

**REGARDING:**

**Federal Court of Australia's submission to the Senate's Inquiry into the Australia Law Reform Commission**

**DATE:**

2 February 2011

## **THE RELATIONSHIP BETWEEN THE COMMISSION AND THE FEDERAL COURT OF AUSTRALIA**

Before the creation of statutory law reform agencies, law reform in Australia was conducted on an ad hoc basis. Until the late 1960s in Australia, judges and lawyers undertook law reform tasks without any formal governmental status and with very limited resources.<sup>1</sup> As society and the law changed, so the need for a permanent and well-resourced Australian law reform agency grew. Since its creation in 1975, the ALRC has become the leading law reform agency in Australia, and a leader in the common law world.

From the beginning, the Federal Court of Australia has had close association with the ALRC; and, over the years, a strong bond has developed between the ALRC and the Federal Court. The Commission has always had judicial members, initially on a full-time basis as Chair and, subsequently, on a part-time basis as part-time Commissioners.<sup>2</sup> For this reason, the Court wishes to make a submission recognising the valuable contribution that the ALRC has made, and continues to make, to the development of the law in Australia.

The Court benefits from the work of the Commission on several levels. The Court benefits greatly from the ALRC's reports, research and analysis of complex areas of law within federal jurisdiction. The Court is also greatly enriched by the experience of its judges who have acted as part-time Commissioners. This submission addresses the role of the ALRC's reports and the Commissioners' roles.

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<sup>1</sup> See Michael Tilbury, "A History of Law Reform in Australia" in Brian Opeskin and David Weisbrot (editors) *The Promise of Law Reform* (The Federation Press, 2005) ("Promise"), at p 10

<sup>2</sup> The Commission has always been constituted by full-time and part-time members: see *Australian Law Reform Commission Act 1996* (Cth), s 8; *Law Reform Commission Act 1973* (Cth), s 12(4). Under the current Act, the President and Deputy President must both be full-time members. *Australian Law Reform Commission Act 1996* (Cth), s 8(1). The Board of Management does not include part-time members: see s 29.

## PROVISION OF FIRST CLASS REPORTS CONTRIBUTES TO JUSTICE ADMINISTRATION

From its inception until now the ALRC has produced first-class reports that set out the current law on the topic under consideration reliably and in detail. More often than not, an ALRC report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented. For example, the ALRC's reports on evidence, admiralty and insurance have been critical in assisting the Court's own appreciation and development of the law in these areas. In this way, the ALRC's reports have assisted the Court in the tasks of ascertaining the law, interpreting statute, and developing the common law. These are key tasks for the federal judiciary. It is only because the scholarship embodied in the ALRC's reports has been first class that they have been of assistance to the judiciary.

Various commentators and researchers have recognized this feature of the relationship between the federal judiciary and the ALRC. According to Professor Brian Opeskin, there have been between about 60 to 80 citations of the work of the ALRC each year since 1998.<sup>3</sup> Of course, there will also be occasions when the judge refers to a report of the ALRC without mentioning that report in a published judgment. Parties regularly cite ALRC reports in cases in this Court; and, today, the Court fully accepts that the ALRC's reports may constitute appropriate sources for reference.<sup>4</sup> The judgment of the Court in *Norman, in the matter of Forest Enterprises Australia Limited (Administrators Appointed) (Receivers & Managers Appointed) v FEA Plantations Ltd (Administrators Appointed) (Receivers Appointed)* is illustrative.<sup>5</sup>

The ALRC's reports do not merely serve as legal textbooks. Their value is greater than this. The ALRC reports set out the surrounding circumstances that affect the operation of the law, including its effect on particular persons and bodies. Since ALRC's statements about the operation of the law have invariably been based on sound research and a considered analytical approach, they have been generally accepted as credible and reliable. This can make a profound contribution to a judge's understanding of the law in complex areas.

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<sup>3</sup> Brian Opeskin, "Measuring Success" in *Promise* at 219

<sup>4</sup> *Ibid* at 218-219

<sup>5</sup> [2010] FCA 1274

Furthermore, the ALRC's reports often provide the only reasonably accessible account of the operation of similar laws in other jurisdictions. This too can greatly assist the time-poor judge in making a better-informed decision.

In this way, the ALRC's published work contributes to the high quality of judicial decision-making in this Court. The high quality of judicial decisions benefits not only the litigants directly bound by the decisions but also the whole Australian community.

More generally, the ALRC's reports provide assistance to lawyers and judges other than members of this Court. As the Honourable Michael Kirby AC CMG has commented:<sup>6</sup>

*"The ALRC has been utilised by successive federal governments. It has continued to perform work of a very high calibre. Its reports enjoy a high rate of implementation by world standards. Its reports are frequently referred to in argument before the High Court of Australia. This occurs not only in cases concerned with statutes originally recommended by the Commission but more generally, by analogy, on relevant aspects of the law".*

Judges and lawyers constitute only part of the community interested in the ALRC's work, a fact that the ALRC has acknowledged in the recent formatting of its publications for the Family Violence inquiry. This had two formats, a straightforward 'Summary Report', as well as the more detailed report, setting out the Commission's analysis in full. In this way, the ALRC has sought to serve not only the interests of the kind referred to in this submission but that of the wider community. It is to be commended for this.

The high quality of the ALRC's work reflects, not only the hard work of the ALRC's personnel, but also their knowledge and experience, together with their outstanding research and analysis skills. Reports of the quality produced by the ALRC depend on excellent staff, with the time and other resources to carry out their appointed tasks. The building of a body of expertise over time has contributed to the ALRC's success in this regard. If the ALRC is to continue to produce these high quality reports, then this pool of talent needs to be preserved.

The Court benefits at another level from the involvement of its judges in the work of the ALRC as an independent, research-based, consultative law reform agency. Participation in ALRC projects inevitably increases judicial understanding of the practical operation of the law. Judges participating in the ALRC's work are exposed to different ways of thinking

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<sup>6</sup> The Hon Michael Kirby AC CMG, '50 years in the law: A critical self-assessment' (2009) 32 Aust Bar Rev 1

about the law and the way it operates; and this knowledge and experience tends to spread through the Court.

#### **APPROPRIATE EXPERT PERSONNEL WITH SUFFICIENT RESOURCES ESSENTIAL FOR FIRST-CLASS REPORTING**

The Court recognises the considerable contribution that the ALRC has made to the betterment of the legal system in Australia, especially by its reported research and analysis. This contribution has been possible because the ALRC has had the requisite staff, with sufficient time to undertake and complete the complex and skilled task of a sophisticated law reform agency. It is important that the ALRC's capacity to continue to make this contribution should not be degraded.

At present the ALRC has only one full time Commissioner, namely its President, Professor Rosalind Croucher. There are also four part-time Commissioners, all of whom are also members of this Court. While the Court is proud of the role that its members can play as part-time Commissioners and regards their participation as beneficial to the Court, it is inevitable that the part-time Commissioners also have major commitments as federal judges. On this account, whilst they contribute to ALRC's knowledge and perceived independence (itself an essential quality for a successful law reform agency), they perform somewhat different roles to that of full-time Commissioners. Full-time Commissioners have the capacity to dedicate themselves fully to the kind of in-depth research and writing essential for the ALRC. Whether the ALRC can continue to maintain its high standards of research and scholarship without the assistance of further full-time Commissioners besides the President must be doubtful.

Full-time Commissioners provide a continuity of understanding of the law reform process that is essential to maintain the ALRC as a pre-eminent law reform agency. As noted, the strength of the ALRC is its thorough research and detailed analysis of evidence, which is often dependent on consultation with stakeholders across Australia as well as with advisory committees. Widespread consultation has ordinarily been led by full-time Commissioners, within an appropriate time-frame. Without sufficient and adequately resourced full-time Commissioners, it would be difficult, if not impossible, to maintain the kind of consultation on which the high quality of the published work of the ALRC depends.