law enforcement role that is on budget and is a civil justice issue and a legitimate role of government. Query, how at the present time law enforcement budgets have been consistently cut over a period of years either through dividend payments or budget reductions yet the market service from the same agency is still providing a client service which the service does not reflect the same expenditure reduction for a variety of reasons. The true impact of such reductions is masked. It is

submitted that in the long term of the standing of business law in Australia this is not a healthy situation.

Principle:

Investigation into serious breaches of the law should be placed with a single Commonwealth investigatory body created to conduct investigations into commercial, banking, funds management and trustee type matters. Investigations would be quite distinct from any agency surveillance activity. One investigatory body would allow:

- (a) rationalisation of public resources;
- (b) guaranteed and consistent levels of expertise and training;
- (c) greater accountability as a stand alone agency; and
- (d) provide for greater career development by allowing personnel movement between agencies.

Civil & Criminal Issues

It is submitted that the distinction between breaches of the law in a commercial sense and fraud investigations should be made more strongly.

Careful consideration needs to be given to the legal distinction that is sometimes blurred between civil, criminal and civil penalty sanctions. This distinction exists and needs to be reinforced particularly when looking at management issues across the public sector.

Contraventions of the Trade Practices Act are not criminal. They are in effect civil penalties (see *TPC v TNT*). A regime that operates effectively to alter the corporate culture toward adherence to the public policy issues contained within that Act.

Company Law did not contain criminal penalties until the national scheme was put in place. Under the Corporations Law a civil penalty regime in respect to Directors was enacted in 1992. Curiously this legislation appears to have generated very few civil penalty matters. It is submitted here that in contrast to the Trade Practices legislation the Corporations Law regime confuses the operation of the three legal standards of proof to the detriment of operation of the law. Alternatively, it is submitted that the

civil penalty regime as enacted in 1992 is aimed at major breaches of directors' duties. If the intent of Parliament was to deal with lesser breaches of the law as criminal and major breaches as a civil penalty the point that it made about the confusion of the three legal means of dealing with corporate breaches of the law is enforced.

Civil penalties have been introduced into legislation to establish the operation of the ICS. Again, the application of the civil penalties regime is limited.

Fraudulent issues should be treated as the law has always treated them and that is as a crime and subject to the criminal law. An agency with the ability to effectively conduct criminal investigations but with considerable experience in the operation of the commercial workplace should have the responsibility of these matters.

Inter-Relationship between a Single Investigatory Agency and a Civil Penalty Regime

There has been no public release of any material which shows a clear relationship between an investigatory function and a civil penalties regime. However, as an observer of the ASC and the ACCC it is clear that there is a strong relationship in determining outcomes between an effective and strong investigatory function with workable legislation and the ability in terms of the public benefit interest test to seek outcomes.

An example of how a civil penalties regime can operate effectively at the "smaller" end of the market has been illustrated within the ASC over the last few years in the Summary Prosecutors Programme, part of the programme operating in the Sydney regional office. Whilst the programme primarily dealt with the failure to lodge Annual Returns, it is an effective working model to see just how a civil penalties regime can operate at this level.

Principle:

A civil penalty regime should be the primary means of dealing with all contraventions of the law dealing with the law in civil/commercial matters save when the conduct to be investigated is fraudulent in nature when the criminal law should be applied. Any civil penalty regime should be consistent in its provisions and operation across different agencies. Such a model of a civil penalty regime should apply to all contraventions of the business law with only the magnitude of the penalty altering.

Summary

A single Commonwealth investigatory body operating with a civil penalties regime of similar structure across commercial functions would facilitate the compliance of the commercial and banking world to any legislation as has been the experience with compliance with the provisions of the Trade Practice Act.

Clearly fraudulent conduct has to be treated as criminal matter.

The model for civil penalties is contained within the very successful provisions of the Trade Practices Act.

Conclusion

Whilst the terms of reference of the inquiry are to deal with the regulation and structure of the financial sector it does also by implication have to square up to the issues of enforcement.

One of the means to advance further the general consideration of the adoption of universal civil penalties regime is for this Inquiry to recommend the consideration of such a regime either through a terms of reference to the Australian Law Reform Commission or such other body as the Federal Government may consider appropriate

As the distinction between traditional banking products, financial products and insurance products is blurring this will impact upon issues of enforcement. To simplify the issues of enforcement there should be only one regime. At present throughout the field there are three possibilities; civil, criminal and civil penalties. On a cursory assessment the most effective of these has been the Trade Practices civil penalties provisions. When seeking to assess what is the most effective approach it is submitted that as most of the legislative thrust is to operate a consumer protection scheme the better assessment is where business entities actively put in place compliance schemes to save the reduction in corporate funds through payouts. Query just how a goal sentence or a community service order assists the furtherance of a consumer protection scheme when compared with a compliance scheme capable of being subjected to surveillance.

The market function and law enforcement function of agencies responsible for commercial activities should be separated if only for the reason of accountability.

This is a somewhat difficult issue as the argument is run that the reporting regime currently in place for the agencies is appropriate. One overriding consideration of management of the public sector today stands above this argument and it is that open government and accountability forces sound management. By giving the agencies a twin management focus there is inherent in this a masking effect that runs contrary to this overriding consideration. There is also the on going of managing together the quite inconsistent functions of market issues and law enforcement issues as defined above.

This submission has not dealt with the concept of a super agency as such. As a final comment if the current agencies were left to be market agencies with a an inter agency agreement with an investigatory body it is submitted that for the reasons outlined above fair greater accountability and transparency would be achieved. This is not a novel approach as many such arrangements are currently in place. The additional benefit is that it would provide a fair greater flexibility between agencies so fair as career structure are concerned. This has not been dealt with here as the inquiry is not considering these type of management and human resource issues.

Summary of Principles

- (1) Adopt a consistent civil penalties regime for all aspects of Commonwealth business law..
- (2) Establish a single Commonwealth investigatory body for investigation into contraventions of banking, corporate and insurance laws.

September 9, 1996.